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November 24, 2020

VIA FedEx and Email
Curtis Rich, Agency Clearance Officer
Small Business Administration
409 3rd Street, SW
5th Floor
Washington, D.C. 20416

VIA FedEx
SBA Desk Officer
Office of Information and Regulatory Affairs
Office of Management and Budget
New Executive Office Building
Washington, D.C. 20503

Re: Paycheck Protection Program
OMB Control Number: 3245-0407
Solicitation of Public Comments Issued by the Small Business Administration Concerning SBA Form 3509, *Loan Necessity Questionnaire (For-Profit Borrowers)*

Thank you for all of the hard work performed across the government as it relates to responding to the COVID-19 pandemic. The work performed by the legislature, Treasury Department, Small Business Administration, thousands of banks across our country, and many others to create, roll out, and administer the Paycheck Protection Program has been a lifesaver for a number of our clients and millions of others spread across many different industries and in all parts of the country. Without the Paycheck Protection Program, some of our clients and many others would be out of business.

As a number of Paycheck Protection Program loan recipients are now embarking upon the loan forgiveness process, we write on behalf of some of our clients not only to say thank you with respect to everything done to date regarding the Paycheck Protection Program, but also with the utmost respect and in response to an invitation for public comments to highlight a few potential areas of improvement regarding the recently issued draft SBA Form 3509.

I. Comments

Certain SBA Form 3509 Requests for Information are not Necessary for the SBA to Determine Whether Borrowers Satisfied the Certification Concerning Economic Need.

Section 1102(a) of the Coronavirus, Aid, Relief, and Economic Security Act ("CARES Act") amended section 7(a) of the Small Business Act to require borrowers of Paycheck Protection Program loans ("borrowers") to make various certifications on their applications for such loans ("PPP applications"),[1] including the following certification (the "certification concerning economic need"):

> An eligible recipient applying for a covered loan shall make a good faith certification that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient.[2]

On April 23, 2020, the Small Business Administration ("SBA") published guidance related to the certification concerning economic need, providing that, "all borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and the PPP regulations *at the time of the loan application*."[3] To assess their economic need, the borrowers, "must [take] into account their *current* business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business."[4] The SBA gave existing borrowers until May 7, 2020 to repay their loans in full if they did not satisfy the certification concerning economic need based on this new guidance.[5] On May 5, 2020, this deadline was extended to May 14, 2020.[6]

On May 13, 2020, the SBA published additional guidance related to the certification concerning economic need, which extended the deadline for borrowers to repay their loans in full to May 18, 2020,[7] and noted that, "borrowers with loans greater than $2 million * * * may still have an adequate basis for making the required good-faith certification, based on their individual circumstances in light of the language of the certification and SBA guidance."[8]

The CARES Act and subsequent SBA guidance provides that the certification concerning economic need is determined as of the PPP application date. The certification itself uses the phrase "current economic conditions" and SBA guidance reinforces this position by providing that borrowers must assess their economic need "at the time of the loan application." Therefore, SBA guidance suggests that a borrower must assess its economic need based on the current economic conditions at the time of the PPP application.

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[1] Pub. L. 116-136, Coronavirus Aid, Relief, and Economic Security Act § 1102(a) (March 27, 2020).
[2] 15 U.S.C. § 636(g)(i)(I).
[3] Small Business Association, *Paycheck Protection Program Frequently Asked Questions*, #31 (published Apr. 23, 2020) (emphasis added).
[4] *Id*. (emphasis added).
[5] *Id*.
[6] *Id*. at #43 (published May 5, 2020).
[7] *Id*. at #47 (published May 13, 2020).
[8] *Id*. at #46 (published May 13, 2020).

Events subsequent to the date of the application could not be taken into account by the borrower in making this determination because they had not occurred or were uncertain when the certification was made. For example, many borrowers applied for PPP loans before the end of the second quarter (in fact, some as early as April 3, 2020) and could not be certain how much revenue their businesses would generate in the second quarter and thereafter, whether they would be subjected to COVID-19 related restrictions introduced by state and local authorities, or how their owners and employees would be compensated after the application was made.

Importantly, even if borrowers took into consideration events and information that occurred or became certain after the PPP application was made, they could only do so through May 18, 2020 before the safe harbor to repay the loan in full expired. After May 18, 2020, borrowers could not make actionable decisions about their certification concerning economic need based on new economic developments.

SBA Form 3509 does not limit the scope of its requests to information related to the then current economic conditions at the time of the PPP application. The form requests ex-post information that was not available to the borrower at such time. This ex-post information is to be used by SBA loan reviewers to evaluate the good-faith certification concerning economic need made on borrowers' PPP applications, [9] and includes:

1. A comparison of gross revenue between the second quarters of 2019 and 2020.[10]

2. Whether the borrower was ordered to shut down or to significantly alter its operations by a state or local authority due to COVID-19 since March 13, 2020.[11]

3. Whether the borrower voluntarily ceased, reduced, or altered its operations due to COVID-19.[12]

4. Whether the borrower began any new capital improvement projects not due to COVID-19 between March 13, 2020 and the end of the covered period.[13]

5. Whether the borrower paid any dividends or other capital distributions between March 13, 2020 and the end of the covered period.[14]

6. Whether the borrower prepaid any outstanding debt between March 13, 2020 and the end of the covered period.[15]

7. Whether any employee or owner received compensation exceeding $250,000 annualized during the covered period.[16]

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[9] Small Business Administration Form 3509, *Paycheck Protection Program Loan Necessity Questionnaire (For-Profit Borrowers)*, 1 (Oct. 2020).
[10] *Id*. at Business Activity Assessment #1.
[11] *Id*. at Business Activity Assessment #2-3.
[12] *Id*. at Business Activity Assessment #4-5.
[13] *Id*. at Business Activity Assessment #6.
[14] *Id*. at Liquidity Assessment #2.
[15] *Id*. at Liquidity Assessment #3.

In order to answer each of these requests, the borrower must provide information and documentation that the borrower did not know, that was uncertain, or that did not exist when the PPP application was made. In fact, all seven requests ask for information which covers periods after the May 18, 2020 deadline to repay the loan in full. This ex-post information will then be used by SBA loan reviewers to "evaluate" whether the certification concerning economic need was made in good-faith, despite the contradictory statutory language and SBA guidance. This situation seems unfair to borrowers, as just having access to this information could seemingly impact an SBA loan reviewer's evaluation of the certification concerning economic need. Whereas the borrower was experiencing economic uncertainty and attempting to predict COVID-19's effect on its business going forward, the SBA loan reviewer will use hindsight to know COVID-19's ultimate effect on the borrower with certainty.

Most critical to the SBA loan reviewer's guidance is the snapshot in time of when the certification was made and the borrower's then current economic need for maintaining the business. Think of all of the millions of businesses in our country that applied for and received PPP loans and acted upon their receipt of such loans (and expecting full loan forgiveness) by saving and retaining millions of jobs that otherwise may have been eliminated due to the COVID-19 pandemic. We are personally aware of a number of loan recipients who would have shed a number of jobs if there was a real chance they could be determined to be ineligible for their PPP loans during the loan forgiveness process based on events and information unavailable at the time of the PPP application, as reflected by the ex-post type questions contained above.

In that regard, if there is a desire by the SBA to consider information occurring after the then current economic need as reflected when the PPP application was made, perhaps a more appropriate question may be the addition of the following to the draft SBA Form 3509: "Using hindsight to guide your response, if your PPP loan was at risk of not being forgiven, how many jobs that you otherwise saved or retained would you have eliminated during your covered period?" Perhaps another appropriate follow up question could be the following on the draft SBA Form 3509: "Using hindsight to guide your response, if your initial eligibility for the PPP loan was based on information and events that occurred after your PPP application, would you have applied for the loan?" To insert uncertainty into the loan forgiveness process with the inclusion of some of the ex-post questions harms borrowers that relied upon SBA guidance and complied with all terms regarding the application process, the disbursement process, and all other steps along the way.

Note that SBA Form 3509 does request information that falls within the scope of information related to the then current economic conditions at the time of the PPP application and which is therefore necessary to its determination. These requests include information that occurred or were known by the borrower on or before the date the PPP application was made. For example, question seven of the Business Activity Assessment asks for the borrower's primary six-digit NAICS code. Question six of the Liquidity Assessment asks whether any of the borrower's equity securities were listed on a national securities exchange on the date of the PPP application. These types of questions are appropriate because they relate to information available at the time of the PPP application.

[16] *Id*. at Liquidity Assessment #4-5.

II. Conclusion

On behalf of certain of our clients, thank you to the Small Business Administration for its invitation for comments regarding draft SBA Form 3509 and for consideration regarding the requests for information found on Form 3509 that are not necessary to the determination of whether borrowers satisfied the certification concerning economic need. Because the CARES Act and subsequent SBA guidance provided that borrowers must take into account the then current economic conditions at the time of the PPP application, requests pertaining to information and events that are related to periods after the PPP application was made should be eliminated from the current draft SBA Form 3509, or certain of the questions should be updated to reflect the more exact timing regarding the snapshot in time of the then current economic needs of the business. If all of the questions in their current form remain on SBA Form 3509 when such form is finalized and formally issued, then those questions that relate to periods after the PPP application was made should not be used to evaluate the certification.

Respectfully submitted,

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