



November 25, 2020

By reginfo.gov and e-mail

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RE: Reporting and Recordkeeping Requirements Under
OMB Review; OMB Control No: 3245-0407.

Ladies and Gentlemen:

The National Automobile Dealers Association (NADA) represents more than 16,000 franchised automobile and commercial truck dealers who sell new and used motor vehicles and engage in service, repair, and parts sales. Together they directly employ some 1,200,000 people, yet the majority are small businesses as defined by the SBA.

SBA has successfully stood up a Paycheck Protection Program (PPP) pursuant to and (largely) consistent with, Sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, as amended by the PPP Flexibility Act of 2020.¹ To date, SBA has issued 25 interim final rules, two sets of frequently-asked-questions (FAQs), and numerous other [documents](#). Congress has provided for two rounds of PPP funding resulting in 5.2 million loans made by thousands of lenders. Those loans enabled borrowers to keep millions of Americans employed in jobs that likely would have been lost due to COVID-19's deleterious economic impacts.

Last month, SBA published a Paperwork Reduction Act information collection request (ICR) notice for a dozen forms and instructions associated with the PPP.² Those documents were previously approved on an emergency basis until October 31, 2020.³ The following comments

¹ Pub. L. 116–136 (March 27, 2020); Pub. L. 116–142 (June 5, 2020).

² [85 Fed. Reg. 67809-10 \(October 26, 2020\)](#).

³ Many, but not all, of those documents were also the subject of a 60-day ICR notice issued by SBA in July. [85 Fed. Reg. 42479-80 \(July 14, 2020\)](#).

and suggestions focus exclusively on only one of those documents, Form 3509 entitled *PPP Loan Necessity Questionnaire (For-Profit Borrowers)*.

I. The PPP Loan Necessity Questionnaire (For-Profit Borrowers); Form 3509

Form 3509 consists of 3 parts and nine pages, the first of which contains background information as to its purpose.⁴ The questionnaire arises from determinations made in April and May of 2020 that SBA would audit borrowers with PPP loans of \$2 million and above regarding the good faith certifications they made in their loan applications stating that *...current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant*.⁵ Should SBA subsequently determine that an affected borrower did not make its “necessity certification” in good faith, some or all of its PPP loan may not be forgiven⁶, meaning that it will remain subject to the statutory and regulatory PPP loan terms.

Part A of Form 3509 asks for information identifying the borrower-respondent. NADA does not take issue with the information requested in Part A. The third part of Form 3509, entitled “Certifications,” contains three certifications together with spaces for a borrower-respondent’s representative to sign, provide a printed name, give a title, and date the completed questionnaire. NADA does not take issue with this part of Form 3509 either.

Part B of Form 3509, entitled “For-Profit Borrower Questionnaire,” consists of two sections, the first entitled “Business Activity Assessment” and the second “Liquidity Assessment”. NADA has major concerns with the information requests in these two sections.

II. The Business Activity Assessment

This section is most concerning in that it requests information that was not available to, let alone known by a borrower-respondent when it made its good faith “necessity certification.” It is important that SBA and OIRA recognize that only requests for information regarding what a borrower-respondent reasonably and in good faith knew by the date of its loan application are appropriate. These include:

1. The current (and foreseeable) economic uncertainty it was facing.
2. The need for a PPP loan to support its ongoing operations.

Importantly, PPP borrowers could only apply for a maximum of ten weeks of payroll costs for a (then) 8-week covered period. Thus, “necessity certifications” were made in the context of keeping employees on payroll for the near term in lieu of furloughing or terminating them. Naturally, PPP borrowers could only certify in good faith based on what they knew and believed

⁴ In October, SBA began sending letters to PPP lenders stating that within five days they must send Form 3509 questionnaires to specific PPP borrowers. Those PPP borrowers then has 10 days to return the Form 3509 back to their PPP lenders, together with potentially voluminous supporting documentation.

⁵ See FAQs 31, 37, and 46, [SBA PPP FAQ for Lenders and Borrowers](#).

⁶ Forgiveness is the process by which a PPP loan is effectively turned into a grant.

at the time. Questionnaire requests for post-certification information that was unavailable to PPP borrower-respondents when they filed their loan applications are neither relevant nor appropriate and, by definition, involve unnecessary information collection burdens.

NADA specifically suggests that any requests for information regarding the following be deleted from the questionnaire:

1. Gross revenue comparisons between 2020Q2 and 2019Q2
2. Specific start/end dates of state or local pandemic-related “shutdowns” as it was impossible to know their nature, extent, length, or staged nature at the time of certification.
3. Cash outlays for business alterations due to closures after March 2020.
4. Assessments of a borrower’s financial standing after March 2020.

Questions 1- 6 should be eliminated, and all questions in this section should be reevaluated and narrowed consistent with an appropriate assessment of what a borrower-respondent knew leading up to and at the time of its good faith certification. In sum, hindsight and information requests involving hindsight, are irrelevant.

III. The Liquidity Assessment

This section is concerning in that it asks for information as to a borrower-respondent’s then current and future liquidity and revenues, even though these have no bearing on the good faith assessments made by for the “necessity certification” it made when it applied for its PPP loan. The CARES Act did not impose a PPP means-based test, revenue reduction test, or liquidity test. To the contrary, it was clear that that PPP loan eligibility did not require that borrowers meet a “no credit elsewhere” test. Instead, borrowers were required to assess, in good faith, if prospective PPP loan proceeds were necessary to *support* the continued employment of their highly valued employees, an assessment that is neutral with respect to whether they had funds available to meet other aspects of their ongoing operations.

Since this entire liquidity assessment section is irrelevant and inappropriate, *it should be removed from the questionnaire, thereby eliminating the information collection request burdens it imposes.*

IV. Other Suggestions For Reducing Form 3509’s Information Collection Costs and Burdens

In its October 26, 2020 federal register notice, SBA estimates that 42,000 respondents to Form 3509 will take some 67,833 hours to complete it (or 1.6 hours each). But on page 8 of the ICR Supporting Statement, it is expected that 37,000 borrower-respondents will take 1.5 hours each to complete Form 3509 for a total of 55,000 hours. The discrepancy is unexplained. The Supporting Statement then applies a \$36.00/hour wage rate to calculate a total cost burden for borrower-respondents of \$1,998,000. Other significant Form 3509 information collection costs include \$462,500 for PPP lenders, \$1,332,000 for SBA staff, and \$20,458,040 for SBA’s

contractors. According to the Supporting Statement, the total cost burden imposed by existing Form 3509 is well over \$24,000,000!

In preparation for these comments, NADA surveyed four of the many CPAs assisting dealerships with PPP loans. When asked for their opinion regarding how much time and cost it would take for a PPP borrower to respond to Form 3509 as currently written, they responded as follows:

1. 8-10 hours total at \$50/hour.
2. 4-6 hours to complete, plus 4 hours for CPA/legal review, totaling 8-10 hours at \$100/hour.
3. 3-5 hours to gather information and complete, plus 3-5 hours for review.
4. 6 hours to complete, plus 1.5-3 hours to review.

NADA urges SBA and OIRA to recognize that a streamlined questionnaire asking borrower-respondents to present simple narratives regarding their “necessity certifications” would greatly reduce the information collection burden for all, while more than serving as an appropriate tool for auditing. For example, the following four questions could suffice:

- 1. Please explain the uncertainty of the economic conditions at the time the PPP loan was applied for that supported your good faith belief that a loan request was necessary to support ongoing business operations?*
- 2. What were the unknowns did the business face when it applied for a PPP loan? Was it experiencing a serious drop-off in sales? Was it subject to a partial or full shutdown and/or were its customers and/or employees subject to stay-at-home orders?*
- 2. At the time the PPP loan was applied for, what in good faith did you expect you might have to do differently with respect to your workforce without a PPP loan safety net?*

NADA estimates that these three questions could be answered in 1-1.5 hours at \$50.00/hr.

V. Conclusion

In sum, the Form 3509 questionnaire is unduly burdensome and should not be approved in its current form. As drafted, it seeks information well beyond what can possibly be considered appropriate and relevant to a good faith “necessity certification” made in the light of the COVID-19 related economic uncertainty that existed when virtually all PPP borrowers applied for their loans. Indeed, that fact that current Form 3509 requests far more than the minimum amount of information necessary to achieve its intended purpose, is especially important given that many potential respondents are small businesses as defined by SBA.

SBA should immediately cease asking lenders to issue Form 3509 questionnaires to their borrowers until it is revised and reissued as an appropriately and narrowly targeted audit tool.⁷

On behalf of NADA, I thank SBA and OIRA for the opportunity to comment on this matter.

Respectfully submitted,

A handwritten signature in black ink, reading "Douglas I. Greenhaus". The signature is written in a cursive, flowing style.

Douglas I. Greenhaus
Chief Regulatory Counsel,
Environment, Health and Safety

⁷ Form 3509 was not listed in the 60-day federal register notice issued by SBA last July (see above). Moreover, NADA has been unable to locate in the docket for OMB Control Number 3245-0407 where a version of Form 3509 with an 11/30/2020 expiration date was approved for use.