

## CLIENT ALERT

### The Anticipated SBA Evaluation of PPP Borrower's Economic Necessity Certification

November 13, 2020

From the inception of the Paycheck Protection Program (PPP), borrowers questioned the meaning of the economic necessity certification that the Small Business Administration (SBA) required borrowers to make in the PPP loan application. While the SBA provided some definition to this certification in such [Frequently Asked Questions](#) as FAQs 31, 37, and 46, uncertainty remained. Now, months after the last PPP loan application was submitted, the SBA is beginning to undertake an information collection effort to allow SBA loan reviewers to scrutinize a borrower's certification that economic necessity made the loan request necessary.

The SBA is poised to collect this information from PPP borrowers through newly-created Paycheck Protection Program Loan Necessity Questionnaires, with a version for for-profits ([SBA-Form-3509](#)) and for non-profits ([SBA-Form-3510](#)). The following details about this information collection effort can be gleaned from these two forms (which have yet to be publicly released by SBA or Treasury and could still be subject to further revision prior to formal release):

- **From whom is SBA collecting information?** Borrowers that, together with their affiliates, received PPP loans with an original principal amount of \$2 million or greater. (Note, the SBA has not publicly stated whether all such borrowers will receive this form or merely a subset of such borrowers.)
- **What information is SBA requesting?** Through the Questionnaires, the SBA is requesting extensive information about the borrower's activities (including but not limited to whether the borrower was ordered to significantly alter its operations by a state or local authority, the borrower voluntarily ceased or reduced its operations due to COVID-19, or the borrower began new capital improvement projects not due to COVID) as well as regarding the borrower's liquidity (such as whether the borrower paid any dividends or other capital distributions, made any debt repayments, or has any employees compensated in an amount that exceeds \$250,000 on an annualized basis, etc.).
- **What time frame does the borrower have to respond?** Borrowers must complete the Questionnaires within 10 business days of receipt of the Questionnaire from their lender.
- **What certifications must be made in this form?** Among other certifications, borrowers have to certify that the information provided in the Questionnaire and in all supporting documentation is true and correct in all material respects and the certification is made after a reasonable inquiry of people, systems, and other information available to the borrower.
- **What are the consequences for failing to complete the Questionnaire and provide the necessary supporting documents?** The SBA may determine that the borrower was ineligible for the PPP loan, the PPP loan amount, or any forgiveness amount claimed, and the SBA may seek repayment of the loan or pursue other available remedies.
- **What standard will the SBA use when reviewing the Questionnaire?** The SBA's determination will be based on the totality of the borrower's circumstances.

While the SBA notified the public of the existence of these Questionnaires in a [Notice published to the Federal Register on October 26, 2020](#), as of November 12, 2020, the SBA has not yet publicly released these forms on either the SBA's or Treasury's

websites. **BUT**, the SBA has already provided lenders with these forms, and some lenders have begun sending these forms to their PPP borrowers.

In light of the significant amount of information and documentation required by these Questionnaires, including whether and when they will be issued to all (or some subset of) borrowers with an original principal amount of \$2 million or greater, and what consequences borrowers will face if SBA takes issue with information conveyed in the form, a PPP borrower with loans at or above the \$2 million threshold would be well-advised to begin considering how it would respond to the Paycheck Protection Program Loan Necessity Questionnaire. We stand by ready to assist as PPP borrowers work through this anticipated new hurdle and will provide prompt updates as the SBA releases more information about this information collection effort.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

**Olivia Lynch**

Partner – Washington, D.C.  
Phone: +1.202.624.2654  
Email: [olynch@crowell.com](mailto:olynch@crowell.com)

**Stephanie Marcantonio**

Partner – New York  
Phone: +1.212.895.4305  
Email: [smarcantonio@crowell.com](mailto:smarcantonio@crowell.com)

**Amy Laderberg O'Sullivan**

Partner – Washington, D.C.  
Phone: +1.202.624.2563  
Email: [aosullivan@crowell.com](mailto:aosullivan@crowell.com)

**Paul J. Pollock**

Partner – New York  
Phone: +1.212.895.4216  
Email: [ppollock@crowell.com](mailto:ppollock@crowell.com)