

December 2020

Client Advisory

SBA Issues New Guidance on Paycheck Protection Program Loan Forgiveness Questionnaires

In early November, Archer advised its clients that the Small Business Administration (“SBA”) had quietly developed two questionnaire documents that were anticipated to be required of both for-profit and non-profit recipients of large Paycheck Protection Program (“PPP”) loans. Although not publically confirmed at that time by the SBA, a notice had appeared in the Federal Register announcing the SBA’s intention to seek approval from the Office of Management and Budget to collect data from certain PPP loan recipients. This action was seemingly consistent with Treasury Secretary Mnuchin’s April 2020 statement that the SBA would undertake a “full review” of any PPP loan that exceeded \$2 million. Draft versions of the questionnaires were widely circulated online and it was apparent that the SBA was developing the questionnaires as a means of gathering supplemental information to be used by SBA loan reviewers to evaluate and assess borrowers’ “good faith” certifications of economic need, including the requirement that “...current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”

The Federal Register comment period concluded on November 25th. Shortly thereafter, certain borrowers began to receive the questionnaires from their lenders. This week, the SBA issued a new Frequently Asked Question specifically addressing this topic. FAQ #53 simplistically asks, “Why are some PPP borrowers receiving a Loan Necessity Questionnaire?” The answer provided by the SBA is considerably more nuanced.

The SBA confirms that the information provided by borrowers will help the SBA assess borrowers’ certifications within their loan application that, “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant” as required by the CARES Act. While the SBA is clear that the request to complete a questionnaire does not mean that a borrower’s certification is being challenged, it is equally clear that the information provided will be used to assess the concept of loan “necessity.” The answer to FAQ #53 speaks to an evaluation, “....based on the totality of the borrower’s circumstances through a multi-factor analysis.” This analysis will assist the SBA in determining, on an individualized level, whether a loan recipient had an adequate basis for making all required good-faith certifications.

Two sentences within the SBA’s answer to FAQ #53 are of particular interest:

- 1) This certification is required to have been made in good faith at the time of the loan application, even if subsequent developments resulted in the loan no longer being necessary, and
- 2) In its review, SBA may take into account the borrower’s circumstances and actions both before and after the borrower’s certification to the extent that doing so will assist SBA in determining whether the borrower made the statutorily required certification in good faith at the time of its loan application.

While the first statement is important in that it implies that a borrower need not realize actual financial harm from the pandemic to be considered by the SBA to have made the PPP loan necessity certifications in good faith, the second statement indicates that the SBA will, in fact, review a borrower’s post-certification actions when performing its evaluation of PPP loan necessity. It will be interesting to see how the SBA reconciles these concepts and what additional guidance is promulgated.

The updated list of Frequently Asked Questions - including FAQ #53 - can be found at this link: <https://www.sba.gov/document/support-faq-lenders-borrowers>

Links to the questionnaires appear below:

[Form 3509](#) (used by for-profit entities)
[Form 3510](#) (used by non-profit entities)

Should you have any questions regarding this information, please reach out to your Archer attorney or any member of Archer’s [COVID-19 Task Force](#).

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