PPP Loan Over $2 Million? An Imminent Deadline May Be Looming!

by Kenneth Logsdon

Since inception, the Paycheck Protection Program (the “PPP”) under sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act has undergone numerous and material refinements by the Small Business Administration (the “SBA”). One such recent development is the publication by the SBA of two forms, SBA Form 3509, Paycheck Protection Program Loan Necessity Questionnaire (For-Profit Borrowers), and SBA Form 3510, Paycheck Protection Program Loan Necessity Questionnaire (Non-Profit Borrowers) (the “Necessity Forms”). The Necessity Forms have been approved by the SBA, but a PPP borrower can expect for the request to complete such to come directly from its PPP lender (usually after the PPP borrower has applied for loan forgiveness). The Necessity Forms are directed at PPP borrowers who received a loan in excess of $2 million and are intended to provide the SBA with additional information when determining whether or not a PPP loan was necessary for ongoing operations. Critically, a PPP borrower should not delay in completing and submitting a Necessity Form since borrowers are given only 10 business days to return such along with the required supporting documents to the PPP lender. Failure to timely deliver a Necessity Form “may result in the SBA’s determination that a PPP Borrower is ineligible for the PPP loan, the PPP loan amount, or any forgiveness amount claimed” and the SBA may therefore seek repayment of the loan or pursue “other available remedies.” As for the purpose of the Necessity Forms, in the initial PPP loan application each PPP borrower was required to make a good faith certification that, after “taking 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”, the PPP loan was necessary for ongoing operations. For PPP loans over $2 million, the SBA will take the further step of determining whether or not a PPP borrower lacked an "adequate basis" when making such necessity certification. The substance of the Necessity Forms focus on a PPP borrower’s business activities and also contain questions pertaining to a PPP borrower’s liquidity. It is clear that the Necessity Forms are designed to provide the SBA potential grounds to deny loan forgiveness or seek further remedies against borrowers who were not eligible for the PPP. Interestingly, the Necessity Forms also appear to merely be one component of the

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SBA's review and, ideally, PPP borrowers should expect to have the opportunity to provide further context following submission. In any event, care must be taken by a PPP borrower to timely complete and submit a Necessity Form and supporting documentation and, to the extent there are any questions or ambiguities in respect of any question therein, a PPP borrower should use the opportunity to provide a narrative or additional context as is permitted by the Necessity Forms (a total of up to 2,000 characters may be used for such purpose).