

# PPP Borrowers May Need to Explain Themselves in New Forms

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Businesses that took millions in loans to make it through the economic downturn must answer some thorny questions to have those loans forgiven on a tax-free basis under draft forms that are circulating among practitioners.

The draft forms for **for-profit** and **nonprofit** businesses are for borrowers that receive \$2 million or more in Paycheck Protection Program loans to have those amounts forgiven tax free.

The Small Business Administration indicated in a notice published October 26 in the *Federal Register* that it is seeking input on the forms that ask for borrower information to determine if they actually needed the loans. The forms themselves weren't posted in the notice, nor are they available on the SBA or Treasury websites.

Multiple attempts to confirm the authenticity of the draft forms at both agencies went unanswered.

The draft forms are being shared throughout the business community, with some practitioners saying that if they are the SBA's approach to proving loan necessity, that could be worrisome.

The PPP, created by the Coronavirus Aid, Relief, and Economic Security Act ([P.L. 116-136](#)), generally allows businesses with fewer than 500 employees to borrow up to \$10 million in some cases. If a specified portion of the loan is used for payroll costs, the loan is forgivable tax free. The program's time frame was **expanded** in June.

Right after the PPP was enacted, it was revealed that major companies were receiving millions in loans. That prompted a tweak to the guidance on certification to ensure that large companies, such as Shake Shack and Ruth's Chris Steak House, weren't taking advantage of the program when smaller businesses needed the cash.

Other problems have plagued the PPP as well. Practitioners pointed out that it wasn't clear under the language of the CARES Act whether the expenses paid with loans that are later forgiven tax free

could be deducted by the business. The IRS stepped in and issued [Notice 2020-32](#), 2020-21 IRB 837, which closed the door on deducting expenses funded with a forgiven PPP loan.

As guidance was released throughout the summer, more questions continued to pop up; tales of abuse of the program were rampant; and borrowers that needed and received the loans grew increasingly concerned that forgiveness wouldn't be as straightforward as initially thought.

The SBA has streamlined the forgiveness process for smaller borrowers and others who didn't have major workforce reductions. But the government indicated that the scrutiny would be increased for borrowers of \$2 million or more.

### Changing the Rules?

The draft forms on necessity seek to put those borrowers under the microscope, but some practitioners say the government is changing the rules late in the game.

Eric J. Kodesch of Lane Powell PC pointed out that in draft Form 3509, which applies to for-profit borrowers, one question compares a business's second-quarter gross revenue in 2020 — which wasn't known at the time of the PPP loan application — with its revenue during the same time period in 2019. It appears as if the government is saying the revenue comparisons to last year are relevant to the certification about uncertainty the business faced about the future, he said.

"The certification, however, was about uncertainty so that an actual drop is not required," Kodesch said. "Also, it disregards the impact on the pipeline for future projects."

For example, the 2020 second-quarter cash flow for many businesses was from pre-pandemic projects that were approved and budgeted, Kodesch said. Those businesses wouldn't have a drop in second-quarter 2020 revenue, but could have a drop in future quarters, he added.

Adam Sweet of Eide Bailly LLP agreed, noting that the original PPP loan application only required a borrower to certify that, in essence, the loan was necessary because of the economic uncertainty caused by the COVID-19 pandemic. The application had no reference to measuring revenue declines or a borrower's other forms of liquidity, he said.

According to Sweet, the draft forms are part of the ongoing saga of the government retroactively changing the rules. The saga began with an earlier Q&A in which the government said it will review all loans in excess of \$2 million, he said.

“And now Form 3509 states that the government apparently is asking borrowers with loans in excess of \$2 million to demonstrate gross revenue declines, inability to access liquidity from another non-PPP source, and other requirements,” Sweet said. “This whole exercise seems a bit unfair given that many borrowers applied for their loan in good faith and maintained full payroll, seemingly in furtherance of the statutory goals of the PPP, and yet now the government is questioning their original eligibility for the PPP loan.”

Lewis Horowitz of Lane Powell said the draft forms include a liquidity assessment that asks if any employees during the covered period were paid more than \$250,000 on an annual basis. Horowitz said it’s unclear how the SBA plans to use that data.

“I do not think that having employees who earn more than \$250,000 should be a factor,” Kodesch said. “However, if the SBA is going to ask, it should focus on whether there was an increase in the number of such employees, compared to 2019.”

Horowitz also said it’s not clear what happens to businesses that paid off lines of credit with their PPP funds. He pointed out that cash is fungible and said some PPP recipients borrowed on their lines of credit in case they fell out of other covenants, then repaid the credit when they realized the PPP gave them the reassurance they needed to survive as a business.

“Are borrowers now suspect because they paid down their line of credit?” Horowitz asked.

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 YES

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