

November 24, 2020

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Washington, DC 20416

SBA Desk Officer
Office of Information and Regulatory Affairs
Office of Management and Budget
New Executive Office Building
Washington, DC 20503

Re: *Paycheck Protection Program*
OMB Control Number: 3245--0407

To Whom It May Concern:

The American Financial Services Association (AFSA)¹ appreciates the opportunity to comment on the Small Business Administration's (SBA) Form 3509, the Loan Necessity Questionnaire. Substantial changes are needed to Form 3509 and the Office of Management and Budget (OMB) should not approve the form until those changes are incorporated.

I. Background

Section 1102 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Public Law 116-136, authorizes SBA to guarantee loans made by banks or other financial institutions under a new temporary program titled the "Paycheck Protection Program" (PPP). These loans are available to eligible businesses adversely effected by the COVID-19 emergency. Under section 1106(b) of the CARES Act, a loan may be forgiven in full or in part if the PPP borrower uses the proceeds for specified costs.

In order to make the financial assistance available as expeditiously as possible after the PPP was authorized, SBA obtained emergency approval of this information collection. As required by the PRA, SBA is now submitting the information collection to OMB for standard (non-emergency) review and approval to use the information collection beyond the emergency expiration date, October 31, 2020.

II. Form 3509 Requirements

The reason for Form 3509 is understandable. There were many negative news stories regarding the PPP loans, and as a result, the Department of the Treasury announced that SBA would audit all PPP loans above \$2 million.

SBA states in the questionnaire that the purpose of Form 3509 is, "to facilitate the collection of supplemental information that will be used by SBA loan reviewers to evaluate the good-faith

¹ Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

certification that you made on your PPP Borrower Application (SBA Form 2483 or Lender's equivalent form) that economic uncertainty made the loan request necessary." SBA also writes that it is, "reviewing these loans to maximize program integrity and protect taxpayer resources."

Form 3509 is divided into two categories of information requests: a "Business Activity Assessment" and a "Liquidity Assessment."

In the Business Activity Assessment section, the form requires:

- A financial revenue comparison from the second quarter of 2020 to the second quarter of 2019 (with special rules for seasonal employees);
- Information on changes in the business operations after March 13, 2020 (the date of issuance of the National Emergency Declaration) due to the pandemic, including cash outlays;
- Information on voluntary measures taken after March 13, 2020 due to the pandemic, including cash outlays; and
- Capital expenditure projects after March 13, 2020 due to the pandemic and approximate cash outlays for these projects.

In the Liquidity Assessment section, the form requires:

- The borrower's cash position and any payment of dividends;
- Any prepayments of any outstanding debt;
- Compensation payments in excess of \$250,000 to any employee or to any owner employed by the borrower;
- The book value of the borrower in the last calendar quarter prior to the loan application (if the borrower is a private company);
- The market cap of the parent company (if it is a public company listed on a U.S. or non-U.S. securities exchange)
- A disclosure if a borrower is owned by a private equity fund, a venture capital fund or a hedge fund; and
- A disclosure if a foreign state enterprise owns 50% or more of the borrower.

The SBA is requiring that all this information, with documentation, be completed within 10 business days of receipt.

III. Concerns with Form 3509

The OMB is asking: (a) whether the collection of information is necessary; (b) whether the burden estimates are accurate; (c) whether there are ways to minimize the burden, and (d) whether there are ways to enhance the quality, utility, and clarity of the information. Each of these is addressed below.

A. Whether the Collection of Information is Necessary

We find several of the questions in the Liquidity Assessment section portion of Form 3509 to be unnecessary. The Liquidity Assessment requests information pertaining to the borrower's original considerations when applying for a PPP loan that were not required by the original implementing guidance. Specifically, the borrower must answer questions regarding their cash on hand, dividend payments and prepayments of outstanding debt throughout the covered period of the PPP loan, and the book value of the borrower's business (for private companies) in the previous quarter prior to the loan application. On the surface, these questions present a potential bias towards companies who were profitable during the pandemic. Prepayments of debt, for example, support the long-term health of a company. In addition, information regarding the book value of the borrower is irrelevant as the PPP did not include means-based test for borrowers.

Even if profitable prior to the pandemic, a business had no reason to believe they would remain at or near levels prior to the pandemic. Logic would support a reasonable conclusion that with governmentally mandated business shutdowns or curtailments, many consumers would suffer loss of employment or at least decreases in income. Uncertainty even existed with regards to how state and local governments would define critical businesses that could remain open. Again, even businesses profitable prior to the pandemic could be shut down or curtailed in a way that would make it hard to continue to employ their team again supporting their conclusion that they had the necessity.

The Liquidity Assessment requests further additional information unrelated to what the borrower was originally asked to consider when applying for a loan. Specifically, the borrower must provide a revenue comparison between Q2 of 2020 and Q2 of 2019 when the program did not include any revenue or liquidity-based assessments. This again poses a potential bias towards profitable businesses and assumes that all borrowers experienced immediate revenue reductions on the onset of the pandemic. This quarterly gross revenue comparison can also be misleading because many borrowers received the PPP loan prior to the conclusion of Q2 of 2020.

With the first release of funds, businesses expected the committed guaranty funds to be used up very quickly and there was no early commitment to release additional funds in a later stimulus package. This resulted in a race to apply before funds disappeared. A business with uncertainty going forward had the choice of applying or not applying or applying later when SBA funds may be exhausted, risking their business and employment of their team.

B. Whether the Burden Estimates are Accurate

The burden estimates are not accurate. SBA estimates that it will take around an hour and half to complete the form. It will actually take hours longer because of the number of questions, the amount of information required, and the documentation that must be provided.

C. Whether There are Ways to Minimize the Burden

As you know, borrowers have 10 days upon receipt of the notice to complete and send the questionnaire to the lender. The nine-page questionnaire includes new reporting requirements that were not present in the origination of these loans. We believe that an appropriate alternative to the nine-page questionnaire which would satisfy agency efforts to review the efficacy of the loans would be to allow borrowers to submit or sign a statement (with supporting documentation) explaining how they reasonably felt the PPP loan was necessary to continue business operations. This would also reduce compliance costs which disproportionately hurt smaller PPP borrowers.

At the moment, we believe that an appropriate, immediate solution would be to temporarily suspend the new review process until the SBA issues an interim final rule and all comments from stakeholders are considered.

D. Whether There are Ways to Enhance the Quality, Utility, and Clarity of the Information

In the Liquidity Assessment portion of Form 3509, additional questions could be included to help the borrower articulate their original good-faith belief in the necessity of the loan at the time. As you know, the purpose of the PPP was to maintain business' ongoing operations and keep employees on the payroll. An appropriate question to include in the questionnaire would be, "How many, if any, employees were re-hired after approval of the PPP loan?"

Economic uncertainty was a significant factor in applying for the PPP loans and many businesses were planning potential layoffs prior to the CARES Act. To receive funding, business had to certify that "current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." The driver to this question appears to be that the business applicant does not know what is going to happen in the future and because of that uncertainty, they believe they will need money to support ongoing operations. This appears to be a low bar to meet as borrowers could not predict the impact of the pandemic other than to assume they were going to lose business and face difficulty in maintaining then current levels of employment. Thus, a relevant question would be, "How many employees, if any, were you anticipating to layoff if you did not receive the PPP loan based on your experience at the time of the loan?" While this question addresses a hypothetical scenario, it is relevant to the borrower's good faith attestation that their perceived economic uncertainty warranted a PPP loan.

In addition to the beforementioned comments regarding the Business Activity Assessment and Liquidity Assessment portions of Form 3509, we are concerned that this collection is contrary to the President's "Memorandum on Transparency and Open Government" (Memorandum)² calling for the establishment of "a system of transparency, public participation, and collaboration," and directing OMB to issue an Open Government Directive and clarify guidance with respect to the Paperwork Reduction Act of 1995 (PRA). When evaluating agency information processes, OMB helps agencies fulfill their goal of collecting information necessary pursuant to their statutory mission *while preventing the collection of duplicative (and as a result, costly) data*. Furthermore,

² Available at: <https://obamawhitehouse.archives.gov/the-press-office/transparency-and-open-government>

to implement the Memorandum, OIRA should evaluate whether the data collection by the agency “minimizes the Federal information collection burden, with particular emphasis on the individuals and entities most adversely affected.”³ While the SBA is well-intentioned in providing oversight of the good-faith certification PPP borrowers made on SBA Form 2483, the current requirements of SBA Form 3509 are contrary to the Memorandum.

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We appreciate the OMB’s and SBA’s time and attention in this area. Please contact me by phone, 202-776-7300, or email, cwinslow@afsamail.org, with any questions.

Sincerely,



Celia Winslow
Senior Vice President
American Financial Services Association

³ Available at:
https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/inforeg/PRAPrimer_04072010.pdf