

Current Federal Tax Developments

Week of November 2, 2020

Edward K. Zollars, CPA
(Licensed in Arizona)

ACCOUNTING
CONTINUING EDUCATION

CURRENT FEDERAL TAX DEVELOPMENTS
WEEK OF NOVEMBER 2, 2020
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SECTION: 164

IRS LETTER TO CONGRESSIONAL OFFICE INDICATES THAT \$10,000 CAP APPLIES TO DEDUCTION OF REAL ESTATE TAXES ON REAL ESTATE COOPERATIVE UNIT UNDER §216

Citation: Information Letter 2020-0010, 9/25/20

In an information letter,¹ the IRS has informally addressed an issue that has existed since the passage of the Tax Cuts and Jobs Act—does the \$10,000 state and local tax deduction cap apply to the special deduction under IRC §216 to a shareholder’s portion of taxes paid by a housing cooperative?

In February 2019² we published an article looking at the interaction of the limitation on personal state and local taxes found at IRC §164(b)(6) and the deduction allowed for owners of shares in a real estate cooperative under IRC §216. A real estate cooperative is an alternative to the use of a condominium structure to have an individual purchase a segment (or unit) in a particular building. The cooperative is a corporation that owns the building, with each shareholder normally having the right to occupy a particular unit.

Since the property tax would be imposed on the corporation as owner of the building rather than the shareholder, IRC §216 provides a method for the shareholder to claim his/her share of the taxes paid by the corporation.

As was described in the article, it appeared the language of the Tax Cuts and Jobs Act added at §164(b)(6) to limit itemized deductions for state and local taxes other than for business or investment properties failed to specifically limit taxes for which the deduction was allowed under IRC §216. As was noted, the Blue Book indicated that it was Congress’s intent to have the limit applied, but the Blue Book text also contained the footnote reference that a technical correction might be necessary to achieve that result—that is, the text of the law might not be drafted properly to achieve the intended result.

Congressman Jerrold Nadler’s office made an inquiry to the IRS about whether, in fact, this limitation applied and, in a letter dated July 29, 2020 but formally released on the IRS website later, the IRS addressed the issue.

¹ Information Letter 2020-0010, September 25, 2020, <https://www.irs.gov/pub/irs-wd/20-0010.pdf> (retrieved October 28, 2020)

² Edward Zollars, “Owners of Shares in Housing Cooperatives May Escape \$10,000 Limit on Tax Deduction Due to Drafting Error in TCJA,” *Current Federal Tax Developments* website, February 22, 2020, <https://www.currentfederaltaxdevelopments.com/blog/2019/2/22/owners-of-shares-in-housing-cooperatives-may-escape-10000-limit-on-tax-deduction-due-to-drafting-error-in-tcja> (retrieved October 28, 2020)

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The IRS letter takes the position that the limitation does apply to these taxes under IRC §216:

The SALT limitation under section 164(b)(6) applies to the deduction taken into account by a tenant-stockholder under section 216 for the tenant-stockholder's proportionate share of the real estate taxes paid or incurred by a cooperative housing corporation.³

The letter provides the following analysis in support of this position:

Section 164 generally allows an itemized deduction for certain taxes, including state and local real property tax, state and local personal property tax, and state and local income tax or state and local sales tax, for the taxable year in which paid Section 164(b)(6), which was added by the Tax Cut and Jobs Act of 2017, limits an individual's deduction for the taxable year to an aggregate amount of the state and local taxes taken into account during the taxable year to \$10,000 (or \$5,000 in the case of a married individual filing a separate return) for taxable years beginning after December 31, 2017, and before January 1, 2026.

Section 216(a) allows a deduction by a tenant-stockholder for the tenant-stockholder's proportionate share of the real estate taxes allowable as a deduction to the cooperative housing corporation under section 164. The legislative history to section 216 states that "[t]he general purpose of this provision is to place the tenant stockholders of a cooperative apartment in the same position as the owner of a dwelling house so far as deductions for interest and taxes is concerned." S. Rep. No. 1621, 77th Cong., 2d Sess. 51 (1942). Further, regarding the SALT limitation, the Joint Committee on Taxation states that "[i]t is intended that the limitation apply to the deduction for amounts paid or accrued to a cooperative housing corporation by a tenant-stockholder under section 216(a)(1) (relating to real estate taxes) in the same manner as the limitation applies to real estate taxes under section 164." Joint Committee on Taxation Staff, *General Explanation of Public Law 115-97*, JCS-1-18 p. 68 (December 2018).⁴

The analysis is interesting in that it relies entirely on statements of Congressional intent and steers clear of analyzing the actual text of the section in question. As well, while quoting the Blue Book (the *General Explanation of Public Law 115-97*), the letter avoids mentioning the footnote that was tied to the passage quoted that indicates a law change might be necessary to achieve this result.

So where does this leave taxpayers and advisers? First, advisers should include the fact that, as informal as these letters are, the IRS is on record as deciding the limit applies when advising taxpayers on the matter. Even if the IRS position is improper, there would be costs incurred to defend the position if it is challenged on exam, costs that would be avoided if the taxpayer simply applies the cap. That is, the full deduction

³ Information Letter 2020-0010, p.2

⁴ Information Letter 2020-0010, pp. 1-2

might be justified, but the costs of carrying the issue could be greater ultimately than the taxes saved.

But, as well, it's important to note that the IRS is issuing this guidance in a format that carries little or no authority beyond the persuasive nature of the legal analysis—and analysis that, conveniently, ignores the language found in the relevant provisions. Generally, Congressional intent only matters when attempting to resolve ambiguity in the law—but the IRS does not attempt to first show the existence of such ambiguity in the positions in question. If the law itself can only reasonably be read to lead to one result, that is the result that matters regardless of intent.

And, frankly, the IRS has applied that very standard to other TCJA provisions. Although clearly Congress intended for qualified improvement property to have a 15-year life and be eligible for bonus depreciation treatment when the TCJA was passed, the IRS took the position that the law itself did not support that treatment. Eventually Congress passed a technical correction in the CARES Act to modify the law to agree with the intent.

At this point it would appear that taking the position that a deduction in full is allowed under §216 is at the very least a reasonable interpretation of the law. For that reason, an adviser should be able to sign a return taking that position if the taxpayer wishes to risk an IRS challenge. The adviser may decide the position lacks substantial authority, or that it might be viewed as doing so, and decide that disclosure of the position on a Form 8275 may be appropriate.

But, fundamentally, aside from the IRS going on the record in a rather obscure manner indicating the limit should apply, nothing much has changed regarding this issue. Only time will tell if this is merely IRS saber rattling to scare taxpayers away from doing this (and thus, actual challenges would be rare) or if the agency seriously plans to pursue these positions. And, in the latter case, it will likely take a few more years before any such case ends up before the courts for a ruling on the matter.

SECTION: 3201

IRS GIVES INSTRUCTIONS FOR PREPARATION OF FORMS W-2 FOR EMPLOYERS WHO DEFERRED EMPLOYEE OASDI UNDER EXECUTIVE ORDER

Citation: “Form W-2 Reporting of Employee Social Security Tax Deferred under Notice 2020-65,” IRS website, 10/30/20

The IRS has released guidance for preparing Forms W-2 for employers who have deferred employee old age, survivors and disability taxes pursuant to the President's August 8 memorandum, as provided for in Notice 2020-65.⁵

⁵ “Form W-2 Reporting of Employee Social Security Tax Deferred under Notice 2020-65,” IRS website, October 30, 2020, <https://www.irs.gov/forms-pubs/form-w-2-reporting-of-employee-social-security-tax-deferred-under-notice-2020-65> (retrieved October 30, 2020)

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The page describes the impact of the Notice for employers that participated as follows:

The Notice allows employers the option to defer the employee portion of Social Security tax from September 1, 2020 through December 31, 2020, for eligible employees who earn less than \$4,000 per bi-weekly pay period (or the equivalent threshold amount with respect to other pay periods) on a pay period-by-pay period basis. To pay the deferred amount of the employee portion of Social Security tax, the employer will ratably withhold the amount of Social Security tax deferred from the employees' paychecks from January 1, 2021 through April 30, 2021.⁶

The IRS begins by instructing employers that they should continue to report any wages from which social security was not withheld as social security wages, but not include the deferred social security tax withholdings in the social security withheld box:

If you deferred the employee portion of Social Security tax under Notice 2020-65, when reporting total Social Security wages paid to an employee on Form W-2, Wage and Tax Statement, include any wages for which you deferred withholding and payment of employee Social Security tax in box 3 (Social security wages) and/or box 7 (Social security tips). However, do not include in box 4 (Social security tax withheld) any amount of deferred employee Social Security tax that has not been withheld.⁷

The IRS has decided to require such employers to file Forms W-2c, Corrected Tax and Wage Statement, once the taxes have been withheld in 2021:

Employee Social Security tax deferred in 2020 under Notice 2020-65 that is withheld in 2021 and not reported on the 2020 Form W-2 should be reported in box 4 (Social security tax withheld) on Form W-2c, Corrected Wage and Tax Statement. On Form W-2c, employers should enter tax year 2020 in box c and adjust the amount previously reported in box 4 (Social security tax withheld) of the Form W-2 to include the deferred amounts that were withheld in 2021. All Forms W-2c should be filed with SSA, along with Form W-3c, Transmittal of Corrected Wage and Tax Statements, as soon as possible after you have finished withholding the deferred amounts. See the 2021 General Instructions for Forms W-2 and W-3 (to be published in January 2021) for more information about completing and filing Forms W-2c and Forms W-3c. Forms W-2c should also be furnished to employees, and you may direct your employees to (or otherwise provide to them) the Instructions for Employees, below, for instructions specific to this correction.⁸

⁶ "Form W-2 Reporting of Employee Social Security Tax Deferred under Notice 2020-65," IRS website

⁷ "Form W-2 Reporting of Employee Social Security Tax Deferred under Notice 2020-65," IRS website

⁸ "Form W-2 Reporting of Employee Social Security Tax Deferred under Notice 2020-65," IRS website

The IRS provides similar guidance for Railroad Retirement Tax Act items:

Similarly, when reporting total Railroad Retirement Tax Act (RRTA) compensation include any compensation for which you deferred withholding and payment of the employee Social Security tax equivalent of Tier 1 RRTA tax under Notice 2020-65 in box 14 of the 2020 Form W-2, Wage and Tax Statement. However, do not include in box 14 any amount of deferred employee Tier 1 RRTA tax that has not been withheld.

Employee RRTA tax deferred in 2020 under Notice 2020-65 that is withheld in 2021 and not reported on the 2020 Form W-2 should be reported in box 14 on Form W-2c for 2020. On Form W-2c, employers should adjust the amount previously reported as Tier 1 tax in box 14 of the Form W-2 to include the deferred amounts that were withheld in 2021. See the 2021 General Instructions for Forms W-2 and W-3 (to be published in January 2021) for more information about completing and filing Forms W-2c and Form W-3c, Transmittal of Corrected Wage and Tax Statements. Employee copies of Forms W-2c should be furnished to employees, and you may direct your employees to (or otherwise provide to them) the Instructions for Employees, below, for instructions specific to this correction.⁹

The IRS provides guidance to employees, primarily warning those that have multiple employers that they may need to wait for the Form W2c to determine if there has been excess FICA withheld from those employers:

If you had only one employer during 2020 and your Form W-2c, Corrected Wages and Tax Statement, for 2020 only shows a correction to box 4 (or to box 14 for employees who pay RRTA tax) to account for employee Social Security (or Tier 1 RRTA tax) that was deferred in 2020 and withheld in 2021 pursuant to Notice 2020-65, no further steps are required. However, if you had two or more employers in 2020 and your Form W-2c for 2020 shows a correction to box 4 (or to box 14 for employees who pay RRTA tax) to account for employee Social Security (or Tier 1 RRTA tax) that was deferred in 2020 and withheld in 2021, you should use the amount of Social Security tax (or Tier 1 RRTA tax) withheld reported on the Form W-2c to determine whether you had excess Social Security tax (or Tier 1 RRTA tax) on wages (or compensation) paid in 2020.

If the corrected amount in box 4 of the Form W-2c for 2020 causes the total amount of employee Social Security tax (or equivalent portion of the Tier 1 RRTA tax) withheld by all of your employers to exceed the maximum amount (\$8,537.40) of tax that you owe, or increases an already existing excess amount of employee Social Security tax (or Tier 1 RRTA tax withheld), then you should file Form 1040-X, Amended U.S. Individual Income Tax Return, to claim a credit for the excess Social Security tax (or Tier 1 RRTA tax) withheld. See the instructions

⁹ “Form W-2 Reporting of Employee Social Security Tax Deferred under Notice 2020-65,” IRS website

to line 10 of Schedule 3 in the 2020 Instructions for Form 1040 and Form 1040-SR for more information.¹⁰

SECTION: PPP LOAN SBA ANNOUNCES WILL CREATE QUESTIONNAIRE TO DETERMINE NEED FOR PPP LOANS, PURPORTED COPIES BEING CIRCULATED ONLINE

Citation: Purposed Form 3509, Loan Necessity Questionnaire (For-Profit Borrowers), 10/30/20

A number of sources are reporting that the SBA has begun circulating two forms to be completed by borrowers with PPP loans in excess of \$2 million, to provide information for determining the necessity of their borrowings.¹¹ The SBA had published a notice in the *Federal Register* on October 26, 2020 indicating that there would be two such forms (Forms 3509, *Loan Necessity Questionnaire (For-Profit Borrowers)* and 3510 *Loan Necessity Questionnaire (Non-Profit Borrowers)*)¹² the agency had not posted such forms on any website as of October 30.

However, copies of such forms did show up on various websites, all of which reported that the SBA had not return requests for comments on whether the forms published were authentic. One such copy of the Form 3509 can be found on *Politico's* website,¹³ and other sites have identical copies of the form.

Eric Asgeirsson of the AICPA posted the following note on Twitter related to the forms:

AICPA is in the process of following up with Treasury/SBA on PPP loan necessity 3509 & 3510 forms to better understand. The forms have not yet been officially released. We don't think the information requested is inline with the intent of the PPP act.¹⁴

¹⁰ "Form W-2 Reporting of Employee Social Security Tax Deferred under Notice 2020-65," IRS website

¹¹ Zachary Warmbrodt, "SBA presses big businesses to justify aid, sparking uproar," *Politico* website, October 30, 2020, <https://www.politico.com/news/2020/10/30/sba-big-businesses-ppp-loans-433736> (retrieved October 31, 2020), Eric Yauch, "PPP Borrowers May Need to Explain Themselves in New Forms," *Tax Notes Today Federal*, November 2, 2020, <https://www.taxnotes.com/tax-notes-today-federal/partnerships/ppp-borrowers-may-need-explain-themselves-new-forms/2020/11/02/2d4rv> (retrieved October 31, 2020 subscription required)

¹² Small Business Administration, 30-Day Notice, 85 FR 67809, *Federal Register*, October 30, 2020, pp. 67809-67810, <https://www.govinfo.gov/content/pkg/FR-2020-10-26/pdf/2020-23594.pdf> (retrieved October 31, 2020)

¹³ Form 3509, Paycheck Protection Program Loan Necessity Questionnaire, <https://www.politico.com/f/?id=00000175-7c07-d665-a1ff-fe0fd5390000> (retrieved October 31, 2020)

¹⁴ <https://twitter.com/ErikAsgeirsson/status/1322329528694353921?s=20>, October 30, 2020, (retrieved October 31, 2020)

As Mr. Asgeirsson notes, the information being requested on the form has raised questions about whether the SBA is changing the rules after the fact with the program.

SBA Description of the Form

Although the form has not yet been released by the SBA, nor have the copies posted online confirmed by the agency as being from the agency, the agency has not taken steps to indicate the form is not from the agency and the agency did indicate such a form was coming.

The copy of the form that is in circulation has the following information from the SBA indicating the purpose of the Form 3509:

The purpose of this form is to facilitate the collection of supplemental information that will be used by SBA loan reviewers to evaluate the good-faith 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. Each for-profit Borrower that, together with its affiliates,¹ received PPP loans with an original principal amount of \$2 million or greater is required to complete this form and submit it, along with the required supporting documents, to the Lender servicing Borrower's PPP loan. The completed form is due to the Lender servicing your PPP loan within ten business days of receipt from your Lender.¹⁵

The Form 3509 goes on to provide the following information to the borrower that receives the questionnaire:

SBA is reviewing these loans to maximize program integrity and protect taxpayer resources. The information collected will be used to inform SBA's review of your good-faith certification that economic uncertainty made your loan request necessary to support your ongoing operations. Receipt of this form does not mean that SBA is challenging that certification. After this form is submitted, SBA may request additional information, if necessary, to complete the review. SBA's determination will be based on the totality of your circumstances.

Failure to complete the form and provide the required supporting documents may result in SBA's determination that you were ineligible for either the PPP loan, the PPP loan amount, or any forgiveness amount claimed, and SBA may seek repayment of the loan or pursue other available remedies.

Within five business days after you provide a complete form with all required responses, supporting documents, and signatures and certifications, the Lender servicing your loan is required to upload the form and documents to the SBA PPP Forgiveness Platform

¹⁵ Form 3509 from Politico site, p. 1

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(forgiveness.sba.gov) and separately input your responses to each question into the web form available in the platform¹⁶

Information Requested

Pages 2-8 has a series of questions, divided into two categories:

- Business Activity Assessment and
- Liquidity Assessment.

Business Activity Assessment

The first question in the business activity assessment requests information on the borrower's gross revenue for the second calendar quarter of 2020 and the same quarter in 2019. A business that is seasonal may optionally use the third quarter for each year.¹⁷

A business that was not in existence in the second quarter of 2019 will enter revenue for the first quarter of 2020. However, a seasonal business that chooses the third quarter of 2020 revenue report cannot use the first quarter of 2020 to compare to and must, instead, provide the third quarter of 2019's revenue.¹⁸

The second question asks the business if it had been ordered to shut down at some time after the declaration of the COVID-19 National Emergency on March 13, 2020 by a state or local government order. If the business was subject to such an order, the form asks for the name of the governmental authority and dates of the shutdown.¹⁹

The third question asks if the business has been ordered to significantly alter its operations by a state or local entity. If the business has, it again is to provide the dates involved with the modification. The question then asks for the nature of the modification, specifically asking whether any of the following were part of the modification:

- Number of people permitted in a location at one time was reduced or capped;
- Service was restricted to outdoors; or
- Employee workspaces were reconfigured.

If there were other restrictions, the borrower is allowed 1,000 characters to describe such restrictions. As well, the business is asked for cash outlays related to these alterations.²⁰

¹⁶ Form 3509 from Politico site, p. 1

¹⁷ Form 3509 from Politico site, p. 2

¹⁸ Form 3509 from Politico site, p. 3

¹⁹ Form 3509 from Politico site, p. 3

²⁰ Form 3509 from Politico site, p. 3

The fourth and fifth question repeat the last two inquiries, except this time asking for times the borrower voluntarily, without a governmental order, took any of the above actions. If the business closed, the questionnaire asks for the reason why, this time having the following two checkbox reasons:

- An employee or multiple employees contracted COVID-19 or
- COVID-19 disrupted the business's supply chain.

A business that closed for some other reason can explain that reason, again limited to 1,000 characters.²¹

In question 6 the questionnaire asks if the business, between March 13, 2020 and the end of the loan forgiveness covered period, began any capital improvement projects not related to COVID-19. If the borrower did undertake such capital improvements, the borrower is asked to provide the approximate cash outlays for that improvement.²²

Question 7 asks for the borrower's NAICS six digit code,²³ while question 8 provides one more 1,000 character box where any additional comments on the above questions can be provided by the borrower.²⁴

Liquidity Assessment

The second section of the questionnaire inquires about items related to the borrower's liquidity status.

The first question asks the borrower to provide the amount of cash and cash equivalents the borrower had on hand on the last day of the calendar quarter immediately before the date of the borrower's PPP loan application, and to provide supporting documentation.²⁵

Question 2 asks if the borrower has paid any dividends or other capital distributions (other than for pass-through estimated tax payments) to its owners during the period from March 13, 2020 to the end of the PPP loan forgiveness period.²⁶ If any such distributions were made, the borrower is asked to provide the total of such distributions.²⁷

A footnote discusses the estimated tax exception as follows:

Distributions made by a partnership or S-corporation that are designed to be used only for owners' estimated quarterly tax payments are excepted, as long as they do not exceed the tax liability on profits earned in the first three quarters of 2020, 110 percent of the pro-rata

²¹ Form 3509 from Politico site, pp. 4-5

²² Form 3509 from Politico site, p. 5

²³ Form 3509 from Politico site, p. 5

²⁴ Form 3509 from Politico site, p. 5

²⁵ Form 3509 from Politico site, p. 5

²⁶ Form 3509 from Politico site, p. 5

²⁷ Form 3509 from Politico site, p. 6

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share of last year's tax liability on distributions, and/or 100 percent of the pro-rata share of tax liability on total distributions in 2020.²⁸

Question 3 asks if the borrower has prepaid any outstanding debts (paid before contractually due) during the period from March 13, 2020 to the end of the PPP loan forgiveness covered period and, if so, the amount of such prepayment and documentation related to that prepayment.²⁹

Question 4 asks if any of the borrower's employees were compensated during the loan forgiveness covered period of the PPP loan were compensated in an amount that exceeds \$250,000 on an annualized basis. If the answer is yes, the borrower is asked how many employees were compensated at such levels and the total amount of such compensation paid to all such employees during the loan forgiveness covered period.³⁰

Question 5 repeats question 4, this time narrowing the request to only refer to owners of the borrower who received such compensation.³¹

Question 6 asks if the borrower had any equity securities listed on a national securities exchange and, if so, what was the borrower's market capitalization as of the date of the borrower's loan application.³²

Question 7 inquires if any public company owned more than 20% of any class of the borrower's outstanding equity securities. If so, the borrower is asked to give the name and market capitalization of each such public company equity holder as of the date of the borrower's loan application.³³

If the company did not have any equity securities listed on a national exchange (that is, it answered question 6.A "No"), question 8 asks for the shareholder equity value (book value) of the borrower as of the end of the calendar quarter immediately before the date of the borrower's loan application.³⁴

Question 9 asks questions regarding a parent company, asking if the borrower was a subsidiary of another company at the date of the borrower's PPP application. A subsidiary is defined as having a parent that holds 50% or more of the borrower's common stock or similar equity interest.³⁵

If a parent does exist, the borrower is asked to name that parent, whether the parent was organized under U.S. laws or that of another country. If the parent has shares listed on a U.S. or other national securities exchange, the borrower also is asked to

²⁸ Form 3509 from Politico site, p. 5, Footnote 2

²⁹ Form 3509 from Politico site, p. 6

³⁰ Form 3509 from Politico site, p. 6

³¹ Form 3509 from Politico site, p. 6

³² Form 3509 from Politico site, pp. 6-7

³³ Form 3509 from Politico site, p. 7

³⁴ Form 3509 from Politico site, p. 7

³⁵ Form 3509 from Politico site, p. 7

supply the market capitalization of the parent on the date of the borrower's PPP loan application.³⁶

Question 10 asks if 20% or more of any class of the borrower's outstanding equity securities are held by a private equity firm, venture capital firm, or hedge fund, including a fund managed by any such firm.³⁷

Question 11 moves on to ask if the borrower was an affiliate or subsidiary of a foreign, state-owned enterprise or of a department, agency or instrumentality of a foreign state. For purposes of this question:

- An affiliate is defined by reference to the SBA's interim final rule on affiliates, 85 FR 20817 (April 15, 2020)³⁸ and
- Subsidiary is defined as having at least 50% of the borrower's common equity owned, directly or indirectly, or controlled by the foreign entity.³⁹

If the answer to question 11 is yes, the borrower is asked to enter the name of the foreign entity.⁴⁰

Question 13 asks about whether the borrower received funds from any other CARES Act program (such as the EIDL grant program), excluding tax benefits and, if the answer is yes, to give the funding amounts.⁴¹

Again, the final question gives the borrower another 1,000 characters to expand upon any of the answers provided to other liquidity assessment questions.⁴²

The final page contains three certifications that the authorized representative of the borrower must initial, along with the signature block. Those certifications are:

- I certify that I have the authority to sign and submit this questionnaire on behalf of the Borrower.
- I certify that the information provided in this questionnaire and in all supporting documentation is true and correct in all material respects. I make this certification after reasonable inquiry of people, systems, and other information available to the Borrower.
- I understand that knowingly making a false statement to obtain a guaranteed loan or forgiveness of an SBA-guaranteed loan is punishable under the law, including under 18 U.S.C. 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 U.S.C. 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a

³⁶ Form 3509 from Politico site, p. 7

³⁷ Form 3509 from Politico site, p. 7

³⁸ Form 3509 from Politico site, p 8, Footnote 3

³⁹ Form 3509 from Politico site, p. 8

⁴⁰ Form 3509 from Politico site, p. 8

⁴¹ Form 3509 from Politico site, p. 8

⁴² Form 3509 from Politico site, p. 8

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federally insured institution, under 18 U.S.C. 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.⁴³

Materials to be Provided

Along with answering the questions, borrowers are asked to provide documentation for the following items:

- For the Business Activity Assessment, the borrower must include supporting documentation for the borrower's answers to question 1 on relative revenues in the appropriate two quarters and
- For the Liquidity Assessment section the borrower must provide supporting documentation for the answers to:
 - Question 1 on available cash and cash equivalents;
 - Question 2.B on amounts of distributions to owners;
 - Question 3.B on the amounts of any debt prepayments;
 - Question 4.C on compensation for employees paid an annualized amount of greater than \$250,000 during the PPP loan forgiveness period and
 - Question 5.C on compensation for owners paid an annualized amount of greater than \$250,000 during the PPP loan forgiveness period.⁴⁴

As well, for each question the borrower is to indicate whether the information provided for each answer normally is kept confidential.⁴⁵

The SBA also indicates that during the loan review, the SBA may request additional information.⁴⁶

So What Does This Mean?

The questionnaire does not indicate why each item of information is being requested or what the SBA plans to do with the data, but many advisers are making inferences based on the stated purpose of the form—to evaluate the borrower's need for the loan—to determine the likely use of the requested information. And many aren't terribly happy.

For instance, in an article found in the November 2 issue of *Tax Notes Today Federal*, Eric J. Kodesch of Lane Powell PC is cited as suspecting that the SBA is comparing revenue in the second quarter of 2020, which wasn't a known value when many borrowers applied for their PPP loan, with revenue for the same period in 2019,

⁴³ Form 3509 from Politico site, p. 9

⁴⁴ Form 3509 from Politico site, p. 2

⁴⁵ Form 3509 from Politico site, p. 2

⁴⁶ Form 3509 from Politico site, p. 2

looking for an actual drop in revenue in the second quarter vs. the prior year in order to show a need for the loan.⁴⁷ But Mr. Kodesch is quoted in the article as stating:

“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-COVID-19 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.⁴⁸

Similar complaints about the relationships of the information provided in response to other questions as being relevant to the uncertainty at the time of application (as opposed to what the actual eventual resolution of that uncertainty might be) are voiced by other advisers.

As David Mayo, JD and Matthew Walsh, CPA noted in an article published on the website of Withum Smith+Brown, PC on October 30:

The questions in these forms suggest the SBA is evaluating how borrowers were affected by COVID-19 at the loan application date, and for some period of time period after the loan application date. This is odd because the certification addressed in FAQ #31 addresses the borrower’s good faith only as of the loan application date, and not at any point in time after that date.

As we have seen time and time again, the PPP loan eligibility and loan forgiveness process evolves over time.⁴⁹

⁴⁷ Eric Yauch, “PPP Borrowers May Need to Explain Themselves in New Forms,” *Tax Notes Today Federal*, November 2, 2020

⁴⁸ Eric Yauch, “PPP Borrowers May Need to Explain Themselves in New Forms,” *Tax Notes Today Federal*, November 2, 2020

⁴⁹ Daniel Mayo and Matthew Walsh, “SBA Intends to Release Two New Forms for Large PPP Borrowers,” *Withum+* website, October 30, 2020, <https://www.withum.com/resources/two-new-forms-released-by-sba/> (retrieved October 31, 2020)