



Parity for Main Street Employers

April 16, 2020

The Honorable Warren Davidson
United States House of Representatives
1107 Longworth HOB
Washington, DC 20515

Dear Representative Davidson:

As a long-time champion of Main Street businesses, the undersigned groups are asking you to help ensure *all* Main Street businesses have access to the new Main Street lending facilities announced by Treasury and the Federal Reserve.

S corporations and other pass-through businesses are a critical part of the American economy – they employ the majority of workers and they contribute the majority of business income to our GNP. Any response to the COVID-19 crisis needs to include these businesses if it is going to be effective.

Our reading of the rules governing the new Main Street lending facilities, however, is that they would preclude S corporations and REITs, and possibly partnerships, from participating in the programs. According to the rules announced by the Federal Reserve and the Treasury Department last week, an “eligible borrower” must attest that it will follow compensation, stock repurchase, and capital distribution restrictions that apply to direct loan programs under section 4003(c)(3)(A)(ii) of the CARES Act.

These restrictions would prohibit participating companies from paying “dividends or make other capital distributions with respect to the common stock” of the business for up to a year after the loan is paid off.

Most S corporations, however, make quarterly distributions to their owners to cover the pass-through taxes they owe. In many cases, these distributions are required under the S corporation’s ownership agreement. The business must make them.

Left in place, then, the capital distribution limitations would preclude most S corporations from participating in the new small and medium-sized business loan programs. Similar concerns also apply to Real Estate Investment Trusts and some partnerships. That obviously was not the intent of Congress.

To address this, we recommend the capital distribution attestations for the loan programs be amended to reflect the contractual exception included in Section 4003(c)(3)(D)(i)(vii) of the

CARES Act together with a narrow exception for pass-through distributions that are made solely to finance taxes owed on the businesses' income:

The Eligible Borrower must attest that it will follow compensation, stock repurchase, and capital distribution restrictions that apply to direct loan programs under 4003(c)(3)(D)(i)(vii) of the CARES Act. In the case of pass-through entities, these restrictions do not apply to distributions made to pay taxes attributable to income earned by the eligible entity.

These changes could be made to the term sheets under the broad authority granted to Treasury and the Federal Reserve under Section 4003(c)(3)(D)(ii):

4003(c)(3)(D)(ii) MAIN STREET LENDING PROGRAM.—Nothing in this subparagraph shall limit the discretion of the Board of Governors of the Federal Reserve System to establish a Main Street Lending Program or other similar program or facility that supports lending to small and midsized businesses on such terms and conditions as the Board may set consistent with section 13(3) of the Federal Reserve Act (12 U.S.C. 343(3)), including any such program in which the Secretary makes a loan, loan guarantee, or other investment under subsection (b)(4).

This is an important issue. The Paycheck Protection Program has run out of funds as of this morning, so the 5 million S corporations and other businesses affected by these limitations will be left with no functioning lending program to rely upon.

Many of these businesses have been shut down by the health response to COVID-19 – their doors are closed and their workers are idle. The loans offered under the Main Street Loan Facilities could provide them with a lifeline, but only if the rules are adjusted to allow them to pay their taxes without violating the loan's terms.

We thank you for your consideration of this matter.

Sincerely,

American Council of Engineering Companies
Associated Builders and Contractors
Associated General Contractors of America
Independent Community Bankers of America
National Association of Wholesaler-Distributors
National Beer Wholesalers Association
National Electrical Contractors Association
National Roofing Contractors Association
NFIB
S Corporation Association
Wine and Spirits Wholesalers of America