

November 17, 2020

The Honorable Nancy Pelosi, Speaker  
U.S. House of Representatives  
1236 Longworth House Office Building  
Washington, D.C. 20515

The Honorable Mitch McConnell, Leader  
U.S. Senate  
317 Russell Senate Office Building  
Washington, D.C. 20510

The Honorable Kevin McCarthy, Leader  
U.S. House of Representatives  
2468 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Charles Schumer, Leader  
U.S. Senate  
322 Hart Senate Office Building  
Washington, D.C. 20510

Dear Speaker Pelosi, Majority Leader McConnell, Democratic Leader Schumer, and Republican Leader McCarthy:

As the leading 80 national organizations representing the vast majority of the millions of small business borrowers and thousands of lenders participating in the Paycheck Protection Program (PPP) in order to preserve millions of jobs for America’s workforce, we write to express concern about a new review process, which includes the “Loan Necessity Questionnaires,” established by the Small Business Administration (SBA) and the Department of Treasury (Treasury). The members of our organizations have been on the frontlines both delivering and receiving aid from PPP loans which have been critical to the small business economy over the last eight months. Unfortunately, the questionnaires introduce a confusing and burdensome process for both borrowers and lenders, and we fear that it could lead the agencies to inappropriately question thousands of qualified PPP loans made to struggling small businesses. On behalf of the millions of American workers supported by PPP loans, we urge you to act quickly to work directly with SBA and Treasury to avoid this unintended consequence.

Under the new requirements, PPP borrowers with loans of \$2 million or greater must complete one of two versions of the new Loan Necessity Questionnaire—SBA Forms 3509 (for-profit entities) or 3510 (non-profit entities)—and provide extensive documentation supporting their responses. Currently, the questionnaires only apply to loans of \$2 million and greater that have been submitted to SBA for forgiveness; however, without clear guidance in an Interim Final Rule, we are concerned about what types of review processes could be imposed on other borrowers. To date, the new process has not been described in any official regulations or SBA procedural notices, and the questionnaires have not been posted on either the Treasury or SBA websites.

Our organizations are fully supportive of appropriate review and oversight of PPP loans. The existing PPP Forgiveness Applications (SBA Forms 3508, 3508EZ and 3508S) require extensive documentation that speaks directly to how PPP borrowers retained or re-hired employees in the weeks after receiving PPP funds and throughout the covered period. This information allows the agencies to examine, in great detail and prior to the approval of loan forgiveness, relevant facts to ensure that PPP loan funds were used in the way Congress intended.

We also understand the agencies would like to conduct further review into certain loans. We strongly encourage you to ensure that all agency review processes are necessary and appropriate to

avoid undue burden on borrowers and lenders, possible bias and subjectivity, or concerning departures from requirements borrowers and lenders understood from the statute and original implementing guidance. We do not believe that the information collection sought by the new Loan Necessity Questionnaires achieves this appropriate balance.

### *The CARES Act Requirements Related to Borrower Good Faith Certifications*

When Congress created PPP loans, borrowers and lenders understood that a small business that met various eligibility criteria would also be required to make a “good faith certification” of need for the loan at the time of the loan application. Specifically, the CARES Act calls for an eligible recipient to certify that the “uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient.” The statute did not define the words “uncertainty” or “necessary” and did not provide standards by which to measure compliance, nor have those terms ever been defined in subsequent implementing guidance by the agencies.

Both borrowers and lenders understood that the goal of the program as enacted by Congress was to encourage small businesses to retain their employees in order to avoid sending millions of workers to unemployment lines because of circumstances related to the pandemic which were beyond their control. With this goal in mind, the certification was intended to permit a borrower to self-assess its need for a PPP loan based on the economic uncertainty it was aware of *at the time of its loan application*. With no way to predict how long business closures would last or quantify potential losses their business might suffer, borrowers were directed to make their own good faith determination whether the loan was necessary to maintain operations and continue paying their employees, rather than take the precautionary steps that the uncertain circumstances may have otherwise encouraged them do, such as furloughing employees.

### *Policy Concerns with the Questionnaires—Misplaced Timing & Reliance on Data Unrelated to Program Requirements*

While subsequent agency guidance as far back as April announced the agencies’ intent to conduct automatic reviews on all loans \$2 million and greater, neither borrowers nor lenders could have anticipated the approach now laid out in the Loan Necessity Questionnaires.

Language included on the forms notifies lenders and borrowers that the “information collected will be used to inform SBA’s review of [the borrower’s] good faith certification” described above. The form goes on to specify that “Failure to complete the form and provide the required supporting documents may result in SBA’s determination” that the PPP loan, the loan amount, or any applicable forgiveness is “ineligible.” While the questionnaire states that receiving “this form does not mean that SBA is challenging that certification,” the types of questions included and the implications that can be drawn from them raise concerns regarding the potential direction of an agency review.

The questionnaire presents two fundamental policy concerns: a focus on the wrong timeframe during which need for the PPP loan must be assessed and an apparent reliance on assessing the good faith certification based on information unrelated to what the borrower was asked to consider. The questionnaire requests metrics, narratives, and documentation that all paint a picture of whether the borrower has been successful or has been struggling throughout the pandemic. Specifically, questions seek gross revenue comparisons between 2020Q2 and 2019Q2, specific start and end dates of any state or local shutdown orders that have occurred during the pandemic, any cash outlays for any business alterations due to closures since March, and a detailed assessment of a borrower’s

financial standing since March through current bank statements and other data. These questions focus on the wrong timeframe. The borrower was asked to certify in good faith that economic uncertainty made the loan necessary *at the time of the borrower's application for the loan*. The law required that the borrower self-assess to the best of its ability with the information it had *at the time*. Any circumstances that happened after the certification was made and throughout the pandemic should have no bearing on evaluating the borrower's good faith statement at the time it made the certification.

In addition, questions regarding current liquidity information and revenue data during the weeks and months after the good faith attestation of need require reporting outside the scope of evaluating a borrower's attestation. We are also surprised at inquiries that could veer into the personal finances of small business owners, even seeking exact dollar amounts of all cash on hand with supporting documentation. The CARES Act did not include a means-based test, revenue reduction test, liquidity test, or any other metric to assess financial standing in order to assign prioritization of PPP loans to certain borrowers over others. To the contrary, Congress explicitly directed that the requirement in other SBA loan programs that the borrower be unable to obtain credit elsewhere shall not apply to PPP loans. While Congress has since introduced numerous legislative proposals that could introduce liquidity or revenue-based assessments in a future extension or second round of PPP lending, per the existing statute those considerations are inapplicable and inappropriate as it relates to the forgiveness of any currently outstanding PPP loan.

Requiring submission of revenue and liquidity data appears to signal a bias against PPP borrowers that managed to survive or remain profitable despite the COVID-19 pandemic. For many borrowers, it was the PPP loan that provided the means by which they could withstand the economic uncertainty they were facing. PPP loan requirements directed PPP borrowers to use the majority of loan funds to keep employees on their payrolls, giving them the ability to direct other available liquidity or revenue to other aspects of the ongoing operations of their business. If a PPP borrower emerges from the pandemic reporting steady or increased revenue with healthy liquidity and continuing employment, for that borrower and its employees, the program was successful in meeting its goal to help sustain the economy. We are worried that the questionnaire implies conclusions in the opposite direction.

There are other elements of the questionnaire that require data that should not have any bearing on evaluating a borrower's good-faith attestation of uncertain economic conditions that necessitate a PPP loan to maintain operations, and we are concerned that the borrower's answers may lead to a misinformed analysis by the agencies. Some of these examples include statements that focus on whether closures or changes in operations were either mandatory or voluntary, and details on which governmental jurisdiction mandated the closures. These and many others should not correlate to a borrower's up-front attestation of need for a PPP loan. And most concerning, there has not been any direction or explanation of how the answers to any of the questions will be viewed or interpreted by SBA.

### *Process Burden on Borrowers & Lenders*

Both borrowers and lenders also have concerns relating to the burden the new review process presents. Based on instructions compiled from the questionnaires and a SBA letter to lenders transmitted through the PPP Loan Forgiveness Portal, program participants learn that: lenders have 5 days from receipt of the letter to notify borrowers of SBA's new review process, including the obligation to complete the questionnaire; borrowers have 10 days from the time of receipt of notice from the lender to complete the questionnaire; and lenders then have 5 days after receiving the

completed forms to upload them to the PPP Forgiveness Platform “and separately input [borrower] responses to each question into the web form available in the platform.” These deadlines are impractical and compliance by borrowers and lenders would be virtually impossible in most cases. The nine-page questionnaire demands a level and type of reporting never previously required from borrowers by statute or in any process in PPP lending thus far. Based on conversations with PPP borrowers, we believe the agencies’ estimate that borrowers would need 90 minutes to complete the paperwork substantially understates the actual burden presented by the forms.

Furthermore, the SBA letter to lenders referenced above informs lenders of additional borrower and lender documentation requirements which are not disclosed on the questionnaire and must also be submitted to SBA. Of note, the lender is asked to provide a written notice to the borrower requiring the borrower to submit to the lender documentation that the original Forgiveness Application characterized as “Documentation that Each Borrower Must Maintain but is Not Required to Submit.” Borrowers and lenders were not aware until now that this extensive document production must be submitted to the agency, further increasing the paperwork burden on borrowers and lenders.

Reliance on lenders to perform these new functions raises liability concerns regarding any errors made when entering information and also where lenders would stand if a borrower refuses to complete the questionnaire. Private-sector lending partners want to continue to be helpful and ultimately support borrowers, but this new process places them in the uncomfortable position of trying to help their customers through a process that they themselves do not understand.

#### *Recommendation for an Appropriate Approach*

If the agencies want to inquire further into the necessity or suitability of a PPP loan for certain categories of eligible small businesses, we recommend that a better approach would be to ask the borrower to provide a narrative statement with any documentation the borrower believes appropriate to support the basis for its good faith certification that the uncertainty in economic conditions made the PPP loan necessary to support the ongoing operations of the business. This approach would satisfy commitments made by the agencies to review certain loans beyond the Forgiveness Application, but would not impose major changes to PPP criteria in an after the fact manner that could penalize small businesses that played by the rules. Most importantly, this simple, understandable narrative format would honor what was required of borrowers by the CARES Act.

We would also recommend that Congress encourage the agencies to temporarily suspend use of these questionnaires while we collectively address these issues and work together toward a better solution. This seems especially helpful considering that SBA is currently soliciting public comment through November 25 to determine “whether the collection of information is necessary,”<sup>1</sup> and the best approach to do so if deemed necessary. A temporary suspension could help avoid increasing borrower and lender confusion and concern as they attempt to comply with the process while simultaneously providing feedback on it. This action should fit well within SBA’s existing plans to be responsive to stakeholder feedback collected during the comment period.

Please be aware that we are concurrently communicating these recommendations to the agencies.

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<sup>1</sup> <https://www.federalregister.gov/documents/2020/10/26/2020-23594/reporting-and-recordkeeping-requirements-under-omb-review#h-8>

As the organizations that represent millions of PPP participants who want to see this critical program succeed, we have very real concerns that the PPP would not serve America's needs in the way that was envisioned if the issues related to these questionnaires are not addressed. Going forward, with respect to any proposal to extend PPP lending or establish a similar program, our members are worried that these new agency review procedures could chill the appetites of small businesses and lenders to participate, an outcome that we all would like to avoid.

We urge you to work with the agencies to promptly address the issues that we have identified related to the Loan Necessity Questionnaire process without waiting for legislative negotiations regarding any potential new recovery package. We appreciate the critical and monumental role that both Congress and the agencies play in implementing and overseeing PPP lending, and our organizations and the members that we represent look forward to working with you and the agencies to address these issues.

Sincerely,

American Bakers Association  
American Bankers Association  
American Council of Engineering Companies  
American Financial Services Association  
American Frozen Food Institute  
American Hotel & Lodging Association  
American International Automobile Dealers Association  
American Lighting Association  
American Mold Builders Association  
American Road & Transportation Builders Association  
American Society of Association Executives  
American Staffing Association  
America's SBDC  
Asian American Hotel Owners Association  
Associated Builders and Contractors  
Associated Equipment Distributors  
Associated General Contractors of America  
Association of International Certified Professional Accountants  
Bank Policy Institute  
Community Development Bankers Association  
Construction Industry Round Table  
Consumer Bankers Association  
Convenience Distribution Association  
Credit Union National Association  
Farm Credit Council  
Financial Executives International  
Foodservice Equipment Distributors Association  
Gases and Welding Distributors Association  
Glass Packaging Institute  
Global Business Travel Association  
Heating, Air-conditioning & Refrigeration Distributors International  
Independent Community Bankers of America

Independent Electrical Contractors  
Independent Insurance Agents & Brokers of America  
Industrial Fasteners Institute  
Institute of Scrap Recycling Industries, Inc.  
International Association of Movers  
International Council of Shopping Centers  
International Dairy Foods Association  
International Foodservice Distributors Association  
International Franchise Association  
National Association of Federally-Insured Credit Unions  
National Association of Government Guaranteed Lenders  
National Association of Home Builders  
National Association of Manufacturers  
National Association of Wholesaler-Distributors  
National Bankers Association  
National Community Pharmacists Association  
National Cooperative Business Association CLUSA  
National Council of Farmer Cooperatives  
National Electrical Contractors Association  
National Fastener Distributors Association  
National Funeral Directors Association  
National Marine Distributors Association, Inc.  
National Marine Manufacturers Association  
National Mining Association  
National Ready Mixed Concrete Association  
National Restaurant Association  
National Roofing Contractors Association  
National Small Business Association  
National Tooling and Machining Association  
National Wild Turkey Federation  
NFIB  
North American Association of Food Equipment Manufacturers  
North American Die Casting Association  
Outdoor Power Equipment and Engine Service Association, Inc.  
Precision Machined Products Association  
Precision Metalforming Association  
Professional Beauty Association  
Project Management Institute  
S Corporation Association  
Small Business & Entrepreneurship Council  
Small Business Investor Alliance  
Society of Collision Repair Specialists  
Southeastern Lumber Manufacturers Association  
Specialty Equipment Market Association  
The Metals Service Center Institute  
Tile Roofing Industry Alliance  
Tire Industry Association  
U.S. Chamber of Commerce

cc:

The Honorable Sherrod Brown

The Honorable Ben Cardin

The Honorable Steve Chabot

The Honorable Mike Crapo

The Honorable Patrick McHenry

The Honorable Marco Rubio

The Honorable Nydia Velázquez

The Honorable Maxine Waters