



**International Bancshares
Corporation**

November 25, 2020

Via mail and email submission:

Small Business Administration
Attn: Agency Clearance Officer, Curtis Rich
409 3rd Street SW, 5th Floor
Washington, DC 20416
curtis.rich@sba.gov

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

Re: Comments on CARES Act Reporting and Recordkeeping Requirements Under OMB Review. OMB Control Number: 3245-0407; FR Doc. 2020-23594.

Dear Mr. Curtis Rich and SBA Desk Officer:

The following comments are submitted by International Bancshares Corporation ("IBC"), a publicly-traded, multi-bank financial holding company headquartered in Laredo, Texas. IBC maintains 187 facilities and 284 ATMs, serving 88 communities in Texas and Oklahoma through five separately chartered banks ("IBC Banks") ranging in size from approximately \$397 million to \$9 billion, with consolidated assets totaling approximately \$13.5 billion. IBC is one of the largest independent commercial bank holding companies headquartered in Texas.

IBC is an active member of the American Bankers Association, which recently signed onto letters to you, as well as the U.S. Department of Treasury ("Treasury") and certain members of Congress expressing deep concern regarding a new Paycheck Protection Program ("PPP") loan forgiveness review process, which includes certain Loan Necessity Questionnaires ("Questionnaires"), as established by the Small Business Administration ("SBA") and Treasury (together, the "Agencies").¹ IBC supports the Letters and all the comments and requests therein.

The Letters were signed onto by 80 leading national organizations representing the vast majority of small business borrowers and thousands of lenders participating in the PPP. These organizations, representing lenders and borrowers that have been in the foremost trenches of the

¹ A copy of the Letters is attached hereto as Exhibit A.

PPP since its enactment over seven months ago, strongly argued against the implementation of the Agencies' newly proposed PPP loan review process, which includes Questionnaires that are unclear, burdensome, and will likely result in the questioning of and harm to the majority of qualified small business PPP borrowers trying to stay solvent and operational throughout these turbulent times. IBC is deeply concerned that these Questionnaires, as currently drafted, will have the unintended consequence of confusing, harassing, unduly scrutinizing small businesses that have already weathered so many obstacles this year.

We know it is not the intention of you and Treasury to subject small businesses participating in the PPP to draconian oversight, and we appreciate your consideration of our comments, along with those contained in the Letters. We look forward to any opportunity to provide input into the PPP loan process and working with you to improve the PPP oversight in a way that maximizes the benefit to participating small businesses and lenders, as well as consumers who rely on those small businesses.

Under the new PPP loan forgiveness review requirements, PPP borrowers requesting loan forgiveness equal to or greater than \$2 million must complete one of two versions of the new Loan Necessity Questionnaire (SBA Form 3509 or 3510) and provide extensive documentation supporting their responses.

While these Forms only apply to borrowers seeking PPP loan forgiveness equal to or greater than \$2 million, there is not clear guidance on how these Questionnaires, and the new PPP review process, will be implemented or affect PPP lenders and borrowers. IBC strongly urges the Agencies to postpone the new review process and Questionnaires and instead focus on collecting public input and issuing an Interim Final Rule. To date, the new process has not been described in any official regulations or procedural notices of either Agency, and the Questionnaires have not been posted on either the Agencies' websites.

IBC understands the importance of and supports the review and oversight of PPP loans. The current PPP Forgiveness Applications (SBA Forms 3508, 3508EZ and 3508S) require extensive documentation which includes information as to how PPP borrowers retained or re-hired employees after receiving PPP loan funds and throughout the PPP-covered period. This information allows the Agencies to examine relevant facts to ensure that PPP loan funds were used in the way Congress intended, and thus that the PPP loan can be forgiven. The Agencies have not provided a fulsome explanation as to why they believe the current PPP forms and Applications are not sufficient and require revisions and additions.

Good Faith Certifications for PPP Loans

At the inception of the PPP, 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 PPP loan at the time of the loan application. Specifically, an eligible borrower was required to certify that the "uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient." The CARES Act does not provide a definition for the words "uncertainty" or "necessary" and does not provide standards by which to measure compliance. These terms have not been defined in subsequent implementing guidance by the Agencies. Moreover, the Agencies are not proposing definitions for those terms at this time.

The goal of the PPP was to encourage small businesses to retain their employees in order to avoid creating millions of new unemployed individuals due to circumstances caused by the pandemic, which were beyond their control. The PPP was meant to provide a level of stability to allow small businesses the flexibility to adapt to the “new normal.” In service of this goal, the required certification permitted borrowers to self-assess their need for a PPP loan based on the economic uncertainty they were aware of at the time of their PPP loan Application. Due to the absolute economic upheaval caused by the pandemic, the vast majority of businesses were unable to predict how long closure, restriction, or stay-at-home orders would last and were unable to accurately quantify potential losses their business might suffer. Recognizing this problem and intending to assist in the implementation of the PPP, Congress and the Agencies allowed borrowers to make their own good faith determinations whether the PPP loan was necessary to maintain operations and continue paying their employees, with the alternative being precautionary steps that they would have otherwise taken, such as furloughing employees.

Questionnaire Content Concerns

IBC is concerned that the content of the Questionnaires indicates potential problems with the focus of PPP loan forgiveness review. The Questionnaires notify lenders and borrowers that the “information collected will be used to inform SBA’s review of [the borrower’s] good faith certification” described above. “Failure to complete the form and provide the required supporting documents may result in SBA’s determination” that the PPP loan is “ineligible” for forgiveness. IBC is concerned that the information sought in the Questionnaires and the implications that can be drawn from them raise concerns regarding the tenor of PPP loan forgiveness review.

The Questionnaires focus on the wrong timeframe for evaluating the good faith need for the PPP loan. The Questionnaire requests metrics, narratives, and documentation related to a borrower’s economic performance *throughout* the pandemic, not just at the time the PPP loan was requested. Specifically, the Questionnaires seek gross revenue comparisons between 2020Q2 and 2019Q2, specific start and end dates of any state or local shutdown orders, any cash outlays for any business alterations due to closures since March, and a detailed assessment of a borrower’s financial standing since March. These questions completely ignore the question that borrowers were asked to certify in order to receive (and have forgiven) PPP loans and focus on the wrong timeframe. Borrowers were asked to certify in good faith that economic uncertainty made the loan necessary *at the time of the borrower’s Application* for the PPP loan. Anything that happened after that certification, such as limited or extended lockdowns or supply chain failures, should not be used to undermine or call into question the good faith of the certification at the time it was made. Borrowers were asked to make the certification based on the information they had at the time of the Application, and the good faith of the certification should be judged based on that information. Obviously, this does not include information regarding a borrower’s current liquidity and revenue.

It may be that the Agencies have no intention of using post-certification information to assess the good faith of the certification. But the Agencies have not provided any direction or explanation of how the answers to Questionnaires will be viewed or interpreted by the Agencies.

Process Burden on Borrowers & Lenders

It is IBC's understanding that lenders who originated PPP loans have five days from receipt of a letter from the SBA to notify borrowers of the new PPP loan forgiveness review process, including the obligation to complete the Questionnaires. Borrowers will then have 10 days from that lender notice to complete the Questionnaire. Lenders then have five days after receiving the completed Questionnaires to upload them to the PPP Forgiveness Platform, which may include separately populating Questionnaire answers. Moreover, the Questionnaires are the most detailed reporting to date required by the PPP. These deadlines are incredibly tight, if not completely impossible, and the Agencies have provided no explanation for the intense rush.

IBC is also aware that the new PPP loan forgiveness review process will require additional borrower and lender documentation that was not disclosed on the Questionnaire. In fact, it is IBC's understanding that the new review process will require documentation the Forgiveness Application characterized as "Documentation that Each Borrower Must Maintain but is Not Required to Submit" to be submitted to the Agencies. How were lenders or borrowers supposed to predict such documentation would be required of them later? The Agencies did not announce until now that this additional documentation must be submitted for PPP loan forgiveness, further increasing the paperwork burden on borrowers and lenders.

Finally, relying on lenders to perform these new functions raises liability concerns regarding information entry errors and what, if any, safe harbor the Agencies will provide. IBC is also concerned about a lender's options and liability if a borrower refuses to complete the Questionnaires or refuses (or is unable) to provide the required documentation. IBC and other community bank lenders did not hesitate to step up when their local areas needed them, and IBC wants to continue to support small business borrowers in its community. However, the proposed new PPP loan forgiveness process places a significant additional burden on lenders without sufficient clarity and protection.

Recommendation for Action

IBC believes one of the most efficient ways to ensure that any revisions or additions to the PPP forms, Applications, or Questionnaires are appropriate is for the Agencies to temporarily suspend use of the Questionnaires while they collectively address these issues with PPP borrowers, lenders and the general public and work together toward a better solution.

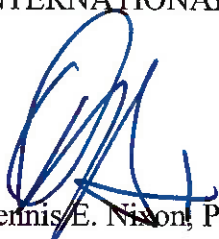
IBC does not believe that the Questionnaires would be particularly helpful or informative until the SBA has more data and information in response to the proposed content of the Questionnaires. Currently, the Questionnaires are up for public comment by the SBA through November 25. Specifically, the SBA wants to determine "whether the collection of information is necessary," whether the Questionnaires as proposed are appropriate, and, if not, what would be the best framework for collecting such information. Postponing the implementation of the Questionnaires will result in a better process and more robust information gathering, if SBA listens and responds to the concerns of the public, including PPP loan borrowers and lenders. Postponement and revision will also mitigate borrower and lender confusion and concern as they attempt to comply with the new Questionnaire process while simultaneously providing comment feedback on it to SBA.

IBC also recommends that instead of mandating certain document production to assess the good faith of a borrower's certification, the Agencies ask the borrower to provide a narrative statement with any documentation the borrower believes appropriate to support the basis for certification. This approach would more closely align with the review that was promised at the outset of the PPP – namely, did the borrower, in good faith, believe a PPP loan was necessary based on economic uncertainty and the facts at the time of the certification.

IBC continues to stand ready, willing, and able to continue serving its communities through these uncertain times. However, the issues described herein regarding the proposed changes to the PPP loan forgiveness review process are deeply concerning to IBC and bring its ability to continue participating in the PPP into question. IBC hopes that the Agencies continue to be responsive and open to the concerns of PPP lenders, borrowers, and the public in order to maintain the PPP and all the good it has done.

Thank you for the opportunity to share IBC's views and comments. We look forward to working together moving forward and continuing our dialog with you.

INTERNATIONAL BANCSHARES CORPORATION

A handwritten signature in blue ink, appearing to read 'Dennis E. Nison', is written over the printed name.

Dennis E. Nison, President and CEO

EXHIBIT A

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,”¹ 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.

¹ <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

November 17, 2020

The Honorable Steven Mnuchin
Secretary
U.S. Department of Treasury
1500 Pennsylvania Avenue NW
Washington, D.C. 20220

The Honorable Jovita Carranza
Administrator
U.S. Small Business Administration
409 3rd Street SW
Washington, D.C. 20416

Dear Secretary Mnuchin and Administrator Carranza:

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), we write to make you aware of concerns that we are concurrently raising with Congress regarding the new review process, which includes the “Loan Necessity Questionnaires,” established by your agencies. Specifically, we are concerned that 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 would like to work with you directly to avoid this unintended consequence. While several of our organizations have had the opportunity to discuss some of these issues with key agency staff one-on-one, it is important that we communicate the full extent of our concerns on behalf of all the many organizations that have jointly come together as one voice on this critical issue. We appreciate the monumental role that your 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.

Attached is the letter we are simultaneously transmitting to Congress in which our organizations detail the most critical components of the issues the Loan Necessity Questionnaires and process present.

Of particular importance to flag, we would request that you consider temporarily suspending 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,”¹ 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 your existing plans to be responsive to stakeholder feedback collected during the comment period.

We look forward continuing our dialogue with you.

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

Sincerely,

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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

Attachment

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,”² 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.

² <https://www.federalregister.gov/documents/2020/10/26/2020-23594/reporting-and-recordkeeping-requirements-under-omb-review#h-8>

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

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