May 15, 2020

The Honorable Jovita Carranza  
Administrator  
U.S. Small Business Administration  
409 Third Street, SW  
Washington, DC 20416

Re: Interim Final Rule:  
   # 1 – Business Loan Program Temporary Changes: Paycheck Protection Program  
      RIN: 3245-AH34 / Docket No. SBA-2020-0015

Dear Administrator Carranza:

The National Association of Government Guaranteed Lenders (NAGGL) appreciates the opportunity to provide comments relating to the above-referenced Interim Final Rule (IFR) which was the first formal guidance to implement the Paycheck Protection Program (PPP) authorized by the CARES Act, P.L. 116-136. NAGGL also appreciates the tremendous effort that the Small Business Administration (SBA) and the Department of the Treasury (Treasury) (together, the Administration) have expended to implement this critically important program.

In providing these comments, NAGGL notes that, as of the date of this letter, the Administration has posted to the separate SBA and Treasury websites 11 documents identified as Interim Final Rules, with 8 of those documents having been formally published in the Federal Register as IFRs and 3 still pending such publication. These IFRs were posted on a sporadic basis beginning on April 2, 2020 with the most recent IFR posted on May 15, 2020, and virtually all the documents have different dates on which their comment periods will close. In addition, the Administration has posted to the Treasury website a Frequently Asked Questions (FAQ) document with the first question in the document posted on April 3, 2020 and the most recent questions # 46 & 47, added on May 13, 2020.

The issuance of guidance in this piecemeal manner is unprecedented, at least as it relates to SBA’s implementation of other legislatively-created programs. Ordinarily, lenders would have expected to see virtually complete program guidance, including loan authorization and loan note templates, prior to implementation of a loan program as complex as PPP. But, to date, no lender has the complete guidance that it needs to process a PPP loan transaction from start to
finish. While this has made it very difficult for lenders and borrowers to fully understand PPP, it
has not deterred lenders from fully supporting the program as evidenced by the fact that, to
date, lenders have received SBA approval for approximately 4.4 million PPP loans valued at
more than $537 billion.

But the problems created by this approach have made lenders’ participation in the program
and borrowers’ access to critically needed loan funds much more difficult than necessary and
have caused serious concerns about how program performance will be evaluated on a long-
term basis. This situation was anticipated by SBA’s Office of the Inspector General when, on
the very day that PPP loans first were made available, it issued a sobering white paper noting
how essential it is that the government provide clear guidance and training before loan funds
are disbursed under programs like PPP. It appears that the implementers of this program failed
to heed that warning.

The fact that program guidance has been issued on a rolling basis also makes it very difficult for
interested parties to offer comments on the IFRs on an individual basis since many of the
provisions in the individual documents have been superseded or supplemented by subsequent
guidance provided in the form of either additional IFRs or FAQ. Despite these limitations,
however, we are providing simultaneous comments on the first two IFRs.

But our most urgent comment is an overarching one, relating to all the IFRs and other program
guidance that has been issued to date by the Administration. On behalf of NAGGL’s members
and the millions of small businesses that they have been attempting to assist with PPP loans,
NAGGL urges the Administration to find a better, more cohesive way to communicate the PPP
guidance that is so urgently needed – by both lenders and borrowers.

We do not believe that it is appropriate for either borrowers, or the lenders working with them,
to be continually buffeted by shifting requirements as they desperately try to understand
whether they qualify for the program, how the program will operate and what review they will
be subject to as the program proceeds. What would have been appropriate would have been a
single program guide like that which SBA has issued for other special programs. While it is too
late for that now as it relates to the loan application processes, we urge the Administration to
provide all of the additional pending guidance on the related topics of loan reporting, loan
cancelations, loan forgiveness, advance purchase, etc., in one cohesive document. To do this, it
may be necessary for the Administration to temporarily suspend activities related to these
issues, and to extend previously established, and in some cases already extended, deadlines.
[Loan processing could and should continue through this period.] But that would be a small
price to pay if the result would be that lenders and borrowers could have a full picture of the program requirements allowing them to make better informed decisions regarding their actions. Obviously, even with a more unified approach to providing program guidance, occasional updates might be necessary, but those updates should be limited to those required to clarify the broader policy guidance.

We also should note that one area not yet addressed in Administration guidance is the post-forgiveness servicing requirements for PPP loans. Because we would not want to further extend any pause that might be necessary while the Administration compiles the other guidance that we are requesting, we believe that this issue can be addressed separately. But, again, we would request that it be addressed in a single policy guidance document.

NAGGL and the lender community that we represent continue to strongly support PPP. We fully understand that the program offers an essential lifeline to small businesses that have been devastated by the economic conditions caused by the COVID-19 emergency and we pledge our continuing support for this essential undertaking. We remain concerned, however, by the lack of overall guidance for the program, and we respectfully request that you consider our recommendation regarding how this critical issue can be addressed.

The attached analysis provides NAGGL’s additional comments and recommendations specifically related to IFR # 1. A second similar letter is being submitted simultaneously with NAGGL’s comments on IFR # 2

Again, thank you for providing this opportunity for us to provide comments on the Administration’s implementation of PPP. Thank you, too, for your continuing support of America’s small businesses during these unprecedented times.

Sincerely,

Tony Wilkinson
President & Chief Executive Officer

cc: William Manger, Chief of Staff and Associate Administrator, Office of Capital Access
NAGGL Paragraph-by-Paragraph Comments and Recommendations

Normally these comments would be offered on a section-by-section basis conforming to the section of the regulations being amended. That methodology is not possible for this IFR because it has not been written in a way that amends the existing regulations. Therefore, these comments are being provided on a paragraph-by-paragraph basis referring to the paragraphs in the IFR. They include only those provisions where we have questions, comments or concerns.

Paragraph 2 – What do borrowers need to know and do?

a.: Specifies that a borrower is eligible for a PPP loan if it has “500 or fewer employees whose principal place of residence is in the United States ...”

NAGGL recommends that this provision be amended to clarify that, for purposes of determining size, SBA considers all of the employees of the company, but for purposes of determining loan and forgiveness amounts, payroll amounts include only those employees whose principal places of residence are in the U.S. [This issue is addressed in FAQ # 44 posted on May 5.]

c.: States that business eligibility is the same for PPP as it is for standard 7(a) loans except that nonprofit organizations may be eligible as authorized by the CARES Act

NAGGL recommends that this provision be revised to reflect all of the subsequent changes that have been made to the standard eligibility requirements by subsequent IFRs and FAQ. We also believe that it would be helpful if the regulation, or other program guidance, provided, in one document, specific information regarding which of the eligibility criteria continue to apply to PPP loans. On April 13, NAGGL requested this information as part of a detailed list of questions and recommendations that it sent to SBA. To date, we have received no direct response to that request although a few of our questions and comments have been addressed indirectly by subsequently issued program guidance.

e.: As part of the instructions for calculating the loan amount for which a borrower is eligible, the IFR states that the borrower should add “the outstanding amount of an Economic Injury Disaster Loan (EIDL) made between January 31, 2020 and April 3, 2020, less the amount of any “advance” under the EIDL COVID-19 loan (because it does not have to be repaid)”.
NAGGL notes that there continues to be confusion by both borrowers and lenders regarding the requirements that apply to PPP borrowers that received EIDLs both before and after April 3. This confusion extends to how the loan amount must be calculated, how PPP loan proceeds must be used to payoff existing EIDLs, and how forgiveness will be calculated when the borrower has an existing EIDL. NAGGL, therefore, requests that the Administration provide additional guidance on these points.

i.: Sets the interest rate for PPP loans at 1 percent

NAGGL notes that Section 1102 of the CARES Act authorized an interest rate of up to 4 percent, and while we believe that it is too late for this rate to be changed, we note our disagreement with the Administration’s conclusion that the 1 percent rate is appropriate on a long-term basis. We are particularly concerned that this rate is insufficient to support the lender actions that could be required for PPP loans that have balances remaining after the application of any forgiveness.

In addition, NAGGL finds the fact that the Administration failed to specify how the interest rate is to be calculated to be a major concern. We believe that the Congress would have expected that interest would be charged on PPP loans in the same way that it is charged on standard 7(a) loans, that is, that only simple interest would be charged, as opposed to compounded interest. This interest rate provision in the IFR is further interpreted by FAQ # 21 (April 13) which permits lenders to “include in their promissory notes for PPP loans any terms and conditions, including relating to amortization and disclosure, that are not inconsistent with Sections 1102 and 1106 of the CARES Act, the PPP Interim Final Rules and guidance, and SBA Form 2484”. This means that, depending on how a lender amortizes its conventional loans, a PPP borrower could wind up paying an annual percentage rate (APR) far in excess of the 1 percent rate specified in the IFR. To the extent that it is possible to amend program requirements at this date, NAGGL strongly recommends that lenders be required to calculate interest on a simple, rather than a compound, interest rate basis.

j.: Specifies that the maturity date for a PPP loan is two years

As noted in the IFR, the statute authorized a “maximum maturity of ten years from the date on which the borrower applies for loan forgiveness.” For several reasons, NAGGL disagrees with the Administration’s conclusion that a two year maturity is appropriate. First, now that we have more information regarding the impact that the pandemic is having on the economy,
particularly the small business sector, there is a significant probability that the economic disruption caused by the coronavirus will not have fully abated “well before the two year maturity”. In addition, because we still do not have clear guidance regarding the PPP loan forgiveness process, we have no way of estimating how many loans will have outstanding balances – or the size of those balances – after application of any forgiveness amounts. Therefore, especially for larger PPP loans, it seems unreasonable to expect that borrowers will have the ability to fully repay the full outstanding balances in the 18-months remaining after the authorized 6-month deferment periods. We therefore recommend that SBA amend this IFR to address how the unpaid loan balances are to be handled and to specifically authorize lenders to reamortize the loans and extend the loan maturities as deemed appropriate on a case-by-case basis taking into consideration the outstanding balance and the adequacy of the borrower’s cash flow to meet its ongoing operations including repayment of the PPP loan. Some borrowers may need, at a minimum, the maximum 10-year maturity authorized by the statute.

**k.:** Specifies that a borrower can apply for only one PPP loan

The Administration’s “safe harbor” provisions, and the changing guidance on that provision have caused many PPP borrowers to repay loans that they now believe they were eligible for. NAGGL recently requested clarification from SBA regarding how those borrowers may be able to have those loans reinstated but has not yet received the requested information. Absent that guidance, we would note that one way to handle this issue would be for the Administration to immediately issue new regulatory guidance that would allow a PPP borrower to apply for and receive a second PPP loan if the original loan had been repaid based on the borrower’s uncertainty regarding the Administration’s changed safe harbor guidance.

**n.:** States that borrowers will receive an automatic six-month deferment on all PPP loans and that during this period, interest will accrue on the loan

As indicated in the IFR, the CARES Act authorized deferments of up to one year. NAGGL recommends that the IFR be amended to specifically authorize lenders to provide an additional deferment beyond the initial six-month deferment if the borrower’s financial and operational condition makes such deferment necessary and appropriate. With regard to the interest accrual stated in this provision, NAGGL again notes its serious concerns regarding how some lenders may be computing interest and the detrimental impact that this will have on borrowers.
o.: Provides information regarding forgiveness of PPP loans, including imposing a condition not specified in the statute that “not more than 25 percent of the loan forgiveness amount may be attributable to non-payroll costs”

Section 1106 of the CARES Act mandates that regulatory and other guidance regarding the implementation of the forgiveness provision be issued within 30 days of enactment of the statute, so by April 27. As of May 15 that guidance still has not been issued leaving lenders and borrowers uncertain about how the forgiveness process will work.

In addition, NAGGL is concerned because, to date, no practical guidance has been issued to implement the statutory mandate that SBA provide a mechanism for the “advance purchase” of PPP loans. It appears that the statutory provision was intended to provide liquidity to PPP lenders, and given the time that has elapsed, that purpose is not being met.

As indicated in our cover letter, NAGGL strongly recommends that the Administration issue a single document that will provide guidance on loan forgiveness, loan reporting, loan cancelations, advance purchases, etc., and that that guidance be issued as quickly as possible so that borrowers and lenders will be able to make more informed decisions regarding their PPP loans.

NAGGL also has concerns about the 75/25 payroll vs. other authorized expenses provision imposed by the Administration without specific statutory authority. We believe that businesses operating in some industries and in some geographical areas will not be appropriately supported by PPP loans made subject to this requirement. Therefore, we strongly recommend that the Administration amend the IFR to allow for exceptions to the 75/25 requirement based on the circumstances of individual PPP borrowers.

q.: Requires a PPP applicant to submit SBA Form 2483 (Paycheck Protection Program Application Form) and payroll documentation, as described elsewhere in the IFR; and requires that lenders submit SBA Form 2484 (Paycheck Protection Program Lender’s Application for 7(a) Guaranty)

While the specific data required on the application is not specified in the IFR, NAGGL notes that the original borrower application form which was posted on the Treasury and SBA websites on approximately March 31 and subsequently replaced on both websites on approximately April 2 provided more specific information regarding borrower eligibility which would have been helpful to lenders to determine that a loan was appropriate for approval. For example, one of
the questions that was omitted when the form was revised relates to whether the business is at least 51 percent owned by a U.S. Citizen or Lawful Permanent Resident (LPR). Absent this question it appears that even though both the statute and this IFR state that business eligibility will be based on SBA’s standard eligibility criteria, except where specifically changed, requirements related to lawful immigrant status do not apply. If that was the intention of the Administration, that policy should have been specifically stated, so that lenders and borrowers would not have to guess what requirements apply. We also note that the current amended application form deleted the requirement that each of the owners of the applicant concern execute the form. Therefore, it appears that the penalties for false statements may not be able to be imposed for assertions related to eligibility made on behalf of individuals that did not sign the application.

With regard to the revised SBA Form 2484 (Paycheck Protection Program Lender’s Application for 7(a) Loan Guaranty), we note that the form does not address the standard lender conflict of interest limitations imposed for 7(a) borrowers. This issue was subsequently addressed in FAQ # 21 which was not issued until April 13, again leaving borrowers and lenders uncertain about whether SBA’s 7(a) eligibility limitations applied as indicated in both the statute and this IFR.

In addition, while not specifically covered in this IFR, FAQ # 21 also includes a footnote (6) which states that after a lender submits its loan through E-Tran “no transmission or retention of a physical copy of Form 2484 is required”. NAGGL requests that the Administration clarify whether it intends that an electronic copy of the application form be retained by the lender.

r.: Specifies how the proceeds of a PPP loan are to be used, including the conditions relating to an SBA EIDL made between January 31 and April 3, and imposes a requirement that at least 75 percent of the loan proceeds be used for payroll

NAGGL again notes its concerns over the 75/25 requirement and the lack of clarity with regard to the EIDL requirements. (See “o”, above.)

s.: Specifies the actions that the Administration can take if PPP loan funds are misused, including the recourse it will have against a shareholder, members or partners of a PPP borrower who uses PPP funds for unauthorized purposes

NAGGL requests that the Administration provide additional information regarding the possible imposition of these remedies especially given that, as previously noted, SBA Form 2484 only requires execution/certification by one authorized representative of the applicant firm.
t.: Specifies that “an authorized representative of the applicant must certify in good faith” to various specified conditions, including that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant”

FAQ #s 31 (April 23), 39 (April 29), 43 (May 5) and 46 & 47 (May 13) expanded this provision by, among other things, requiring that, when making their eligibility certifications, applicants assess the “economic need for a PPP loan … taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business” and specifically indicating the Administration’s assumption that it would be “unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification”. NAGGL believes that this expansion of the borrower certification requirement is imposing a “credit elsewhere test” that both the statute and this IFR eliminated.

NAGGL is concerned regarding the lack of clarity about how this language must be interpreted particularly because the Administration has made clear that, for loans of $2 million and more, it intends to closely examine the borrower certification regarding its need for the loan. Since the Administration has never provided a definition for what is “necessary” to “support the ongoing operations” of a business, it is virtually impossible for borrowers to know whether their individual situations will meet the standard that they will be measured against. This concern is very real to many small loan borrowers, some of which have repaid their loans already because of their uncertainty regarding the requirements for certification and their fear of being audited by the government. Other borrowers remain on the fence about what to do regarding keeping or repaying their loans even though the “safe harbor” deadline for borrower repayment, now extended to May 18, is fast approaching. And, on the other side of this issue, after reading the most recently issued FAQs, some of the borrowers that repaid their loans now have decided that they can make the required certification regarding need in good faith, so are begging their lenders to find ways to get their loans back. NAGGL made SBA aware of this phenomenon on May 14 and requested that the Agency provide guidance to lenders regarding whether and how the loans could be reinstated, whatever that process might be called.

Given the lack of clarity regarding the borrower certification of need, it appears that the review procedure established by the Administration could have the effect of punishing borrowers for utilizing a program specifically authorized by legislation to assist them through these difficult times. To avoid that outcome, NAGGL requests that the Administration extend the current
deadlines for borrowers to decide whether to repay their loans and for lenders to fully disburse or cancel loans and report those actions to SBA. This will allow an appropriate time period during which the Administration can clarify its certification requirements in a way that will be easily understood by borrowers. This clarification should be part of the overall program guidance document requested in the NAGGL cover letter.

**Paragraph 3 – Who is eligible to make PPP loans?**

a.: Describes lender authority to make PPP loans and discusses the inclusion of new lenders specifically limited to PPP loan processing

NAGGL requests that the Administration provide additional information about the process by which SBA and Treasury each approved lenders for PPP participation, the number of new PPP lenders, by category that were approved by each, and the volume of loans in numbers and dollars approved by each category of new lenders.

b.: Describes lenders underwriting responsibilities

NAGGL notes that this provision was clarified in FAQ # 1 originally posted to the Treasury website on April 3.

c.: Indicates that lenders can rely on borrower documentation submitted in connection with a request for loan forgiveness without conducting any verification as long as the borrower “submits documentation supporting its request for loan forgiveness and attests that it has accurately verified the payments for eligible costs”, and that it will be held harmless for such reliance

NAGGL again notes that, to date, the Administration has not provided definitive guidance regarding the forgiveness process. Until that guidance is issued, lenders cannot be sure how this provision will apply, and borrowers remain uncertain about what documentation and attestations they will be required to submit.

e.: Specifies that lenders “will not be required to apply the “credit elsewhere test” when evaluating PPP loan applications”

Please see previous comment related to Paragraph 2. t.
Paragraph 4 – What do both borrowers and lenders need to know and do?

c.: Provides guidance regarding the payment of agents that assisted PPP borrowers with their loan applications including specifying that agent fees “will be paid by the lender out of the fees the lender receives from SBA”, and indicating the fees that the agents may collect.

NAGGL notes that the only provision in the CARES Act that relates to agents reads as follows: “An agent that assists an eligible recipient to prepare an application for a covered loan may not collect a fee in excess of the limits established by the Administrator”. NAGGL strongly objects to the Administration’s expansion of this legislation provision to make the lender responsible for paying fees to agents unless the lender directly contracted with the agent to provide services in connection with the loan application. In this regard we note that, unless the lender was a party to the transaction, it has no way to know what, if any services were performed, the qualifications of the agent to perform those services, etc. In fact, we understand that in some cases, lenders specifically advised agents and/or borrowers that it would not pay fees to agents in connection with PPP loans, but now are receiving bills from agents with whom they have no relationships requesting payment related to loans approved by the lender. NAGGL therefore recommends that SBA revise this provision to include only the maximum amounts that an agent may charge (as already specified in the IFR), that the fees cannot be paid out of the loan proceeds (also as already specified in the IFR), and that lenders will be responsible for paying the fees for services only when they contracted to have the work performed.

d.: Indicates that, after full disbursement, PPP loans may be sold in the secondary market “at a premium or a discount to par value”.

NAGGL notes that the low interest rate on the loans and the uncertainty of the loan balance that may remain after any forgiveness and the term of such loan make it unlikely that there will be a market for PPP loans.

e.: Specifies that a lender may request that the SBA purchase the expected forgiveness amount of a PPP loan or pool of PPP loans at the end of week seven of the covered period.

NAGGL believes that this provision is inconsistent with the intent of the statute to provide upfront payments to lenders to improve their liquidity. We therefore recommend that SBA amend this IFR and provide detailed guidance to lenders to enable them to immediately request SBA’s advance purchase of the expected forgiveness amounts on their individual loans, or on a pool of such loans, as specified in the CARES Act.