**Pandemic Response Accountability Committee Public Listening Forum:**
***Stakeholder Perspectives on Federal COVID-19 Spending and Response***
**Statement of Anthony R. Wilkinson**
**on Behalf of the National Association of Government Guaranteed Lenders**
**June 3, 2020**

Thank you to the Pandemic Response Accountability Committee (the Committee) for inviting me to present a lending industry perspective at today's first Listening Forum titled *Stakeholder Perspectives on Federal COVID-19 Spending and Response*.

The National Association of Government Guaranteed Lenders (NAGGL) is a national trade association representing private-sector lenders that participate in the Small Business Administration (SBA) flagship 7(a) loan program. Our members range in size from the largest national institutions to the smallest community banks across the country. For the past two months, these lenders have been charged with being on the front lines of delivering the aid and programs authorized by the *CARES Act*, most notably the Paycheck Protection Program (PPP), to the country's millions of small business borrowers. These efforts have served as the cornerstone of the national response laid out by Congress to support the American economy in the wake of the outbreak of the COVID-19 pandemic.

The purpose of the *CARES Act* (the Act), signed into law on March 27, 2020, was to help the country's small businesses survive during the COVID-19 pandemic and allow them to retain employees while shelter-in-place orders and social distancing became a national health priority. The goal was to protect people's lives while, at the same time, allowing small businesses to continue to exist and maintain payroll status quo until a return to more normal business operations could be undertaken.

Section 1109 of the *CARES Act* gave the SBA Administrator authority to administer PPP "with guidance from the Secretary [of the Treasury]." However, while the statute provided for shared implementation of PPP, it is our understanding that, in practice, it is the Department of the Treasury (Treasury) that led the process, and that it is Treasury that was responsible for deciding the way that program guidance would be issued – that is, through a series of separate Interim Final Rules (IFRs) and Frequently Asked Questions (FAQs), as opposed to a comprehensive PPP implementation guide. Therefore, most of my comments will reference Treasury's handling of PPP implementation.

To date, over 5,500 participating lenders have received SBA approval for over 4.4 million PPP loans totaling over $510 billion. This is an enormous feat over the span of two months for a network of SBA lenders which typically make roughly $25 billion in 7(a) loans annually, especially considering that the ability to make a PPP loan did not exist until about 8 weeks ago. To put this accomplishment into a different perspective, Congress authorized $30 billion for loans made under SBA's flagship 7(a) loan program in Fiscal Year 2020 and, in the first two weeks in April alone, PPP loans totaling more than ten times that figure were approved for small businesses across the country.

The data is not the only impressive aspect of the PPP – there are countless stories of success and hope behind the millions of loans made. PPP loans have ensured that millions of borrowers have a chance at surviving what could be the most challenging and devastating economic crisis the country will face this century. This success could not have been achieved without the commitment of SBA, its lending partners, and those small businesses which took the steps necessary to protect their employees' livelihoods during these unprecedented times.

However, despite the heroic efforts made by PPP stakeholders, the program's implementation strategy, as spearheaded by Treasury, has, in many ways, been abysmal. The ability of lenders to help maintain program integrity requires clear policies and procedures which allow lenders, the involved Executive Branch agencies, and Congress to develop systems, controls, and oversight strategies that mitigate the risk of fraud and unnecessary losses to the government. Yet, to date, Treasury has failed to provide clear and comprehensive guidance. Instead of clear guidelines, Treasury mismanagement has resulted in confusion, rules inconsistent with the Act, and guidance so incomplete that no party understands how compliance may be realized. Regrettably, the recently issued forgiveness guidance remains incomplete and Treasury still needs to provide guidance on how PPP loans that have balances remaining after the loan forgiveness is applied will be handled. The risk to lenders who answered the call and performed their patriotic duty is incalculable. But perhaps more troubling is that the risk to the small business borrowers the program purports to assist is just as tangible and consequential. With this in mind, my comments attempt to provide the Committee a frank assessment of the state of PPP implementation, which will hopefully inform appropriate oversight efforts and policy adjustments.

The Committee has a critical role to play in the midst of these failures and, as such, the challenges which this Committee faces during our nation's national emergency are daunting. For two months the efforts of Treasury and SBA to implement PPP have been, at best, misguided. My decision to appear before this Committee to share my observations and opinions and those of NAGGL members regarding PPP implementation shortcomings was made because I have reluctantly concluded that oversight bodies such as this Committee may represent the best hope for getting the program on an appropriate track. America's small businesses and the lenders that are attempting to help them survive during these difficult times deserve nothing less. I believe that if the current path is not corrected and quickly, PPP could face a bruised legacy in the years to come, and more importantly, the small businesses that are depending on this program will not receive the assistance that it was created to provide. This Committee could prevent this from happening by detailing thorough and honest stakeholder accounts of PPP implementation to Congress, the Executive Branch, and the American public, and by making critically needed thoughtful and appropriate recommendations for program improvements. I am proud to be a part of that today.

I am also acutely aware that this forum will serve as a marker in history for the Inspector General community and Congress as an account of the challenges lenders and borrowers faced during the first two months of *CARES Act* implementation. Unfortunately, having been in my current position in the aftermath of 9/11 and the Great Recession when Congress asked SBA lenders to similarly serve small business needs during a time of national crisis, I learned first-hand that financial institutions that attempt to answer such a call to duty can wind up caught in the cross-hairs of the worst sort of hindsight criticism for years after the response efforts have ended. I wish I could say that hindsight when it comes to these special programs is 20/20. But the reality is that when hindsight is mixed with a heavy dose of politics and optics, it can be a lethal combination that makes for reflection often tinged with significant bias and misunderstandings. I hope my statement today helps to guide the record for years to come as *CARES Act*, and particularly the PPP, faces its own post-mortem review that will be forced to document stakeholders struggling to comply with Treasury missteps with serious repercussions. But I also hope that this statement also will preserve for the record the fact that PPP reached millions of small businesses through a network of SBA lenders that served their neighbors during one of the country's greatest times of need.

**PART ONE: A Comparison between Paycheck Protection Program Intent & Implementation**

Since implementation of PPP began, it has been dictated by a constant theme. Statute and legislative intent set out the initial course, while Treasury guidance set out another; the SBA Office of Inspector General (OIG) warned of the need for one path – the issuance of complete guidance before the first loan was made – while Treasury opted to take another; the first rounds of Treasury guidance stipulated one set of expectations, while subsequent rounds of FAQs and IFRs continually amended and sometimes contradicted those earlier requirements. This course has steered PPP implementation down a path riddled with confusion, leaving both borrowers and lenders questioning whether to participate in the program. What follows is an outline of many of these alarming inconsistencies.

*Lack of Guidance:*

On the very day that PPP loans were first made available, SBA's Office of Inspector General (OIG) 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. Clearly Treasury and SBA did not heed that warning.

Since early April, there have been 15 Interim Final Rules which were first merely posted to the Treasury and SBA websites and then, days later, made "official" by publication in the Federal Register; 48 individual questions addressed in an often-updated Frequently Asked Questions document; and additional guidance provided in the form of several stray procedural notices, forms and other miscellaneous documents. The head-scratching decision by Treasury to dole out piecemeal and sometimes inconsistent requirements has chilled the willingness of many small businesses to even apply during the second round of PPP funding and has caused many businesses to withdraw their applications or to cancel or return their approved loans for fear of doing something in error because they do not understand the constantly evolving program requirements. I challenge anyone in the Inspector General community to agree with Treasury that piecemeal, fragmentary guidance that amends and contradicts itself, changing the rules on a weekly, and sometimes more frequent, basis while millions of loans are already approved or in the process of approval, is an appropriate way to implement a program under which hundreds of billions of dollars of loans have already been approved and are intended to be forgiven by the federal government.

Given this mismanagement, mistakes and errors are going to be common place. It will be a daunting, if not impossible, task for the Inspector General community to assess the safety and soundness parameters under which lenders operate given the lack of any clear guidance that has existed for lenders and borrowers for the life of every loan on the books in the PPP.

As the program exists today, there is no one place that a borrower or a lender can go to find complete program guidance. This is daunting to even the most experienced SBA lenders, and impossible for those lenders that are new to SBA lending. In addition, despite frequent requests from the lender community, Treasury never saw fit to issue even the most basic program templates which could have greatly simplified lenders' understanding of program parameters. By way of example, when PPP lending first began, lenders immediately called on Treasury and SBA to provide templates for a PPP-specific loan note (the contract between the lender and the borrower) and a PPP-specific loan authorization (the contract between the lender and SBA) – the contracts that would typically outline the terms and conditions of the loan for the borrower, lender, and SBA. Those template documents were deemed essential by lenders because the terms and conditions under which PPP loans are to be made are different from those that apply both to regular 7(a) loans and to conventional small business loans. Despite this, however, the requested templates were never provided. Instead, on April 13, 10 days after the program was implemented, Treasury finally issued FAQ #21 which basically said that lenders should be comfortable using their own notes and authorizations. While this might have been acceptable if the lenders understood all of the terms and conditions to include in the contracts, lenders did not, and still do not have all of the necessary guidance. While making millions of loans over the past 8 weeks, lenders never knew what the forgiveness process would even look like, yet were being told by Treasury to draw up contracts which should provide all of the terms and conditions, including the terms surrounding forgiveness, to which borrowers needed to agree and for which lenders would be held accountable. From the very beginning, Treasury asked lenders to fly blind and, by extension, asked borrowers to execute documents agreement to terms and conditions which were largely unknown even to the lenders. The very borrowers Treasury was purporting to help were signing contracts on a loan that centered on forgiveness without knowing how to obtain forgiveness.

Borrowers have also experienced serious whiplash when it comes to understanding continually changing deadlines. The Act and amended PPP borrower application contain similar language requiring applicants to certify that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the applicant. When borrowers were asked to repay loans that were not deemed "necessary" (more on this later in my statement), IFR #4 required borrower to repay the loan in full by May 7th, IFR #9 extended that deadline to May 14th, and IFR #13 further extended the deadline to May 18th. In at least one instance, an extension announcement was not published until the night before the deadline, causing these extensions to be more frustrating than helpful. By the time the extension was announced, borrowers would already have had to make the decision to return the funds by the next morning. The result was that many borrowers repaid their loans out of fear, and then frantically asked their lenders for a reinstatement of that loan when new FAQ #46, issued on the same eleventh hour basis, appeared to change the guidance on how loans would be reviewed. To date, there has not been any guidance provided as to whether cancelled or repaid loans can be reinstated as a result of this guidance whiplash.

The two IFR's on forgiveness and SBA's loan review process and borrower and lender responsibilities were finally issued on May 22nd, 56 days after the *CARES Act* was signed into law, and 26 days after the 30-day timeframe specified in the statute for the publication of such regulations. This meant that borrowers that were uncertain about their eligibility could not make informed decisions about how the forgiveness process would work which could have impacted whether they kept their loans or decided to repay them when faced with strict Treasury guidance on use of proceeds and threats of federal government reviews of loans.

Despite the fact that this forgiveness guidance finally has been issued, there is still confusion regarding the level of diligence that lenders will be required to perform and what certifications they will need to make to SBA in order for SBA to grant forgiveness. Lenders are also unaware what the standards for advance purchase will be, as well as its related procedures. Advance purchase was a tool created by the statute meant to provide lenders, especially small community banks, necessary liquidity so that they could aid even more borrowers. This intent never has been met because Treasury still has not issued guidance establishing the Advance Purchase processes. Lenders have made over 4.4 million loans, with no personal guarantees and no collateral. With program guidance still incomplete, lenders are taking an enormous gamble that the government will continue to stand behind the loans that the lenders are making in good faith.

Think about this for a moment – a program designed on the premise of forgiving loans had no process by which to forgive loans until last week and, to date, no lender has the complete guidance that it needs to process a PPP loan transaction from start to finish.

Perhaps even more concerning when it comes to the guidance as promulgated by Treasury is that many of the ever-changing program requirements continue to be issued in the form of FAQs issued as a plain white paper document (no letterhead of either Treasury or SBA) posted on Treasury's website. While the document states that "Borrowers and lenders may rely on the guidance provided in this document as SBA's interpretation of the *CARES Act* and of the Paycheck Protection Program Interim Final Rules ("PPP Interim Final Rules")", it also includes a footnote that reads "This document does not carry the force and effect of law independent of the statute and regulations on which it is based." Between that footnote and the fact that FAQs continue to be issued, it is difficult to believe that any protections and assurances offered to lenders through FAQs can be relied upon. Yet, FAQs have been the means through which the parameters for hundreds of billions of dollars in 100% government backed loans are issued. In over thirty years of experience, I have never seen a scenario in which the government has put small business borrowers and lenders on more perilous and uncertain ground than in this instance.

*Adding New Restrictions Beyond Statute that Assumes All Small Businesses Fit the Same Mold*:

The *CARES Act* identified four eligible uses of proceeds that could qualify for forgiveness – payroll costs, payment of interest on mortgage obligations, payments or rent obligations and covered utility payments. However, Treasury guidance added another mandatory requirement – which 75% of eligible expenses of the total amount of a PPP loan and also of the forgiveness amount had to be related to payroll costs. This was not the direction provided in the *CARES Act*, and in fact, the statutory list of use of proceeds and eligible use of funds for obtaining forgiveness implies there is a recognition that borrowers should be able to utilize funds for both payroll and maintaining some overhead costs necessary to keep the business in operation.

While it should be obvious that all small businesses do not operate with one, universally uniform business model and set of costs, I acknowledge that there is now debate even on Capitol Hill over whether there should be as much flexibility as the statute would imply for use of PPP funds. Lenders on the frontlines of working with small business borrowers have quickly realized that we must acknowledge that some borrowers, depending on geography and industry, may have a differing breakdown in needs in order to maintain payroll <u>and</u> maintain minimal operations to remain open. Simply put, lenders understand that the purpose of the program is to keep small businesses at status quo when it comes to their payroll in an effort to keep the American public employed. But what good is that if these small businesses make payroll for 8 weeks, but then are forced to shutter the business entirely because they could not afford to remain open afterwards? Does that help keep Americans employed in a meaningful way? If we could help even a portion of small businesses in this country remain standing by injecting some common-sense flexibility into the Treasury-created 75%-25% restriction, and therefore more likely to be able to make payroll at all after an 8 week period, then that should be considered immediately.

Treasury guidance alone instituted the 75%-25% breakdown of funds. Treasury could eliminate it or introduce any flexibility to that breakdown whenever it pleases. Continuing to ignore the call of millions of small businesses for this kind of common-sense approach is concerning if our goal is to help these borrowers survive unprecedented times.

*Targeting Larger Loans, Credit Elsewhere Contradictions & Publicly Threatening Borrowers:*

When the architects of the program indicated that loan proceeds could be used to provide an amount generally equal to 2.5 times the applicant's monthly payroll costs, and then set the maximum PPP loan size at $10 million – double the standard 7(a) maximum, it appeared to be a clear signal that the intent of the program was to also assist businesses with higher payrolls, and thus more employees in need of the support intended to be provided. For a company to qualify for a $10 million loan under the statute, that company would have to boast a $4 million payroll per month on average—that is an incredibly successful small business by any standard. Yet, Congress and the statute could not be clearer – these were the parameters in black and white, inviting small businesses of potentially larger market valuations than typically seen in SBA loan programs or perhaps businesses successful enough to be publicly traded companies. This interpretation was further supported by the fact that, for PPP loan purposes, the statute allowed more businesses to be considered small than under SBA's traditional size standards.

But perhaps nowhere else in statute is it clearer that the PPP was meant for a different kind of small business borrower than is otherwise allowed for the SBA 7(a) loan program than in the statute's credit elsewhere waiver. The credit elsewhere requirement is a statutory cornerstone of SBA's traditional programs, prohibiting SBA from guaranteeing a loan for a borrower that can obtain credit elsewhere. By specifically eliminating the credit elsewhere requirement for PPP borrowers, the drafters of the statute let lenders and borrowers alike know that those small businesses that could obtain access to capital through conventional means were still eligible for PPP loans.

The only statutory test that borrowers had to meet was that the loan applicant had to certify that "the uncertainty of the current economic conditions makes [the loan] necessary…to support the ongoing operations"—but nowhere in statute or guidance has there ever been a definition of the word "necessary." In fact, there is specifically no revenue threshold or any other prioritization included in the statute as a way to specifically direct PPP loans to those small businesses that could demonstrate a greater need based on some metric defining the business' success, and therefore its ability to access other means of capital. The architects of the program wanted to not only emphasize speed to market, but also recognize that virtually <u>all</u> small businesses in this country would be negatively impacted by the events of the COVID-19 pandemic—and more importantly, that all small businesses' *employees* that the program intends to support would be negatively impacted by the pandemic. To pick and choose among the nation's small businesses based on any means-based threshold would have been to ignore the wide-sweeping effects the pandemic was threatening to create and which, unfortunately, we all have seen actually occur.

But how this has played out on the stage of public opinion is a different story. Based on the cited statutory provisions, loan applicants and lenders believed, in good faith, that they qualified for PPP loans – right up to the point where they became subject to criticism in the media. In part, this media focus on publicly traded companies was only exacerbated by Treasury's refusal to release any information or data on the program's recipients, leaving reporters to dig into any public filings they could possibly find to fill the information vacuum. In response to this very public criticism over recognizable companies receiving PPP loans, Treasury quickly issued FAQ #31 which imposed a new self-test requiring loan applicants to take into account their "current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations …" – a test that sounds a lot like the credit elsewhere test that was specifically excluded from PPP loan eligibility considerations.

When discussing this issue, it is important to note that, while the headlines focus on the larger loans, as of May 23, less than 0.7% of PPP approved loans were for amounts greater than $2 million. Evidently, it does not make for a splashy enough headline to note that 3.5 million of the 4.4 million loans approved were for amounts of less than $100,000 with the average size for that group being only $28,369. That means that 79% of the loans reached businesses with an average monthly payroll of only $11,347, so the smallest of America's small businesses.

If Congress or the Administration wants to fine tune the public policy purpose of the program, then that needs to be clearly defined for any future extensions of PPP. But, in the meantime, borrowers should not be shamed or threatened for doing what the law invited them to do – obtain PPP loan funds to help them continue to meet their payrolls during these difficult times.

Treasury has only further led the charge toward dangerous territory – announcing automatic reviews on all loans over $2 million. However, even these threats have been contradictory. In FAQ #39 issued on April 29, Treasury states that it will conduct reviews on all loans "in excess of $2 million, in addition to other loans as appropriate." Two weeks later, FAQ #46 is released stating that any borrower that receives a loan less than $2 million will be deemed to have made the required certification concerning its need for the loan request in good faith. That FAQ justifies this threshold by stating: "… borrowers with loans below this threshold are generally less likely to have had access to adequate sources of liquidity in the current economic environment than borrowers that obtained larger loans". The clear implication of that FAQ was that loans less than $2 million would not be subject to scrutiny regarding borrower need. But in the past week, IFR #15 was issued stating that SBA can review any loan of any size at any time. All of this can only be described as imposing a credit elsewhere test on a borrower, in direct contradiction to Congressional intent. And in what appears to be the most blatant threat, Treasury announced, and then extended deadlines requiring borrowers to repay loan funds by May 18 in order to be deemed by Treasury to be in good standing regarding the attestation of need. This ticking clock to repay funds instilled panic and fear in thousands of borrowers who were suddenly left to decide whether they met conflicting and undefined guidelines and in lenders who were unable to provide any assurances or insight.

Should we really be sending the message that if a small business borrower gets a larger loan that is still within the size maximum that the law provides that the borrower will find itself automatically questioned and audited by the federal government? I don't know any small business that could possibly be comfortable applying for a PPP loan after the sequence of Treasury's contradictory guidance and threats unfolded in recent weeks. Is it any surprise after these threats that PPP loan volume actually would decrease from previously higher levels? Unknown numbers of loans were hastily returned in the wake of the Treasury-led threats, which were unfortunately only further echoed by Members of Congress who were busy spearheading their own frenzy of optics-control campaigns in the wake of the negative media reports that companies with recognizable names had dared to find themselves eligible for a PPP loan to help their hourly wage employees. In my opinion, the voracious appetite in the first round of PPP funding was successfully tamped down by Treasury leading the charge to instill fear in small business borrowers. In fact, PPP volume is now down $27 billion from its peak volume, and there is no doubt in my mind that government fear-mongering contributed not only to the downturn, but also to the now-chilled atmosphere around new PPP loan applications.

Perhaps the saddest outcome of this credit elsewhere confusion turned public shaming is to learn that it was not just large loans that were returned; rather, lenders reported on an anecdotal basis that borrowers were returning loans as low as $15,000. FAQ #46 was released well into the evening on the day before the safe harbor deadline set for borrowers to repay their loans with no penalty (a deadline that was subsequently extended), stated that borrowers with loans less than $2 million would be deemed to have made their "needs" certifications in good faith. But that clarification came too late for the many borrowers with smaller loans that already had repaid their loans out of fear that they would be in trouble with the government for accepting their loans. Issuance of the eleventh-hour guidance change meant that lenders started the next morning fielding heart-breaking pleas from borrowers who now wanted the loan that they had repaid just the night before reinstated. When the federal government starts leading the charge in threatening small business borrowers for following what the law invited them to do and creates situations in which struggling borrowers frantically return small dollar loans out of fear, we have a broken system.

*The Concerning Shifts Around Lenders' Hold Harmless Protections:*

The *CARES Act* made clear that it would be the borrower which would certify to an attestation of need at the time of application, provide various required documentation during both origination and the forgiveness application, and certify that all of the documentation presented was "true and correct." The statutory hold harmless language intended to protect lenders from having to independently verify that borrower-presented documentation certified as true and correct, is, in fact, true and correct, and to allow lenders to wholly rely on the veracity of the documentation a borrower provides. Even preliminary Treasury guidance assured lenders that they could rely upon borrower certifications. The borrower application provided by Treasury includes a section in which borrowers must certify that they have presented true and accurate material in good faith. The lender application provided by Treasury repeatedly frames all areas regarding eligibility, affiliation, and loan size with language that states that the "Applicant has certified," "the Applicant has represented to the Lender," or the "Applicant must provide documentation to Lender supporting how the loan amount was calculated…" From the outset, Treasury seemed to allow the lender to rely on borrower documentation and certifications. Based on these understandings and premises, lenders financed an unprecedented number of loans.

FAQ #1 issued on April 3 immediately began to slightly muddy the situation by stating that "Lenders are expected to perform a good faith review, in a reasonable time, of the borrower's calculations and supporting documents concerning average monthly payroll cost", without defining what "good faith review" meant. Yet, FAQ #1 never *requires* the lender to independently verify a borrower's reported information. FAQ #31 issued 20 days later on April 23 then seemed to assuage lender fears regarding verification during the application process by stating that "Lenders may rely on a borrower's certification regarding the necessity of the loan request". However, it was not until the forgiveness guidance in IFR #15 which was released on May 22 that Treasury reversed this foundational premise for lenders and stated that lenders would also bear the risk of improper or inaccurate certifications from borrowers. Lenders were suddenly told that they must perform a review of the borrower's calculations and supporting documents relating to amounts eligible for loan forgiveness. The guidance goes on to explain that minimal review of calculations based on a payroll report by a recognized third-party payroll processor is considered reasonable, but if a borrower does not have that documentation, more extensive review by the lender of calculations and data is deemed "appropriate." Forgiveness applications could now not only be denied if not appropriately documented, causing PPP loans to remain on lenders' balance sheets, but the government was now also announcing that they could claw back any fees lenders earned in making such loan (more on this further in this statement).

Of course, as outlined above, given that IFRs can be used in a court of law, and that FAQs bear the disclaimer that they cannot and do not carry the force and effect of law, lenders are left confused as to which premise they should rely upon. **The recent IFR changing the rules of engagement on lender liability did not exist when well over 4 million loans were made, and so it is unconscionable that it could be expected to apply to loans that had already been made**, but Treasury is silent to that point. FAQs have made clear that lenders are only required to follow the guidelines that were available to them at the time.  But does that mean that new rules apply to a loan from the moment those new rules are made known even if the loan was made before the new rules were even created, or does it mean that the new rules apply only to new loans made after issuance of the new requirements?

The duty of the lender in documentation verifications and the ability for a lender to rely on such documentation is at the heart of understanding the lender's role and liability if the lender chooses to participate in the program.  Thousands of lenders chose to participate based upon one premise, only to find out last week that that cannot be relied upon.  Because of the constantly changing guidance, many lenders are reporting that they feel that they have been duped by Treasury – plain and simple.  As financial institutions across the country scramble to understand their duties and exposure as has only been revealed to them in recent days, it is not hard to imagine that many are wondering if this was a program they ever would have participated in had they known the full scope of the program's parameters from the outset.  Meanwhile, the reality remains that over 4 million loans are on the books of thousands of lenders who are being asked to play a vastly different role in reviewing those loans than they were told when approving them.  This is an inappropriate way to treat business partners delivering the government's (hopefully) to-be-forgiven grants.

*Onerous Forgiveness Process*:

IFR #1 posted on the Treasury website on April 2 provides general information regarding loan forgiveness.  But, borrowers and lenders had to wait until the evening of May 15 to see the forgiveness application form and its instructions, and until nearly 11 pm on May 22 to get the IFRs (#s14 & 15) that attempt to provide more specific guidance regarding the forgiveness process.  And, as noted in those IFRs, lenders still are waiting for promised guidance regarding borrower appeals of adverse decisions related to forgiveness applications and general loan eligibility, and for guidance regarding the process by which lenders can apply for the Advance Purchase of their PPP loans as specifically provided for in the Act.  Also missing from the guidance issued to date, are any details regarding the mechanics of lenders' submission of forgiveness applications to SBA.  IFR #14 states only that the lender has 60 days from receipt of a complete forgiveness application to review that application and that it must then "issue a decision to SBA".  No information is provided regarding where within SBA the decision must be directed or how the submission must be made.  So, once again, lenders are left not knowing how a critically important process will work.  If there were only a few thousand PPP loans, lenders might be able to muddle through; but with more than 4 million loans already approved, lenders need to know ALL of the details of the loan forgiveness process now so that they can begin to set up the internal processes that will be required to handle the volume of PPP loan forgiveness applications that they will be receiving beginning very soon.

And, despite how long it took Treasury to issue forgiveness guidance, what has been provided lacks clarity and imposes an onerous burden on borrowers, particularly those with the smallest loans.  The borrower "Loan Forgiveness Application" is 11 pages long and includes 6 pages of instructions and 4 forms filling another 5 pages.  The required "Paperwork Reduction Act" statement on the form indicates that the estimated time for a borrower to complete the form, including "gathering data needed", is 180 minutes.  I am an accountant by training, and I find it impossible to believe that most borrowers will be able to complete the form in that short period of time.  In fact, I find the form and its instructions so daunting for most small businesses that I believe that many of them will have to engage and pay a business professional to complete the form for them.  Given that correct completion of the forgiveness application and the provision of the required back-up documentation will mean the difference between having a loan forgiven or being left with a balance that will have to be repaid, and that providing incorrect information could subject a borrower to significant criminal and/or civil penalties, who could blame them? And, here it is important to note that lender liability issues will prohibit lenders from providing the kind of assistance that many borrowers will need to correctly complete their forgiveness applications.

While I understand that it is necessary to obtain appropriate documentation to support the government's extension of forgiveness, I find it inconceivable that a borrower with a very small loan is being required to use the same 11 page application as a borrower that received a multi-million dollar loan. Surely Treasury could have designed a system – could still design one – that could provide a more streamlined forgiveness application process for borrowers with very small loans. But, based on the guidance provided to date, Treasury appears to have given little, if any, consideration to the inequity inherent in imposing the same requirements on a borrower that received a $10,000 loan that it is imposing on a borrower that received a $10 million loan. And, here I would point out that there is precedent even in the current situation for lightening the burden on borrowers with smaller credit needs. For example, applicants for loans under SBA's Economic Injury Disaster Loan (EIDL) program are receiving virtually automatic grants of up to $10,000. Surely similar consideration should be given to PPP borrowers.

*Delays in SBA's Payments to Lender of Statutorily Authorized Processing Fees:*

The *CARES Act* required the government to reimburse lenders for their costs for processing PPP loans based on a fee schedule provided in the legislation. The statute further required that the processing fees be paid to lenders "not later than 5 days after the disbursement of the covered loan". The first specific guidance regarding lender reporting of PPP loans and the payment of the authorized processing fees was provided to lenders by SBA Procedural Notice 5000-20028 issued on May 21, nearly 50 days after the first PPP loans were made. That notice only <u>begins</u> the process for lenders to receive reimbursement.

Included in the instructions provided in the cited notice and in IFR # 15 are concepts not envisioned by the legislation – the right for the government to determine that even though a lender processed and disbursed a loan in good faith, it may not be entitled to the statutorily authorized processing fee, and, even more troublesome, that, for a period of one year after loan disbursement, the government has the right to claw back a fee paid to a lender. Per the processing fee guidance, lenders will not be paid processing fees if: the loan is canceled prior to disbursement, the loan is canceled or voluntarily terminated and repaid after disbursement based on the borrower's self-determination that it did not meet the after-the-fact determination of loan need requirement, or if any of those events occurred based on SBA's finding that the borrower was ineligible for the loan. As it relates to SBA's after-the-fact loan reviews, the guidance authorizes SBA an entire year to claw back any fees paid to the lender if the Agency subsequently determines that the borrower was ineligible for the PPP loan. While it may make sense that a processing fee not be paid on a loan that is never disbursed, it is unacceptable to withhold, or to claw back, from a lender the fee that it is otherwise entitled to by virtue of having undertaken all of the activities, and incurring all of the related costs, involved in processing the loan.

*Basic Eligibility Confusion:*

The *CARES Act* states that all small business borrowers that meet the statutory size criteria, as well as any of the specific exemptions related to affiliation and 501(c)(3)s are eligible. IFR #1 states that the business eligibility will be based on SBA's standard 7(a) eligibility criteria, except where specifically changed in statute. However, in reality, the way in which eligibility has unfolded has been incredibly convoluted such that not one lender today knows the full picture of eligibility for a PPP loan. This is a problem that needs to be solved immediately.

While the specific data required on the application as to eligibility is not specified in the overarching IFR #1 that addresses the bulk of eligibility issues, 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. The additional information that was removed from the application would have been helpful to lenders to determine that a loan was appropriate for approval.

For example, one of the first issues that arose as to eligibility involved citizenship. One of the questions that was omitted when the application forms were revised relates to whether the business is at least 51 percent owned by a U.S. Citizen or Lawful Permanent Resident. 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, the standard 7(a) requirements related to lawful immigrant status do not apply. If that were the intention of the program, the policy should have been specifically stated, so that lenders and borrowers would not have to guess what requirements apply.

In addition, there have been a number of moving targets related to eligibility that appear to showcase Treasury's ever-evolving perspective in real time as to who is eligible and who is not. A case in point is Treasury's treatment of casinos. As previously noted, guidance in IFR #1 issued on April 3 stipulated that, unless specifically changed by PPP guidance, businesses were only eligible for PPP loans if they were eligible for regular 7(a) loans. Under this guidance, casinos would have been deemed to be ineligible for PPP. This interpretation was changed by IFR #3 issued on April 14 which said that a business that was otherwise eligible could qualify for a PPP loan if its legal gaming revenue did not exceed specified dollar and percentage thresholds. This created a carve-out for smaller casinos. Only 10 days later, on April 24, IFR #4 included a new provision stating that a business is not rendered ineligible due to its receipt of legal gaming revenues, thus making casinos of all sizes eligible. I do not lay out these facts to imply a position from NAGGL on allowing or not allowing casinos; rather, this pattern is indicative of the constant guessing game that Treasury has created for lenders and borrowers when it comes to PPP eligibility, a premise many would consider the most basic parameter of a loan program.

Similarly, the Act clearly states that only non-profits that are classified by the IRS as 501(c)(3)s are eligible for PPP loans. But, as announced in IFR #11, Treasury decided on its own that for purposes of PPP, 501(c)(12)s are deemed as for-profit entities making them eligible for PPP loans. How does a 501(c)(12) entity get deemed eligible, while other non-profits are not? How can a non-profit be designated as a for-profit entity by Treasury? Let me be clear on this point – in my opinion, all non-profits should be included in PPP eligibility. But to start making one-off announcements about special carve-outs has laid the groundwork for a program riddled with question marks instead of clarity.

To further complicate matters, a Michigan court decision in early May (DV Diamond Club of Flint LLC et al v U.S. Small Business Administration et al, U.S. District Court, Eastern District of Michigan, No. 20-10899) ruled that strip clubs cannot be blocked from obtaining PPP loans, despite SBA eligibility criteria referenced in the Act, regulations as amended for PPP and other guidance deeming it ineligible per standard 7(a) eligibility parameters. The U.S. District judge in Michigan issued a preliminary injunction which barred the SBA from excluding not only the types of businesses represented in the case, but also other businesses that SBA would typically exclude from its loan programs such as banks and political lobbying firms. In deciding he case, the Judge wrote: "Simply put, Congress did not pick winners and losers in the PPP." SBA has yet to apply applicable written guidance regarding the eligibility of businesses operating in industries that were a party to the lawsuit, although I understand that, on an individual basis, SBA has told the specific businesses that were parties to the lawsuit they were eligible for PPP loans. How this case and other lawsuits like it will play out is yet to be determined, but it showcases the vast interpretations over a component of the program that should be very clear for stakeholders. It also points out how the guidance vacuum may effect lenders and small business loan applicants because I would speculate that some lenders reading the court's decision may have interpreted it as opening the door to all businesses operating in the industries named in the suit, while other lenders would not have seen the decision in the same way.

I would also note that the final amended application form for borrowers 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.

To avoid "gotcha" moments with small business borrowers, Treasury needs to clearly provide all of the eligibility criteria in one document and provide additional guidance on the concerns that continue to go unaddressed, such as the issue regarding citizenship and the Michigan court decision applicability to borrowers outside of that particular lawsuit. On April 13, as part of a detailed list of questions and recommendations that it sent to SBA, NAGGL requested information regarding the PPP eligibility of businesses operating in a variety of industries. 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. But except for the few specific exceptions to business industry eligibility set forth in the IFRs, no guidance on the issue of general business industry eligibility has been provided.

This issue becomes even more important because IFR #15 issued on May 22 indicates that SBA will review PPP loans for three purposes, one of which is borrower eligibility. The IFR says that eligibility will be tested against the Act; SBA regulations, as modified by the various IFRs; and other guidance. But, without a clear understanding of which eligibility criteria actually apply to PPP loans, both lenders and borrowers remain at a huge disadvantage. We know that this has led to disparity in the way that loan applications have been treated on a lender-by-lender basis, but we also fear how this lack of clarity may adversely impact borrowers subjected to an SBA lender review.

*Opening the Door for Significant Confusion about Payments to Agents:*

The *CARES Act* authorizes the Administrator to establish fees limits for agents that assist borrowers to prepare their PPP applications. The hastily drafted guidance in IFR #1 issued April 2, provides a fee schedule established by Treasury/SBA as required by the Act, but then adds new requirements making lenders responsible for paying the fees being charged by agents, and prohibiting the payment of these fees directly from the borrowers or from the loan proceeds. This provision is concerning because in most cases, the lender did not contract with the agent and, in many more cases, would not even have been aware of services being procured by the borrower.

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, or any other reasonable parameters for determining that a fee is appropriate. In fact, NAGGL understands that, in some cases, lenders specifically advised agents and/or borrowers that it would not pay fees to agents in connection with PPP loans. However, lenders have reported that agents are asking them to pay for services that they had no knowledge of being provided, or no contractual agreement to provide compensation for. IFR guidance should be swiftly amended to indicate that lenders will be responsible for paying fees for agent services only when they contracted to have the work performed. Absent such contract, the responsibility for payment of the fees, limited as provided by IFR #1, must be the responsibility of the borrowers that actually contracted for the services. Without this change, there will continue to be demands by agents unknown to the lenders to receive payments for services that the lenders knew nothing about. The result will be a wave of unsupported agent claims and frivolous litigation, a situation which already is being played out in the courts.

*Terms Set In a Way That Are Difficult for the Borrower:*

The *CARES Ac*t authorized an interest rate of no more than 4% and a maximum maturity of ten years after the date on which a borrower applies for forgiveness. The implementing guidance reduced the interest rate to 1% and set the loan maturity at two years. While setting these values was within the statutory scope, it does not appear that consideration was given to the fact that if the entire balance was not forgiven, it would be a significant burden on the borrower to make loan payments on the loan within 18 months after the required 6 month deferral period. To date, no guidance has been provided regarding SBA's expectations related to servicing loans with balances remaining after the forgiveness is applied. This guidance is critically needed because it is highly likely that a significant number of PPP loans will have remaining balances, and depending on the original loan amount, and the amount of any forgiveness received, it would be unreasonable to expect repayment of the loan in the short period remaining of the original 2-year maturity. In a recent discussion, one lender called this situation a "crushing blow" for small businesses that have already been hard hit by the Coronavirus emergency. I would call it a potential death blow. The government must provide guidance to address the loan maturity issue by, for example, authorizing lenders to extend the loan maturity up to the 10-year maximum provided by the Act. In addition, given the special nature of PPP loans, e.g., no collateral, no personal guaranties, maximum interest rate limited to 1%, 6-month limit on payment deferments, etc., SBA needs to provide additional guidance regarding how these loans will be serviced, and, if the borrower business ultimately fails, how they will be liquidated. Once again, lenders need this guidance as soon as possible so that they can begin planning for their handling of the huge number of loans that may have remain after forgivenesses are applied.

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Throughout this document, I have attempted to paint a picture of the challenging circumstances under which both small business borrowers and lenders have been operating and continue to operate. I would like to take a moment to further describe the situation in which lenders now find themselves.

From the outset, lenders have been forced to take significant risks if they chose to participate in PPP lending by having to guess what after-the-fact guidance might be issued to change the parameters under which they thought they were making PPP loans. Congress and the Administration counted on this country's lenders to fully participate in the PPP, and lenders knew how important their participation was, so they were forced to balance their financial risk against their political and reputational risks. When thousands of lenders answered the call to duty, they entered into the program expecting one thing, only to find out the rules of the road look very different with every passing week.
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Lenders have spent the past two months conducting themselves in a way that they believed to be right at the time, all while navigating landmines of changing rules and misguided optics. They have had to hope that any action they take in the moment will not later garner the cancelation of a loan because of guidance that continues to redefine what is okay and what is not even after millions of loans have already been made. Lenders hope they will not invite an audit, a subpoena to testify on Capitol Hill, or an embarrassing headline simply because they trusted one set of rules at one time that no longer seem to apply the next day. Lenders are told how they were expected to behave while already in the process of making the loan or even after the loan was approved. FAQs and IFRs are still being released after millions of loans now sit on lenders' books. Threats of subpoenas have been made to investigate loans that were originally encouraged by Congress, only to find out that Treasury and Congress do not seem to like loans of a certain size after all—loans they invited and permitted into the program. To make matters more difficult, much of the hindsight criticism is not based on written law or guidance in effect at the time the loan was approved; rather criticism of the program has been based on media attention and whether an issue has garnered public anger. This public opinion was only inflamed by high profile officials promising that any small business could walk into any bank and walk out with a loan the very first day PPP loans were made available, creating public frenzy, panic, and outrage when lenders could not live up to a promise that never could have been met given prudent lending standards and regulator requirements.

This landscape carries severe repercussions, concerns, and potential liabilities for the lenders, putting the country's financial institutions at risk for having millions of loans, without any personal guaranties or collateral, on their balance sheets should anything go wrong. I would be remiss if I failed to paint a picture of the precarious position into which the implementation of this program has placed lenders.

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**PART TWO: Industry Recommendations to Improve Administration of the Paycheck Protection Program**

I do not lay out these concerns detailing PPP mismanagement on the part of Treasury just to add to a volume of criticism. Rather, I hope that in laying out the facts, it becomes more clear that this mismanagement has caused real and specific hardships to the small business borrowers and lenders and also that there are solutions available to Treasury/SBA and to the Congress to fix these issues.

First, NAGGL reiterates the plea that it has been making since the program was rolled out – that the government provide complete program guidance in a single guidance document as soon as possible. Contrary to Congress's clear intent, the willingness of Treasury to create requirements not contained in the *CARES Act* have been harmful to lenders and small businesses and are in violation of the Administrative Procedures Act. Treasury's failure to provide one all-encompassing set of rules has left lenders, SBA, and borrowers with jumbled, constantly changing, inconsistent, and chilling guidance. This gross mismanagement deprives SBA, the Inspector General community, this Committee, and the Congress of the ability to oversee the program in a responsible manner. The 15 IFRs and the 48 FAQs issued as of May 27 with more still to come, and the program forms, notices and other guidance documents do not square with the legislation's intent to help small businesses survive the pandemic and safeguard their employees' paychecks. Significantly, this mismanagement is at odds with the SBA's OIG's desire for a system which permits transparency and mitigates the risk of fraud, waste, and abuse. 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. Therefore, in order to protect PPP integrity, we recommend that the Committee assist SBA, lenders, and small business borrowers by recommending that Treasury adopt one set of clear, all-encompassing guidelines, from origination through the guaranty purchase process, with reasonable time requirements. While it is too late to fix the process entirely, we urge the Administration to provide all of the guidance, including all eligibility guidance, in one cohesive document and to update that document going forward if there are any additional parameters to include.

Second, adapting PPP to the real-life circumstances under which millions of small businesses find themselves will be essential to both the short-term and long-term success of PPP. Some of the needed flexibilities can only be provided by Congress amending *CARES Act*, such as extending the 8 week period for a borrower to expend PPP funds to a longer period of time to allow for the countless borrowers who have prolifically expressed that they cannot use the money as intended within the 8 week time frame. This is a common-sense flexibility that NAGGL has discussed with Congress at length, and we hope to see the underlying statute amended in future legislation to address this concern. However, there are other components of Treasury-issued guidance that could provide enormous relief and flexibility to borrowers that are entirely within the government's ability to change. For example, the Treasury could easily issue guidance at any point and by its own volition to provide flexibility to the guidance stipulating 75% of the proceeds must be used on payroll expenses and only 25% of the proceeds may be used on non-payroll expenses. If this issue is not addressed, Treasury is stipulating that all small businesses across the country regardless of geography, business industry and operational model, or size are all universally identical in their expenditures and we know that this is not true. Without addressing the need for flexibility, small business borrowers that greatly need the support that a PPP loan can provide and who want to use that loan to support payroll, but simply cannot meet the 75%-25% breakdown of proceeds, will continue to stay on the sidelines. And those that did receive PPP loans and have not been able to abide by the 75%-25% breakdown will soon find themselves carrying debt that it does not appear the underlying statute intended them to shoulder. Most concerning is the repeated Treasury position that this is a flexibility that is not within its power to consider when it was only put in place by Treasury itself. NAGGL recommends that the Committee consider reminding Treasury of its role in administrative guidance and the regulatory process when implementing restrictions that go beyond statute.

Small business borrowers also need a simplified forgiveness process to reduce the burden that comes with having to complete an 11-page forgiveness application that fails to give consideration to the inequity inherent in imposing the same requirements on a borrower of any size. The current application would very likely take far more than the estimated three-hour timeframe to complete unless a professional is hired to assist with its completion. NAGGL would recommend the consideration of a de minimis threshold below which there would be a streamlined forgiveness process. This would alleviate burdensome paperwork for borrowers and onerous verification requirements for lenders. Simplifying the forgiveness process should also help to avoid stifling the appetite for prospective borrowers to participate in the program going forward.

In addition, NAGGL urges the Committee to recommend that Treasury clarify for lenders a number of concerning provisions in order to instill confidence back into the working relationship between the government and its PPP lending partners. This should include stipulating clearly and unequivocally in regulation that lenders may wholly rely upon any and all documentation and certifications to be true and correct that an applicant or recipient provides to the lender to satisfy any requirement of statute, regulation, or any program requirement and which that applicant certifies to be true and correct. This basic premise cannot be muddied with FAQs and IFRs that twist and turn when it is the foundational understanding for every lending partner of the role and responsibilities they carry. If the government wants to work with lenders, a respectful working relationship needs to be established and then preserved.

We also request that the Committee recommend to Treasury/SBA that they reconsider the onerous restrictions that it put on the payment of processing fees due to lenders, especially the provisions that relate to the one year period that they have allowed during which fees already paid can be clawed back.

Finally, and most importantly, NAGGL asks that the Committee issue decisive recommendations to protect small business borrowers against future threats and fear tactics relating to their receiving larger loans, being publicly traded, or any other premise that is either encouraged or invited by the statute. Treasury should immediately clarify FAQ #s 31, 39, 43, 46, and 47 to ensure that small business borrowers do not feel as if they are doing something wrong by asking for the size of the loan that they require and that is clearly authorized under the statutory formula. Of course, if there is any fraud at any time in the program, NAGGL applauds the government for swiftly addressing that abuse. But, if we are aiming to protect the vast majority of small business borrowers that are acting in good faith when seeking the government's help during these extraordinary times, we must do just that, help, not score or punish, them.

And while this may be outside the purview of the Committee, it would be to ignore a critical issue for borrowers if I did not remind you of the old adage we all heard growing up – **words matter**. The rhetoric employed by the officials in both the Administration and in the Congress matter a great deal when it comes to encouraging or discouraging small businesses from seeking assistance. I think we all can agree that we should be encouraging borrowers to trust that the laws Congress passes mean what they say. Unfortunately, the Treasury guidance issued in the last two months suggests otherwise.

These recommendations are not by any means comprehensive but are four top-line issues that would go a long way to improve PPP for both borrowers and lenders. Other issues that must also be addressed in the short-term are the creation of advance purchase guidelines, eligibility clarification, and guidance regarding servicing PPP loans post-forgiveness. If these, and other issues are not addressed soon, it will quickly become too late for the program to benefit from these much-needed repairs.

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**PART THREE: Section 1112—A Powerful Tool that Must Be Implemented Appropriately**

I would be remiss if I did not also briefly discuss Section 1112 of the *CARES Act.* That section authorizes SBA to make six months of principal and interest payments on existing and new 7(a), 504, and microloans and, in some ways is both the most significant and the most simple injection of economic relief provided to small business borrowers that Congress has passed since the outbreak of the COVID-19 pandemic. Unlike PPP, authority for this initiative rests solely with SBA which means that the guidance has not been subject to the process of having Treasury and SBA negotiate program parameters acceptable to both parties. And, while Section 1112 has not received much public attention, SBA's implementation of the payment structure has been relatively straightforward.

There still are some issues that need to be resolved regarding loan payments made on individual loans, including how payments will be provided on loans that are not now, and still will not be fully disbursed by September 27. But, general feedback from lenders indicates that, so far, this initiative seems to be working as intended. And, best of all, the relief that this section of the statute was intended to provide – relieving existing and new small business borrowers of the burden of making loan payments during these unprecedented times – appears to be working in a meaningful way.

## Concluding Remarks

In some ways, PPP as implemented by Treasury, has set up lenders to fail. But instead of failing, lenders have risen to the challenge. Thanks to their efforts, millions of small businesses all over the country are receiving the help so critical to their survival during this crisis. Have there been discouraging headlines? Yes. But they have been more than balanced out by the countless messages of hope and gratitude that borrowers have sent to their lenders. These messages describe how PPP loans saved their businesses in these dark and difficult times. That is why PPP matters and why lenders continue to strongly support the program.

As I mentioned above, the Committee has a substantial role to play in assuring the success of PPP. It is often the reviews and recommendations of the Inspector General community that spur on Congress and the Executive Branch agencies to respond to concerns that might otherwise continue unchecked. I look forward to seeing the Committee exercise that critical role – the country's financial institutions and small business borrowers are depending on it. I would welcome continuing this dialogue if I can be of further help.

**Appendices:**

*Appendix A: Dates of Publication of Interim Final Rules as of June 1, 2020*

*Appendix B: NAGGL Comment Letter to IFR #1, Submitted May 15, 2020*

*Appendix C: NAGGL Submitted Questions to SBA on April 13, 2020*

*Appendix A: Dates of Publication of Interim Final Rules as of June 1, 2020*

NAGGL

## PAYCHECK PROTECTION PROGRAM – INTERIM FINAL RULES

| | DESCRIPTION | ISSUED | FED REGISTER |
|---|---|---|---|
| 1 | *Business Loan Program Temporary Changes: Paycheck Protection Program* | 04/02/20 | 04/15/20 |
| 2 | *Applicable Affiliation Rules* | 04/02/20 | 04/15/20 |
| 3 | *Additional Eligibility Criteria and Requirements for Certain Pledges of Loans* | 04/14/20 | 04/20/20 |
| 4 | *Requirements for Promissory Notes, Authorizations, Affiliation and Eligibility* | 04/24/20 | 04/28/20 |
| 5 | *Additional Criterion for Seasonal Employers* | 04/27/20 | 04/30/20 |
| 6 | *Disbursements* | 04/28/20 | 05/04/20 |
| 7 | *Corporate Groups and Non-Bank and Non-Insured Depository Institution Lenders* | 04/30/20 | 05/04/20 |
| 8 | *Nondiscrimination and Additional Eligibility Criteria* | 05/05/20 | 05/08/20 |
| 9 | *Extension of Limited Safe Harbor with Respect to Certification Concerning Need for PPP Loan Request* | 05/10/20 | 05/19/20 |
| 10 | *Business Loan Program Temporary Changes; Paycheck Protection Program – Loan Increases* | 05/13/20 | 05/19/20 |
| 11 | *Eligibility of Certain Electric Cooperatives* | 05/14/20 | 05/19/20 |
| 12 | *Paycheck Protection Program – Treatment of Entities with Foreign Affiliates* | 05/18/20 | 05/21/20 |
| 13 | *Extension of Limited Safe Harbor with Respect to Certification Concerning Need for PPP Loan and Lender Reporting* | 05/20/20 | 05/26/20 |
| 14 | *Interim Final Rule on Forgiveness* | 05/22/20 | 06/01/20 |
| 15 | *Interim Final Rule on Loan Review Procedures and Related Borrower Responsibilities* | 05/22/20 | 06/01/20 |

*Appendix B: NAGGL Comment Letter to IFR #1, Submitted May 15, 2020*

NATIONAL ASSOCIATION
OF GOVERNMENT GUARANTEED LENDERS

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,

Anthony R. Wilkinson

Tony Wilkinson
President & Chief Executive Officer

cc: William Manger, Chief of Staff and Associate Administrator, Office of Capital Access

**Interim Final Rules # 1 – *Paycheck Protection Program***
**RIN: 3245-AH34 / Docket No. SBA-2020-0015**

**<u>NAGGL Paragraph-by-Paragraph Comments and Recommendations</u>**

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.

**<u>Paragraph 2 – *What do borrowers need to know and do?*</u>**

**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.

**<u>Paragraph 3 – *Who is eligible to make PPP loans?*</u>**

**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.

**<u>Paragraph 4 – *What do both borrowers and lenders need to know and do?*</u>**

**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*.

*Appendix C: NAGGL Submitted Questions to SBA on April 13, 2020*

NATIONAL ASSOCIATION
OF GOVERNMENT GUARANTEED LENDERS

**PAYCHECK PROTECTION PROGRAM LOANS**
**LENDER QUESTIONS**

[This initial list includes some of the overwhelming volume of most frequently asked questions posed to NAGGL. More to come.]

**PROGRAM GUIDELINES:**

- We now understand that the two Interim Final Rule (IFRs) providing guidance for PPP lending will be published in the Federal Register on 4/15, what status should those documents be accorded during the period between program inception and the date of publication?
- Each of the IFR documents will provide a 30 day comment period measured from the date of publication. Can we assume that those comment periods will not be considered to have started until the actual date of formal publication in the Federal Register?
- To date, other than the IFRs, the FAQs published on the Treasury website are the only written guidance provided to assist lenders to make loans under PPP. Those documents have been updated several times and each document bears the date on which it was posted to the website. Would it be possible to also include, for each question, the date that it was added to the list, and for any questions that have had answers amended, the date on which the answers were amended. Otherwise it is impossible for lenders to know the date that the guidance is regarded as having taken effect.
- FAQ 21 states that lenders do not "need a separate SBA Authorization for SBA to guarantee a PPP loan". We're not looking for individual authorizations for each PPP loan, but could SBA please provide an outline that spells out the rights and responsibilities of SBA and lenders? Of special concern is the requirements that apply to loan forgiveness since this is a unique provision that has never existed in regular 7(a) lending.
  - Until recently a Loan Authorization document was available (apparently in error) via the servicing function within E-Tran. Can we use that authorization for our loans? Will there be a problem on the loans for which we used that authorization?
- FAQ 21 also states that lenders may include in their PPP loan promissory notes "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 Rule and guidance, and SBA Form 2484".
  - Since PPP loans include a provision for forgiveness that is not present in any other 7(a) or conventional loan, we're concerned about how that issue should be addressed in the loan note and are requesting sample suitable language from SBA.
  - We need guidance on how to describe repayment terms, including how interest should be charged, e.g., can we use compounding interest rather than the simple interest structure mandated for regular 7(a) loans?

- Without written guidance to the contrary, our LSP has been producing PPP loan notes as interest-only for 24 months with a balloon. Historically SBA has not allowed balloon payments in the past. Should these be re-amortized after the forgiveness and how should we document this in the Note?

**ELIGIBILITY:**

- Both statute and the IFRs indicate that where the statute and other guidance is silent as to eligibility, the regular 7(a) requirements apply. The IFRs rule does not address any of the following issues, so confirmation is needed as to the eligibility of:
    - Businesses that are not at least 51% owned and controlled by an individual(s) who is a U.S. citizen. [A question regarding citizenship/LPR status was included on the first borrower application that was issued with the indication that unless one or the other status was required for eligibility. But that question was removed from the current version of the form and no explanatory guidance has been provided.]
    - Foreign-owned businesses
    - Financial businesses, including banks and CDCs, primarily engaged in the business of lending, and other similar business, e.g., cash advance businesses (NAISC #522291)
    - Passive (landlord or investment) businesses
    - Life insurance companies (as opposed to life insurance agents)
    - Pyramid sale distribution plans
    - Businesses that derive more than 1/3 of gross annual revenue from legal gambling activities, including casinos
    - Private clubs and businesses which limit the number of memberships for reasons other than capacity
    - Businesses that engage in discriminatory hiring practices, e.g., Hooters, Tilted Kilt, etc.
    - Loan packagers deriving more than 1/3 of gross annual revenue from packaging SBA loans
    - Businesses which present live performance of a prurient sexual nature or derive more than de minimis gross revenue through the sale of products or services, or the presentation of any depictions or display of a prurient sexual nature
    - Businesses primarily engaged in political or lobbying activities
    - Speculative businesses [as further described in SOP 50 10 5(K)]
    - Businesses where, for regular 7(a), additional examination would be required to rule out possible conflicts of interest or issues of lender preference as primarily described in SOP 50 10 5(K), pp. 14-16, e.g., businesses where there is a financial stake held by a director of the lender institution (most commonly asked), an employee of the lender institution, a Member of Congress, a current or former SBA employee or other individual with a separate relationship with SBA, etc. [The 2nd lender application requires the lender representative completing the form to certify that he/she, his/her spouse and children have no ownership interest in the applicant, but that indirect guidance is all that is available to address this issue]
    - ESOPS [Issue is whether delegated processing is permitted for PPP loans]
    - Publicly traded companies

- Homeowner/condominium associations
- Cooperatives [issue is whether lenders have delegated authority to process]
- Production farmers (crops & livestock), ranches, etc.
- Franchises not on the Franchise Directory – lenders are aware to keep checking since new brands are being added
- Businesses with regular 7(a) loans in liquidation status
- Business that are not current on trust tax payments; businesses that are not current on income taxes; businesses with current IRS tax liens
- Businesses that were in business prior to 2/15/2020, but have changed ownership since that date
- Rural electric cooperatives

**<u>SPECIAL CONCERNS RE PARTNERSHIPS, SOLE PROPRIETORS, INDEPENDENT CONTRACTORS, ETC.:</u>**

- Are there any more detailed guidelines on how to process independent contractors or self-employed individuals?
- Exactly what documentation is required for sole proprietors and independent contractor to verify their PPP eligibility?
- How do you determine average monthly payroll for independent contractors/self-employed?
- Are partner distributions eligible?
- Am I correct that amounts paid to an independent contractor cannot count toward the payroll of an employer business since those amounts can be claimed by the independent contractor?
- I'm looking for some guidance on single member LLCs – and if they can be treated as Sole proprietors for the PPP loans. Does it make a difference if they have employees (and thus an EIN) or if it all rolls under the individual's SSN?
- Have we received any guidance yet on how to process these? We have not been proceeding on these since they do not have a "payroll" so to speak.
- Did I miss something or are we still waiting for sba guidance on what is needed for documentation and how to calculate sole proprietor or independent contractor income and how do we prove use of those proceeds? They just write a check to themselves?

**<u>OTHER PROCESSING ISSUES:</u>**

- Are we really allowed just to rely on the applicants' certifications, or do we have to do some verification of that information?
- What should we do if an applicant makes a certification that, based on other information that we have, e.g., from prior loan applications, we have reason to believe may be false?
- Are CAIVRS and SAM Checks required for PPP loans?
- Are we required to check for outstanding legal actions including judgments, bankruptcies, etc.
- Are there any requirements that lenders obtain information to assure business has proper business licenses and insurance (verify workers comp./standard fire/hazard coverage) based on the business type?
- Size –
  - How do we calculate number of employees for purposes of determining size?

    - How should lenders count part-time employees?
    - Do we follow the 13 CFR 121 standard (full-time, part-time and temporary each counting as an employee) or do we consider full time equivalents?
- Bankruptcy – What is the definition/scope of "involved in a bankruptcy" in Question 1 of the Borrower Application?
    - Is there a statutory or regulatory citation or authority for this requirement?
    - If not, will the Borrower application be amended to remove this apparent requirement?
    - Are creditors of a debtor that file claims in a bankruptcy or that are parties to adversary proceedings "involved in a bankruptcy" and thus ineligible?
    - Are debtors that have already reorganized and are operating under a confirmed plan or that have already received a discharge "involved in a bankruptcy" and thus ineligible?
    - Or, is "involved in a bankruptcy" limited to current debtors in bankruptcy that have not received a discharge or are not operating under a confirmed plan?
    - If a business obtains a PPP loan and subsequently files a bankruptcy case, will the commencement of such bankruptcy case impact its ability to obtain forgiveness of such loan (assuming the other requirements for forgiveness are satisfied)?
- Maximum loan size –
    - Does the $10 million PPP loan limit apply to the applicant and all affiliates or is that limit on an applicant-by-applicant basis?
    - Will the PPP loan be counted when determining the maximum SBA guaranteed amount outstanding for purposes of determining whether a borrower has reached its maximum lending limit for regular 7(a) purposes (currently $3.75 million)?
    - Is it correct that 1099 payments cannot be claimed as "payroll" expenses for the employer applicant since those amounts can be claimed directly by the independent contractor that received the payments?
    - Treasury FAQ #1 (which has been amended) makes it appear that for purposes of determining the eligible loan amount, the lender has to review the borrower's calculations for errors or a lack of substantiation? What does that mean? How much review is required?
- Limit of one PPP per TIN –
    - What happens when the same individual owns more than 1 business since E-Tran will not allow more than 1 PPP per identification number [This is confusing since the application is by business entity, not owner and some people own several businesses with more than just one person.]
- Can the same borrower get a PPP loan now and a regular 7(a) loan later?
- Limitations regarding EIDLs and PPP loans –
    - Can we get a better definition of same purpose?
    - Will it be possible for a small business to get a PPP loan now and an EIDL loan later if the EIDL proceeds will be used for purposes not covered by PPP? If so, what will lenders need to do to monitor how loan proceeds are used?
    - If a borrower has applied for an EIDL but not received funds is the PPP loan amount still 2.5 times average monthly payroll? If they have received an EIDL $10,000 advance, what do we enter?

**NOTE TERMS:**

- Can bank set up the PPP note on a 2 year interest only basis with a 6 month deferral of interest payments? We would like to do this to reduce maintenance of system amortization changes when forgiveness is issued on residual balances. The posted SBA Form 147 has a blank box on the SBA website for terms.
- Can you confirm that the 100% guaranty is that for full life of loan even if the lender winds up needing to extend the maturity beyond the original maximum 2-year term?
- I've never dealt with a loan where part of the balance may be forgiven: how do I describe the forgiveness entitlement in the loan note?
- How is interest handled for PPP loan note purposes – simple or compounding?
- Since I will not know the amount of the loan that will not have to be paid back, can I write my loan note so that it has a balloon payment at the end of the 2-year maturity?
- Should I include a feature in the PPP loan note that reminds the borrower that penalties can apply if it misuses the loan proceeds?
- For my PPP loan note, do I have to include the provisions regarding enforceability under Federal law that are generally required for regular 7(a) loans?

**LOAN DISBURSEMENT:**

- The IFRs posted on 4/2 did not specify a disbursement period for PPP loans. FAQ #20 contained in the document posted on the Treasury website after the close of business on 4/8 states that 1st disbursement is required within 10 days of loan approval. In some cases, borrowers are requesting delayed deferment, in other cases lenders are finding that they are unable to disburse by the specified deadline.
    - For loans approved between 4/3 and 4/8, since the disbursement deadline wasn't known to borrowers and lenders, can they assume that there is no disbursement deadline on their loans?
    - For loans approved after the FAQ was issued –
        - What penalty will be imposed on lenders that fail to meet the deadline?
        - Will the loan approval be canceled?
        - Will borrowers face the possibility of being denied their right to loan forgiveness?
        - Will the lender be subject to adverse finding during reviews by OIG, OCRM, etc.?
- Is SBA Form 1050, Settlement Sheet, required at time of 1st disbursement on loans over $350,000?
- What documentation does lender need to have in file to show how funds were disbursed?
- Is controlled disbursement required? What about for very large loans, e.g., over some dollar threshold ($1 million)?
- We understand that if the applicant received an EIDL between 1/31/2020 and 4/3/2020 that was used for payroll purposes, the EIDL must be repaid from the PPP loan proceeds. Since there has been no guidance on how this is to be done, and since the goal is to get these loans disbursed as quickly as possible, we are making paying of the SBA EIDL the responsibility of the borrower. Is that okay?

**E-TRAN:**

- Traditional 7(a) lenders are concerned about the possibility that new lenders are been made subject to different program requirements, including loan processing mechanics and loan eligibility requirements, etc. Is that a legitimate concern? How are the newly approved PPP-only lenders being approved and how are their loans being processed? Can you make traditional lenders comfortable that there is no disparity between the treatment of regular and new lenders?
- Since the date SBA started accepting PPP loan applications, numerous changes have been made to E-Tran data requirements, including which fields are mandatory. Can you provide an E-Tran template that shows exactly what data needs to be input, including which fields are not mandatory so will not cause the application submission to be blocked? Are the same requirements being used for applications submitted via E-Tran and the new processing gateway?
- How is ownership information/percentages entered for organizations like non-profits and coops?
- Is it acceptable to hire temps for assisting with input of applications into E-Tran?
- I'm getting internal pressure to allow "technology bots" to use my eTran log-in credentials, but I'm concerned that this would be in violation of SBA's eTran guidelines. Can I used bots to input my loans?
- What should lenders do when a tax ID is pre-populated with a name and address that the borrower does not recognize?
- What should a lender do when the borrower does recognize the pre-populated business name but that is no longer the legal name of the entity?
- If foreign-owned businesses with employees permanently residing in the U.S. are eligible, how do I enter the application in E-Tran?
- Under legal organization type on the borrower information screen there is no option in the drop down menu to select Tribal Organization. What should we select when a tribal organization applies?

**FORGIVENESS:** [Lenders are very nervous that they are approving loan that contain a never before seen forgiveness feature and do not feel that the minimal guidance provided to date is enough for them to understand the parameters of forgiveness requirements and processes. So, they are requesting soup-to-nuts guidance on the entire forgiveness process. A few of the MANY questions we have received follow…]

- Can you provide additional information about the advance purchase process for PPP loans mandated by CARES?
    - The interim final rule states that lenders may not request advance purchase until week seven of the covered period. Since the covered period began on 2/15/2020, can we assume that period already has run, or is the calculation based on a different date, e.g., loan approval or first disbursement?

- If SBA purchases my PPP loans in advance, what will I need to do after the forgiveness amount(s) is known to settle any under- or over-estimation of the expected forgiveness amount, accrued interest, etc.?

- Is SBA going to provide guidance regarding the process for PPP borrowers to request loan forgiveness? – A sample form for calculating forgiveness would be helpful. Maybe this could be made part of E-Tran?
- Can the lender rely on the information and documentation provided by the borrower to justify the forgiveness request?
- Treasury FAQ #1 (which has been amended) makes it appear that for purposes of determining the eligible loan amount, the lender has to review the borrower's calculations for errors or a lack of substantiation? What does that mean? Does that requirement apply to applications for forgiveness?

**<u>AGENTS:</u>** [Lenders are aware the IFR makes lenders responsible for paying agents that assist borrowers with their PPP applications, but are not sure how this will work]

- Is an SBA Form 159 required?
- How will lenders know that an agent assisted with the application?
- How can lenders be held responsible for paying agents when they were not a party to the contract for services, and most of the time, didn't even know that an agent had been involved?
- How can SBA prevent borrowers from paying agents that they pay directly without disclosing the payment?
- CPAs seem to be "preying" on borrowers, i.e., charging a substantial fee and then saying the lender MUST pay it no matter what. What can be done about that?

**<u>POST-DISBURSEMENT SERVICING/LIQUIDATION:</u>**

- What does a lender have to do to report to SBA that a loan has been disbursed? Will the usual 1052 reporting process be used for that purpose?
- What is the process for lenders to be paid the origination fee provided for in the statute?
- How soon can lenders expect payments to be made to lenders?
- After the 6 month deferment period, are we required to go to monthly interest payments or could we collect the interest at maturity or at forgiveness of the principal?
- Will all lenders be required to report the status of PPP loans each month via the 1502 process used for regular 7(a) loans?
- Do lenders report PPP loans to the credit bureau in the same way that they are required to report regular 7(a) loans
- When will SBA provide guidance regarding its loan servicing requirements for loans with balances that are not forgiven?
- Since PPP loans have no collateral and there are no personal guaranties, will SBA expect lenders to attempt any collection from PPP loan borrowers that default on the unforgiven balances of their loans?
- Will PPP loans be included in Lender OCRM review/Will they impact PARRIS ratings?

- Thinking ahead, will lenders be able to refinance any balances remaining on PPP loans as part of a regular 7(a) loan made for other purposes, or will these loans always be made to stand-alone?
- Does SBA expect that lenders will re-amortize loan balances remaining after the application of any forgiveness to extend the maturity of the note beyond the initial two year maturity?
- Will new lenders authorized only to make PPP loans be required to follow the same servicing requirements as regular 7(A) lenders?
- See “Forgiveness” section for questions regarding advance purchase from lenders.