NATIONAL ASSOCIATION
OF GOVERNMENT GUARANTEED LENDERS

July 27, 2020

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

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

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

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

Dear Speaker Pelosi, Majority Leader McConnell, Minority Leader Schumer, and Minority Leader McCarthy:

As Congress progresses through negotiations to craft the fourth package of legislation responding to the needs of the country during the ongoing COVID-19 pandemic, I would like to shed light on the conversations that the National Association of Government Guaranteed Lenders (NAGGL) has been having with the hundreds of lenders on the frontlines of delivering access to capital to America's small business borrowers, including through the Paycheck Protection Program (PPP). My hope is that with a clear understanding of the needs of both borrowers and lenders, as experienced at ground zero in the race to keep America's Main Streets open, we can help you better understand the priorities that need to be at the heart of the small business component of the fourth package. Otherwise, the financial institutions of this country will have very real and warranted concerns that the PPP and other legislative opportunities intended to provide access to capital for small businesses will not serve the country's needs in the way that was envisioned.

The first set of issues we must address in the fourth package are the persistent, over-arching policy concerns regarding the PPP that have resulted from the implementation of the program. While the intent of the PPP as drafted set up one set of expectations and directives for both borrowers and lenders, the guidance for and implementation of the PPP has deviated drastically from that starting point. To date, program guidance consists of 22 Interim Final Rules (IFRs), 49 Frequently Asked Questions (FAQs), and various other notices and forms, some of which are contradictory of each other and statute. This piece-meal information still fails to give borrowers or lenders a full picture of the rulebook and has resulted in a program riddled with confusion and uncertainty. Borrowers are uncertain how to follow the zig-zagging rules and therefore apprehensive to participate in any further extension of PPP, lenders are unable to help as they are just as unsure, and there continue to be more questions than answers as to how any borrower achieves forgiveness or how any lender ensures their institution is not exposed to damaging risk.

Of course, NAGGL understands that speed was a priority in order to respond effectively to the pandemic and ensure borrowers were helped quickly. And we understand that speed can sometimes mean that not every aspect of standing up a new program will be perfect—there will always be some delays and corrections to guidance throughout any undertaking like the PPP. That practical reality is not the concerns that we present here on behalf of lenders. Rather, the concerns we are referring to are flawed and substantive policy decisions made by Treasury and SBA that round after round of implementation have stayed constant and deliberate, and guidance that continues to subvert statutory intent.

For example, in the *CARES Act*, architects of the PPP told lenders that they were to be conduits of loans that were to be structured as grants, without traditional underwriting or analysis of the borrower's repayment ability, and meant to be forgiven as long as the borrower complied with certain requirements to keep Americans employed. Lenders had the capital and the network to distribute the funds, and were charged to simply deliver aid that would later be repaid to them by the government through the forgiveness process. However, lenders learned in late May, after making over $500 billion in PPP loans, that Treasury reversed the foundational premise for lenders regarding their role in verifying borrower applications 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. Bizarrely, this presents an inherent conflict of interest requiring the lender to issue determinations on which loans were forgiven and which loans were not, a flawed outcome that NAGGL has continued to make the architects of the program aware of and which should never exist. From our conversations with lenders, it is clear that they never understood forgiveness determination to be their role and the government should want to ensure that the original expectations of lenders merely being a conduit, not an arbiter of government forgiveness, is honored. This late May reversal also included the shocking announcement that the government could claw back any fees lenders earned in making such loan based on any future determination of whether the loan was eligible based on eligibility criteria that has constantly changed.

These are just some of the issues that have arisen during PPP implementation. For months, NAGGL has discussed and presented potential solutions to Congress to address the over-arching policy issues borrowers and lenders continue to face. And while they warrant thoughtful approaches, these issues are by no means impossible problems to solve. Some of the solutions merely involve clarifying Congressional intent that was never appropriately addressed during the early stages of the *CARES Act* implementation.

Absent comprehensive fixes to these policy issues, many lenders have either slowed down PPP lending or ceased to make PPP loans altogether after determining that their risk-based institutions can no longer take on the very real risk of uncertain program parameters since they have no real understanding of how and when they will be made whole after expending $500 billion of their own capital. Ultimately, what good is a relief program if the entities called upon to deliver it are no longer confident in participating? We see this very concern from lenders no longer comfortable with participating in PPP expressed by the fact that there remains approximately $130 billion in unused program funds. The PPP could be the cornerstone of the legacy of how this country responded to the economy in the midst of COVID-19, but we must address these underlying broken elements of PPP in order to ensure the program helps the millions of American workers it was intended to serve. Lenders are saying publicly that if these foundational issues with PPP implementation are not appropriately addressed, they cannot see easily participating in any future expansion, extension, or second draw of PPP, nor could they participate in a new program without first understanding how to address the current outstanding debt for both borrowers and lenders in the PPP. And, lenders would certainly have enormous hesitation about participating in a new program if program guidance was not provided in its entirety up front to avoid a repeat of PPP implementation.

To address the over-arching PPP policy issues, a fourth package must:

- Require comprehensive guidance on all aspects of the PPP;
- Strengthen hold harmless provisions for lenders to clarify the lenders' role and liability;
- Require SBA to pay fees to lenders for loans that were disbursed regardless of a future determination of eligibility based on changing eligibility rules;

- Streamline forgiveness for loans $150,000 or less that would prescriptively detail that no application and no documentation would be required by the borrower;
- Clarify the lender role for loans $150,000 or less to be defined as needing to review for completeness and submit to SBA, but allow the lender to rely on a certification from the borrower that it used the PPP loan in the way the law required without requiring the lender to verify or certify any application or documentation;
- Simplify forgiveness for loans more than $150,000 up to $350,000 that would prescriptively detail that a simplified one-page application would be required to be submitted by the borrower, but specifically detail that no documentation would be required;
- Clarify the lender role for loans more than $150,000 up to $350,000 to be defined as needing to review for completeness and submit to SBA, but allow the lender to rely on a certification from the borrower that it used the PPP loan in the way the law required without requiring the lender to verify or certify any application or documentation;
- Amend 1106 (g) to remove misleading information that lenders have any "decision" to make on forgiveness applications to address the inherent conflict of interest in lenders determining which loans it will receive forgiveness payments on;
- Address the agent fee issue by clarifying that lenders must only pay an agent if they directly contract with that agent;
- Cement in statute that borrowers may elect to apply prior to the end of the recently extended 24 week covered period;
- Clarify the credit elsewhere confusion by ensuring the certification for the borrower in Section 1102 (G)(i)(I) is in sync with the statutory waiver of credit elsewhere Section 1102 (I);
- Allow for "reinstatement" of PPP loans if the borrower repaid its loan and now wants to reapply, or if the borrower decreased the loan size and now wants to increase it (and has the proper justification/documentation to do so);
- Address the taxability issue in Section 1112 to clarify that no amount of payments provided shall be included in the gross income of the borrower for tax purposes;
- Extend both the length of Section 1112 payments and the period of time for new loans to be eligible for Section 1112 payments in order to utilize the full appropriations provided for those payments; and
- Clarify that loans are eligible for Section 1112 payments based on the date on which the loan was approved by SBA, and not the date the loan is fully disbursed, although the full payments of principal, interest, and other associated fees shall not begin until the loan is fully disbursed, regardless of that date.

In addition, there are numerous technical issues that persist in the underlying *CARES Act* that NAGGL has flagged for the architects of the legislation since mid-March that need to be addressed in the fourth package. While it may seem that these are now mere minor details and that the programs created by the *CARES Act* have moved far past any technicalities in the original legislation through subsequent guidance that may have determined a particular interpretation, allow me to dispel that assumption. While some of the technicalities identified by NAGGL since March were handled appropriately in guidance as the IFRs and FAQs attempted to interpret the technical issues presented by statute, seasoned SBA lenders understand too well, unfortunately, that when they follow SBA guidance that does not comply perfectly with statute, years later they can still be questioned as to why both lenders and SBA were not in compliance with law. In some cases, the SBA's Office of the Inspector General has called the lender's guaranty into question if lenders complied with Agency guidance that was later deemed not to comply with law. Once again, while we understood the need for speed in drafting the *CARES Act*, now, four months later, we are still waiting for the kind of easy, common-sense clean-up that was promised would come in the aftermath of the *CARES Act* passage.

To provide the technical fixes to *CARES Act* that are needed, a fourth package must:

- Clarify bifurcation of FY20 7(a) appropriation cap and PPP appropriation to safeguard against any future changes;
- Ensure all requirements outlined in Section 1102 apply to the life of the loan, not just "During the covered period";
- Match all eligible use of proceeds with eligible forgivenesses so that borrowers cannot be automatically strapped with debt if they comply with the law's outline of eligible uses of proceeds in Section 1102 that are not in the list of eligible forgivenesses in Section 1106;
- Clarify the ability for a seasonal borrower to elect *any* 12-week period during a lookback period, as well as broaden that lookback period in order to capture the months during which many seasonal borrowers around the country are operating;
- Clarify language in Section 1102 (Q) to reflect that a borrower may receive an EIDL and PPP loan as long as they are for different purposes, as the current language continues to suggest that this was not permitted after April 3rd;
- Clarify the period of time at which point lenders are paid the processing fees by SBA to be 5 days after the *reported* disbursement of loans to acknowledge the proper time frame based on the date on which SBA actually receives its first notice that the loan has been disbursed;
- Clarify language outlining the necessary documentation for sole proprietors, independent contractors, and self-employed borrowers to acknowledge that the forms of business structures have different IRS filing requirements;
- Clarify non-recourse language to include all eligible uses of proceeds (e.g. refinancing of EIDL loans) to provide the same protections to borrowers if they elect to refinance an EIDL loan as permitted by Section 1102; and
- Define the use of "same purpose" as used in Section 1102 (G)(i)(IV) "Borrower Requirements—Certification" and in Section 1109 (f) to permit a borrower to receive a subsequent 7(a) loan for the same purpose as long as it is not for the same purpose during the same time period.

Finally, Congress must turn its attention to long-term recovery through tried and true enhancement provisions to the 7(a) loan program that we know stimulate lending and prove to help the economy recovery in past crises. This is universally the SBA lenders' number one priority. We cannot make the misjudgment of assuming that the PPP or other new products will answer every small business borrower's needs in the wake of this pandemic. The SBA has a not so secret weapon in the permanent fixture that is the 7(a) loan program, a program specifically designed to help the small business borrowers that fall through the cracks of being able to access capital in the conventional marketplace. The 7(a) loan provides long-term funding for virtually every business purpose with a maximum maturity of up to 25 years, thus providing payments that will put less stress on borrowers' cash flows. According to SBA's most recent weekly volume reports, SBA reported $340.004 million in 7(a) loan approvals in the week ending in July 17, 2020. Since February 15, 2020, which *CARES Act* marks as the start of the covered period of PPP loans, 7(a) loans have totaled $7.628 billion (as of July 17, 2020). In other words, 7(a) lending is very much alive, steadily serving borrowers even in the midst of the PPP's peak volume, and is being utilized as *the* tool to bring small businesses through the storm on a long-term basis.

In the recent June 25, 2020 report from GAO, titled "Opportunities to Improve Federal Response and Recovery Efforts," which detailed the state of the economy and the Congressional response in the immediate aftermath of the *CARES Act*, data outlining the indicators of small business credit market conditions showed clearly that the conventional markets are actively receding from the small business community in these

difficult times[1]. It is widely understood that this unfortunate trend will only continue in the months to follow. As we have seen in the aftermath of the Great Recession, the 7(a) loan program will likely be the only game in town for many small businesses. However, in the aftermath of the Great Recession, Congress took proactive steps to ensure that the long-term 7(a) loan program was properly set up to aid in economic recovery by arming it with several stimulus provisions that resulted in proven and significant jumps in loan volume. In fact, in FY09, gross 7(a) loan volume was roughly $9.3 billion, in FY10 it was roughly $12.4 billion, and by FY11 it was roughly $19.8 billion. The enhancements provided to the 7(a) loan program on a short-term basis, such as an increased guaranty and fee waivers, clearly spurred small business lending during one of the economy's greatest times of need.

In addition, we understand that Congress has the monumental task of considering how much the country should continue to spend in subsequent packages, a concern shared by many. It should be noted that according to the FY21 Federal Credit Supplement (FCS) published by the Office of Management and Budget, the original subsidy estimate for the stimulus provisions for the 7(a) General Business Loan Guarantees was 3.10 in FY09 and 4.23 in FY10, which were then reestimated in FY21 to have a cost of 3.63 for FY09 and 2.11 for FY10 (a significant downward reestimate for this FY, showing the provisions were far less expensive than originally anticipated). There were also stimulus provisions that were extended and the FY21 FCS shows an original subsidy estimate for those to be 4.23 in FY10 and 5.48 in FY11, which were then reestimated in FY21 to have a cost of 1.58 for FY10 and 0.32 for FY11 (significant downward reestimates for *both* FYs, showing the provisions were far less expensive than originally anticipated). These are fairly good precedents to refer to in attempting to gauge a relative cost of the same enhancement provisions for the 7(a) loan program today. In comparison to these single digit subsidy estimates- sometimes even under 1.0, the PPP subsidy estimate is over 100. This is understandable as the PPP has a forgiven element provided by the government. However, if the task ahead is for Congress to provide long-term recovery measures that are cognizant of overall spending, then these tried and true enhancement provisions fit that requirement perfectly.

Fortunately, the Small Business Committees in both the Senate and House have been discussing the need for these same 7(a) loan program stimulus provisions since early March. In fact, NAGGL sent a letter of support on March 12, 2020 applauding Chairman Rubio's serious action plan to bring back these same enhancement provisions used in the aftermath of the Great Recession to today's 7(a) loan program in the *Immediate Measures to Protect Against COVID-19 Threats (IMPACT) for Small Businesses Act of 2020*. While these measures ultimately were not included in the final version of the *CARES Act*, the architects of that first package acknowledged to lenders that they would come back to these critical provisions that had been widely agreed upon in the subsequent legislative packages that would focus more on recovery. The time is now for those provisions to be authorized. We cannot continue to kick the can down the road on the kinds of common-sense recovery solutions that would allow businesses to gain stability in the coming months.

The 7(a) enhancement provisions that lenders have called for over the past four months that need to be addressed in a fourth package include:

- *All the following for a period of 2 years*:
    - Complete waivers of all program fees (upfront and ongoing guaranty fees) for borrowers and lenders;
    - Increased guaranty;
    - Increased deferment flexibility for both sold and unsold loans, especially to put deferment flexibility for sold loans on par with the same flexibilities for unsold loans;

[1] GAO Report: "Opportunities to Improve Federal Response and Recovery Efforts,"GAO-20-625: Published: Jun 25, 2020. Publicly Released: Jun 25, 2020. https://www.gao.gov/products/gao-20-625

- Increased 7(a) authorization cap (*note: the Secondary Market Guarantee Program authorization cap was sufficiently increased in CARES Act through September 30, 2021 in Section 1107*); and
- Extension of increased loan size for Express loans established in *CARES Act* which expires on January 1, 2021.

I understand the monumental task ahead while competing approaches are sorted and various stakeholders voice conflicting concerns. However, thousands of financial institutions stepped up to the plate to serve as the conduit for the federal government to deliver hundreds of billions of their own capital to borrowers across the country. They did this on an emergency basis without knowing the rules and yet fully aware of the myriad of risks involved to their institution given the lack of clarity. The lenders deserve great credit in making the PPP and other elements of the *CARES Act* possible at all. If Congress does not take the time to listen to the collective voices of these lenders—the same lenders Congress now intends to call upon *again* to potentially continue delivering more aid through extensions or even new products at the lenders' own expense and risk—then Congress will have gravely missed the mark.

The lenders that NAGGL represents are calling for practical clarity and fixes to both PPP and the traditional 7(a) loan program to better serve small businesses. If the goal is to put together a thoughtful package to address the current challenges in this economy, the priorities and concerns of those we are asking to do battle on the frontlines cannot be ignored. Thank you for your consideration of these critical issues.

Sincerely,

Tony Wilkinson
CEO and President, National Association of Government Guaranteed Lenders (NAGGL)

Cc:
The Honorable Marco Rubio
The Honorable Ben Cardin
The Honorable Nydia Velázquez
The Honorable Steve Chabot