

May 11, 2020

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

RE: Comments in Response to SBA Notice of Interim Final Rules "Business Loan Program Temporary Changes; Paycheck Protection Program," SBA-2020-0015 (April 15, 2020)

Dear Madam Administrator:

On behalf of the National Council of Nonprofits, I submit these comments in response to SBA Notice of Interim Final Rules "Business Loan Program Temporary Changes; Paycheck Protection Program" (SBA-2020-0015).

The National Council of Nonprofits (www.CouncilofNonprofits.org) is a trusted resource that advocates for America's nonprofits nationwide. Through its network of state associations of nonprofits and 25,000-plus member charitable nonprofits, faith-based groups, and foundations – the nation's largest network of nonprofits – the Council of Nonprofits serves as a central coordinator and mobilizer to help nonprofits achieve greater collective impact in local communities across the country. It identifies emerging trends, shares proven practices, and promotes solutions that benefit charitable nonprofits and the communities they serve.

Charitable nonprofits employ more than [10 percent of the nation's private workforce](#), which is more than the finance, construction, and even manufacturing industries. The vast majority of nonprofits are small to midsize: 97 percent have annual budgets of \$5 million or less, and for 92 percent it is \$1 million or less. Our nation's people are relying on many of these local charitable nonprofits far more than usual during the response and relief phases to the COVID-19 health and economic crises, and that reliance will only grow in the recovery period ahead (as well as response and relief for any second and third waves of the disease).

Our organization has worked vigorously to develop informational materials to help charitable organizations interpret the resources Congress made available to them under the CARES Act.¹ In the six weeks since the establishment of the Paycheck Protection Program (PPP) within the Small Business Administration, state associations of nonprofits and the National Council of Nonprofits have provided trainings for tens of thousands of nonprofit professionals across the country. Each training identified areas of confusion and concern, and we have received thousands of questions from nonprofit leaders seeking advice. These real-life, current concerns and questions from frontline nonprofits are the framework for the following comments and recommendations.

Summary of Comments and Recommendations

- **Eligibility:** Expand nonprofit access to "alternative size standards" on equal basis as for-profit businesses and agricultural concerns.
- **Calculating Maximum Loan Amounts:** Appreciation for recognizing unique nature of nonprofit accounting and documentation.

¹ See, for example, [Analysis of the Coronavirus Aid, Relief, and Economic Security Act \(CARES Act\) \(Pub. L. 116-136\)](#) and [Loans Available for Nonprofits in the CARES Act](#). See also [How Nonprofits Can Utilize the New Federal Laws Dealing with COVID-19](#), *Nonprofit Quarterly*, Mar. 26, 2020.

- **Maturity Date:** Reject decision to impose a two-year maturity date as based on an unrealistic expectation of economic recovery and replace with a longer maturity date.
- **“First-Come, First Served” Promise:** Delete Question M and the answer (“yes”) as false given the extensive reports of smaller nonprofits and businesses being forced to the back of the line as lenders gave priority to preferred customers in violation of the Interim Final Rule.
- **Need for Nonprofit PPP Data:** Immediately publish state-by-state and national data on nonprofit applications, loans granted, loan amounts and averages, and more.
- **Payment of Principal and Interest:** Extend due date for first payments of principal and interest to one year, recognizing that the proposed start date of six months will occur for most borrowers at a time when scientists expect a second wave of COVID-19 cases and disruptions.
- **Loan Forgiveness:** Reject the “75%/25%” payout rule as arbitrary, capricious, and contrary to the will of Congress.
- **Certifications:** Alter the good-faith certification of “necessity,” delete reference to the “75%/25%” payout rule, and clarify that payments on pre-existing debt are forgivable.
- **Need for Nonprofit-Specific Guidance:** Issue guidance providing clarity on unique questions related to charitable nonprofit operations, such as “ownership,” applicability of “alternative size standards,” and impact of government grants and contracts.

Comments on the Interim Final Rule

The close of this public comment period for the initial Interim Final Rule comes six weeks after the opening of the Paycheck Protection Program to loan applications. In the time since these interim regulations were released, Treasury and SBA have issued additional rules and guidance, and published 45 answers to frequently asked questions. While we recognize that time has been and continues to be of the essence in advancing this vital lifeline to charitable nonprofits, small businesses, and millions of employees, the often confusing and conflicting edicts from the government are disruptive and unsettling. Most notably, the SBA openly warns that the [“Frequently Asked Questions”](#) (FAQs) it has been updating on a near-daily basis regarding the PPP loans are merely informal and the “document does not carry the force and effect of law independent of the statute and regulations on which it is based.” It is inappropriate to force innocent people endeavoring to follow the law passed by Congress to guess on something as serious as potential fraud. Therefore, Treasury and SBA must issue legally binding regulations as soon as possible.

The National Council of Nonprofits offers the following comments that track the question-and-answer format of the Interim Final Rule, beginning at Section III, “2. What do borrowers need to know and do?” Our comments address only some of the identified questions.

A. AM I ELIGIBLE?

The Interim Final Rule explains that charitable nonprofits are eligible for PPP loans if they have 500 or fewer employees, (i) are 501(c)(3) organizations, and (ii) were in operation on February 15, 2020 and had paid employees or paid independent contractors. SBA has broadened the eligibility requirements for some for-profit business entities, but not for nonprofits. Specifically, the [SBA’s Frequently Asked Questions](#) (FAQs) guidance provides that “a business can qualify for the Paycheck Protection Program as a small business concern if it met both tests in SBA’s ‘alternative size standard’ as of March 27, 2020: (1) maximum tangible net worth of the business is not more than \$15 million; and (2) the average net income after Federal income taxes (excluding any carry-over losses) of the business for the two full fiscal years before the date of the application is not more than \$5 million.”

Despite repeated requests that SBA clarify that the “alternative size standard” is also available to charitable organizations, none has been forthcoming. Yet, in late April, SBA added a new FAQ #34, declaring that “agricultural producers, farmers, and ranchers can qualify for PPP loans as a small business concern if their business meets SBA’s ‘alternative size standard.’”

As a matter of fairness, it is incumbent upon Treasury and SBA to modify the Interim Final Rule as well as SBA's FAQs to ensure that charitable nonprofits are entitled to qualify for PPP loans under the "alternative size standard." This would mean that charitable organizations with more than 500 employees could still qualify based on a demonstration of net worth of \$15 million or less and average annual net income of \$5 million or less, or an equivalent measure more appropriate to how nonprofit budgets are structured.

E. HOW DO I CALCULATE THE MAXIMUM AMOUNT I CAN BORROW?

The five-step methodology and examples for calculating maximum amounts that applicants can borrow are helpful and appreciated. Although not connected to this rulemaking, we take this opportunity to express our appreciation for SBA's guidance, [How to Calculate Maximum Loan Amounts – By Business Type](#), issued on April 24, 2020. This document reflects a conscious attempt by SBA to streamline the application process and help borrowers complete the sometimes-complex calculations of payroll and other costs. Answers to Questions 6 and 7 are noteworthy because they identify the precise line items from the specific and unique tax forms that 501(c)(3) and religious institutions complete. We thank SBA for this real-world guidance.

J. WHAT WILL BE THE MATURITY DATE ON A PPP LOAN?

The Interim Final Rule proposes just a two-year maturity from the date the borrower applies for loan forgiveness. This is well short of the ten-year maturity authorized under the CARES Act. The proposed rule asserts that "a two year loan term is sufficient in light of the temporary economic dislocations caused by the coronavirus." It goes on to say that "the considerable economic disruption caused by the coronavirus is expected to abate well before the two year maturity date such that borrowers will be able to re-commence business operations and pay off any outstanding balances on their PPP loans." We respectfully and strenuously disagree, as do government officials, business leaders, medical professionals, and economists throughout the country.

By all estimations, the impact of the disease on the lives of its victims, on the health care system, and on the U.S. economy is far worse than Congress anticipated in March 2020 when crafting the emergency-response loan program known as the PPP. Congress sought to get money into the hands of charitable nonprofits and small businesses as quickly as possible to prevent layoffs and retain employment for eight weeks in April, May, and June 2020, to get those employers through the presumed nadir of the economic downturn. Based on those presumptions, a two-year maturity date and commencement of repayment (see comments to Question N, below) may have seemed reasonable. Those presumptions are no longer valid.

The economy has lost more than 33 million jobs so far, with the unemployment rate skyrocketing to a level that wasn't seen even during the Great Depression. A [survey of more than 8,000 small-business owners](#) – conducted between March 28 and April 20 – and analyzed by economists from Yale, Princeton, and Oxford, found, "business owners' expectations about the future are negative and have deteriorated throughout our study period, with 37% of respondents in the first week reporting that they did not expect to recover within 2 years, growing to 46% by the last week." White House health advisor Anthony Fauci has repeatedly stated that [we may never get back to "normal"](#) after this pandemic, suggesting that life and the economy will be forever altered. On May 10, senior Administration officials acknowledged that unemployment will get worse before it gets better.

With such stark realities confronting the nation for a longer period of time, we strongly urge Treasury and the SBA to change the maturity to ten years, as authorized in the CARES Act. In the alternative, maturity should be pegged to an objective standard of recovery, such as two years after a return to pre-pandemic economic activity.

M. IS THE PPP "FIRST-COME, FIRST-SERVED?"

The Interim Final Rule offers a one-word answer to this question: "Yes." While we recognize the good intention of the SBA that the loan program should be fair for all, the data, analyses, and reports from the

frontlines prove this statement false. Regardless of good intentions, the truth is that priority was given by some lenders to preferred customers, which left out customers without those prior relationships. Nonprofits and smaller employers appear to have been shoved to the back of the line due to factors unrelated to CARES Act criteria. The problems with bias in the PPP system were so great that Congress changed the allocation of subsequent funding for the PPP to prioritize lenders perceived to be more likely to process loans to entities left out of the first round. See Paycheck Protection Program and Health Care Enhancement Act (Pub. Law 116-139) Section 101(d).

Since the “first-come, first-served” declaration is demonstrably false, we encourage Treasury and SBA to change the answer to “no,” or to delete the question from the Interim Final Rule, and take additional steps to ensure equitable access to the program for nonprofits and small employers, particularly those owned by or serving communities of color.

The Need for Nonprofit PPP Data

This opportunity for public comment should not pass, however, without a renewed request for data about the experience of charitable nonprofits in seeking loans under the Paycheck Protection Program. [SBA regularly provides updates](#) on lender size, approved loans, and approved dollars. It has released state-specific data and information based on generic industries for [Round One](#) and [Round Two](#) (through May 8) under the program. To date, SBA has steadfastly refused to release any information on efforts of nonprofits to secure PPP loans. SBA must release data showing, on both a state-specific and national basis, the number of charitable organizations that have sought PPP loans, the dollar amounts sought, the rates that loans have been issued and declined, the duration of the application and approval process, along with comparisons of this data to the experience of similarly sized for-profit businesses. The data should be readily available and accessible because the very first item on SBA’s PPP [Borrower Application Form](#) is a series of boxes for the borrower to check, including a box designated “501(c)(3) nonprofit.” The online form does not seek identification of the organization’s North American Industry Classification System (NAICS) code number, but the information initially released by SBA aggregated data based on NAICS subsectors, such as construction, retail trade, and “other services.”

The data is imperative to inform policymakers about the efficacy of the program, evaluate the equitable treatment of nonprofits in the administration of the program, ensure the well-being of the organizations the program is intended to help, and promote transparency at all levels and in all branches of government. The refusal to disclose this readily available information is troubling. The National Council of Nonprofits strongly urges the Administration to release data on the experiences of charitable nonprofits in the PPP process so that all can evaluate whether nonprofits have been treated to a last-come, last-served, if-at-all policy.

N. WHEN WILL I HAVE TO BEGIN PAYING PRINCIPAL AND INTEREST ON MY PPP LOAN?

The interim rule proposes that borrowers must begin making payments on PPP loans six months after disbursement of the loan funds. As acknowledged in the proposed rule published in the Federal Register, the CARES Act authorizes the SBA Administrator and Treasury Secretary to defer loan payments for up to one year. We have already pointed out in comments to Question J (Maturity), above, that the pandemic that brought about the need for the PPP and other drastic actions is not likely to recede as quickly as originally thought. Indeed, [scientists have warned that a second wave](#) of COVID-19 could be worse because it may coincide with the traditional flu season in the fall. If anything, COVID-19 and the economic havoc it wreaks will likely be raging in September and October when payments on most PPP loans would commence pursuant to the Interim Final Rule. We urge Treasury and SBA to reject the six-month commencement date for paying of principal and interest, and to adopt the one-year rule envisioned by Congress in the CARES Act.

O. CAN MY PPP LOAN BE FORGIVEN IN WHOLE OR IN PART?

The Interim Final Rule seeks to codify in regulation an arbitrary and potentially harmful 75%/25% rule for loan forgiveness. The CARES Act expressly lists allowable uses of covered loans, identifying payroll,

salaries, and benefits costs, as well as four types of other costs: interest on mortgage obligations, rent, utilities, and interest on other pre-existing debt obligations. The statute makes no value or business judgment as to which costs are to be given priority. This makes perfect sense because of the very wide range of services and businesses eligible to apply for the PPP. Despite these statutory and economic realities, Treasury and SBA announced that borrowers spending more than 25 percent of loan proceeds on rent, mortgage, utilities, and interest payments on pre-existing debt will be penalized by not receiving the loan forgiveness guaranteed by Congress.

The 75%/25% rule has been controversial since its announcement. In its recent [Flash Report on Implementation of the Paycheck Protection Program Requirements](#), the SBA's Inspector General urged recognition that many small businesses have more operational expenses than employee costs. The IG found, "Our review of data from round one [of PPP loans] found that tens of thousands of borrowers would not meet the 75-percent payroll cost threshold and would therefore have to repay the amount of nonpayroll costs in excess of 25 percent in less than 2 years."

We certainly support the notion of keeping employees employed. Indeed, many charitable organizations with access to resources are hiring additional employees to address the enormous demand for their services in communities resulting from the health and economic impacts of COVID-19. Congress, however, did not impose the new restriction in the Interim Final Rule, perhaps because Congress recognized the need for each of the millions of small employers – for-profit and nonprofits alike – to make their own decisions about the future of their missions.

We believe this standard is arbitrary, capricious, and contrary to the will of Congress and urge Treasury and SBA to delete it from the Interim Final Rule.

T. WHAT CERTIFICATIONS NEED TO BE MADE?

The Interim Final Rule, as well as the loan application, lists eight certifications that the borrower's representative must make in good faith. Some of these certifications raise questions of administrative authority that must be addressed or require additional clarification, as discussed herein.

The first certification (i) simply identifies the sole considerations for eligibility under the PPP, i.e., that the borrower was in business on February 15, 2020 and had employees or paid independent contractors. CARES Act Section 1102(F)(ii)(II).

The second certification (ii) relating to "necessity" has been and will continue to be the subject of much scrutiny, criticism, and perhaps litigation. The certification paraphrases language in the CARES Act and states: "Current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant." While the National Council of Nonprofits recognizes and supports the targeting of PPP loans to nonprofits and other entities suffering due to the pandemic, we believe interpretations of this one certification have been cobbled together after news reports of perceived abuses by publicly traded business enterprises with easy access to credit (e.g., Ruth's Chris' Steak House and the LA Lakers). We do not believe bad news stories can be the basis for administrative rules imposed retroactively to change legal interpretations of the CARES Act as enacted by Congress.

Congress directed that borrowers must make good faith certifications when they apply for PPP loans based on their sense of uncertainty about how the economic conditions are likely to affect ongoing operations. There are many factors – some common, others unique – that will impact an organization's decision to seek the loan. From the charitable nonprofit perspective, those considerations include, but are not limited to, the ability or inability to perform mission-related services; whether increased demands for services responding to COVID-19 will increase its costs or elimination of demand (e.g., inability to host performing arts or teach pre-school) will cut off revenues; additional costs of operating in a virtual workplace; experiences in operating during natural disasters, the Great Recession, and other economic disruptions; experience operating under government grants and contracts during difficult economic times (e.g., late

payments, late contracts, increased costs associated with the imposition of extra-contractual duties and monitoring); curtailed unrelated business activities; lost or uncertain fundraising opportunities; and the likely inability to raise sufficient funds in an environment in which all other similarly situated charitable organizations are seeking resources from the same philanthropic pool.

Similarly, nonprofits and small businesses may experience changed circumstances between the time of application and receipt of loan funds or when seeking loan forgiveness. Any safe harbors must recognize the uncertainty that nonprofits and small businesses were facing when they applied for PPP loans. They should not have held against them subsequent positive developments, such as contracts or grants that were not anticipated at the time of application. It would also be unreasonable to base a determination of “necessity” on investment returns for 2019 – an historically strong year – when previous years were unstable or less positive. Further, as SBA has already acknowledged in [FAQ #40](#), a borrower’s loan forgiveness should not be penalized when a laid-off employee declines an offer of rehire.

While we recognize that Treasury and SBA are seeking to develop safe harbors, perhaps including some of the foregoing, to reduce anxiety, we caution that overly broad statements and threats by high-ranking government officials are detrimental to the nonprofit and business communities.

The third certification (iii) reiterates the CARES Act requirement that “funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments.” The text in the Interim Final Rule, however, inserts the extra-statutory mandate that “not more than 25 percent of loan proceeds may be used for non-payroll costs.” As discussed previously, we doubt the legal authority to impose this arbitrary restriction and urge Treasury and SBA to remove the mandate and the quoted text.

Certifications four (iv) and five (v) relate to documentation needed to secure loan forgiveness. The list of required materials – “the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities” – omits reference to “interest payments on any other debt obligations that were incurred before the covered period.” As made clear in CARES Act Section 1102(F)(i)(VII) and in the answer to preceding question, “r. How can PPP loans be used?,” payment of interest on pre-existing debt obligations is a legitimate usage of PPP loans and appropriately subject to loan forgiveness under CARES Act Section 1106. We believe the failure of the Interim Final Rule to expressly include this statutorily recognized expense in the list of those eligible for forgiveness may lead some lenders or SBA auditors to inappropriately reject legitimate claims of borrowers. Therefore, we request that SBA add reference to pre-existing debt obligations to list in these certifications.

The Need for Nonprofit-Specific Guidance

We acknowledge, without criticism, that the SBA has little experience in working with charitable organizations. As a result, nonprofits are confronting numerous challenges and almost universal frustrations as they try to maneuver through the PPP application process. Part of the problems arise out of the historic focus on for-profit businesses and how they are structured. Other questions arise based on unique operating models that SBA likely has never encountered in administering loan programs.

In these comments, we formally ask Treasury and SBA to issue guidance pertaining to eligibility and implementation issues specific to nonprofits. Charitable nonprofits urgently need official guidance on many fundamental questions, including the following:

- The application form – designed for for-profit enterprises – asks the applicant to disclose their percentage of “ownership” of the business. How should nonprofits answer the question pertaining to “owner” since they do not have private owners and are instead dedicated to the public good?
- Can nonprofits be eligible under the alternative size standard? (see comments to Question A, above, regarding eligibility).
- Governments at all levels frequently hire nonprofits to deliver a wide variety of services and typically pay nonprofits on a reimbursement basis. How are jobs funded under government grants

and contracts to be counted in the eligibility headcount and for loan forgiveness, and does it matter whether the source is federal versus state or local governments? How should nonprofits treat payroll expenses for such jobs when prior experience during the Great Recession showed that governments were paying up to a year or more late?

- In many instances, charitable organizations and houses of worship establish additional mission-focused activities, such as pre-schools and food pantries, that operate independently yet exist for IRS purposes under a single employer identification number. Can multiple nonprofit operations that share an EIN be considered for separate loans under the program?

This, of course, is not an exhaustive list of questions nonprofits have raised during the numerous webinars and other trainings state associations of nonprofits and the National Council of Nonprofits have conducted over the past six weeks. They do reflect common themes and are representative of the unique nature of nonprofit operations and legal realities. We urge Treasury and SBA to issue answers to these and other questions as soon as possible to promote certainty and reduce burdens and excessive costs on borrowers, lenders, and government officials. Should you have questions about how nonprofits operate, we will be happy to secure answers for you.

Conclusion

As stated previously, the National Council of Nonprofits recognizes the difficulty of the duties imposed on Treasury and SBA – accelerating the distribution of hundreds of billions of dollars through thousands of lenders to millions of charitable nonprofits and businesses. The urgency of the pandemic demanded the highest level of alacrity, commitment, and professionalism. By most measures, staff at Treasury and SBA have performed their public service ably. Your service is greatly appreciated.

We thank you for considering these comments and recommendations, and stand ready to work with you, Congress, and all committed to serving the public good to build the best Paycheck Protection Program and other supports that will help residents of our country get through this crisis and promote a vibrant and equitable economic recovery.

Sincerely,



David L. Thompson
Vice President of Public Policy