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March 5, 2021

Mr. Curtis Rich
Agency Clearance Officer
U.S. Small Business Administration
409 3rd Street SW, 5th Floor
Washington, DC 20416

Re: Solicitation of Additional Public Comments on SBA Form 3509 (OMB Control Number 3245-0407)

Dear Mr. Rich:

In response to this solicitation, the Associated General Contractors of America (“AGC”) is pleased to add the following to the comments that it submitted to the Small Business Administration (“SBA”) on Form 3509 on November 25, 2021.

AGC is the leading trade association in the construction industry. It represents more than 27,000 companies, a number that includes more than 6,500 of the nation’s leading general contractors and over 9,000 specialty-contracting firms. To better serve and support AGC members at the state and local level, AGC also has 88 chapters that stretch from Puerto Rico to Hawaii. AGC members construct public and private buildings, including offices and apartment buildings, hospitals, laboratories, schools, shopping centers, factories and warehouses. AGC members also construct public and private infrastructure, such as highways, bridges, tunnels, dams, airports, industrial plants, pipelines, power lines, and both clean water and wastewater facilities. For statistical purposes, some of these projects are considered residential but it remains extremely rare for AGC members to engage in the construction of single-family homes.

In short, AGC believes that SBA Form 3509 requires substantial revision. As currently written, this form either misapprehends the certification that it targets or seeks to stack new requirements on top of that certification. Instead of asking the questions that the certification logically raises, the form asks for information that will rarely if ever enable the agency to assess whether a borrower made that certification in good faith.

Background

The well-defined place to begin is the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”),¹ which created the Paycheck Protection Program (“PPP”). In the process, this legislation set the original standards for eligibility for PPP loans.² For example, it provided that, “in addition to small business concerns,” the firms

¹ Pub. L. 116-136.

² AGC recognizes that Congress has reauthorized and amended the original program several times. The Paycheck Protection Program and Health Care Enhancement Act (Pub. L. 116–139) provided additional funding and authority for the program. The Paycheck Protection Program Flexibility Act of 2020 (Pub. L. 116–142), changed

eligible for such loans would include any firms with 500 or fewer employees or “if applicable, the size standard in number of employees established by [SBA] for the industry in which the business concern . . . operates.”³ The preexisting foundation for the PPP program was the SBA’s Section 7(a) Program.⁴ Distinguishing the PPP from the Section 7(a) Program, the CARES Act also provided, *inter alia*, that the latter’s “requirement that a small business concern is unable to obtain credit elsewhere . . . shall not apply to a [PPP] loan.”⁵

More to the point, the CARES Act required “[a]n eligible recipient” to certify “that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient.”⁶ The SBA loan application paraphrases the statute, requiring the applicant to certify that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” Notwithstanding some potentially significant differences in the way these two certifications are worded, AGC will, for the sake of convenience, refer to either or both of them as the “Certification.”

At the heart of the continuing debate and even litigation over Form 3509 lies the unfortunate but undisputed fact that the CARES Act did not spell out the role that Congress intended “economic uncertainty” to play in any review of a borrower’s Certification. Nor did it define either “support” or “ongoing” operations. And to date, SBA has yet to provide any meaningful guidance. Both Congress and SBA have left the meaning of these critical words and phrases, and the very purpose of the Certification, both vague and open ended.

As if intended to acknowledge that fact, SBA’s interim final rule on eligibility for PPP loans and other fundamentals of the program makes only vague references to “the required certification concerning the necessity of the loan request,”⁷ and “the borrower’s certification regarding the necessity of the PPP loan request.”⁸ SBA’s interim final rule specifically on loan forgiveness does not even mention the Certification. On that subject, the rule is silent.

In a series of Frequently Asked Questions (FAQs) that SBA has posted on its website, SBA has said more about the Certification. But SBA got off to a slow start, and since then, it has made poor use of its opportunities to provide meaningful guidance. By April 23, 2020, when SBA posted its first FAQ on the Certification, 32% of all of the successful applicants for PPP loans in all of 2020 had already submitted their loan applications.⁹ By May 1, 2020, that number had climbed to 42%.¹⁰ And by May 16, 2020, that number had climbed to 49%.¹¹ When the relevant FAQs did begin to appear, they provided little real guidance, and in fact, they raised at least as many

several key provisions, including provisions relating to the maturity of PPP loans, the deferral of PPP loan payments, and the forgiveness of PPP loans. Public Law 116–147 extended the authority for SBA to guarantee PPP loans to August 8, 2020. The Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (Pub. L. 116–260) reauthorized lending under the PPP through March 31, 2021, and among other things, modified provisions related to making PPP loans and forgiveness of PPP loans. Suffice it to note that none of this subsequent legislation modified the certification that Form 3509 purports to address, or shed any new light on its meaning or purpose.

³ Pub. L. 116–135, §1102(a)(2) (codified at 15 U.S.C. §636(a)(36)(D)).

⁴ 15 U.S.C. §636(a).

⁵ Pub. L. 116–136, §1102(a)(2) (codified at 15 U.S.C. §636(a)(36)(I)).

⁶ Id. (codified at 15 U.S.C. §636(a)(36)(G)(i)(I)).

⁷ 86 Fed. Reg. 3692, 3701 (January 14, 2021).

⁸ Id., at 3709.

⁹ See PPP Data, U.S. Small Business Administration, <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program/ppp-data#section-header-2> (last visited March 3, 2021). By that same date, 84% of the construction contractors that successfully applied for loans of over \$2 million (in all of 2020) had already submitted their loan applications. SBA Paycheck Protection Program Loan Level Data, U.S./ Department of the Treasury, <https://home.treasury.gov/policy-issues/cares-act/assistance-for-small-businesses/sba-paycheck-protection-program-loan-level-data> (last visited March 5, 2021).

¹⁰ Id.

¹¹ Id.

questions as they answered. In hindsight, they may have marked the beginning of the troubling process that culminated in Form 3509, but they accomplished little more. They were not the product of a notice and comment rulemaking, or any subject matter expertise that SBA can reasonably claim to possess. They came from an agency well-conditioned to carefully control and limit access to its Section 7(a) Program. And the consequences are now clear.

The Meaning of the Certification

At the time they applied for their PPP loans, nearly one-third of the successful applicants for PPP loans in 2020 had nothing more than words of the Certification to guide them. Turning to the words, AGC would agree that they do require borrowers to make the business judgment that something is “necessary.” But that fact merely begs the critical question. Just what is the something that borrowers had to consider necessary? The answer begins with “economic uncertainty” and then travels down an uncertain path to “support” for “ongoing” operations. While it remains difficult to say much more, the words do lay down a few markers.

First, the Certification renders it clear that “economic uncertainty,” and not something else, had to be the factor that made a loan “necessary to support the applicant’s ongoing operations.” It was not cash flow or liquidity, or any other financial metric, that had to serve as the starting point. Nor was it any insight into how the pandemic would actually affect the borrower in the weeks, months or years following its application for a loan. Rather, it was evidence that justified a reasonable doubt about how the pandemic would play out, and perhaps reason to fear that it would turn out badly.

Second, the Certification postulates a causal relationship between that “economic uncertainty” and what the loan applicant reasonably, and in good faith, believed to be “necessary.” The Certification does not directly provide any guidance on the nature or the severity of the “economic uncertainty” that it intends to require. But it does proceed from the entirely reasonable premise that economic uncertainty has a direct bearing on a loan applicant’s risk of economic harm. The Certification makes sense only if economic uncertainty, economic risk, and what borrower could reasonably believe to be “necessary to support [its] ongoing operations,” all have a direct and positive relationship with each other. Financial metrics and other factors may be relevant to an after-the-fact review of a borrower’s certification. But SBA cannot evaluate such things in a vacuum and without regard to the worst-case scenario that a borrower had to contemplate. Clearly analogous circumstances could well justify one borrower’s Certification but not another’s, depending on the nature and the degree of the “economic uncertainty” confronting each of them.

Third, the definitions of “support” are both many and varied. Excluding the definitions that are obsolete, archaic or simply rare, the Oxford English Diction (OED) defines “support” twenty-nine different ways.¹² In the context of the CARES Act, Congress could have meant the word to denote a loan that is necessary “[t]o preserve [ongoing operations] from failure,” or very differently, to denote a loan that will merely “contribute to the success of” such operations.¹³ The Merriam-Webster Dictionary (“Meriam-Webster”) teaches the same lesson. It defines “support” in fewer ways, but the number still totals fourteen. Relying on its definitions, Congress could have meant the word to denote a loan that was necessary to provide . . . for the existence” of ongoing operations – or loan that would merely “serve as a . . . prop” for such operations, “at a desired level.”¹⁴ Thus, an applicant for a PPP loan could have correctly read “support” to refer to a loan that fell far short of a *sine qua non* of its ongoing operations. An entirely reasonable applicant, acting in good faith, could have correctly read the Certification to

¹² *Support*, Oxford English Dictionary, <https://www.oed.com/view/Entry/194674?isAdvanced=false&result=2&rskey=CiQWc6&> (last visited Feb. 11, 2021).

¹³ *Id.*

¹⁴ *Support*, Merriam-Webster’s Dictionary, <https://www.merriam-webster.com/dictionary/support>, (last visited Feb. 11, 2021).

refer a loan that would merely contribute to the success of its ongoing operations, or prop them up, or help ensure they continued at a desired level.

Finally, the OED defines “ongoing” to mean as little as “continuing” and as much as “developing.”¹⁵ In a similar fashion, Meriam-Webster defines “ongoing” to mean as little as “as actually in progress” and as much as “growing.”¹⁶ Thus, with equal force, the reference to “ongoing” operations denotes (i) merely stable or even decreasing levels of activity and (i) growing levels of activity. And of course, the word says nothing about the duration of such activity, for the definitions make no reference to any period of time, whether weeks, months, years. An applicant for a PPP loan could have correctly read “necessary to support ongoing operations” to mean a loan necessary to support growing levels of activity, and not for just weeks or months, but for years, and certainly, for the duration of the economic downturn that the pandemic triggered.

In sum, the level of the economic uncertainty that a loan applicant was facing at the time it applied for its loan is the proper place for any review to begin. From that perspective, and no other, one must ask whether the borrower could have reasonably, and in good faith, believed that a loan would prop up its ongoing operations, and help it continue to operate at least at the level necessary to forego furloughs or layoffs for the full duration of the economic downturn that the pandemic triggered. As SBA reviews applications for loan forgiveness, and the Certification that borrowers made at the time they applied for their loans, the agency cannot lawfully require evidence of any greater “need.”

The Purpose of the Certification

Stepping back from the words of the Certification, and taking its several ambiguities into account, one can readily see that it is less intended to require loan applicants to meet a particular standard than to make a judgment call. A simple analogy will illustrate the point. Without looking, any pedestrian can step off a curb and into a street without suffering harm. Indeed, in today’s distracted world, it seems to happen every day. But it does not make the practice safe. A prudent pedestrian will always pause at the curb and at least quickly look around. Are any cars coming? If so, how close are they, and how fast are they traveling? And what are the lighting and road conditions? Is it dark? Is it raining? Is there a stop sign or traffic signal? Is the crosswalk marked? Quickly and even unconsciously but just as certainly, a prudent pedestrian will always entertain these questions and assess his or her risk of stepping off the curb, and potentially, into traffic.

At the end of the day, the same kind of risk assessment is all that the Certification reasonably required of borrowers. The Certification did not require them to calculate their “economic uncertainty,” or what was ultimately “necessary” to “support” their “ongoing operations,” in any objective way. Nor did it manifest that purpose. Rather, it had the apparently intended effect of requiring applicants to make a prudent assessment of their risks before applying for a loan. What were the leading economic indicators telling borrowers about the economy, and about their individual industries? What were they hearing from their customers and clients? What were government officials saying? How did all of that information square with the particulars of their companies? What were their worst-case scenarios? Could they handle those scenarios without a PPP loan? Could they handle those scenarios, and without such a loan, but only by depleting resources they did or might need for other important purposes? And specifically, would it be more prudent to simply furlough or lay off employees? If the purpose and the only foreseeable effect of the words of the Certification were one and the same, then the purpose of the Certification was merely to require such a risk assessment.

¹⁵ *Ongoing*, Oxford English Dictionary, <https://www.oed.com/view/Entry/131429?isAdvanced=false&result=3&rskey=p379FM&> (last visited Feb. 11, 2021).

¹⁶ *Ongoing*, Merriam-Webster’s Dictionary, <https://www.merriam-webster.com/dictionary/ongoing> (last visited Feb. 11, 2021).

Congress could not mandate that employers retain their employees. Congress could only hope to influence their assessments of their individual risks. Properly understood, the purpose of the Certification was merely to require such an assessment, in good faith.

The SBA's FAQ's on the Certification

As time went by, SBA's FAQs on the Certification went beyond the statute and the SBA's interim final rules. But again, SBA posted the very first of these FAQs only after many borrowers had already signed and submitted their applications. By April 16, nearly one-third of the successful applicants for PPP loans in all of 2020 had already signed and submitted their Certifications. By May 15, 2020, that number had climbed to almost 50%. And the FAQs, when they finally appeared, did little to dispel the confusion surrounding the Certification. Indeed, if anything, they increased it.

SBA's posted its first two FAQs on the Certification on April 23, 2020, and April 28, 2020. They were FAQs #31 and #37.¹⁷ The first one asked whether "businesses owned by large companies with adequate sources of liquidity to support the businesses ongoing operations qualify for a PPP Loan." It answered:

[A]ll borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and the PPP regulations at the time of the loan application. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in section 3(h) of the Small Business Act), borrowers still must certify in good faith that their PPP loan request is necessary.

* * *

Borrowers must make this certification in good faith, 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.

* * *

Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.

The second FAQ asked essentially the same question: "whether businesses owned by private companies with adequate sources of liquidity to support [their] ongoing operations qualify for a PPP loan," and then referred the reader back to FAQ #31 for the answer.¹⁸

SBA posted its third FAQ on the Certification on April 29, 2020. It was FAQ #39,¹⁹ and in substance, it added nothing. This FAQ merely reminded borrowers of their Certifications and then announced that SBA would "review all loans in excess of \$2 million, in addition to other loans as appropriate" in order "[t]o further ensure PPP loans are limited to eligible borrowers in need."

¹⁷ See FAQ for Lenders and Borrowers, U.S. Small Business Administration, <https://www.sba.gov/document/support-faq-lenders-borrowers> (last visited March 3, 2021).

¹⁸ Id.

¹⁹ Id.

SBA posted its fourth FAQ on the Certification on May 5, 2020. It was FAQ #43²⁰ and it also neglected to add anything of any substance. Indeed, it merely announced that SBA it was extending its safe harbor for early repayment from May 7, 2020 to May 14, 2020.

SBA posted its fifth FAQ on the Certification on May 13, 2020. It was FAQ #46, and it asked: “How will SBA review borrowers’ required good-faith certification concerning the necessity of their loan request?” The answer to this promising question was, however, disappointing. While the answer touched on many things, the answer was not responsive to the question that SBA had presented. It began by announcing that that SBA was creating a second safe harbor, in this case, for “[a]ny borrower that, together with its affiliates, received PPP loans with an original principal amount of less than \$2 million.” The FAQ then explained that “borrowers with loans below this threshold are generally less likely to have access to adequate sources of liquidity in the current economic environment.” In the process, the FAQ also seemed to acknowledge that one of the program’s policy objectives is to “promote economic certainty” and that another is to help borrowers “retain and rehire employees.” Later, the FAQ expressly acknowledged that “borrowers with loans greater than \$2 million . . . may still have an adequate basis for making the required good faith certification, based on their individual circumstances” And last, the FAQ referred back to SBA’s earlier announcement that “all PPP loans in excess of \$2 million, and other PPP loans as appropriate, will be subject to review by SBA for compliance with program requirements set forth in the PPP Interim Final Rules and in the Borrower Application Form.”

SBA returned to the FAQ for a sixth time also on May 13, 2020, when it posted FAQ #47.²¹ The purpose and effect of that FAQ were, however, limited. The FAQ merely extended the agency’s first safe harbor (for early repayment) from May 14, 2020, to May 18, 2020.²²

SBA returned to the FAQs for its seventh and last time on December 9, 2020, when it posted FAQ #53. SBA began by asking itself “[w]hy” some PPP borrowers “are . . . receiving” Form 3509. The agency answered:

The information that borrowers provide on the questionnaire will help SBA assess those borrowers’ [Certification].

* * *

SBA’s assessment of a borrower’s [Certification] will be based on the totality of the borrower’s circumstances through a multi-factor analysis. As described in FAQ #46, SBA will assess whether the borrower had adequate basis for making the required good-faith [Certification], based on its individual circumstances in light of the language of the [Certification] and SBA guidance. This [Certification] is required to have been made in good faith at the time of the loan application, even if subsequent developments resulted in the loan no longer being necessary. In its review, SBA may take into account the borrower’s circumstances and actions both before and after the borrower’s certification to the extent that doing so will assist SBA in determining whether the borrower made the statutorily required certification in good faith at the time of its loan application.

* * *

After a borrower submits its completed questionnaire, SBA may request additional information, if necessary, to complete its review. When additional information is requested, borrowers will have an opportunity to provide a narrative response to SBA explaining the circumstances that provided the basis for their good-faith loan necessity certification.

* * *

²⁰ Id.

²¹ Id.

²² Id.

This targeted, multi-step approach will ensure the integrity of the evaluation process and expeditious processing

The most obvious and glaring problem with these FAQs is that they made no reference, of any kind, to “economic uncertainty.” Nevertheless, such uncertainty was and is the starting point for the Certification. It was such uncertainty, and not something else, that had to make a loan “necessary to support the applicant’s ongoing operations.” The Certification proceeds from the unmistakable and entirely reasonable assumption that economic uncertainty has a direct bearing on a loan applicant’s risk of economic harm, and ultimately, the “support” it may “necessary” to “support” its “ongoing operations.” Rather than ignore the very subject of the sentence that is the Certification, SBA should have provided useful guidance on how the agency would be evaluating the nature and scope of the economic uncertainty that weighed upon a borrower at the time it applied for its loan.

Second, the FAQs neglected to address the meaning of either “support” or “ongoing” operations. Instead, they characterized what was “necessary” in vague and varied ways that actually added to the confusion. FAQ #31 advised loan applicants to take “their current business activity and their ability to access other sources of liquidity” into account, allowing only that this ability need not be so limited that forgoing a loan would be “significantly detrimental.” FAQ #46 suggested that applicants evaluate their “access to adequate sources of liquidity in the current economic environment,” and that adequacy somehow relates to “economic certainty” and “retain[ing] and rehiring employees,” but then asserted that everything depends, in the end, on “individual circumstances.” FAQ #53 doubled down on that last proposition, explaining that SBA’s “assessment of a borrower’s [certification] will be based on the totality of the borrower’s circumstances through a multi-factor analysis,” and for good measure, on “individual circumstances.” FAQ #53 seemed to add that SBA will not reject a certification simply because “subsequent developments resulted in the loan no longer being necessary,” but then it allowed that “SBA may take into account the borrower’s circumstances and actions both before and after” the borrower applied for its loan, as if the two would carry equal weight.

These vague and varied formulations raised more questions than they answered. How were borrowers supposed to evaluate their “current business activity”? How were they supposed to assess their “ability to access other sources of liquidity”? When was something bad enough to be “significantly detrimental”? And just what were “adequate” sources of liquidity? Would that be “adequate” to provide “economic certainty,” or to “retain and rehire employees,” or some combination of the two? How were borrowers supposed to evaluate the “totality of their circumstances,” including “circumstances and actions both before and after” they applied for their loans – even after allowing that “subsequent developments” would not be enough to disqualify them for their loans? What was this “multi-factor analysis”?

The CARES Act did not spell out the role that Congress intended “economic uncertainty” to play in any review of a borrower’s Certification. Nor did it define either “support” or “ongoing” operations. And to date, SBA has yet to provide any meaningful guidance on any of these things. The agency’s interim final rule on eligibility for PPP loans and other fundamentals of the program makes only vague references to “the required certification concerning the necessity” of a loan, and SBA’s interim final rule specifically on loan forgiveness does not even mention the Certification. As the program rolled out, borrowers had only the wording of the certification to guide them, and as the program continued, they had little more, and perhaps even less. The SBA’s FAQs did address the certification, but in the process, they merely added to the confusion.

Form 3509

SBA has an obligation to protect the integrity of the Paycheck Protection Program. The agency would be well within its rights to require applicants for forgiveness of large PPP loans to explain how they assessed their risks, including the factors they considered, before they applied for their loans. SBA would be equally correct to require

borrowers to explain how their loans changed their employment decisions. To AGC's great regret, Form 3509 does nothing of the kind.

As noted, SBA's interim final rules and its FAQs make no reference, of any kind, to "economic uncertainty." Following suit, the Form 3509 neglects to ask any questions about the scope or nature of the economic uncertainty that weighed on a borrower at the time it applied for its PPP loan. Nor does the form ask how the loan affected the borrower's plans. The form does not even notify borrowers that their economic uncertainty is a factor that SBA must consider – or reflect, in any way, that the "central purposes" of the CAREs Act were to "keep[] workers paid and employed."²³ Rather, the form proceeds from the premise that such uncertainty is irrelevant and neglects to ask any questions about how it affected the borrower's employment decisions. These glaring omissions suggest that SBA has wrongly concluded it that it can disregard these critical factors. It is not enough for the form to broadly declare that SBA will base its determination on the "totality of the circumstances."

The form begins with a set of five questions about "Business Activity" that followed the date on which the borrower submitted its applications for its PPP loan. The first three may be the most alarming:

- SBA opened the PPP program on April 3, 2020, and 49% of the successful applicants for PPP loans in all of 2020 had submitted their applications by the end of the following May. Nevertheless, the form begins by asking borrowers about their gross revenue for the entirety of the second quarter of 2020.
- Then-President Trump issued his National Emergency Declaration on COVID-19 on March 13, 2020, or just twenty-one days before SBA began to accept application for PPP loans. Nevertheless, Questions 2 and 3 ask the borrower about government shutdowns from the date of the president's declaration to and through the date on which the borrower completes Form 3509.

For the vast majority of the successful applicants for PPP loans in 2020, the answers to these questions were neither known nor knowable at the time they submitted their applications for their PPP loans. Quite to the contrary, the answers to these questions were among the many things that reasonable borrowers were uncertain at the time they made their Certifications. Construction contractors had no way to know, for example, whether public or private project owners would delay or cancel projects, or subcontractors would continue to work, or suppliers could meet their delivery deadlines, or construction workers would find it difficult or even impossible to work. Contractors had no way to know what would happen in each and all of the jurisdictions where they were constructing projects. They had no way to know whether state or local governments would recommend or even require testing, distancing or personal protective equipment, or how such measures would impact their workers' productivity. They had no way to know whether any, some or all of these jurisdictions would deem any, some or all construction to be "essential," permitting it to continue.

In addition, and perhaps more importantly, the answers to these first three questions shed no light on whether borrowers made their Certifications in good faith. Borrowers did not purport to predict the course that the pandemic would take, how it would affect their gross revenue, or the way that state and local governments would respond to the crisis. Borrowers merely certified that they were uncertain of the future and that a PPP loan would help them to make and implement plans to retain all of their employees.

Questions 4 and 5 are equally irrelevant. They ask the borrower whether it "voluntarily" ceased, reduced or otherwise altered its operations anywhere between March 13, 2020, to the date on which the borrower completes the form. As a threshold matter, "voluntarily" is a loaded adverb that suggests borrowers were free to do whatever they pleased, without regard to the guidance that the Centers for Disease Control or other public health agencies were providing, or how that guidance changed over time, or the Occupational Safety and Health Act (which

²³ 86 Fed. Reg. 8283, 8285 (February 5, 2021).

requires them to provide their employees with a workplace free of recognized hazards), or their risk of tort liability to anyone who contracted COVID-19 on their worksites. Appropriately, the form might ask borrowers about any firm decisions they had already made, at the time they applied for their loans, to cease, reduce or otherwise alter their operations, and possibly, their answers to those questions could shed some light on whether they made their certifications in good faith. The form does not, however, ask about any decisions already made.

Question 6 targets on capital improvements, asking the borrower whether it began any new capital improvement projects not due to COVID-19. The most fundamental problem is that the answer to that question says nothing about the “economic uncertainty” that the borrower faced at the time it applied for its loan. Nor does it shed any light on the reasons why the borrower concluded the loan was necessary to “support” its “ongoing operations.” The most that a decision to begin new project would suggest is that the pandemic had played out, and the economy had performed, better than the borrower had expected. Before SBA could begin to reach any relevant conclusions, it would have to gather many other facts. What impact did the decision have on the borrower’s plan for avoiding furloughs and layoffs? Did the decision leave the borrower in a better, or at least the same, position to do so? Was the project one that the borrower had scheduled before the pandemic hit? What would have been the direct and opportunity projects of delaying or cancelling the project?

After raising these questions about “Business Activity,” the form asks twelve questions about “Liquidity.” While all twelve are troubling, AGC will only address seven of them. The reason is that very few construction contractors are publicly traded companies or have private equity owners, either in whole or in part. Even fewer are affiliated with foreign, state owned enterprises. In addition, AGC believes that all of these contractors are among the very biggest in the construction industry. AGC does have doubts about these several questions, for they do not logically grow out of the CAREs Act. Nevertheless, AGC will leave it to others to comment on them.

Before turning to the remainder of the questions in the “Liquidity” section of the form, AGC will also pause to observe that the CARES Act did not require loan applicants to demonstrate that their liquidity fell below any particular level, either abstractly or in the context of their specific industries or operations. Logically, a borrower’s liquidity at the time it applied for its loan could bear on the *bona fides* of the risk assessment that the Certification required the borrower to make. But whether and how it had an effect would depend on a host of other factors, beginning with the scope and nature of the economic uncertainty that the borrower faced.

The form begins its inquiry into the borrower’s “Liquidity” by asking “how much” the borrower had “in cash and cash equivalents” on “the last day of the calendar quarter” preceding their application for a loan. The problem is that the cash the borrower had on hand on that one day says nothing about its financial condition and even less about the *bona fides* of its certification. That one day was a mere instant in time, and the cash the borrower had on hand reveals nothing about its liquidity. Indeed, cash and liquidity are two very different things. Without additional information on the other components of the borrower’s working capital, such as the borrower’s accounts payable, its cash on hand says nothing at all. In addition, an even accurate calculation of a borrower’s liquidity would have limited relevance, for liquidity remains far more than an end in itself. A substantial amount of liquidity is something that all borrowers are likely to require simply to meet their banks’ standards and maintain their credit ratings. A substantial amount of liquidity is something that construction contractors also require to maintain their bonding capacity and otherwise to prequalify for future work.

The second question in this section of the form is a question about dividends and other capital distributions. The form asks the borrower whether it made any such payments to its owners between March 13, 2020, and the date on which the borrower completes the form – and if so, how much those payments totaled. The most fundamental problem with that question is a familiar one: the answer says nothing about the “economic uncertainty” that the borrower faced at the time it applied for its loan, or provides any insight into the reasons why the borrower concluded the loan was necessary to “support” its “ongoing operations.” At most, such payments would suggest that the pandemic had played out, and the economy had performed, better than the borrower had expected. Before SBA could begin to reach any relevant conclusions, it would have to gather many other facts. How frequently

and when had the borrower made such payments in the past? How did these particular payments fit into that picture? Was this an owner that had paid little attention to the borrower's balance sheet or one that had consistently sought to strengthen it? One of the great ironies of SBA's approach to the Certification is that it rewards owners who have consistently drained the financial reserves out of their companies and punishes owners who have consistently sought to build them up.

Question 3 is a similar one, and its most fundamental problem is one that it shares with others. The form asks the borrower whether it made any prepayments on any outstanding debts between March 13, 2020, and the end of its loan forgiveness covered period – and if so, how much those prepayments totaled. Such prepayments would not, however, say anything about the “economic uncertainty” that the borrower faced at the time it applied for its loan. Nor would they shed any light on reasons why the borrower concluded that the loan was necessary to “support” its “ongoing operations.” The most that such payments would suggest is that the pandemic had played out, and the economy had performed, better than the borrower had expected. Before SBA could begin to draw any relevant inferences, it would need to know much more about the debts that the borrower had prepaid and how the prepayments had affected the borrower's balance sheet and/or operations. What was the impact on the borrower's cash flow and liquidity going forward? Did the prepayments help the borrower maintain or even improve its credit ratings? In the case of a construction contractor, SBA would also have to know whether the prepayments helped the borrower maintain or even improve its bonding capacity, or made it possible for the borrower otherwise to prequalify for the work it would need to avoid either furloughs or layoffs. Good credit ratings, bonding capacity and strong balance sheets are absolutely necessary for construction contractors. They are necessary both to control costs and to win future work.

Questions 4 and 5 ask the borrower about compensation for employees and owners, respectively. The form asks the borrower whether it compensated any employees or owners, respectively, at an annualized rate exceeding \$250,000 during its loan forgiveness covered period. Depending on the answers, the form also asks follow-up questions. Standing alone, the answers to those questions are as irrelevant as the preceding questions about capital improvements, dividends, capital distributions and any prepayments of any outstanding debt. In addition, the figure itself is both arbitrary and capricious. It has no roots and any provision or purpose of the CARES Act, much less the Certification. And it is blind to several other factors. It is blind to the supply of or demand for the knowledge skills and abilities of anyone paid at or above the selected figure. It is blind to the opportunity costs for any owners, who have to decide how to allocate their finite time and resources. Further, it is blind to location. The selected figure means one thing in Memphis, Oklahoma City and Omaha and quite another thing in New York, San Francisco and Los Angeles.

Question 8 asks about book value. If the borrower is a private and not a public company, the form asks it to provide its book value on “the last day of the quarter” preceding its application for a PPP loan. As noted earlier, with regard to the question about cash on hand, that one day was, of course, a mere instant in the life of the borrower. And, like liquidity, a substantial book value is something that all borrowers are likely to require simply to maintain their credit ratings and that construction contractors also require to maintain their bonding capacity and otherwise to prequalify for future work. Like the question about dividends and other capital distributions, the question about book value also underscores the great irony of SBA's approach to the certification. The question rewards owners who have consistently drained the financial reserves out of their companies and punishes owners who have consistently sought to build them up.

The last question that AGC will address is whether the borrower “directly receive[d] any funds from any CARES Act program other than PPP, excluding tax benefits?” In this instance, the most obvious problem is that the statute did not declare firm's ineligible for PPP loans simply because they received such funds. And of course, the answer has no direct implications for the *bona fides* of the borrower's Certification. The form's follow-up questions do not even ask whether the borrower won approval for such funding before or after it applied for its PPP loan. The answers to these questions come nowhere close to ruling out the possibility that the borrower reasonably, and in good faith, believed that a PPP loan would prop up its ongoing operations, and help the borrower continue to

operate at least at the level necessary to forego furloughs or layoffs for the full duration of the economic downturn that the pandemic triggered.

One Construction Contractor's Story

One AGC member recently took the time to tell the association the story of its PPP loan – which turned out to exceed \$2 million. The story is among the many similar stories that SBA should be encouraging borrowers to tell the agency, for they provide the context that SBA requires to assess whether borrowers made their Certifications in good faith. Regrettably, these stories are also among the important things that Form 3509 greets with great indifference. To illustrate how badly the form misses the mark, AGC will simply recount the facts surrounding this one loan:

- The borrower is a middle market construction contractor that normally employs 140 to 150 individuals.
- It self-performs a significant amount of its work, and for that reason, many of its employees are full-time craft workers.
- It must provide payment and performance bonds for many of its projects. The surety that writes these bonds requires the borrower to maintain in excess of \$5,000,000 in working capital. The surety will not write bonds for the borrower if it fails to maintain that amount of working capital.
- The borrower was one of the very first to apply for a PPP loan. The borrower took that step in early April of 2020, as the pandemic hit, and the economy took a nosedive. At the time, whole sectors of the economy were shutting down.
- The borrower applied for and received a PPP loan of \$2.1 million, based on the information that the loan application had provided, the guidance that SBA had published and what the borrower knew about the CARES Act.
- In reliance on the loan, the borrower consistently made the decisions necessary to retain its employees and to ensure they got their 40 hours each week. For example:
 - The borrower increased the amount of work that it self-performed, accepting the related risks.
 - To keep them working full time, the borrower used highly skilled and better paid craft workers to perform less challenging and even menial tasks.
 - When owners delayed or cancelled projects, the borrower stacked additional employees onto its ongoing projects.
- The borrower also recognized that many of its craft workers had two-income families and that, in many cases, the pandemic's impact on the second-income earner had been severe. In response, the borrower funded an increase in paid medical coverage to include full family coverage for its nonexecutives for several months.
- Recognizing that its craftworkers and other field personnel had faced great challenges, the borrower also funded an appreciation bonus for its craftworkers and other project team members.
- Not to comply with any government mandates, but simply to protect its employees, the borrower continuously altered its work practices as and to the extent necessary to comply with CDC and other health guidelines, and in accordance with best industry practices.

Regrettably, Form 3509 would lead one to believe that most or all of this information is irrelevant. The form allows that SBA will consider the “totality of the circumstances,” but quickly, it heads off in a different direction. In the process it sends the unmistakable signal that SBA has little interest in the way that borrowers used their PPP loans to meet the goals of the larger program. Rather than ask about such things, the form asks borrowers to demonstrate that they had accurately predicted the future, to report any decisions they had “voluntarily” made to cease, reduce or alter their operations, and to report (i) how much cash they had on hand at the close of the preceding quarter, (ii) any dividends they had paid, (iii) any loans they had prepaid, and (iv) whether they had paid anyone more than a sum plucked from thin air. Rather than ask borrowers to explain the scope and nature of the economic uncertainty they had faced, or to outline the strategies that their PPP loans had enabled them to

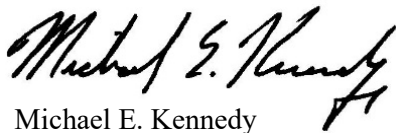
pursue, the form also asks borrowers for their book value, and whether they had received any funds from any other CARES Act programs.

Conclusion

AGC appreciates that the PPP is a large program that SBA had very little time to launch. AGC also appreciates that the original design of the program had some unintended consequences. At the same time, AGC considers it inappropriate and ultimately unlawful for SBA to use the Certification in ways that Congress never intended – and borrowers had no way to anticipate. For these and all of the preceding reasons, AGC urges SBA to make substantial changes to Form 3509, and ultimately, to ensure that the form reflects the actual Certification, and not what SBA might wish it to provide.

AGC would be more than pleased to meet with SBA at its convenience to address any follow-up questions that the agency may have.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael E. Kennedy". The signature is stylized with a large, sweeping "M" and a long, horizontal stroke extending to the right.

Michael E. Kennedy
General Counsel