



Robert C. Lanham, Jr, President  
Dan K. Fordice, III, Senior Vice President  
Lester C. Snyder, III, Vice President  
Jeffrey L. DiStefano, Treasurer  
Stephen E. Sandherr, Chief Executive Officer  
Jeffrey D. Shoaf, Chief Operating Officer

May 15, 2020

The Honorable Jovita Carranza  
U.S. Small Business Administration  
409 3rd Street SW  
Washington, D.C. 20024

**RE: Comments in Response to SBA Notices of Interim Final Rules:**

1. **“Business Loan Program Temporary Changes; Paycheck Protection Program” Docket No. SBA–2020–0015 (April 15, 2020); and**
2. **“Business Loan Program Temporary Changes; Paycheck Protection Program” Docket No. SBA–2020–0019 (April 15, 2020)**

Dear Administrator Carranza:

On behalf of the Associated General Contractors of America (AGC), thank you for the opportunity to comment on these U.S. Small Business Administration (SBA) interim final rules (IFR) implementing the Paycheck Protection Program (PPP). Amid the outbreak of the novel coronavirus (COVID-19) and the devastating human and economic impacts it has wrought; these loans have served as a critical lifeline for many of the construction firms AGC represents and the employees those members employ.

AGC is the leading association for the construction industry, representing both union and open shop prime and subcontractor/specialty construction companies. AGC represents more than 27,500 firms—a majority of which are small businesses of 500 or fewer employees—including over 6,500 of America’s leading general contractors and over 9,000 specialty-contracting firms. More than 10,500 service providers and suppliers are also associated with AGC, all through a nationwide network of 88 chapters in all fifty states, the District of Columbia and Puerto Rico. AGC contractors are engaged in the construction of the nation’s commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, site preparation/utilities installation for housing development, and more.

In the comments below, AGC puts forth the following recommendations for the SBA to address:

- **Ensure Clear Construction Business Eligibility for PPP Loans;**
- **Waive the Affiliation Rules for Construction Business Eligibility for PPP Loans;**
- **Provide Clear Guidance and Reasonable Safe Harbors Regarding the PPP Loan Application Certifications;**
- **Remove Requirement to Dedicate At Least 75% of a PPP Loan to Payroll Costs;**
- **Allow Broad Flexibility for Construction Businesses in Definition of “Payroll Costs”;**

- **Allow for Accrued Costs during the Covered Period;**
- **Eliminate Requirement to Begin Repayment of PPP Loan within Six Months; and**
- **Extend Loan Repayment Period from 2 Years to 5 Years**

### **Ensure Clear Construction Business Eligibility for PPP Loans (IFR Docket No. SBA–2020–0015)**

Early on, AGC and its members identified problematic language in IFR Section III(2) that lead to concern that construction businesses could only qualify for PPP loans as a small business concern (as defined in section 3 of the Small Business Act, 15 U.S.C. 632) using the average annual receipts size standard test. Such an interpretation would foreclose the plain text reading of Section 1102 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act that allows any construction business concern with 500 or fewer employees to participate in the PPP as well as those construction businesses that meet the average annual receipts size standard test, subject to the affiliation rules.

AGC communicated this concern in its April 4, 2020, letter (enclosed) to the SBA Administrator. Ultimately, the SBA and Treasury clarified this concern in question 3 of the Paycheck Protection Loan Programs: Frequently Asked Questions guidance document (herein “FAQ” or “FAQs”).<sup>1</sup> **As such, AGC urges SBA to incorporate the clearly stated answer to question #3 in the final rule.**

### **Waive the Affiliation Rules for Construction Business Eligibility for PPP Loans (IFR Docket No. SBA–2020–0019)**

Small Business Act of July 30, 1953, established the SBA and declared its mission to be to “aid, counsel, assist, and protect . . . the interests of small-business concerns in order to preserve free competitive enterprise.” As our nation, economy and small businesses continue to face the greatest economic disaster since the Great Depression, AGC urges the SBA to adhere to its congressionally mandated mission by preserving free competitive enterprise and the interests of small business, as modified under the Sections 1102 and 1106 of the CARES Act (collectively the “PPP”), by waiving the application of the affiliation rules for construction business eligibility for PPP loans.

A simple understanding of these unprecedented times compounded by the complexities of the affiliation rules alone should compel the SBA to waive them. When the SBA opened the PPP program on April 3, 2020, federal, state and local governments were issuing ever changing pandemic directives that unleashed a powerful storm of economic uncertainty upon the construction industry. Those directives led to construction project shutdowns, slowdowns and cancellations that continue to this day. The PPP loans offered a lifeline to many construction businesses that fit the eligibility criterion of employing 500 or fewer employees. However, some of the businesses did not necessarily qualify—knowing or unknowingly—because of the affiliation rules that the SBA otherwise applies to eligibility for this program.

The SBA’s affiliation rules represent a uniquely federal concept comprised of amorphous and subjective regulations that are contrary to commercial business principles and common sense.<sup>2</sup> The SBA uses these

<sup>1</sup> Available at: <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>

<sup>2</sup> Doug Hibshman, Esq., Federal Contractors’ Guide to Small Business Administration Set-Aside Contracts, Size Standards, Size Protests, and Affiliation, Fox Rothschild LLP (2018) available at:

rules “to determine if individuals or business entities are inextricably linked in such a manner that the individuals/entities should be treated as one.”<sup>3</sup> The affiliation rules are not straightforward or even sensible in the commercial construction industry. Many construction firms share common ownership with parent companies, especially since the “great recession” of the previous decade. For many others, construction is the family business and the family may own several independent legal business entities. Nevertheless, such routine and typical business relationships and legal partitions amid entities in the commercial world are oftentimes deemed impermissible by the SBA as de facto indicators of affiliation.<sup>4</sup>

Add to this that these SBA regulations set forth the general rules of affiliation, recognize numerous exceptions to those rules, and include exceptions that oftentimes swallow the general rules, the room for confusion only grows exponentially.<sup>5</sup> Further, “the application of the affiliation principles is oftentimes inconsistent between the different regional SBA Area Offices.”<sup>6</sup>

To add further complexity to the mix, since passage of the CARES Act on March 27, the SBA and Treasury have collectively issued PPP guidance or regulations that at least include:

- 47 frequently asked questions to serve as guidance that is updated multiple times a week;
- 11 interim final rules; and
- 2 federal agency websites that include varying guidance documents with similarly varying information.

PPP loans represent a lifeline for many construction companies. Over the last seven weeks, these firms have had to interpret constantly changing: (a) federal, state and local pandemic directives to determine with their operations may continue; (b) PPP loan guidance from SBA and Treasury; and (c) the complicated SBA affiliation rules that perplexed even seasoned federal small business attorneys before the creation of the PPP. They have done this while trying to navigate their business operations in a survival mode.

**Understanding the realities of the times, the complexity/subjectivity of these rules and the needs of small businesses, SBA must waive the affiliation rules to help mitigate the sustained construction jobs losses inflicted by the pandemic.**

**If the SBA does not waive the affiliation rules, the agency, at a minimum, should limit their enforcement to clear and convincing cases of affiliation. In addition, the SBA should limit the number of instances where affiliation may be found as reflected in Treasury PPP guidance.<sup>7</sup>**

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<https://www.foxrothschild.com/content/uploads/2017/12/Federal-Contractors-Guide-to-Small-Business-Administration-Set-Aside-Contracts-Size-Standards-Size-Protests-and-Affiliation-Doug-Hibshman-March-2018.pdf>

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> U.S. Department of the Treasury, Affiliation Rules Applicable to U.S. Small Business Administration Paycheck Protection Program, April 3, 2020, available at:

<https://home.treasury.gov/system/files/136/Affiliation%20rules%20overview%20%28for%20public%29.pdf>

## **Provide Clear Guidance on and Reasonable Safe Harbors for the PPP Loan Application Certifications (IFR Docket No. SBA–2020–0015)**

Section “s” of the IFR outlines the penalties for misuse of PPP loans for unauthorized purposes, including charges being brought against the borrower for fraud. Section “t” then outlines the good faith certifications that borrowers need to make on their applications to qualify for the loan.

One of the certifications—specifically that one that states: “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant”—has recently caused much confusion and consternation for borrowers of PPP loans in the construction industry. On April 23, 2020, the aforementioned FAQ document published Question 31, which asked “[d]o businesses owned by large companies with adequate sources of liquidity to support the business’s ongoing operations qualify for a PPP loan?” In response to this FAQ, the document noted that borrowers who make a good faith certification regarding “economic uncertainty” would need to “tak[e] 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.”

On April 29, 2020, AGC sent a letter to Secretary Mnuchin (enclosed) outlining the many concerns of construction firms about the new requirement, added *ex post facto* for many borrowers already through the loan application process, that they would have to take into account, amongst other things, whether they had access to “adequate sources of liquidity to support the business’s ongoing operations” when they applied for a PPP loan. The result of this confusion has caused, according to a recent AGC member survey<sup>8</sup>, as many as 21 percent of respondents to either cancel their applications or return their loan funds, and, in the case of 13 percent of respondents, begin laying off or furloughing employees.

There are many problems that this new requirement presents that are unique to the construction industry in the current environment. Construction is an inherently cyclical industry, generally doing well during economic expansion and suffering losses during economic contractions. Prior to the onset of the COVID-19 pandemic, many construction firms have reported strong balance sheets and access to lines of credit. Construction firms use these financial assets to ensure continuity of operations for construction projects and they are also generally a requirement of their sureties. Without the approval of sureties, construction firms cannot operate. And without strong balance sheets and access to credit, construction firms cannot get approved by their sureties.

Furthermore, while many projects are currently ongoing or finishing up, a multitude of construction firms have reported project cancellations or delays for future projects. Though a diminished or lack of a backlog should easily be categorized as contributing to “current economic uncertainty” for construction firms, if a firm has current ongoing projects, the additional requirement under question 31 that businesses evaluate “current business activity” is extremely concerning.

Economic conditions have significantly deteriorated since the CARES Act was signed into law. While many projected at the time that the economy would be up and running by the end of June, many states and localities have now extended stay-at-home and shutdown order beyond the June 30, 2020, deadline for PPP applications. Construction firms need to prepare now for an extended construction slowdown, and the PPP loan program should acknowledge that fact in regulation.

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<sup>8</sup> Available at [https://www.agc.org/sites/default/files/2020\\_Coronavirus\\_SixthEdition\\_total.pdf](https://www.agc.org/sites/default/files/2020_Coronavirus_SixthEdition_total.pdf)

AGC appreciates the recent guidance provided in FAQ question 46 establishing a safe harbor for borrowers with loans under \$2 million and removing the threat of penalty for larger loans if the borrower is found to be ineligible during SBA review.

**However, SBA and Treasury must clarify in the IFR that construction firms that maintain strong cash reserves and access to credit sufficient to support their ongoing and future operations qualify for PPP loans if sufficient uncertainty exists about future economic conditions. Furthermore, SBA and Treasury must clarify that construction firms that are actively working on current projects, but are sufficiently concerned about future economic uncertainty, are facing future project cancellations, or have otherwise seen a reduction in their construction backlog, will be deemed to have certified in good faith that current economic uncertainty makes their loan request necessary to support ongoing operations.**

### **Remove Requirement to Dedicate At Least 75% of a PPP Loan to Payroll Costs (IFR Docket No. SBA-2020-0015)**

Section 1102 of the CARES Act *allows* a small business to use a PPP loan for payroll costs, rent or mortgage interest payments, utility payments, and a few other uses and leaves to the small business concerned the decision of what portions of the loan to apply to each use.<sup>9</sup> While the CARES Act did not create restrictions on any portions of the loan that needed to be used for payroll, SBA added the requirement that at least 75 percent of the loan proceeds must be used for payroll.<sup>10</sup>

This is an arbitrary requirement that is unfounded under statute and only serves to hamstring the flexibility Congress sought for PPP eligible construction businesses in using these loans. Congress clearly understood, and the statute plainly reflects, that for an eligible construction business with a PPP loan to survive pandemic related impacts and keep its workers paid and employed, these businesses must pay key costs other than payroll costs, such as rent, mortgage interest and utility payments as specified in the CARES Act.

A construction business that no longer has a place to operate because it failed to pay its rent or mortgage payments cannot continue in business, and so it cannot pay its employees. The same goes for utility costs. Congress understood that, for a construction business to survive and pay its employees, the business must pay other costs in addition to payroll. While labor costs are often the highest on any given construction project, they rarely reach 75 percent of projects costs. Significant costs often stem from those associated with needed materials and equipment, among other things. That is why section 1102 leaves it to each borrowing business to decide what proportion of its PPP loan to dedicate to each permissible use.

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<sup>9</sup> Specifically, section 1102 added a new section 7(a)(36)(F) to the Small Business Act (15 U.S.C. 636(a)(36)(F)) that states: “(F) ALLOWABLE USES OF COVERED LOANS.— (i) IN GENERAL.—During the covered period, an eligible recipient may, in addition to the allowable uses of a loan made under this subsection, use the proceeds of the covered loan for— (1) payroll costs; (II) costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums; (III) employee salaries, commissions, or similar compensations; (IV) payments of interest on any mortgage obligation (which shall not include any prepayment of or payment of principal on a mortgage obligation); (V) rent (including rent under a lease agreement); (VI) utilities; and (VCI) interest on any other debt obligations that were incurred before the covered period.”

<sup>10</sup>

The SBA Office of the Inspector General (OIG) agrees with this sentiment, as it found that this IFR and mandate “did not align with the allowable uses requirements for PPP loans” under statute.<sup>11</sup> As the recent SBA OIG report notes, “many small businesses have more operational expenses than employee expenses.”<sup>12</sup>

### **Allow Broad Flexibility for Construction Businesses in Definition of “Payroll Costs” (IFR Docket No. SBA–2020–0015)**

Under Section 1102 of the CARES Act, “payroll costs” are defined as:

- “(AA) salary, wage, commission, or similar compensation;
  - “(BB) payment of cash tip or equivalent;
  - “(CC) payment for vacation, parental, family, medical, or sick leave;
  - “(DD) allowance for dismissal or separation;
  - “(EE) payment required for the provisions of group health care benefits, including insurance premiums;
  - “(FF) payment of any retirement benefit; or
  - “(GG) payment of State or local tax assessed on the compensation of employees; and
- “(bb) the sum of payments of any compensation to or income of a sole proprietor or independent contractor that is a wage, commission, income, net earnings from self-employment, or similar compensation and that is in an amount that is not more than \$100,000 in 1 year, as prorated for the covered period “

The SBA should take a broad view of “payroll” when interpreting what qualifies as payroll costs. The agency has that flexibility under the statute in Subsection AA (“similar compensation”) and subsection EE (“insurance premiums”). Some items that are not explicitly allowed (and also not explicitly disallowed) include: Per Diems; workmen’s compensation; allowances for vehicles, parking, transit benefits, and other transportation costs; union fringe benefits; bonus payments; and short and long-term disability payments. These benefits are inherently tied to “payroll” for many employers, especially in the construction industry. For example, workmen’s compensation policies are often mandated by states for all workers, and employers do not have a choice in paying for it. **As such, AGC recommends that SBA include these costs in its definition of “payroll costs.”**

### **Allow for Accrued Costs during the Covered Period (IFR Docket No. SBA–2020–0015)**

The CARES Act defines the term “covered period” as the 8-week period beginning on the origination date of a covered loan, and the Treasury and SBA issued FAQs state that “[t]he eight-week period begins on the date the lender makes the first disbursement of the PPP loan to the borrower.”

Many employers accrue costs that are not within a set 8-week timeframe. Some common examples of otherwise covered expenses allowed under PPP loan forgiveness that may not be incurred during an 8-week period are: quarterly payments for employee retirement plans or prepayment of rent obligations.

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<sup>11</sup> U.S. Small Business Administration Office of the Inspector General, Flash Report Small Business Administration's Implementation of the Paycheck Protection Program Requirements, May 8, 2020 available at: [https://www.sba.gov/sites/default/files/2020-05/SBA\\_OIG\\_Report\\_20-14\\_508.pdf](https://www.sba.gov/sites/default/files/2020-05/SBA_OIG_Report_20-14_508.pdf)

<sup>12</sup> Id.

**AGC recommends that accrued costs be included in calculating payroll and other costs for PPP loans.**

**Eliminate Requirement to Begin Repayment of PPP Loan within Six Months (IFR Docket No. SBA-2020-0015)**

Section 1102 of the CARES Act requires PPP lenders to provide payment deferral for borrowers for at least 6 months, and “not more than 1 year.” Based on the flexibility in the statute, the IFR provides for 6 months of deferral for borrowers following the date of disbursement of the loan.

While the 6-month deferment period may have seemed appropriate at the time the IFR was published, the economy has seen significant deterioration since then. On May 8, 2020, AGC announced that construction employment declined by 975,000 in April. This loss of jobs constituted nearly 13 percent of the industry’s employment, and was, by far, the worst one month decline on record. Furthermore, construction technology firm Procore announced that worker hours for the industry were down 13 percent between the period of March 1<sup>st</sup> and April 26<sup>th</sup>. Many locations in the U.S. remain under strict shutdown orders, and projections about how long it will take businesses to recover from the current economic downturn are uncertain at best.

**Due to these ongoing challenges and uncertainties, AGC recommends that the SBA revise the 6-month loan deferment period prescribed in the IFR, to the maximum length of time allowed under the CARES Act: 1 year.**

**Extend Loan Repayment Period from 2 Years to 5 Years (IFR Docket No. SBA-2020-0015)**

Section 1102 of the CARES Act allows for a period of up to 10 years from the date on which the borrower applies for loan forgiveness to repay the loan. However, the IFR specifies a maximum repayment period of only 2 years.

As outlined in the previous section, since the IFR was originally published, economic conditions have significantly deteriorated, especially for construction. **Due to these ongoing challenges and uncertainties, AGC recommends that the SBA extend the loan repayment period from 2 years to 5 years.**

In conclusion, AGC appreciates the opportunity to comment on these IFRs and SBA’s consideration of them. Nevertheless, given the continued issues AGC members face in utilizing the PPP loans, AGC reserves the right to petition the SBA to amend any final rules issued under the Administrative Procedures Act (5 U.S.C. 553(e)).

Sincerely,

/S/

James V. Christianson  
Vice President, Government Relations



Robert C. Lanham, Jr, President  
Dan K. Fordice, III, Senior Vice President  
Lester C. Snyder, III, Vice President  
Jeffrey L. DiStefano, Treasurer  
Stephen E. Sandherr, Chief Executive Officer  
Jeffrey D. Shoaf, Chief Operating Officer

April 4, 2020

Jovita Carranza  
Administrator  
Small Business Administration  
409 3<sup>rd</sup> Street SW  
Washington, D.C. 20024

**RE: SBA-2020-0015 Business Loan Program Temporary Changes; Paycheck Protection Program**

Dear Administrator Carranza,

On behalf of the Associated General Contractors of America (AGC), I write you to strongly urge the U.S. Small Business Administration (SBA) to correct and clarify your interim final rule for the Paycheck Protection Program<sup>1</sup> (herein “ the IFR”) in regards to the criteria for construction firm participation in the program. **The IFR is causing significant confusion within the construction industry, as it contradicts statute and U.S. Department of Treasury guidance.**

During these uncertain times where many construction projects are facing delays and shutdowns, construction contractors are being forced to make difficult and immediate decisions about the future of their workforce. As such, there is no time for confusion. The businesses and jobs of millions are at stake.

For background, AGC is the leading association for the construction industry, representing both union and open shop prime and subcontractor/specialty construction companies. AGC represents more than 27,500 firms—a majority of which are small businesses of 500 or fewer employees—including over 6,500 of America’s leading general contractors and over 9,000 specialty-contracting firms. More than 10,500 service providers and suppliers are also associated with AGC, all through a nationwide network of 88 chapters in all fifty states, the District of Columbia and Puerto Rico. AGC contractors are engaged in the construction of the nation’s commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, site preparation/utilities installation for housing development, and more.

**The IFR’s Small Business Eligibility Criteria Severely Restricts the Construction Industry’s Participation in the Paycheck Protection Program**

The IFR’s criteria for small business eligibility are unclear, perplexing and counter to any plain language requirements put forth under Executive Order (E.O.) 12866 and E.O. 12988.<sup>2</sup> The provision within the IFR at issue is the following:

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<sup>1</sup> Docket No. SBA-2020-0015

<sup>2</sup> E.O. 12866 says that regulations must be “simple and easy to understand, with the goal of minimizing uncertainty and litigation” (Sec. 1, Par. (b)(12)) and E.O. 12988 says that each regulation must specify its effect “in clear language” (Sec. 3 Par. (b)(2)).



## **2. What Do Borrowers Need to Know and Do?**

### *a. Am I eligible?*

You are eligible for a PPP loan if you have 500 or fewer employees whose principal place of residence is in the United States, or are a business that operates in a certain industry and meet the applicable SBA employee-based size standards for that industry, and:

#### i. You are:

A. A small business concern as defined in section 3 of the Small Business Act (15 USC 632), and subject to SBA's affiliation rules under 13 CFR 121.301(f) unless specifically waived in the Act;

B. A tax-exempt nonprofit organization described in section 501(c)(3) of the Internal Revenue Code (IRC), a tax-exempt veterans organization described in section 501(c)(19) of the IRC, Tribal business concern described in section 31(b)(2)(C) of the Small Business Act, or any other business; and

#### ii. You were in operation on February 15, 2020 and either had employees for whom you paid salaries and payroll taxes or paid independent contractors, as reported on a Form 1099-MISC.

Under the SBA's size standards, a construction firm's size is determined according to its gross receipts (average annual receipts) as identified by North American Industry Classification System (NAICS) codes, not the total number of employees.<sup>3</sup> As such, the criterion of 500 or fewer employees is applicable to construction firms per the first clause of the first hanging paragraph of IFR Section 2.a, and not the second clause therein relating to a applicable SBA employee-based size standards.

The confusion stems from the use of the conjunction "and" linking the first clause of the first hanging paragraph of IFR Section 2.a. to IFR Section 2.a.i.A. The IFR Section 2.a.i.A. refers to how the SBA defines a small business concern under the Small Business Act and accompanying regulations. As noted above, this definition for construction is determined according to its gross receipts (average annual receipts) as identified by NAICS codes. To AGC and its construction firms the IFR eligibility section thus reads as follows:

You are eligible for a PPP loan if you have 500 or fewer employees whose principal place of residence is in the United States (2.a.) AND [y]ou are [a] small business concern as defined in section 3 of the Small Business Act (15 USC 632) (2.a.i.A.) . . .

Many construction firms have 500 or fewer employees whose principal place of residence is in the United States. However, the conjunction "and" then subjects these firms to also meeting the requirement of meeting the average annual receipts size standard, which generally applies to construction firms. This greatly narrows the eligible firms in the construction industry for the Paycheck Protection Program and

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<sup>3</sup> 13 CFR §121.201

contradicts statute, congressional intent and U.S. Treasury guidance. Such a construction effectively nullifies the 500 or fewer employee test put forth by Congress in the CARES Act and Treasury in its guidance and makes the traditional gross receipts test the only one applicable to the construction industry.

### **The IFR's Small Business Eligibility Criteria Contradicts a Plain Language Reading of the CARES Act Eligibility Provision**

On March 27, the president signed the Coronavirus Aid, Relief, and Economic Security (CARES) Act<sup>4</sup> into law. Section 1102 of the CARES Act establishes the Paycheck Protection Program. The relevant subsection within Section 1102 sets forth eligibility for the program as:

- (D) Increased eligibility for certain small businesses and organizations.—
  - (i) In general--During the covered period, in addition to small business concerns, any business concern . . . shall be eligible to receive a covered loan if the business concern . . . employs not more than the greater of--
    - (I) 500 employees; or
    - (II) if applicable, the size standard in number of employees established by the Administration for the industry in which the business concern . . . operates.

The statute clearly distinguished between “small business concerns” and “any business concern” in subsection (D)(i) as it not only explicitly uses those phrases therein, but also puts forth a test based on a threshold number of employees for “any business concern” to be eligible: not more than 500 employees or the size standard in number of employees, whichever is greater.

While this eligibility provision in the statute is also applicable to “small business concerns,” it is constructed to be applicable more broadly than to only small business concerns as defined under the Small Business Act and implementing SBA size standard regulations. As further evidence of this plain language reading of the statute, the provision reads “in addition to small business concerns, any business concern . . . shall be eligible” (emphasis added). The use of the phrase “in addition to” before the term “small business concern” clearly qualifies other-than-small business concerns—“any business concern”—to be considered eligible for a loan under this program, not just small business concerns based on the size standards the SBA uses to determine small business status. Congress could have used words or phrases like “only” or “restricted to” before “small business concern” to limit eligibility to small businesses. However, Congress did not do so, and those phrases are not included in the provision. As such, a plain language reading of the statute could only allow one to conclude that eligibility under this program would be broader than that of only small business concerns as traditionally defined in the context of construction under SBA regulations.

Again, for these reasons, the definition put forth by SBA in the IFR serves to severely restrict that broad eligibility provided under statute to the traditional small business size standards in construction based on gross revenues. The SBA must address this issue in a revised IFR.

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<sup>4</sup> Public Law No: 116-136

## **The IFR's Small Business Eligibility Criteria Contradicts Treasury Guidance**

The IFR squarely contradicts guidance from Treasury to borrowers concerning the Paycheck Protection Program eligibility criteria. The Treasury guidance—*Paycheck Protection Program (PPP Information Sheet: Borrowers*<sup>5</sup>—unambiguously states:

**Who can apply?** All businesses – including nonprofits, veterans organizations, Tribal business concerns, sole proprietorships, self-employed individuals, and independent contractors – with 500 or fewer employees can apply.

As opposed to the IFR, this guidance does not restrict the construction industry to the standard gross receipts size-standard determination. This guidance clearly articulates that “[a]ll businesses . . . with 500 or fewer employees can apply.” There is absolutely no reference in this guidance to businesses, like those in construction, about having to use the gross receipts size-standard determination to confirm their eligibility for this program. And, like the statute, this guidance provides for “any business concern” to be eligible “in addition to a small business concern” using the 500 or fewer employees test.

## **The SBA Must Revise the IFR to Clearly Allow the Construction Industry to Use the 500 or Fewer Employee Test for Eligibility for Construction Firms to Receive Loans under the Paycheck Protection Program as Clearly Articulated in the CARES Act and Treasury Guidance**

For the reasons articulated above, AGC strongly recommends that the SBA adopt language like the Treasury guidance above to make clear the eligibility criteria for the Paycheck Protection Program for construction firms.

Thank you for your consideration AGC’s comments to the IFR. Again, we strongly urge you to revise the eligibility criteria in the IFR to allow construction firms to utilize the 500 or fewer employee test for loan eligibility.

Sincerely,



James V. Christianson  
Vice President, Government Relations

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<sup>5</sup> <https://home.treasury.gov/system/files/136/PPP--Fact-Sheet.pdf> (as of April 4, 2020)



Robert C. Lanham, Jr, President  
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Stephen E. Sandherr, Chief Executive Officer  
Jeffrey D. Shoaf, Chief Operating Officer

April 29, 2020

The Honorable Steven T. Mnuchin  
Secretary  
U.S. Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

**Re: Latest Guidance on the Paycheck Protection Program**

Dear Mr. Secretary:

On behalf of the 27,000 members and 88 chapters of the Associated General Contractors of America (AGC), I wish to thank you for quickly implementing the Paycheck Protection Program. **Our members report that the program has greatly helped them manage the great and steadily increasing uncertainty that surrounds the demand for their services.** The latest of our weekly surveys reveals that 29% of the responding members of the association saw owners cancel projects that had been scheduled to begin in March or April, and 32% have seen owners cancel projects scheduled to begin later in the year. Under these circumstances, 59% of the respondents reported that they had applied and been approved for program loans and 56% reported that they had managed to retain all of their employees. Another 16% reported that they managed to add employees.

Their now loud concern is that **the latest guidance<sup>1</sup> on the program is increasing their uncertainty and threatens to undo much of the good work that the program has already done.** For readily understandable reasons, your department's latest guidance on the program reminds all borrowers of their certification that "[c]urrent economic uncertainty" made their loan request "necessary to support the ongoing operations," and it required them to "tak[e] into account their current business activity and their ability to access other sources of liquidity." While AGC borrowers want and intend to ensure that they are in full compliance with this guidance, they find themselves at a complete loss to determine whether they are. **Just how does the federal government want or intend them to assess "their ability to access other sources of liquidity"?**

While many of these borrowers exceed the Small Business Administration's size standard for the construction industry (based on their average annual volume of business), they do have fewer than 500 employees and none are anywhere near the size of the companies that have attracted so much public attention. They are small to mid-sized companies that include very few if any publicly traded firms, for only a tiny fraction of all construction companies fall into that category. But many of them

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<sup>1</sup> Treasury PPP FAQ Document Question #31 available at: <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>

do have lines of credit that they have long used to help them manage their cash flow and their economic uncertainty extends well beyond the next few weeks. While equally severe, the pandemic's greatest impacts on the construction industry could well come later in the year, lagging behind the impacts on restaurants, hotels and the like.

If the latest guidance disqualifies AGC borrowers for program loans, they will have to pay the loans back and exhaust their cash and lines of credit, and the pandemic's ultimate impact on their operations will be that much more severe. Furloughs and layoffs will be that much more likely to prove necessary. And the confusion surrounding your department's latest guidance will only make the problem worse. Out of an abundance of caution, they are likely to repay loans that your department would be pleased for them to retain.

The problem is both severe and urgent, for your department's latest guidance also sets an extremely short May 7 deadline for borrowers to repay any loans they may have mistakenly accepted well before your department made them aware of its position on the certification. **AGC therefore urges your department to immediately provide additional guidance on the required certification and to extend the May 7 deadline.** AGC is well prepared to meet with the department at any time to provide any additional information or other assistance that it may require.

Thank you for your continued efforts to mitigate the economic challenges presented by Covid-19.

Sincerely,

Stephen E Sandherr  
Chief Executive Officer