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Via Electronic Mail and Federal Express

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RE: Paycheck Protection Program — SBA Loan Necessity Questionnaires
OMB Control Number: 3245-0407

Dear Administrator Jovita Carranza, Ms. Biles, and Mr. Rich:

On behalf of the Associated General Contractors of America (AGC), we write to express our deep concern that the Office of Management and Budget (OMB) and the Small Business Administration (SBA) are badly disregarding the Administrative Procedure Act, the Paperwork Reduction Act (PRA), and fundamentals of due process. OMB has authorized and the SBA is now demanding that recipients of Paycheck Protection Program (PPP) loans (in excess of \$2 million dollars) complete an onerous “Loan Necessity Questionnaire” (Form 3509) within ten (10) days. Respectfully, we request that OMB immediately withdraw its improper authorization of this unlawful collection of information; that SBA immediately suspend its use of this form; and that SBA immediately inform all PPP loan recipients that they need not respond to this questionnaire until further public notice.

As background, many AGC members applied in good faith for PPP loans, certifying, as required, that “current economic uncertainty [made] this loan request necessary to support ongoing operations.” Neither Congress, nor the SBA, nor any government office, had provided applicants with any consistent or actionable guidance as to the meaning of “economic uncertainty” or “ongoing operations,” and what the SBA deemed “necessary to support” such operations. Indeed, it remains murky to this day. Despite this uncertainty, and without any input

from the borrower community, SBA now seeks to use Loan Necessity Questionnaires to demand a vast amount of information on subsequent events which borrowers had no notice that SBA would deem relevant, much less require them to provide, in conjunction with a future application for loan forgiveness. At least as early as June 1, 2020, SBA provided borrowers with positive assurance that it would base any later assessment on a borrower's eligibility for a PPP loan "on the provisions of the CARES Act, SBA rules or guidance available at the time of the borrower's loan application."¹ Recently, and without warning, SBA then began to demand information on subsequent government orders, changes in company operations, expenditures and the like. SBA's own filing to OMB included an express request "that OMB not make the form publicly available at this time" on the questionable grounds that "....publicizing these questions could enable some borrowers to modify their business practices in an attempt to affect SBA's assessment of their certification."² SBA must reconsider both the process that produced the questionnaires and the scope and substance of the questionnaires.

There are two glaring process defects here. First, SBA deliberately avoided giving the borrowing community any meaningful opportunity to comment on the scope or substance of its information collection efforts—including, in particular, the Loan Necessity Questionnaires—or the timeline by which SBA is requiring borrowers to respond to the questionnaire once received from the lender. Although SBA has yet to make the actual questionnaires available for the general public to review as part of the October 26 *Federal Register* notice, it has already instructed certain lenders to start sending the questionnaires to some borrowers and requiring responses within ten business days, even though the public comment period for the information collection request (ICR) runs until November 25. Thus, it appears that the opportunity to comment on SBA's ICR is meaningless. *See Prometheus Radio Project v. FCC*, 652 F.3d 431, 451 (3d Cir. 2011) (agency pronouncement "did not contain enough information about what it was planning to do, or the options it was considering, to provide the public with a meaningful opportunity to comment"). Given what is at stake for borrowers, such as potential determinations that they are not entitled to loan forgiveness or were not entitled to the loan in the first instance, it is unthinkable that SBA would forego obtaining borrower feedback and making appropriate adjustments to the questionnaires before taking actions that would jeopardize borrowers' interests.³

¹ 85 Fed. Reg. 33004, 33005 (2020) (emphasis added).

² *See* Justification (10.19.20) (available at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202010-3245-005) (emphasis added).

³ Even if SBA is not required by law to take comments on the ICR related to the respective forms, as a matter of good governance, the Agency should hear from the affected community, as it has proposed, before finalizing the forms. *See, e.g.*, Exec. Order 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents, § 4(a), 84 Fed. Reg. 55,235, 55,237 (Oct. 15, 2019) (setting forth general procedures for significant guidance documents, including "a period of public notice and comment of at least 30 days before issuance of a final guidance document, and a public response from the agency to major concerns raised in comments"); Exec. Order 13563, Improving Regulation and Regulatory Review, § 1(a), 76 Fed. Reg. 3,821 (Jan. 21, 2011) ("Our regulatory system . . . must allow for public participation and an open exchange of ideas. It must promote predictability and reduce uncertainty.").

Second, SBA is disregarding the PRA's procedural safeguards. The October 26 *Federal Register* notice states "SBA is submitting the information collection to OMB for standard (non-emergency) review and approval to use the information collection beyond the emergency expiration date, October 31, 2020," yet there is indisputable evidence that SBA has already begun using at least one of the forms to which the ICR relates, before receiving comment. Even under the PRA exceptions to the usual rule that an agency must await comment, *see* 44 U.S.C. § 3507(j), we are hard-pressed to see within the *Federal Register* notice (or anywhere) any justification for not following the usual rule, and awaiting public comment. *See* 44 U.S.C. § 3506(c)(2). In fact, SBA intentionally tried to prevent the disclosure of the forms because it believed borrowers would attempt to manipulate their business practices to affect SBA's assessment of their prior certifications.⁴ Essentially, it appears that SBA assumed – without any evidence and based solely on its own conjecture – that borrowers would commit fraud if they had a better understanding of what information SBA intended to request to verify loan necessity. This is arbitrary and capricious on its face, and totally flips on its head the point of the PRA public comment process.

Compounding the error of these procedural defects and evasive tactics, SBA's conduct offends general principles of due process and fair notice, which dictate that borrowers not be subject to *ex post facto* obligations that could not have been reasonably understood or anticipated at the time they applied for the PPP loans during the onset of a pandemic. Given the lack of clarity in what SBA intended (either initially, or today) by the "economic uncertainty" certification and the total lack of guidance at the time of application on what documentation applicants were expected to maintain, there is a serious question as to whether SBA can even enforce the terms of the Loan Necessity Questionnaires in their current form. AGC members submitted their PPP loan applications, inclusive of their "economic uncertainty" certifications, in good faith, and in the months since have made any number of difficult business decisions based on their good-faith understanding of the forgiveness provision in section 1106(b) of the CARES Act. SBA cannot now, months later, rewrite the rules.

It is well established that parties subject to penalties for non-compliance with regulatory requirements have, as a matter of due process, the right to know what the law requires of them, and that a certain irreducible level of clarity in their regulatory obligations is necessary to both allow the regulated to conform their conduct and safeguard them from the government applying the law in an arbitrary or discriminatory way. *See F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012); *see also Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158–59 (2012) ("It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding..."). AGC member companies

⁴ Whether SBA genuinely believed it necessary to keep the form confidential is at least questionable. If so, it is difficult to explain why SBA provided the questionnaire to lenders without requiring the latter to keep the form confidential. It is equally difficult see how SBA could expect to keep the form hidden from more than the first few applicants for loan forgiveness. Once SBA and/or lenders began using the form, it was foreseeable that word of its existence and details would quickly spread. The form itself betrays how far SBA has strayed from any genuine inquiry into a borrower's state of mind at the time it applied for a loan.

that obtained PPP loans have an absolute right, as a matter of due process, to not be subject to after-the-fact obligations about which the government offered no insights at the time of application. It would be inappropriate for SBA to use the information and documents collected under Form 3509, or the inability of borrowers to timely comply with this form, to take punitive actions such as the cancellation of loans or denial of a forgiveness application given the vagueness of the certification that SBA required them to make, as a condition precedent to receive a loan.

Under these circumstances, AGC respectfully requests that SBA immediately suspend its use of Form 3509 and any extant obligations for AGC borrowers to respond to that form, until SBA provides a meaningful public notice and comment period on the ICR related to Form 3509 and a reasonable period thereafter for SBA to modify the form consistent with the comments it receives, including this one. In addition, AGC requests an opportunity to meet with SBA in order to further explain its construction-industry specific concerns with regard to “economic uncertainty” at the time of loan application submission.

AGC appreciates both OMB’s and SBA’s attention to the concerns expressed in this letter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Amy O'Sullivan", with a long horizontal flourish extending to the right.

Amy L. O’Sullivan
Daniel W. Wolff
David Chung
Olivia L. Lynch
Michael E. Samuels

cc: Michael Kennedy, General Counsel, AGC