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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 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 [illegible]

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 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.”

<u>The Purpose of the Certification</u>

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 the 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. i trid r(oun.9139

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 esta.

SBA posted its fourth FAQ on the Certification on May 5, 2020. It was FAQ #43[20] 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 the 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

This targeted,multi-muarc-2.6 w (ar)8.9 -2.6 eTc 0 Tw (-)Tj 012.7 0 Td [( )Tj 0[(s 48.9 nt)68 (,)g 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 untin6y ii

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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 [illegible] 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

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