November 23, 2020

The Honorable Nancy Pelosi The Honorable Mitchell McConnell Speaker of the House Majority Leader

U.S. House of Representatives U.S. Senate

Longworth House Office Building LHOB-1236 Russell Senate Office Building SR-317

The Honorable Kevin McCarthy The Honorable Charles E. Schumer House Minority Leader Senate Minority Leader Rayburn House Office Building RHOB-2468 Hart Senate Office Building SH-322 Washington, DC 20515 Washington, DC 20510

Dear Speaker Pelosi, Majority Leader McConnell, Democratic Leader Schumer, and Republican Leader McCarthy:

The nonprofit sector organizations represented by the undersigned thank you for your leadership in enacting legislative relief in response to the COVID-19 pandemic. In particular, the Paycheck Protection  Program (“PPP”) has been an indispensable lifeline that has helped charitable organizations retain  millions of employees and continue to partner with the government in providing an array of social,  educational, cultural, health, human services, religious, and other services throughout the country.

We write today to express our deep concerns, however, regarding the Small Business Administration (“SBA”) proposed Form 3510, “PPP Loan Necessity Questionnaire (Non-Profit Borrowers).” Nonprofit organizations applied for and received PPP loans based on a good faith certification that current economic uncertainty made the loan request necessary to support the ongoing operations at the time of the loan application. A number of nonprofit organizations qualified for loans greater than $2 million based on that good faith certification and submission of relevant information in the SBA application.  These organizations are prepared to comply with reasonable requests for information regarding such loans.

The proposed Form 3510, however, is unduly burdensome, does not accurately reflect nonprofit operations, and fails to accomplish the goal of statutory review, all at a time while the pandemic continues to strain nonprofits. As currently drafted, the SBA Form 3510 will require nonprofits to spend countless hours and professional fees to compile financial and other information that is not pertinent to evidencing the good faith certification that was envisioned by Congress in the CARES Act. Attached is a letter we are submitting to the Senate Committee on Small Business and Entrepreneurship and the House Committee on Small Business detailing specific concerns regarding the SBA review procedure and SBA Form 3510.

We respectfully request that you advise the SBA to withdraw the form as currently drafted. We welcome the opportunity to work with the SBA to devise a reporting mechanism that fulfills statutory review responsibilities and promotes transparency without unduly burdening nonprofits.

Respectfully,

American Alliance of Museums

American Society of Association Executives

The Arc

Association of Art Museum Directors

Faith & Giving Coalition

Girl Scouts of the USA

Goodwill Industries International

Independent Sector

Jewish Federations of North America

League of American Orchestras

Lutheran Services in America

National Council of Nonprofits

OPERA America

Union of Orthodox Jewish Congregations of America

United Way Worldwide

YMCA of the USA

YWCA USA

November 23, 2020

The Honorable Marco Rubio The Honorable Benjamin Cardin

Chairman Ranking Member

Committee on Small Business Committee on Small Business

U.S. Senate U.S. Senate

Washington, DC 2510 Washington, DC 20510

The Honorable Nydia Velazquez The Honorable Steve Chabot

Chairwoman Ranking Member

Committee on Small Business Committee on Small Business

U.S. House of Representatives U.S. House of Representatives

Washington, DC 20515 Washington, DC 20515

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We write today to express our deep concerns, however, regarding the Small Business Administration (“SBA”) proposed Form 3510, “PPP Loan Necessity Questionnaire (Non-Profit Borrowers).” Nonprofit organizations applied for and received PPP loans based on a good faith certification that current economic uncertainty made the loan request necessary to support the ongoing operations at the time of the loan application. A large number of nonprofit organizations qualified for loans greater than $2 million based on that good faith certification and submission of relevant information in the SBA application. These organizations are prepared to comply with reasonable requests for information regarding such loans.

The proposed Form 3510, however, is unduly burdensome, does not accurately reflect nonprofit operations, and fails to accomplish the goal of statutory review, all at a time while the pandemic continues to strain nonprofits. As currently drafted, the SBA Form 3510 will require nonprofits to spend countless hours and professional fees to compile financial and other information that is not pertinent to evidencing the good faith certification that was envisioned by Congress in the CARES Act.

**Background**

The Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) created the Paycheck  Protection Program (“PPP”) loans to provide short-term, economic relief to (1) businesses  eligible to participate in the Small Business Administration (“SBA”) section 7(a) loan guarantee  program, and (2) section 501(c)(3) organizations with not more than 500 employees. Under the  terms of the CARES Act and as part of the loan application process, a prospective Borrower  was required to make a good faith certification that “current economic uncertainty makes this  [PPP] loan request necessary to support the ongoing operations of the Applicant.”

The Small Business Act authorizes the SBA to conduct investigations to determine whether a recipient or participant in any assistance under a 7(a) program, including the PPP, is ineligible for a loan, or has violated section 7(a) or any rule or regulation. The CARES Act authorizes the SBA to conduct an audit of a PPP loan and requires a Borrower to provide all requested documentation supporting the loan application and any application for loan forgiveness.

After the enactment of the CARES Act, and in many cases, after many Borrowers’ applications for PPP loans were approved, the SBA issued a series of frequently asked questions (“FAQs”) and interim final rules interpreting the PPP. The most relevant FAQs and interim final rules can be summarized as follows:

· FAQ 17: Borrowers and lenders may rely on the laws, rules, and guidance available at the time of the relevant application (emphasis added)

· FAQ 31: Borrowers must make this [current economic uncertainty] 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 (emphasis added). Note that the FAQ continues: “For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith.”

· FAQ 37: Applies FAQ 31 to private companies with adequate sources of liquidity to support the business’s ongoing operations.

· FAQ 46: Borrowers with loans of less than $2 million will be deemed to have made the required certification concerning necessity of the loan request was made in good faith (i.e. “the safe harbor”). Borrowers with loans of $2 million or more that do not satisfy the safe harbor but may still have an adequate basis for making the required good-faith certification, based on their individual circumstances in light of the language of the certification and SBA guidance. SBA has previously stated that all PPP loans in excess of $2 million, and other PPP loans as appropriate, will be subject to review by the SBA for compliance with program requirements set forth in the PPP  Interim Final Rules and in the Borrower Application Form.

· Interim Final Rule RIN 3245-AH47: The SBA, in consultation with the Secretary of  the Treasury, has determined that it is appropriate to adopt additional procedures and  criteria through which SBA will review whether an action by the Borrower has resulted in  its receipt of a PPP loan that did not meet program requirements. For loans that SBA selects for review, the applicable Lenders will be required to submit information to allow SBA to review the loans for Borrower eligibility and SBA will submit new reporting requirements as a modification to the existing PPP information collection.

On October 26, 2020, SBA submitted SBA Forms 3509 “Loan Necessity Questionnaire (For Profit Borrowers)” and 3510 “Loan Necessity Questionnaire (Non-Profit Borrowers) to the Office of Management and Budget (“OMB”) for approval. According to the OMB submission, SBA estimates that approximately 42,000 entities will be required to file Form 3509 and that the estimated annual hour burden per entity is approximately 1.5 hours. SBA estimates that approximately 10,000 nonprofit organizations will be required to file Form 3510 and that each response will take just under 1 hour. Public comments on SBA Forms 3509 and 3510 are due by November 25, 2020.

Although SBA Form 3510 is not presently on either the SBA or Treasury Department websites, it is reported that the SBA has “released” both forms to Lenders, and certain publications. The forms are widely available from a number of professional organizations, including law firms and CPA firms. It is not clear when Lenders will be required to submit these forms to Borrowers. It is reported that Lenders have 5 days from receipt of notice from the SBA to notify Borrowers of SBA’s review process, including the obligation to complete the questionnaire. The instructions on the form, however, state that Borrowers have 10 business days to return a completed form, including necessary supporting documentation to the Lender.

It is important to note that the SBA has indicated that loans under $2 million may also be subject to review. As such, while these comments regarding proposed Form 3510 are directed primarily at the requirements for review for loans greater than $2 million, they are also applicable (and perhaps more egregiously so) if they are imposed on loans under $ 2 million.

**Questioning the Validity and Scope of SBA Form 3510**

Nonprofit organizations seem to be within their rights to question whether the current SBA Form 3510 as drafted is a valid exercise of SBA authority. If so, are there portions of the form that overreach? Should certain questions be recrafted or deleted?

There are several arguments that nonprofits can make regarding the validity and scope of SBA Form 3510. They include:

Nonprofits should not be required to file Form 3510 as drafted. Although it is clear that SBA has  the statutory authority under the Small Business Act and the CARES Act to audit PPP loans and  to request certain documentation from a Borrower that supports the loan application, general  SBA reporting and documentation rules should not apply to nonprofits. The CARES Act created a new category of 7(a) loans under the PPP, the SBA has not previously had the authority or experience of making loans available to nonprofit organizations under other 7(a) programs. As such, 7(a) standards and reporting requirements should not be applied to nonprofit organizations which are different in form and character from for-profit entities. It is important to note that as SBA guidance regarding the good faith certification of “current economic uncertainty” evolved, there is no specific reference to nonprofits in SBA FAQs or Interim Final Rules. Both FAQ 31 or FAQ 37 refer to for-profit entities, either publicly traded or private companies. Nonprofits should be able to rely on the language in FAQ 17, referring to “the laws, rules, and guidance available at the time of the relevant application.”

If it is assumed that nonprofits are required to file Form 3510 (and that all the FAQs and Interim  Rules noted above apply), we raise a number of general objections to the framework and  timeframe during which the need for the PPP loan should be assessed. Specifically:

The information requested in the form does not accurately reflect the subjective considerations that Borrowers were forced to make at the time of the loan application and incorrectly focuses on objective criteria that are backward-looking in nature. Nonprofits were clearly facing “current economic uncertainty” at the start of the COVID-19 crisis. With revenue-generating operations such as fundraising events, program service operations, and other sources cancelled, the loan was necessary to support ongoing operations.

The SBA should instead ask for explicit information from the Borrower including any contemporaneous internal assessment prepared by management or the Board of Directors to support the certification. If Borrowers did not prepare such a written assessment at the time of the loan application, such reasons could be supplied now. Such subjective assessments of uncertainty should provide sufficient justification rather than compile and answer numerous questions that appear to evaluate “economic necessity” both on the date of the application and for weeks and months after such date.

The questions in Form 3510 suggest that the SBA will evaluate how a Borrower was affected by COVID-19 at both the loan application date and for some time period thereafter, specifically the second quarter of calendar year 2020. This contradicts the language in several of the SBA  pronouncements including FAQ 17 as noted above as well as FAQ 31 which states “all  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**.” (emphasis added) Through SBA Form 3510, the SBA seems to have replaced uncertainty about what will happen in the future with 20/20 hindsight, clearly in contradistinction to the CARES Act statutory standard of “current economic conditions.” Such an interpretation of statute clearly goes beyond the authority delegated to the SBA.

It is important to restate that neither FAQs 31, 37 nor 46 were available when many Borrowers applied for their PPP loans. The applicable standard for the evaluation of the certification of any such Borrower should only be based on the provisions of the CARES Act, the rules and guidance available at the time of the loan application and the terms of such application. In  addition, perhaps the most significant phrase in FAQ 31 notes that “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**.” (emphasis added). In the case of nonprofits, the “business” is the provision of service to the community, often those who are the most vulnerable. Nonprofits do not have access to many of the sources of liquidity available to for profit entities. In addition, a large percentage of the assets on nonprofit balance sheets, such as endowments, cannot be readily accessed due to legal and other constraints as discussed in more detail below.

It is not clear from either the questions or the limited instructions to SBA Form 3510 how the SBA will use the answers and supporting documentation. Some questions seem to reflect an inherent “bias” against the good faith uncertainty certification. Although the form indicates that  the SBA review of the good faith certification “will be based on the totality of [the Borrower’s]  circumstances,” it could be asserted that requiring submission of revenue, liquidity data, and  other information regarding spending during the loan covered period reflects some  predisposition to penalize organizations that were able to continue their operations despite the  pandemic. This again imposes a retroactive, rather than prospective lens on the good faith certification made **at the time of the loan application**.

Finally, the instructions to SBA Form 3510 contain several burdensome provisions that will be difficult, if not impossible, for many nonprofit organizations to meet, absent the dedication of significant time and resources. For example, the form calls for the Borrower to submit a completed form, along with supporting documentation to the Lender within ten business days.  The form contains numerous questions that will require detailed reporting not required by the statute and often not regularly compiled by impacted nonprofit organizations. The SBA estimate regarding the amount of time to fill out the form as listed in the Federal Register seems to be grossly understated. We believe the flawed time estimate makes clear the lack of understanding of how charitable nonprofits operate and how finances are regularly reported. In addition, the requirement for supporting documentation on a number of the most difficult questions will greatly add to this compliance burden.

**Concerns regarding specific questions in the Activity and Liquidity Assessment sections**

Specific questions contained in SBA Form 3510 are unnecessarily cumbersome and difficult to  answer, appear arbitrary in their application to Borrowers based on location or type of  organization, seem to connote a bias against “good faith,” and will require extensive and  expensive professional and organization time and effort, all at a time when nonprofits, in  general, are struggling to meet payrolls while continuing to provide a wide array of essential  community services, many to the most vulnerable among us.

This is especially true in the Non-Profit [sic] Activity Assessment section.

a. Questions 1,2, and 3 require the Borrower to provide specific second quarter 2020 and second quarter 2019 information on gross receipts, gifts, grants, contributions, and similar amounts, and expenses. Most Borrowers do not maintain separate books and records on a  quarterly basis and determination of such information, including the provision of supporting  documentation that is required by the form, will require additional accounting and recordkeeping  activities, imposing a significant reporting burden on the Borrower. Regardless of the fiscal year of the organization, the ability to determine accurate second quarter numbers could be problematic.

b. Question 2 asks for information regarding gross receipts from specific sources: gifts, grants, contributions, and similar amounts. This appears to be a request for specific information as well as supporting documentation for a subset of the information requested in Question 1. In addition to asking for information and documentation that may be duplicative, there is no opportunity for Borrower’s to indicate the reasons that could impact such receipts, either positively or negatively due to the pandemic and its impact on operations.

c. Questions 4 through 7 request information regarding mandatory government shutdowns due to COVID-19 as well as significant alteration of operation and voluntary cessation or reduction in operations. These factual questions ignore or clearly minimize the subjective uncertainty that organizations faced at the time of the PPP loan application about the scope and impact of both existing or future government orders as well as the implications for current and future operations.

Organizations in certain states with less restrictive government orders may have also taken similar precautions as those in states with more restrictive orders based on health concerns, including those based on liability, safety of employees, clients, donors, students, patients, and others. Such concerns also serve to call into question whether or not certain operational changes or alterations undertaken (and in many cases still underway) were in fact “mandatory” or “voluntary.”

Even if there were no required closures, losses in revenue or impact on employee productivity,  such as the ability to work efficiently or effectively remotely, it was impossible for a Borrower to  make an accurate determination of such conditions at the time of the loan application. All of these factors point to a Borrower making a “good faith” certification that such conditions would negatively impact business operations.

Similar concerns are apparent regarding a number of questions in the Liquidity Assessment section.

a. Question 1 asks the Borrower to supply information regarding cash, savings, and temporary cash investments as of the last day of the calendar quarter before the date of the loan application. Many organizations spend approximately as much as they take in revenues each year. Indeed, for a number of organizations, expenses exceed revenue for certain years.  Although the balance sheet of an organization has excess net assets, most such assets are restricted for specific purposes or are needed to meet operational expenses. Cash reserves and liquid investment assets may appear to be significant, the monthly expense rate for many organizations is also significant and will only be able to meet expenses for a period of 30 or 60 days at the most. Although the question seems to imply that organizations with significant cash reserves should be able to finance ongoing business operations, this may not have been the perception of the Borrower facing uncertain economic conditions caused by the COVID-19 pandemic.

The question to be answered is whether a set dollar amount constitutes sufficient “liquidity” so that the organization should have used those assets instead of taking out a PPP Loan. Nonprofit organizations are typically advised to have on hand at least three to six months of reserves to cover operating expenses. Such amounts may not be sufficient if the organization has experienced recent operating losses, flat revenue streams, and increasing expenses. All such factors would point to the organization being an ideal candidate to take out a PPP Loan facing the economic uncertainty of the pandemic.

b. Question 3 asks for information regarding compensation of employees earning more than $250,000 on an annual basis. The compensation question seems to imply that such organizations with employees earning over $250,000 should either have convinced those employees to take pay cuts or did not “in good faith” face economic uncertainty. Although many  organizations did reduce compensation (either voluntarily or by mandate) for highly-paid  employees, expecting organizations to do so undermines the purpose of the PPP which was to  encourage organizations to maintain their workforce so that the economy could restart when the  pandemic ended. Regardless, suggesting at this date that organizations should have demanded salary concessions in lieu of securing a PPP loan does not seem to be evidence of a lack of good faith economic uncertainty or need at the time of the loan application.

c. Question 5 asks for Borrower information regarding endowments and restrictions on such assets. Again, this question seems to impose a bias that organizations holding significant endowment assets may be able “to access other sources of liquidity sufficient to support ongoing operations,” as referenced in FAQ 31. However, the totality of that FAQ should be respected, i.e. whether or not it would be significantly detrimental to the business.

Invading an endowment or “borrowing” from an endowment is not an alternative to a PPP Loan. Endowments must be respected even during difficult economic times for two  reasons: (1) any attempt to invade an endowment would be “significantly detrimental to the  business” of the charity; and (2) state law permits invading an endowment only with court  approval and only in specific situations.

Endowments are governed by state law. In almost every state, a version of the Uniform Prudent Management of Institutional Funds Act (“UPMIFA”) applies. Under UPMIFA, an endowment fund is a fund not wholly expendable by the institution (in this case, a charity) on a current basis under the terms of the applicable gift instrument. UPMIFA allows a charity to appropriate for expenditure, or accumulate, so much of an endowment fund as the charity determines is prudent for the purposes for which the fund was established.

Further, several states Attorney Generals have recently opined that endowments must be respected. For example, both the Massachusetts and California Attorney Generals’ offices have recently released guidance instructing charities **not to invade their endowments to address shortfalls in light of COVID-19, without first trying to obtain PPP Loans and other sources**, and then only after going to court. The bottom line of such guidance is that “nonprofits need to be cautious on how much they spend from their endowment funds. Spending more than 7 percent of the fair market value of an endowment fund may create a presumption of imprudence.”

Given these widely-adopted legal principles as articulated by statute and interpretation, it is  clear that organizations with endowments cannot legally invade or borrow from their  endowments in order to address unanticipated costs or budget shortfalls, even when those  costs or shortfalls result from a disaster such as the COVID-19 pandemic. An endowment is not a viable alternative source of funds even if Question 5 presumes that large endowment holdings would undermine a “good faith” certification of economic uncertainty. Further, attempts to access such endowments as a source of liquidity to support ongoing operations would clearly be **significantly detrimental to the business** as limited by FAQ 31.

**Recommendations**

We believe it is important to note that properly formed and managed nonprofit organizations do not present the same risks of “unjust enrichment” from the PPP program that could be present in the for-profit space. We clearly acknowledge the obligation of the SBA to perform a due  diligence review of all PPP loans. However, we would assert that the expansion of the SBA loan portfolio to include PPP loans for qualified nonprofit organizations represents a recognition of the key role that such organizations would (and continue to) provide in response to the pandemic. Agency review of such vital government support for the work of nonprofit organizations should not itself diminish the resources that such organizations have to accomplish this vital function.

Transparency is a hallmark of nonprofit organizations throughout the country. We reiterate our  support of that basic concept and ask that the SBA consider addressing its review function  through a more pragmatic approach which could include requiring Borrower’s to provide a  definitive narrative statement regarding their basis for the good faith certification of uncertainty  in economic conditions that made the PPP loan necessary to support the ongoing operations of  the organization. If specific financial data is requested, such data should be limited in scope and should complement the narrative statement.

We ask that Congress recommend that SBA Form 3510 in its present form be withdrawn so that stakeholders such as nonprofit organizations may be permitted to work with the agency to develop an appropriate review mechanism.

Respectfully,

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