

Chair
Debra A. Cafaro
Chairman and CEO
Ventas, Inc.

President and CEO
Jeffrey D. DeBoer

Treasurer
Thomas M. Flexner
Vice Chairman & Global Head of Real Estate
Citigroup

Secretary
Tim Byrne
President and CEO
Lincoln Property Company

Dr. Thomas R. Arnold
Global Head of Real Estate
Abu Dhabi Investment Authority

Jeff T. Blau
CEO
Related Companies

Richard B. Clark
Managing Partner and Chairman
Brookfield Property Group

John F. Fish
Chairman & CEO
SUFFOLK

Christine Gorham
Director of Development
Caddis Healthcare Real Estate
2020 *President, CREW Network*

Scott O. Jones, P.E.
Principal
Jacobs, Inc.
Chair and Chief Elected Officer
Building Owners & Managers Association, Int'l.

Anthony E. Malkin
Chairman and CEO
Empire State Realty Trust, Inc.

Roy Hilton March
Chief Executive Officer
Eastdil Secured

Kathleen McCarthy
Global Co-Head of Blackstone Real Estate
Blackstone

Jodie W. McLean
Chief Executive Officer
EDENS

Robert R. Merck
EVP, Senior Managing Director / Global
Head of Real Estate and Agriculture Finance
MetLife

Charlie Oppler
COO
Prominent Properties Sotheby's International
Realty
2020 *President-Elect*
National Association of Realtors®

Ross Perot, Jr.
Chairman
Hillwood

Amy Rose
President, Chief Executive Officer
Rose Associates, Inc.

William C. Rudin
Co-Chairman and CEO
Rudin Management Company, Inc.
Immediate Past Chair
The Real Estate Roundtable

Rob Speyer
President and CEO
Tishman Speyer

Robert A. Spottswood
President
Spottswood Companies, Inc.
Chairman of the Board
American Resort Development Association

Barry Sternlicht
Chairman and CEO
Starwood Capital Group

Owen D. Thomas
Chief Executive Officer
Boston Properties



April 2, 2020

The Honorable Steven Mnuchin
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

The Honorable Jovita Carranza
Administrator
Small Business Administration (SBA)
409 3rd Street, S.W.
Washington, D.C. 20416

Re: Regulatory Clarifications for the Payroll Protection Program

Dear Secretary Mnuchin and Administrator Carranza:

The Real Estate Roundtable (www.rer.org) applauds the inclusion of the Payroll Protection Program (PPP) in the CARES Act. The PPP will help get our economy back on track by conferring expanded authorities that significantly amplify the scope of the SBA’s loan programs during the Covid-19 emergency. The Roundtable urges the Administration to liberally construe its PPP authorities and effectuate Congress’s intent by providing as much loan assistance as possible, to as many small businesses as possible.

Regulations to implement the PPP must be designed for small businesses to receive emergency loans with haste. Agency rules must minimize complexity and subjective interpretation by borrowers and lenders – so loans are swiftly originated to keep workers on payroll, cover their health care and other benefits, and provide impacted businesses with proceeds they need to help pay rent, mortgage interest, utilities, and other debt obligations.

NAICS Code 72 businesses in the “Accommodation and Food Services” sector receive a key waiver from the SBA’s complicated affiliation rules.¹ This is a great start, and the nation’s small business restaurants, hotels, bars, and similar concerns indeed merit emergency support. However, more is necessary:

- Doctors, nurses, caretakers and supporting staff in our medical and senior care facilities are on the frontlines. They should not have to worry about their next paycheck.
- The workers in our warehouses, grocery stores and pharmacies, stocking shelves and enabling the supply chain, must be protected.
- The devastating loss sustained by our retail sector while stores are shuttered must be mitigated.
- Owners, managers and financiers of commercial and residential buildings must continue operating their assets so they are healthy and safe for their occupants, and allow business tenants to keep functioning during the pandemic.

¹ 15 U.S.C. § 636(a)(2)(F)(36)(D)(iv)(I) [CARES Act p. 16, lines 18-22]

As the Administration is on a fast-track to develop rules that implement the PPP,² we recommend the following principles and clarifications. The points below reflect the numerous questions we have received from our members trying to determine whether their businesses are eligible under the new loan program:

1. **Reduce the amount of loan forgiveness where a borrower avoids, but has the financial ability to pay for, contractual obligations during the “covered period.”** Borrowers receiving loans should not receive what is essentially an SBA “grant” to erase obligations where they have resources to continue contracted payments for mortgages, rents, or utilities in whole or part. Just as forgiveness amounts are lowered if a small business borrower reduces the number of employees³ or salaries⁴ during the covered period, the borrower should not be allowed to “game the system” by avoiding rents and other contractual commitments if they have the means to continue to meet them. In applying for forgiveness, the Administrator has the discretion to request from the borrower “any ... documentation the Administrator determines necessary.”⁵ Any loan forgiveness request for payroll or other costs should be accompanied by some showing that the applicant is unable to meet remaining contractual obligations as a result of the Covid-19 outbreak, to receive the benefit of “canceled indebtedness”⁶ by the U.S. government. Misrepresentation by an applicant that it is unable to pay contracted obligations where it is financially able to do so – while also receiving loan forgiveness – should disqualify that borrower from future SBA assistance.
2. **Flexibility is needed regarding the percentage of forgiveness afforded to particular eligible loan uses.** Agency overviews of the PPP released on March 31 provide: “Due to likely high subscription, it is anticipated that not more than 25% of the forgiven amount may be for non-payroll costs.”⁷ Treasury and SBA should clarify that this is not a hard and fast, “one size fits all” rule. The statute only specifies a limit on the amount of loan forgiveness insofar as it must not exceed principal, and where the borrower reduces payroll or salary.⁸ Nowhere did Congress parse among permissible, forgiven loan uses in establishing percentages of canceled indebtedness.⁹ Particular SBA loan needs for eligible borrowers must be considered on a case-by-case basis. Different federal and state programs, and borrowers’ reserves, might be available to cover payroll and retain workers. The borrower should be afforded as many options as possible to seek loan forgiveness for other obligations as Congress allowed in the CARES Act. Flexibility is key here.
3. **Implement the broadest possible waiver of SBA’s affiliation rules¹⁰ for the widest spectrum of business sectors and structures.** The affiliation rules are complex, require extensive legal interpretation to fact-specific contexts, and will unduly delay getting SBA loan proceeds out the door and into the hands of eligible

² Regulations to implement the SBA title generally are due not later than 15 days after enactment [p. 83, line 14]. Rules to implement the “forgiveness” provisions are due not later than 30 days after enactment. [p. 8 line 52]

³ Subsection 1106(d)(2) [p. 45, line 13]

⁴ Subsection 1106(d)(3) [p. 47, line 3]

⁵ Subsection 1106(e)(4) [p. 50, line 24]

⁶ Subsection 1106(c)(1), (2) [p. 43 lines 15-25]

⁷ E.g., <https://home.treasury.gov/system/files/136/PPP--Fact-Sheet.pdf>.

⁸ Subsection 1106(d) [p. 45, starting at line 7]

⁹ Costs regarding payroll, covered mortgage interest, covered rent obligations, and covered utility payments are *all* eligible for SBA forgiveness. Subsection 1106(b) [p. 43, lines 3-14]

¹⁰ 13 C.F.R. 121.103.

small businesses. The Administration should restrict application of the affiliation rules to the utmost, within CARES Act authorities.

4. **Confirm that “any business concern” with not more than 500 employees is eligible for its own individual PPP loan “per physical location,”¹¹ as duly formed under State incorporation and partnership laws.** Loan eligibility “per physical location” should be available where that entity is duly formed and recognized under State law as “an individual proprietorship, partnership, limited liability company, joint venture, association, trust or cooperative.” This is in accord with underlying SBA rules defining “business concern.”¹² Certainly, a “loan per physical location” rule must at least be afforded to businesses in NAICS Code 72,¹³ and any franchised business outlet as per #5 below.
5. **Confirm that “any business concern operating as a franchise and assigned a franchise identifier code”¹⁴ is eligible for a covered loan – regardless of its industry sector – and is temporarily exempt from the affiliation rules.** Franchises in the retail, health care, and all other sectors should be temporarily exempt from the affiliation rules if they are coded on the SBA Franchise Directory.¹⁵
6. **Confirm that small business “start-ups” with equity investors are not excluded from the 7(a) emergency loan program because of the “affiliation rules.”** Angel investors often hold 15-20 startup companies in their portfolios, but under affiliation rules all of these firms might be aggregated and could push the total number of employees over the 500 threshold. Each startup is a separate entity. They should not be precluded from accessing the emergency SBA loan program simply because of some common investors.
7. **Confirm that capital injections from 20% equity owners are not required under the CARES Act.** The CARES Act temporarily suspends the “credit elsewhere”¹⁶ requirement, and waives the personal guarantee requirement,¹⁷ which both normally apply under the primary SBA Section 7(a) loan program. The agencies should confirm that these provisions effectuate a waiver of the SBA’s existing regulation that ordinarily requires 20% equity owners in the borrower to “inject” their own “liquid assets” to reduce the amount of the SBA loan.¹⁸ Clarification is warranted here because the new loan application form released on March 31 requires that 20% owners must be identified, and further they must make certain good faith certifications as to compliance with PPP requirements.¹⁹

¹¹ Subsection(36)(D)(iii) [p. 15, line 23]

¹² [13 C.F.R. § 121.105\(b\)](#) (“A business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust or cooperative ...”)

¹³ Subsection (36)(D)(iv)(I) [p. 16, lines 15-20]

¹⁴ Subsection (36)(D)(iv)(II) [p. 16, lines 21-24]

¹⁵ See <https://www.sba.gov/document/support--sba-franchise-directory>.

¹⁶ Subsection (36)(I) [p. 24, line 14]

¹⁷ Subsection (36)(J) [p. 24, line 20]

¹⁸ [13 C.F.R. § 120.102](#). This current SBA regulation states: “An Applicant for a business loan must show that the desired funds are not available from the resources of any individual or entity owning 20 percent or more of the Applicant. SBA will require the use of liquid assets from any such owner as an injection to reduce the SBA loan amount when that owner’s liquid assets exceed the amounts specified in paragraphs (a)(1) through (3) of this section.” In other words, 20% owners must inject certain amounts of their own “liquid assets” to reduce the overall amount of the SBA loan, in varying amounts based on the “total financing package” and the extent of the 20% owner’s liquidity.

¹⁹ See <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Application-3-30-2020-v3.pdf>

8. **Confirm that payroll costs for workers re-hired after February 15, 2020 can be forgiven.** Where a small business must furlough workers after February 15, but is able to re-hire them before June 30, the agencies should clarify that payroll costs for re-hired workers can be included in forgiven loan amounts.
9. **Confirm that rent obligations under a lease modified after February 15 – but which derives from an original pre-February 15 lease – are still “covered” for forgiveness purposes.** A “covered rent obligation” eligible for forgiveness is “rent obligated under a leasing agreement in force before February 15, 2020.”²⁰ A lease might be modified after February 15 with revisions on terms favorable to business lessees (on issues such as deferral, abatement, or pre-payments of rent). The agencies should clarify that rents paid under a lease modified after February 15 – that derives from a pre-February 15 lease involving the same parties and property interest – are eligible for forgiveness as a “covered rent obligation.”
10. **The 500-employee limit should be based on full-time employees.** The CARES Act defines “employee” for purposes of the 500-level criterion as a term that “includes individuals employed on a full-time, part-time, or other basis.”²¹ The text does **not** state “shall include.” Small businesses in key sectors like hotels, restaurants, tourism, and construction rely heavily on seasonal, on-call labor and could rapidly exceed the 500-employee cap if these components of the workforce must be counted. The Roundtable submits that the intent of the CARES Act is furthered by reaching as many small business concerns as possible, and latitude should be given to only include full-time employees within the “500” count.
11. **Provide businesses with flexibility to measure employment at the level of the management/operating business or the underlying business with the financial obligation for payroll costs.** In some industries, it is common for the business to contract with an operating company to manage and oversee employees. The business nonetheless maintains full contractual responsibility for the costs of compensating those employees. In some cases, a single management company may work with many property owners (e.g., hotel and lodging). In other cases, a single property owner may work with many management companies (e.g., senior housing). The PPP should strive to support as many of these struggling businesses as possible by providing significant flexibility to the business to determine the appropriate entity for purposes of applying for a loan and allocating payroll and other costs.
12. **Confirm that “alternative size standards” do not pre-empt CARES Act eligibility rules.** The “alternative size standards” that assess an applicant’s maximum net worth and average net income²² – for either the underlying Section 7(a) primary loan program or the Section 7(b)(2) disaster loan program – should not displace the temporary enhanced eligibility standards for CARES Act qualification..
13. **Clarify the relationship between the bill’s text allowing a business concern to include payments of compensation to independent contractors within covered “payroll costs,”²³ with the separate text that renders an independent contractor itself eligible to receive a covered loan for wages and other allowable uses.²⁴** The

²⁰ Section 1106(a)(4) [p. 42, line 1]

²¹ Subsection 36(D)(v) [p. 17, lines 6-14]

²² 15 U.S.C. § 632(a)(5)(A),(B)

²³ Subsection (36)(A)(viii)(I)(bb) [page 12, line 1]

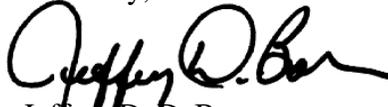
²⁴ Subsection (36)(D)(ii) [page 15, line 1]

April 2, 2020

Administration should assess whether an independent contractor might somehow get compensation covered through its own loan, and then indirectly *again* through a business concern that hired and procured the contractor's services.

The Roundtable looks forward to working with the Department and the Administration to implement the *CARES Act's* small business provisions. They will play a vital role to re-start our economy. We share your objective to immediately get these loans reviewed, approved and into the coffers of America's small businesses. For more information, please contact Duane J. Desiderio, Senior Vice President and Counsel (ddesiderio@rer.org).

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey D. DeBoer". The signature is fluid and cursive, with a large initial "J" and "D".

Jeffrey D. DeBoer
President and Chief Executive Officer

JDD/lh