December 12, 2022

Dianna Seaborn, Director
Office of Financial Assistance
U.S. Small Business Administration
409 Third Street SW
Washington, DC 20416

RE: RIN 3245-AH87
Document ID: SBA-2022-0012-001
Affiliation and Lending Criteria for the SBA Business Loan Programs

Dear Ms. Seaborn:

The National Association of Development Companies (NADCO), on behalf of the Certified Development Company (CDC) industry, submits these comments in response to the U.S. Small Business Administration's (SBAs) Proposed Rule titled "Affiliation and Lending Criteria for the SBA Business Loan Programs (RIN 3245-AH87)."

Background

NADCO provides comments specific to CDCs and their involvement in SBA programs as mission-based lenders focused on promoting economic development through job creation. CDCs are non-profit lenders approved by SBA to participate in specific agency loan programs, including the 504 Loan Program, the Community Advantage (CA) Pilot Program, and the Microloan Program. The Agency is the primary regulator and conducts rigorous oversight of CDCs, including – but not limited to – a biennial review of each CDCs risk rating, historical performance measures (e.g. default rate, purchase rate and loss rate), and portfolio compliance; quarterly Loan and Lender Monitoring System (L/LMS) analysis of the outstanding balance of each CDCs portfolio; specific reviews and biennial reapproval for CDCs who have Accredited Lenders Program (ALP) or Premier Certified Lenders Program (PCLP) status; an extensive Annual Report to SBA covering every aspect of CDC activity from operations of the CDC to loan portfolio metrics; and more.

CDCs are by design economic developers, which is a primary reason that in addition to the myriad of other federal, state, and local programs they offer, they all have in common delivery of the SBA's 504 Loan Program. The 504 program is SBA's only program for which economic development in the form of job creation or meeting public policy or community development goals are requirements for eligibility, which differentiates it from other SBA capital access programs for which credit elsewhere (including consideration of personal resources) is a statutory determinant for eligibility. Additionally, the 504 Loan Program is focused on economic development through the purchase of commercial real estate and capital equipment, in essence, fixed assets.

The Community Advantage Loan Program is also delivered by non-profit entities, which includes nearly 50 CDCs, many who have delivered the program since its inception in 2011. This program is also mission-driven with 60% of loans made in underserved communities, encapsulating rural, HUBZone, low-to-moderate income, and new businesses. Many of the changes SBA proposes in this rule were introduced

for the Community Advantage Loan Program on April 29, 2022 (87 FR 25398), which NADCO supported in comments submitted to the Agency on May 24, 2022. At that time, NADCO encouraged SBA to extend many of these reforms to the 504 Loan Program.

NADCO's comments below are reflective of the manner in which CDCs operate within the SBA ecosystem, the unique parameters of the programs they deliver, and are consistent with comments made to the Agency previously. **NADCO has long advocated for simplification and streamlining of SBA's 504 Loan Program and Community Advantage Loan Program to promote speed, consistency, and certainty for small business access to capital**.

Given this background, NADCO offers the following –

Section 120.130—Restrictions on Uses of Proceeds

Current § 120.202 restricts Borrowers from using 7(a) loan proceeds to purchase a portion of a business or a portion of another owner's interest. SBA proposes to revise this section to allow Borrowers to use 7(a) loan proceeds to fund partial changes of ownership in addition to full changes of ownership.

> *NADCO supports SBA's desire to assist small businesses and provide a path to ownership for employees. While no such regulatory restriction on partial change of ownership projects exists in* § 120.884 for *SBA's 504 Loan Program, SBA has historically used Standard Operating Procedure (SOP) guidance to allow full change of ownership projects in 504. SBA has not historically allowed 504 to fund partial change of ownership projects. NADCO recommends that SBA change its guidance to allow the 504 Loan Program to finance full or partial change of ownership projects provided those projects are supported by underlying fixed assets.*

Section 120.150—What are SBA's lending criteria?

Current § 120.150 states that SBA's lending criteria for 7(a) and 504 loans requires that the applicant (including the Operating Company) must be creditworthy; loans must be so sound as to reasonably assure repayment; and SBA will consider nine specific factors in its lending criteria. The factors consist of: (a) Character, reputation, and credit history of the applicant (and the Operating Company, if applicable), its Associates, and guarantors; (b) Experience and depth of management; (c) Strength of the business; (d) Past earnings, projected cash flow, and future prospects; (e) Ability to repay the loan with earnings from the business; (f) Sufficient invested equity to operate on a sound financial basis; (g) Potential for long-term success; (h) Nature and value of collateral (although inadequate collateral will not be the sole reason for denial of a loan request); and (i) The effect any affiliates (as defined in part 121 of this chapter) may have on the ultimate repayment ability of the applicant.

SBA proposes to revise this regulation by retaining the requirement that the applicant (including an Operating Company) must be creditworthy and that loans must be so sound as to reasonably assure repayment and streamlining the nine specific factors in its lending criteria to three specific criteria when approving loans: (a) The credit score or credit history of the applicant (and the Operating Company, if applicable), its Associates and any guarantors; (b) The earnings or cashflow of the applicant; or (c) where applicable, any equity or collateral of the applicant.

SBA is also incorporating into the regulation a new requirement that Lenders and Certified Development Companies (CDCs) must use appropriate and prudent generally acceptable commercial credit analysis processes and procedures consistent with those used for their similarly sized, non-SBA guaranteed commercial loans. The rule also adds language to § 120.150 to permit Lenders, CDCs, and SBA to use a

business credit scoring model to streamline loan underwriting. Lenders and CDCs may use SBA's Small Business Scoring Service (SBSS) credit scoring model. Lenders and CDCs may also use other credit scoring models; however, when doing so, Lenders and CDCs must be able to validate the credit scoring model and must document with appropriate statistical methodologies that their credit analysis procedures are predictive of loan performance, and they must provide that documentation to SBA upon request and during oversight reviews.

> *NADCO supported SBA's recent streamlining of lending requirements for the Community Advantage (CA) Loan Program [implemented in April 2022 via Federal Register Notice Vol. 87, No. 63 and via Federal Register Notice Vol. 87, No. 83], as these changes expanded access to the CA program's delivery of critical capital through small loans to underserved communities. CDCs have participated in the Community Advantage Loan Program since its inception in 2011. Historically, approximately 40-50 CDCs have delivered the program as part of our mission-based lending ethos, representing over 40% of total CA lenders and over 60% of CA lending dollars.*
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> *NADCO supports SBA's desire to extend the simplification and modernization of its lending requirements to the 504 Loan Program, while also embracing new technology to allow generally acceptable commercial credit analysis processes and procedures, including loan scoring models, to streamline underwriting. NADCO strongly encourages SBA to continue its focus on prudent lending standards while balancing program access with portfolio performance and program integrity.*
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> *For 504 Loan Program purposes, NADCO specifically supports SBA removing the requirement to consider character and reputation because as SBA stated in the proposed rule, "the lending industry commonly uses the terms character and credit history interchangeably." Credit history is a more objective, empirical measure than the amorphous concepts of "character" and "reputation." SBA's proposed change would focus more appropriately on current conditions more indicative of creditworthiness rather than minor infractions in an applicant's past.*
>
> *NADCO is concerned that SBA may use this change to implement a minimum credit score for all loans and recommends that SBA make clear in SOP guidance that CDCs are able to use mitigating factors when a credit score is impaired for explainable reasons. NADCO recommends that SBA retain the consideration of "experience and depth of management" in its lending criteria, as this is particularly important for start-up or new businesses – NADCO acknowledges that management strength can be implied by the financial performance of existing businesses, but it should be a separate consideration for start-up or new businesses where underwriting is based in part on management skills and projections.*

Section 120.160—Loan Conditions

Current § 120.160(c) states that for 7(a) and 504 loans, SBA requires hazard insurance on all collateral and does not distinguish this requirement by loan size. In the proposed rule, SBA is modifying the requirement for hazard insurance for all 7(a) and 504 loans $150,000 and under to create flexibility for SBA Lenders to mirror their hazard insurance requirements for their similarly sized non-SBA loans. SBA proposes revising this regulation to state that SBA requires hazard insurance for loans greater than $150,000.

> *NADCO supported SBA making this change in the Community Advantage Loan Program for small loans to underserved communities. As NADCO has long advocated for SBA to simply and*

streamline the 504 Loan Program, we support this change for 504 loans, as it allows for CDC flexibility to meet the needs of the small business Applicant more cost-effectively. To the extent that the CDC believes that hazard insurance is necessary for small loans secured by real estate, the proposed rule still allows that flexibility.

NADCO has advocated for SBA to grant similar flexibility for life insurance for the 504 Loan Program and recommends that SBA not automatically require life insurance for single owner businesses, allowing the CDC and Applicant to make the case that life insurance is not necessary, even for sole proprietorships and single member LLCs. In situations where life insurance is deemed necessary for these entities, if SBA's collateral gap calculation is less than a minimum threshold (i.e., $50,000), NADCO advocates for SBA to simply waive the requirement for life insurance altogether as this cost can be onerous for small business owners while providing minimal risk to SBA.

Section 120.193—Reconsideration After Denial

Under current regulation § 120.193, the Director of the Office of Financial Assistance (OFA) makes all reconsideration decisions. To facilitate fair and expeditious reconsiderations, SBA is proposing to grant the OFA Director the ability to delegate decision making to designees – for 7(a) loan applications, the Director's designee would include the Chief, 7(a) Loan Policy; for 504 loans, the Director's designee would include the Chief, 504 Loan Policy. From time to time, SBA may change the designee(s) and would do so in accordance with published Delegations of Authority.

NADCO supports this proposed change.

Section 120.202—Restrictions on Loans for Changes of Ownership

Current § 120.202 restricts Borrowers from using 7(a) loan proceeds to purchase a portion of a business or a portion of another owner's interest. SBA proposes to revise this section to allow Borrowers to use 7(a) loan proceeds to fund partial changes of ownership in addition to full changes of ownership.

This proposed change is contemplated in conjunction with SBA's proposed change to § 120.130 as outlined above. As stated above, NADCO supports SBA's desire to assist small businesses and provide a path to ownership for employees. While no such regulatory restriction exists in SBA's 504 Loan Program, SBA has historically used Standard Operating Procedure (SOP) guidance to restrict partial change of ownership projects in 504. NADCO recommends that SBA change its SOP guidance to allow the 504 Loan Program to finance full or partial change of ownership projects provided those projects are supported by underlying fixed assets.

Section 121.301—What size standards and affiliation principles are applicable to financial assistance programs?

SBA's proposed rule seeks to streamline SBA's affiliation criteria under § 121.301 for all of its business loan programs, including 504 and 7(a). SBA proposes to specifically remove the principle of control of one entity over another as a separate basis for finding affiliation because the concept of control has proven particularly burdensome for applicants and lenders to understand and implement.

NADCO supported SBA's streamlining and modernizing affiliation principles in the Community Advantage Loan Program in April 2022 and advocated for SBA to extend those changes to the 504 Loan Program as part of our long-term goal of program simplification.

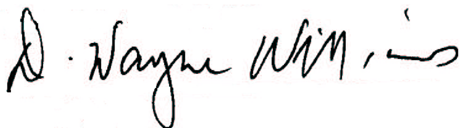
To use SBA's words, existing affiliation rules are "particularly burdensome for applicants and lenders to understand and implement." Additionally, the complexity has led to inconsistent interpretation and implementation by all parties in the loan approval process. SBA's proposal would create a "bright line" test that CDCs and small businesses can easily understand and implement.

With respect to the individual revisions to § 121.301 –

1. *NADCO supports SBA's proposed revisions to affiliation based on ownership in § 121.301(f)(1).*
2. *NADCO supports SBA's proposed revisions to affiliation based on stock options, convertible securities, and agreements to merge in § 121.301(f)(2).*
3. *NADCO supports SBA's proposed elimination of affiliation based on management in § 121.301(f)(3). NADCO also supports SBA's statement that "it [SBA] should not interfere in a business owner's right to enter into a service agreement with a management company." To the extent that SBA requires review and approval of management agreements for loan program requirements (i.e., passive business activity), NADCO expects SBA will continue its current guidance established in existing Standard Operating Procedures (SOP).*
4. *NADCO supports SBA's proposed elimination of affiliation based on identity of interest in § 121.301(f)(4). NADCO agrees with SBA that the existing requirement is "inherently unfair and impractical" when a close relative is not a principal of the Applicant business.*
5. *NADCO supports SBA's proposed elimination of affiliation based on franchise and license agreement in § 121.301(f)(5); however, <u>NADCO does not support elimination of the SBA Franchise Directory and SBA's approval of compliance with loan program requirements (i.e., business model eligibility)</u>. The current franchise review and approval process for business model eligibility has evolved over time and is working well for CDCs, Third Party Lenders, and small business Applicants. Keeping SBA involvement in the approval of business model eligibility will assure consistency and avoid second guessing through SBA's oversight activities, including Payment Integrity Information Act of 2019 (PIIA) audits and CDC reviews. NADCO recommends that SBA continue reviewing all franchise and license agreements for compliance with Loan Program Requirements and publishing that data on the Franchise Directory to provide transparent assurance to CDCs, Third Party Lenders, and small business Applicants.*

NADCO appreciates the opportunity to provide these comments and welcomes additional collaboration with SBA to create additional efficiencies in the 504 Loan Program.

Sincerely,



Wayne Williams
Executive Vice President
Regulatory Affairs & Training

January 6, 2023

Dianna Seaborn, Director
Office of Financial Assistance
U.S. Small Business Administration
409 Third Street SW
Washington, DC 20416

RE: RIN 3245-AH92
Document ID: SBA-2022-0013-001
Small Business Lending Company Moratorium Rescission and Removal of the Requirement for a Loan Authorization

Dear Ms. Seaborn:

The National Association of Development Companies (NADCO), on behalf of the Certified Development Company (CDC) industry, submits these comments in response to the U.S. Small Business Administration's (SBAs) Proposed Rule titled "Small Business Lending Company Moratorium Rescission and Removal of the Requirement for a Loan Authorization" (RIN 3245-AH92).

Improving access to capital to underserved communities has long been a shared priority of NADCO and its members and the SBA. NADCO does not believe that this proposed rule will achieve our common goal, and therefore, we <u>cannot</u> support the proposed rule as presented. We welcome dialogue with agency leadership to develop solutions to meet our common objectives.

Background
NADCO supported and applauded SBA's CA program reforms announced in April 2022, as those revisions were made in consultation with mission lenders to speed loan processing, delivery of capital of underserved communities, and encourage greater lender participation. Specific reforms included –

1. Extending the pilot program for two years (to September 30, 2024)
2. Removing the temporary moratorium on new CA Lender Participation Applications
3. Granting delegated authority to experienced CA lenders
4. Modifying Lending Criteria to simplify and streamline underwriting and approval of CA applications, including authorizing the use of business credit scoring models
5. Modifying regulations to provide equitable access under SBA programs and economic opportunities to justice-involved individuals
6. Increasing the maximum CA loan size from $250,000 to $350,000
7. Revising fee methodology and maximum interim rate to encourage greater lender participation in the CA Loan Program
8. Revising collateral requirements to increase the speed of capital being delivered to small businesses while decreasing overall costs to the CA Lender and borrower
9. Allowing revolving lines of credit to better meet the evolving capital needs of small businesses
10. Revising the requirements for hazard insurance
11. Simplifying affiliation principles

NADCO has long advocated for the CA Loan Program to be made permanent either through congressional action or through SBA's long-term extension of the pilot program (i.e., a 10-year

extension). The current program sunset of September 30, 2024 is a barrier to entry for new lenders. NADCO continues advocating for additional reforms to increase lender participation and better meet the capital needs of underserved communities, including –

1. SBA supporting Congressional action to make Community Advantage a permanent program
2. As an interim measure, SBA extending the pilot program until September 30, 2034, to encourage greater lender participation
3. Increasing the maximum SBA guarantee
4. Expanding CDC access to sources of liquidity
5. Expanding CA program eligibility to socially and economically disadvantaged businesses, such as businesses owned and controlled by women and minorities
6. Expanding CA program training for CA lenders new to SBA lending, SBA district office staff, and other resource partners to continue safeguarding programmatic integrity
7. SBA making grants available to CA lenders to support delivery of technical assistance, which is a crucial component of the CA program and critical to the success of CA borrowers and meeting the needs of underserved communities
8. Implementing streamlined, limited documentation closings for CA Loans of $100,000 or less [similar to what SBA allows in SBA 7(a) Express]; including –
    a. No life insurance required for CA loans of $50,000 or less
    b. Simplified verification of use of proceeds and equity injection

Given this background, our objections to the proposed rule include –

1. SBLC Moratorium Rescission

SBA proposes to lift the moratorium on new Small Business Lending Companies (SBLCs). This will allow new for-profit SBLCs into the program. SBA will also create a new type of non-profit Mission-Based SBLC, which SBA purports will help bridge financing gaps, particularly in underserved communities. Based on current oversight capacity, SBA anticipates it has the ability to approve three new SBLCs in total (regular for profit SBLC and Mission-Based SBLC).

Lifting Moratorium on SBLCs to Promote Mission Lending

1. *Lifting the moratorium and adding non-mission SBLCs does not improve access to mission lending for underserved communities. SBA's stated goal of this proposed rule is to address "certain markets where there are capital market gaps (that) struggle to obtain financing on non-predatory terms," particularly underserved communities. SBA imposes additional requirements on Mission-Based SBLCs "to ensure that Mission-Based SBLCs fill identified capital market gaps and provide targeted financial assistance to underserved communities." SBA does not impose **any** mission-based requirements on non-Mission-Based SBLCs, which is contrary to the goals outlined in the proposed rule and may have adverse impacts on programmatic integrity.*

    For example, as proposed, both regular and Mission-Based SBLCs would operate within the SBA 7(a) Loan Program. Because there is no limit to the number of SBLCs SBA could potentially add to participate in 7(a) lending, borrowers in underserved communities may experience disruptions in their ability to access capital through the 7(a) program if for-profit SBLCs lend at a rate to which the authorization cap is reached and the program is shut down, which would require an act of Congress to address.

Additionally, the expected cost of SBA's capital access programs is determined by SBA in conjunction with the Office of Management and Budget (OMB) and released in the President's budget request each year. There are many factors that determine the subsidy and whether a cost will be associated with each program, including economic conditions, expected loan cohort performance, and more.

Unfettered access to the 7(a) Loan Program by for-profit SBLCs may result in subsidy costs to the program necessitating not only the elimination of fee waivers for small dollar and veteran borrowers, but higher fees for all borrowers. Borrowers will suffer any unintended consequences of lifting the moratorium on SBLCs.

2. *By removing the moratorium on new SBLCs (both regular and Mission-Based), SBA can increase the number of SBLCs at any time with a notice in the Federal Register "to respond to market conditions and oversight capacity." However, the proposed rule does not detail how SBA will prioritize the approval of new non-profit Mission-Based SBLCs over new regular for-profit SBLCs. Without such detail and priority, lifting the moratorium will not achieve SBA's stated goal to increase lending capacity in underserved communities.*

3. *It is unclear how the proposed rule will advance mission lending when so many programmatic details are not addressed (i.e., geography, maximum loan size, target markets, etc.). The rule leaves those details to be approved by SBA personnel on a lender-by-lender basis, thus creating separate guidelines for each lender. SBA promotes this individualized approach as flexible in order to fill specific market gaps, yet it lacks transparency, creates inconsistency for small business borrowers, and places added responsibilities on an already overburdened agency to devise, approve, and monitor individualized lender compliance. To encourage mission lending, NADCO supports SBA making further reforms to the Community Advantage Loan Program which already has the requisite programmatic framework.*

4. *The proposed rule is absent specificity and transparency around Mission-Based Small Business Lending Companies (SBLCs) and the transition of existing CA lenders to this new category. SBA proposes to "allow CA Lenders an opportunity to apply to permanently participate in the 7(a) Loan Program as a Mission-Based SBLC while continuing to meet the needs of underserved communities." However, the proposed rule provides no details on this "application" process and no assurance that all existing CA lenders will be granted the new Mission-Based SBLC designation. Depending on how implemented, transitioning existing CA lenders could be costly and time-consuming to lenders and inhibit their ability to serve borrowers. The rule also contains no details on an application process for new Mission-Based SBLCs not coming from the CA loan program. Further, SBA removed the temporary moratorium on new CA Lenders in April 2022 [Federal Register Notice Vol. 87, No. 63] to encourage greater lender participation in the CA program, but the proposed rule states that SBA "has capacity to authorize three new SBLC Licenses" and "SBA anticipates approving three SBLCs, including Mission-Based SBLCs, in the full first year after this proposed rule becomes effective." This would restrict adding new mission lenders when no such restriction exists in the CA Loan Program today. This is contrary to the April 2022 changes allowing increased lender participation in the CA Loan Program.*

Impact on Community Advantage Pilot Program and Meeting the Capital Needs of Underserved Communities

1. *SBA's April 2022 reforms to the CA Loan Program included lifting the moratorium on new lenders and extending the program until September 30, 2024. Lenders considering CA program participation must balance the cost of investing in a new program versus the uncertainty of the program ever becoming permanent. Without such certainty, new lenders are reluctant to invest in the program. As SBA stated in the proposed rule when discussing new SBLC lenders, "newly established SBLCs take up to five years to reach the current lending activity sustained by established SBLC license holders." In contrast, SBA's reforms to the CA loan program have only been in place since April 2022. Rather than being "an unviable alternative" for increasing volume in underserved lending, CA simply needs time. Additionally, had SBA paired its program reforms with a longer extension of the pilot, lenders would have more certainty to justify the investment in a program to deliver much-needed capital to underserved communities.*

2. *The proposed rule does not address NADCO's other recommendations to improve the Community Advantage Loan Program, including increasing the maximum SBA guarantee, expanding CDC access to liquidity, streamlining closing documentation, expanding training, and making grants available to assist with much-needed technical assistance that is critical to underserved communities.*

3. *The proposed rule is silent on capital requirements for Mission-Based SBLCs, which could impede existing CA lenders from transitioning to a Mission-Based SBLC designation and deter new lenders from applying for this program. For context, the current SBLC capital requirement is $5 million. Additionally, under the proposed rule, SBA requires an existing CDC currently providing CA loans to form a new affiliated non-profit entity to apply to serve as the proposed Mission-Based SBLC. This requirement creates costs and additional burdens for existing CA lenders to transition to the Mission-Based SBLC designation defeating the goals of the proposed rule.*

4. *Per the proposed rule, Mission-Based SBLCs will be subject to a minimum $10,000 initial safety and soundness examination at the time of application and ongoing safety and soundness examinations at least once every two years. "Additionally, SBA conducts targeted reviews of loan files in between regularly scheduled safety and soundness exams. The total biennial cost of these risk-based reviews is currently $50,000 to $150,000 per institution, with review costs correlated to the size of the SBLC's loan portfolio." As mission-based non-profit lenders, CA lenders pay oversight fees commensurate with the size of their CA loan portfolios and associated risk; whereas traditional SBLCs are for-profit lenders not subject to SBA's mission lending mandates, have significantly larger portfolios, and can make loans up to $5 million. This proposal creates another cost pain point for mission-based lenders and may force smaller CA lenders to exit the program, which is counterproductive to the goal of increasing lending to underserved communities.*

2. Removal of the Requirement for a Loan Authorization

SBA is proposing to remove the requirement for a Loan Authorization in its 504 and 7(a) Loan Programs. Both the 7(a) Loan Program and the 504 Loan Program currently require a Loan Authorization providing the terms and conditions under which SBA will make or guarantee business loans. The terms and

conditions of each loan are also submitted into E-Tran by the SBA Lender through the submission of the loan application data and conditions. SBA has decided this dual entry of information is a duplication of effort and creates an opportunity for a mismatch of information between two sources of the loan terms and conditions. SBA proposes to eliminate the requirement for a separate Authorization and to instead rely on the use of the terms and conditions of the loan application as submitted by the SBA Lender into E-Tran.

> *NADCO does not support the elimination of the Loan Authorization for the 504 Loan Program or the Community Advantage Loan Program. The loan authorization in the 504 Loan Program is relied upon by the CDC, the Interim Lender, the Third Party Lender, and the Borrower to provide a detailed outline of the terms and conditions under which SBA will guarantee the 504 debenture and allow for closing and funding of the 504 loan to pay off a portion of any interim financing. All parties use this document as a roadmap for the closing process of the interim financing, the third party financing, and the 504 loan.*
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> *In a commercial real estate transaction, sellers rely on a buyer's ability to arrange the financing needed to consummate the purchase. Buyers traditionally provide a seller with a commitment letter to evidence the certainty that the buyer has been approved for any necessary financing. While not a commitment to lend, the SBA Authorization for a 504 loan provides the certainty to all parties that project financing has been reviewed and approved by the SBA, and that upon successful completion of the project and fulfillment of the terms of the Authorization, SBA will allow the CDC to close and fund the 504 loan and payoff the interim financing. For that reason, an Authorization is critical to the transaction.*
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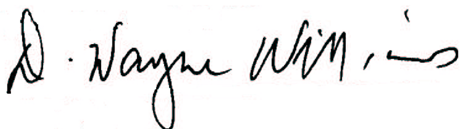
> *NADCO and CDCs have collaborated with SBA on eliminating the "wizard" interface for generating authorizations for 504 loans and creating a mechanism that allows a CDC to populate an authorization directly from data stored in ETRAN. SBA introduced this functionality in May 2022, and technology providers launched a direct interface with ETRAN in September 2022, further streamlining the creation of an authorization from ETRAN data. The rule's stated purpose for eliminating the loan authorization is to preclude "dual entry of information," as that is a "duplication of effort and creates an opportunity for a mismatch of information between two sources of the loan terms and conditions" [the ETRAN loan data and the authorization]. However, SBA's recently introduced 504 ETRAN authorization, now coupled with CDC technology provider interface, created directly from ETRAN data sources, has addressed SBA's "duplication" concern for the 504 Loan Program.*

NADCO appreciates the opportunity to provide these comments and welcomes additional collaboration with SBA to improve efficiency and effectiveness in the agency's 504 and CA loan programs.

Sincerely,



Wayne Williams
Executive Vice President
Regulatory Affairs & Training

National Association of Development Companies

September 20, 2021
UPDATE 9/23/2021 – see page 6

Linda Reilly
Chief, 504 Program Branch
Office of Financial Assistance
U.S. Small Business Administration
409 Third Street SW
Washington, DC 20416

RE: RIN: 3245-AH78
Interim Final Rule
Debt Refinancing in the 504 Loan Program

Dear Ms. Reilly:

The National Association of Development Companies (NADCO), on behalf of the Certified Development Company (CDC) industry, submits these comments in response to the U.S. Small Business Administration's (SBAs) interim final rule ("IFR") titled, "Debt Refinancing in the 504 Loan Program," (RIN: 3245-AH78). NADCO appreciates the opportunity to comment on these crucial changes to SBAs 504 loan program. It has always been our belief that 504 regulations should not only protect the integrity of the program, but also improve avenues for CDCs to promote economic development through job creation guided by the best interests of the small businesses we all serve. Our comments are based on this philosophy, which we know you share.

Congress reauthorized and made permanent the 504 debt refinance without expansion program under Section 521 of Division E of the Consolidated Appropriations Act, 2016. Since its reimplementation, Congress has authorized a $7.5 billion cap for the loan program. However, the program has historically been underutilized, due in part to conditions and limitations placed on the program by SBA in its regulations and policy guidance. In the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues" Act ("Economic Aid Act"), Congress revised the requirements for refinancing debt in the 504 loan program to expand small business access to, and use of, this critical capital resource.

The Senate Small Business and Entrepreneurship Committee released a section-by-section guide to the Economic Aid Act, Division N, Title III: Continuing the Paycheck Protection Program and Other Small Business Support. In "Section 328: Low-Interest Refinancing" of that section-by-section guide, the Committee states the statute, "(e)nhances the 504 refinancing rules in order to create reciprocity for refinancing between 504 and 7(a) programs." It is clear the legislative intent of the statute was to create parity in the ability to refinance existing debt under either the 504 or 7(a) loan programs – both should be equally accessible and guided by what is in the best interest of the small business borrower, while protecting program integrity.

SBA initially implemented the 504 debt refinance without expansion program through an interim final rule on May 26, 2016, and a final rule on June 6, 2018. As originally authorized by Congress and implemented by SBA, "(t)he Debt Refinancing Program shall be in effect only in those fiscal years during

which the cost to the Federal Government of making guarantees under the Debt Refinancing Program and under the 504 Loan Program is zero." SBA introduced conditions that limited and restricted the usability of the debt refinancing program under this "zero cost" requirement. The Economic Aid Act removed the "zero cost" requirement. While remaining cognizant of prudent underwriting and program integrity, NADCO believes that certain program guidance can be revised to increase access and usability.

NADCO's comments focus on suggested changes to the Interim Final Rule and policy guidance, which we believe will simplify the program, making it more accessible and efficient without adding undue risk –

13 CFR 120.882(g)(3)
NADCO has two specific recommendations in this section. First, NADCO recommends that SBA not include in regulation any conditions or requirements that restrict or limit the ability to refinance a loan that is subject to a guarantee by a Federal agency or department since no such conditions or restrictions exist in statute. NADCO recommends SBA use similar language the agency previously used in regulations for the 504 debt refinance with expansion program at 13 CFR 120.882(e)(3) – there, SBA simply states, "Existing 7(a) and 504 loans may be refinanced under this section in accordance with SBA policies or procedures." Using the same language in 13 CFR 120.882(g)(3) would prevent unnecessary restrictive conditions from being incorporated into regulation and will provide the agency with maximum flexibility to allow refinancing through policy guidance that is in the best interest of the small business borrower.

Second, NADCO recommends removal from policy and procedure guidance the written verification of the existing 7(a) lender's inability or unwillingness to modify the current payment schedule as a requirement to allowing the refinance of an existing 7(a) loan. NADCO takes strong exception to the limitations that SBA is imposing on the CDCs ability to refinance an existing 7(a) loan in Section 120.882(g)(3)(ii) and in its SOP Policy Notice 5000-808830, paragraph 10.e)ii) –

> "An existing 7(a) loan may be refinanced if the CDC verifies in writing that the present lender is either unwilling or unable to modify the current payment schedule. In the case of same institution debt, if the Third Party Lender or the CDC affiliate as authorized under § 120.820 is the 7(a) lender, the loan will be eligible for 504 refinancing only if the lender is unable to modify the terms of the existing loan because a secondary market investor will not agree to modified terms."

Just like the ability to refinance an existing 504 loan in § 120.882(g)(3)(i), the ability to refinance an existing 7(a) loan should be unfettered and guided by what is in the best interest of the small business applicant. In § 120.882(g)(3)(iii), SBA establishes a "substantial benefits test" for the refinance of existing government-guaranteed debt that already assures the debt refinance is advantageous to the small business borrower. Any further restrictions only benefit the best interest of the 7(a) lender, potentially a secondary market investor, and not the small business applicant. To expand upon this point, the written verification requirement should be removed from the IFR and policy guidance for the following reasons:

1. This requirement is not in the best interest of the small business borrower. The small business borrower should be able to obtain the loan product that best meets the needs of his/her business. This requirement essentially takes that choice away from the borrower, if his/her existing 7(a) lender will not issue a written verification.

2. This requirement continues to allow an advantage for the 7(a) program over the 504 program, which effectively nullifies the parity that was the original intent of the law. This rule essentially provides a “first right of refusal” to the existing 7(a) lender, which is neither customary nor reasonable in the commercial lending industry and puts the onus on the small business borrower to advocate in their best interest. We have already heard from small business borrowers that, prior to issuing a written verification, existing 7(a) lenders are requiring the small business borrower to submit a full application for credit review. This adds unnecessary time and complexity to the refinance process, serves the interest of the existing 7(a) lender, and does not promote the best interests of the small business borrower.
3. SBA is already adding a “substantial benefits test” to the refinancing of existing government-guaranteed debt in Section 120.882(g)(3)(iii), which ensures the debt refinance is beneficial to the small business borrower.

13 CFR 120.882(e)(3)
NADCO recommends that SBA remove this same “written verification” restriction/limitation from the 504 debt refinance with expansion program at 13 CFR 120.882(e)(3) when refinancing an existing 7(a) loan for all the same reasons outlined above. Additionally, SBA has always required a “substantial benefits test” in 13 CFR 120.882(e)(5), which ensures the debt refinance is beneficial to the small business applicant.

13 CFR 120.882(g)(6)(i)
NADCO recommends that SBA remove the restriction that if a Borrower’s application includes a request to finance Eligible Business Expenses, “the portion of the Refinancing Project provided by the 504 loan and the Third Party Loan may be no more than 85% of the fair market value of the fixed assets that will serve as collateral and the Borrower may receive no more than 20% of the fair market value of the Eligible Fixed Asset(s) securing the Qualified Debt for Eligible Business Expenses.”

No such restrictions or limitations exist in statute – not in the original enabling legislation in Section 521 of Division E of the Consolidated Appropriations Act, 2016 nor the revised statutory language in Division N, Title III, Section 328 of the Economic Aid Act. SBA implemented this limitation in regulation and policy guidance in part to address the original statutory requirement that the Debt Refinancing Program must operate at “zero cost,” which was eliminated in the Economic Aid Act. In its Final Rule published in the **Federal Register**, Vol. 83, No. 88 on May 7, 2018, SBA stated –

> “When SBA first implemented the reauthorized Debt Refinancing Program in 2016, SBA applied a maximum 75% loan-to-value (LTV) for any project that financed business expenses and limited such financing of business expenses to no more than 25% of the value of the Eligible Fixed Asset(s) securing the Qualified Debt. See Policy Notice 5000–1382, effective May 26, 2016. Thirty-six commenters expressed concerns that the 75% LTV was severely restrictive and would impair utilization of the program, and many urged SBA to allow for a 90% LTV for all Refinancing Projects. SBA considered these comments and decided to revise 13 CFR 120.882(g)(6)(i) to allow a maximum LTV of 85% for any project that includes the financing of Eligible Business Expenses. SBA concludes that this higher LTV will provide increased access to credit without adding undue risk to SBA...In addition, with the statutory requirement that SBA maintain the Debt Refinancing Program at zero subsidy in order for the program to be in effect during any fiscal year, SBA must be diligent in placing prudent controls on the program to mitigate SBA’s risk and exposure. Accordingly, SBA has decided to limit the portion of the financing that may be for business expenses to 20% of the value of the Eligible Fixed Asset(s). In addition, if the Refinancing Project

includes the financing of Eligible Business Expenses, SBA will not accept as collateral any fixed assets other than the Eligible Fixed Asset(s) securing the Qualified Debt. Accordingly, SBA is revising 13 CFR 120.882(g)(6)(i) and (ii) and the definition of ''Refinancing Project'' in 13 CFR 120.882(g)(15)."

The restriction has continued to impair program utilization. In the Interim Final Rule published in **Federal Register**, Vol. 86, No. 143, July 29, 2021, and despite a program authorization of $7.5 billion, SBAs own data shows the depressed utilization of the 504 Debt Refinancing Program due in part to restrictions imposed by SBA beyond statutory language or legislative intent –

504 Debt Refi Without Expansion – Unit & Dollar Volume by FY				
FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
45	266	181	166	386
$41,598,000	$289,491,000	$154,745,000	$156,114,000	$374,749,000

NADCO recommends removal of the restriction for the following reasons –

1. The restriction is not authorized in law and is a barrier for small businesses to utilize the program.
2. The SBA acknowledged user concerns in its May 2018 Final Rule that the restriction was limiting and impaired utilization of the program. While SBA revised the restriction in the Final Rule to increase the maximum LTV from 75% to 85%, the agency reduced the financing of Eligible Business Expenses from 25% to 20%, further impairing program utilization.
3. The legislative intent of the Economic Aid Act was to increase program access and utilization, as well as to create "reciprocity for refinancing between 504 and 7(a) programs;" no such restriction exists in the 7(a) loan program.
4. The Economic Aid Act removed the requirement that the 504 Debt Refinancing Program operate at "zero cost," which SBA used as justification for imposing this restriction as outlined above. Though this requirement was removed, it is important to note that the program has performed well over time, allowing SBA to drop its Congressionally-mandated supplemental annual guarantee fee each year since program launch in May 2016 – dropping from 4.4 basis points at program launch to 1.15 basis points for fiscal year 2022. Removing this requirement, and subsequent restrictions based on the "zero cost" requirement, do not jeopardize the integrity of the program.

NADCO believes removing this restriction will improve program access and utilization without adding undue risk to SBA. In fact, during the COVID-19 pandemic, allowing small business borrowers to access equity in fixed assets to fund working capital and business operating expenses provided much-needed relief and stability as businesses recover and position themselves for future growth. Through September 10, 2021, 606 borrowers have been approved for 504 debt refinance projects totaling $621,358,000.[1] This is a significant increase from prior years, further demonstrating the need for low-cost, long-term, fixed rate financing for small businesses to reposition their balance sheets for immediate relief and growth.

13 CFR 120.882(g)(6)(ii)

NADCO recommends that SBA broaden the definition of Eligible Business Expenses to include "or other obligations of the business." In its Final Rule published in the **Federal Register**, Vol. 83, No. 88, May 7,

[1] Source – *SBA Weekly Approvals Report for 9/10/2021*

2018, SBA specifically removed the phrase, "or other obligations of the business," from the definition of Eligible Business Expenses, "to clarify that, except as described below, other debt of the business is not included as Eligible Business Expense." SBA clarified that business credit card debt and business line of credit debt could be included as an Eligible Business Expense if the credit card and business line were in the name of the Applicant small business and the Applicant certified that the credit card debt and business line of credit debt were incurred exclusively for business related purposes. By removing "other obligations of the business," SBA specifically excluded other debt obligations that were not business credit card or business line of credit debts. In fact, in its regulations at 13 CFR 120.882(g)(6)(ii), SBA specified that "Debt is not included as an Eligible Business Expense, except debt that was incurred with a credit card or business line of credit...."

NADCO recommends broadening the definition of Eligible Business Expenses to also include any other debt of the business that is not Qualified Debt. For example, under current regulations and policy, a small business that has a permanent working capital term loan secured by a second mortgage on its company headquarters building cannot refinance that loan in the 504 Debt Refinancing Program – the permanent working capital loan does not meet the requirements of Qualified Debt, as it was not used to acquire Eligible Fixed Assets, and it is not a business line of credit or business credit card qualifying as Eligible Business Expenses. So, the small business is unable to refinance this debt even though it is secured by Eligible Fixed Assets. And, to compound the dilemma, the small business can refinance its existing first mortgage loan if that loan meets all conditions of Qualified Debt and can even obtain new funds for Eligible Business Expenses, but the lender of the existing second mortgage must agree to subordinate its second mortgage to the 504 debt refinancing project. In the commercial banking industry, it is highly unlikely that a lender will agree to such a subordination or a diminishing of its lien position. Therefore, the small business borrower is precluded from accessing and using the 504 Debt Refinancing Program to consolidate its debt and potentially benefit from long-term, low-cost fixed rate financing to better position the business for the future.

In its Interim Final Rule dated May 25, 2016, SBA previously allowed this junior lien debt to be considered part of Eligible Business Expenses, just like business credit card debt and business line of credit debt. However, SBA eliminated this allowance for junior lien debt in its Final Rule dated May 7, 2018, thereby decreasing small business access to and usability of the 504 Debt Refinancing Program. NADCO recommends SBA reverse this position.

13 CFR 120.882(g)(7)

NADCO recommends SBA clarify in its policies and procedures that a partial refinance of any Qualified Debt is allowed, including a partial refinance of an existing government-guaranteed debt or conventional debt. SBA's Interim Final Rule (IFR) retained 13 CFR 120.882(g)(7) requiring –

> "(7) If the qualified debt is not fully satisfied by the funding provided by the Refinancing Project, the lender of the qualified debt must take one of the following actions, or some combination thereof, to address the deficiency:
>
> > (i) Forgiveness of all or part of the deficiency;
> > (ii) Acceptance of payment by the Borrower, or
> > (iii) Acceptance of a Note executed by the Borrower for the balance, or any portion of the balance. Such Note must be subordinate to the 504 loan if the Note and the 504 loan are secured by any of the same collateral. The Note is subject to any other restrictions that SBA may establish to protect its creditor position, including standby requirements;"

It is clear from the regulatory language that SBA has historically allowed and continues to allow a partial refinance of a Qualified Debt. The portion of an existing indebtedness that meets the conditions of Qualified Debt can be refinanced in the 504 Debt Refinancing Program, and the remaining portion of the existing indebtedness that, "is not fully satisfied by the funding provided by the Refinancing Project," must be addressed according to the actions outlined by SBA in the regulation.

For example, a small business acquired its company headquarters facility with a conventional bank loan secured by a first mortgage on the property. The conventional lender advanced funds to allow the small business to acquire the property and include permanent working capital to help fund a new product line the business was launching when it moved into this new location. 75% of the loan proceeds were used for the purchase of the property with the remaining 25% funding the permanent working capital. Under existing regulation and policy, among other requirements, SBA requires that to be a Qualified Debt, "substantially all (85% or more) of the proceeds of the indebtedness were used to acquire land, including a building situated thereon, to construct a building thereon, or to purchase equipment. The assets acquired must be eligible for financing under the 504 loan program." In the current example, only 75% of the loan funds were used for 504-eligible purposes. Under current policy and procedures, SBA would deem the current loan ineligible to be refinanced in the 504 Debt Refinancing Program, as the entire loan must meet the 85% requirement, or the entire loan is ineligible. However, it is clear from SBAs own regulations that that portion of the indebtedness that meets the 85% test should be eligible for refinancing under 504 and the remaining balance should be addressed through one, or some combination, of the three deficiency options outlined in 13 CFR 120.882(g)(7). In fact, SBA applies this partial refinancing methodology now to the partial refinance of an existing 7(a) loan in SBA Policy Notice 5000-808830, paragraph 10.a.(1)e)ii), which states in part that, "...The existing 7(a) loan may be refinanced in whole or in part."

NADCO recommends that SBA simply apply this same policy guidance to refinancing conventional debts in the 504 Debt Refinancing Program and allow partial refinances of all Qualified Debt.

UPDATE – 9/23/2021

13 CFR 120.882(e)(1) and definition of "Qualified Debt" in 13 CFR 120.882(g)(16)

NADCO recommends that SBA modify its definition for debt eligible to refinance in the 504 loan program [for 504 debt refinance with expansion program at 13 CFR 120.882(e)(1) and for the 504 debt refinance without expansion program at 13 CFR 120.882(g)(16)] by lowering its "substantially all" (85% or more) standard to a "majority" standard (51% or more).

The Small Business Investment Act establishes in law the following requirements related to this matter –

> For 504 debt refinance with expansion, Section 502(7)(B)(i) –
>
> > "[t]he proceeds of the indebtedness were used to acquire land, including a building situated thereon, to construct a building thereon, or to purchase equipment;"
>
> For 504 debt refinance without expansion, Section 328 of the Economic Aid Act updates Section 502(7)(C) of the Small Business Investment Act with the amended Section 502(7)(C)(i)((III)(cc) –
>
> > "The term 'qualified debt" means indebtedness – the proceeds of which were used to acquire an eligible fixed asset;"

In both cases, SBA has chosen to implement in regulation and policy, a "substantially all" standard meaning "almost all" or "nearly all" of the proceeds, and a Borrower will satisfy this standard when it used at least 85% of the proceeds of the existing debt "to acquire land, including a building situated thereon, to construct a building thereon, or to purchase equipment" (for 504 debt refinance with expansion) or "to acquire an Eligible Fixed Asset" (for 504 debt refinance without expansion). SBA applies this standard to the original loan used to acquire, construct, or purchase the asset.

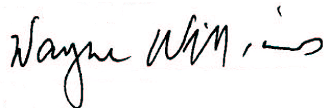
NADCO recommends that SBA lower in regulation and policy the "substantially all" standard (85% or more) to a "majority" standard of 51% or more. We believe this change will promote increased access to and utilization of both 504 debt refinancing programs without adding undue risk to SBA while honoring the original intent of the law.

Conclusion

NADCO has no comment on any other parts of the Interim Final Rule not specifically addressed above and welcomes these changes, as they will improve the accessibility and utilization of the 504 Debt Refinancing Programs to the benefit of small businesses and entrepreneurs across the country.

We appreciate the opportunity to provide these comments.

Sincerely,



Wayne Williams
Executive Vice President
Regulatory Affairs & Training

"Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues"

SECTION-BY-SECTION

Division N, Title III: Continuing the Paycheck Protection Program and Other Small Business Support

(starts on p. 2042 of the attached formatted bill text)

Section 301; 302: Short Title; Definitions.

Section 303: Emergency Rulemaking Authority.

- Requires the SBA Administrator to establish regulations to carry out this title no later than 10 days after enactment, which is the date of the President's signature.

Section 304: Additional Eligible Expenses.

- Makes the following expenses allowable and forgivable uses for Paycheck Protection Program (PPP) funds:
  - Covered expenditures for operations. Payment for any software, cloud computing, and other human resources and accounting needs.
  - Covered property damage costs. Costs related to property damage due to public disturbances that occurred during 2020 that are not covered by insurance.
  - Covered supplier costs. Payments to a supplier pursuant to a contract, purchase order, or order for goods that was in effect prior to taking out the loan and was essential to the recipient's operations at the time at which the expenditure was made. Supplier costs of perishable goods can be made before or during the life of the loan.
  - Covered worker protection expenditure. Investments in personal protective equipment and other adaptive costs to help a loan recipient comply with federal health and safety guidelines or any equivalent State and local guidance related to COVID-19 during the period between March 1, 2020, and the end of the national emergency declaration.
- Allows loans made under PPP before, on, or after the enactment of this act to be eligible to utilize the expanded forgivable expenses except borrowers that already had their loans forgiven**.**

Section 305: Strengthened Hold Harmless.

- Provides that a lender may rely on any certification or documentation submitted by a borrower for an initial or second draw PPP loan and specifies that no enforcement action may be taken against the lender and that the lender shall not be subject to any penalties relating to loan origination or forgiveness if (1) the lender acts in good faith relating to loan origination or forgiveness; and (2) all relevant federal, state, local and other statutory and regulatory requirements are satisfied.

Section 306: Selection of Covered Period for Forgiveness.

- Allows the borrower to elect a covered period ending at the point of the borrower's choosing between 8 and 24 weeks after loan origination.

Section 307: Simplified Application.

- Creates a simplified application process for loans under $150,000 such that:
  - A borrower shall receive forgiveness if a borrower signs and submits to the lender a certification that is not more than one page in length that includes: (1) a description of the number of employees the borrower was able to retain because of the covered loan; (2) the estimated total amount of the loan spent on payroll costs; and, (3) the total loan amount. The borrower must also attest that the borrower accurately provided the required certification and complied with PPP loan requirements.

The SBA must provide this certification form within 24 days of enactment and may not require additional materials unless necessary to substantiate revenue loss requirements or satisfy relevant statutory or regulatory requirements. Additionally, borrowers are required to retain relevant records related to employment for four years and other records for three years. The Administrator may review and audit these loans to ensure against fraud.

  - At the discretion of the borrower, the borrower may complete and submit demographic information for all PPP loans.
  - The SBA must submit to the Senate and House Small Business Committees a report 45 days after enactment detailing their review and forgiveness audit plan to mitigate risk of fraud and provide monthly reviews and audit updates thereafter.
  - These provisions apply to loans made before, on, or after the date of enactment, including the forgiveness of the loan.

Section 308: Specific Group Insurance Payments as Payroll Costs.

- Clarifies that other employer-provided group insurance benefits are included in payroll costs. This includes group life, disability, vision, or dental insurance.
- Applies to loans made before, on, or after the date of enactment, including the forgiveness of the loan.

Section 309: Demographic Information.

- Requires the SBA to include a voluntary demographic information section on the loan origination application for initial PPP loans and second draw PPP loans. All PPP loan applications after enactment must include this section.

Section 310: Clarification of and Additional Limitations on Eligibility.

- Clarifies that a business or organization that was not in operation on February 15, 2020 shall not be eligible for an initial PPP loan and a second draw PPP loan.
- Prohibits eligible entities that receive a grant under the Shuttered Venue Operator Grants from obtaining a PPP loan.

Section 311: Paycheck Protection Program Second Draw Loans.

- Creates a second PPP loan called a "PPP second draw" loan for smaller and harder-hit businesses, with a maximum new loan amount of $2 million.
- <u>Eligibility.</u> In order to receive a PPP loan under this section, an eligible entity must:
  - Employ not more than 300 employees;
  - Have used or will use the full amount of its first PPP loan; and
  - Demonstrate at least a 25% reduction in gross receipts in the first, second, or third quarter of 2020 relative to the same 2019 quarter. Provides applicable timelines for businesses that were not in operation in Q1, Q2, Q3, and Q4 of 2019. Applications submitted on or after January 1, 2021 are eligible to utilize the gross receipts from the fourth quarter of 2020.
- Eligible entities include businesses, certain non-profit organizations, housing cooperatives, veterans' organizations, tribal businesses, self-employed individuals, sole proprietors, independent contractors, and small agricultural co-operatives.
- Ineligible entities include: (1) entities listed in 13 C.F.R. 120.110 and subsequent regulations except entities which have otherwise been made eligible by statute or PPP implementation guidance, including nonprofits and religious organizations; (2) entities involved in political and lobbying activities including engaging in advocacy in areas such as public policy or political strategy or otherwise describes itself as a think tank in any public document, entities affiliated with entities in the People's Republic of China; (3) registrants under the Foreign Agents Registration Act; and, (4) entities that receive a grant under the Shuttered Venue Operator Grant program.
- <u>Loan terms.</u> <u>In general</u>, borrowers may receive a loan amount of up to 2.5X the average monthly payroll

costs during the year prior to the loan or the previous calendar up to a maximum of $2 million, subject to the following exceptions:

  - Seasonal employers may calculate their maximum loan amount based on a 12-week period beginning February 15, 2019 through February 15, 2020.
  - New entities may receive loans of up to 2.5X the sum of their average monthly payroll costs.
  - Entities in industries assigned to NAICS code 72 (Accommodations and Food Services) may receive loans of up to 3.5X average monthly payroll costs.
  - Businesses with multiple locations that are eligible entities under the initial PPP requirements may employ not more than 300 employees per physical location.
  - Waiver of affiliation rules that applied during initial PPP loans apply to a second loan.
  - An eligible entity may only receive one PPP second draw loan.
  - Fees are waived for both borrowers and lenders.
  - For loans of not more than $150,000, the entity may submit a certification attesting that the entity meets the revenue loss requirements on or before the date the entity submits its loan forgiveness application and non-profit and veterans' organizations may utilize gross receipts to calculate their revenue loss standard.

- <u>Loan forgiveness.</u> Borrowers of a PPP second draw loan are eligible for loan forgiveness equal to the sum of their payroll costs, as well as covered mortgage, rent, and utility payments, covered operations expenditures, covered property damage costs, covered supplier costs, and covered worker protection expenditures incurred during the covered period. Full forgiveness will still require the same 60/40 allocation between payroll and non- payroll costs that applies to initial PPP loans.
- <u>Lender eligibility.</u> A lender approved to make loans under initial PPP loans may make covered loans under the same terms and conditions as the initial loans.
- <u>Lender compensation</u>. The Administrator is authorized to reimburse a lender as follows: (1) For loans up to $50,000, the lender processing fee will be the lesser of 50% of the principal amount or $2,500: (2) for loans between $50,000 and $350,000, the lender fee will be 5%; and, (3) for loans $350,000 and above, the lender fee will be 3%.
- <u>Guidance to prioritize underserved communities.</u> The Administrator is directed to issue guidance addressing barriers to access to capital for underserved communities no later than 10 days after enactment.
- <u>Standard Procedures.</u> SBA is directed to allow lenders to approve loans made under this paragraph utilizing existing program guidance and standard operating procedure, to the maximum extent possible, as the standard SBA 7(a) program.
- <u>Churches and religion organizations</u>. The statute expresses the sense of Congress that the Administrator's guidance clarifying the eligibility of churches and religious organizations was proper and prohibits the application of regulations otherwise rendering ineligible businesses principally engaged in teaching, instructing, counseling, or indoctrinating religion or religious beliefs. It also codifies that the prohibition on eligibility in 13 CRF 120.110(k) shall not apply for initial and second draw loans.
- <u>Application of Exemption Based on Employee.</u> Existing safe harbors on restoring FTE and salaries and wages are extended. Specifically, the statute applies the rule of reducing loan forgiveness for the borrower reducing the number of employees retained and reducing employees' salaries in excess of 25%. Allows the SBA and Treasury Department to jointly modify any date in section 7(a)(d) consistent with the purposes of PPP.

Section 312: Increased Ability for Paycheck Protection Program Borrowers to Reapply for a PPP Loan or Request an Increase in Loan Amount

- Requires the Administrator to release guidance to lenders within 17 days of enactment that allows borrowers that returned all or part of their PPP loan to reapply for the maximum amount applicable on loans where forgiveness has not been paid. Additionally, this section allows borrowers whose loan calculations have increased due to changes in interim final

rules to work with lenders to modify their loan amounts regardless of whether the loan has been fully disbursed, or whether SBA Form 1502 already has been submitted.

Section 313: Calculation of Maximum Loan Amount for Farmers and Ranchers under the Paycheck Protection Program.

- Establishes a specific loan calculation for the first round of PPP loans for farmers and ranchers that: (1) operate as a sole proprietor, independent contractor, self-employed individual; (2) report income and expenses on a Schedule F; and (3) were in business as of February 15, 2020. These entities may utilize their gross income in 2019 as reported on a Schedule F. Lenders may recalculate loans that have been previously approved to these entities if they would result in a larger PPP loan.
- Applies to PPP loans before, on, or after the date of enactment, except for loans that have already been forgiven.

Section 314: Farm Credit System Institutions.

- Allows Farm Credit System Institutions to be eligible to make loans under PPP. Also allows for a zero risk weight for PPP loans and aligns eased requirements for Farm Credit System Institutions with those of other PPP lenders.
- Applies to any loan made before, on or after enactment including the forgiveness of the loan.

Section 315: Definition of a Seasonal Employer.

- Defines a seasonal employer to be an eligible recipient which: (1) operates for no more than seven months in a year; or, (2) earned no more than 1/3 of its receipts in any six months in the prior calendar year.
- Applies to any loan made before, on or after enactment including the forgiveness of the loan.

Section 316: Housing Cooperatives.

- Extends PPP eligibility to housing cooperatives defined in section 216(b) of the Internal Revenue Code of 1986 that employ no more than 300 employees.

Section 317: Eligibility of News Organizations for Loans under the Paycheck Protection Program.

- Makes eligible FCC license holders and newspapers with more than one physical location, as long as the business has no more than 500 employees per physical location or meets the applicable SBA size standard; and makes eligible section 511 public colleges and universities that have a public broadcasting station if the organization certifies that the loan will support locally focused or emergency information.
- Waives affiliation rules for newspapers, TV and radio broadcasters, and public broadcasters, as long as the organization has no more than 500 employees per physical location or meets the applicable SBA size standard.
- Waives the prohibition against publicly-traded news organizations being eligible if the business certifies that the loan will support locally focused or emergency content.

Section 318: Eligibility of 501(c)(6) and Destination Marketing Organizations for Loans Under the Paycheck Protection Program.

- Expands eligibility to receive a Paycheck Protection Program loan to include the following organizations:
    - 501(c)(6) organizations if:
        - The organization does not receive more than 15% of receipts from lobbying;
        - The lobbying activities do not comprise more than 15% of activities;
        - The cost of lobbying activities of the organization did not exceed $1,000,000 during the most recent tax year that ended prior to February 15, 2020 and
        - The organization has 300 or fewer employees.
        - The organization is not a professional sports leagues or organization with the purpose of

promoting or participating in a political campaign or other political activities.
- Destination Marketing Organizations if:
  - The organization does not receive more than 15% of receipts from lobbying;
  - The lobbying activities do not comprise more than 15% of activities;
  - The organization has 300 or fewer employees; and
  - The destination marketing organization is registered as a 501(c) organization, a quasi-government entity, or a political subdivision of a state or local government.

Section 319: Prohibition on Use of Loan Proceeds for Lobbying Activities.

- Prohibits any eligible entity from using proceeds of the covered loan for lobbying activities, as defined by the Lobbying Disclosure Act; lobbying expenditures related to state or local campaigns; and expenditures to influence the enactment of legislation, appropriations, or regulations.

Section 320: Bankruptcy Provisions.

- Establishes a special procedure in the bankruptcy process if the Administrator determines certain small business debtors are eligible for PPP. This procedure requires court approval for PPP loans to these debtors and requires any such loan be given a super-priority claim in the bankruptcy process, providing additional protection to taxpayers and participating banks. The provisions in this section would take effect only upon a written determination by the Administrator that certain small business debtors are eligible for PPP loans and would sunset two years after the date of enactment.

Section 321: Oversight.

- Requires the SBA to comply with GAO requests within 15 days and requires the SBA to submit a detailed justification to Senate and House Small Business Committees if they are unable to comply with the request. It also would require the Secretary of the Treasury and SBA Administrator to testify within 120 days of enactment of this Act and not less than twice per year for the next two years to the Senate and House Small Business Committees.

Section 322: Conflicts of Interest.

- Requires the President, Vice President, the head of an Executive department, or a Member of Congress as well as their spouses that has received a PPP loan to disclose this status at forgiveness or within 30 days thereafter. It would also prohibit the covered individuals from receiving a loan in the future.

Section 323: Commitment Authority and Appropriations.

- Extends to March 31, 2021, the authority to make commitments under both the extension of round one of PPP and the Second Draw of PPP.
- Sets the joint authorization level for both round one of PPP and the Second Draw of PPP at $806.45 billion.
- Provides clarifying language that bifurcates regular 7(a) and PPP loans (in 7(a) (36) and (37)) to ensure the continued operation of the 7(a) program
- Sets regular 7(a) authorization cap at $75 billion, effective from the date of enactment through September 30, 2021.
- Clarifies that the secondary market cap for FY21 is set to $100 billion for ALL 7(a) loans.
- Provides direct appropriations of:
  - $284.45 billion for PPP, including the following set-asides:
    - Lenders:
      - $15 billion for PPP loans (initial and second draw) issued by community financial institutions, including community development financial institutions (CDFIs) and minority depository intuitions (MDIs);
      - $15 billion for PPP loans (initial and second draw) issued by certain small

depository institutions.

        - Borrowers:
            - $35 billion for first-time borrowers, $15 billion of which for smaller, first-time borrowers with 10 or fewer employees, or loans less than $250,000 in low-income areas;
            - $25 billion for second draw PPP loans for smaller borrowers with 10 or fewer employees, or loans less than $250,000 in low-income areas.
        - After 25 days, the SBA Administrator may adjust the set-asides as necessary.
    - $25 million for the Minority Business Development Centers program under the Minority Business Development Agency (MBDA);
    - $50 million for PPP auditing and fraud mitigation purposes;
    - $20 billion for the Targeted EIDL Advance program, of which $20 million for the Inspector General;
    - $57 million for the Microloan program as described in section 329;
    - $1.9 billion to carry out sections 326, 327, and 328, which are the regular 7(a) and 504 stimulus provisions for increased guarantees, increased Express loan size, and fee waivers;
    - $3.5 billion for the Debt Relief program as described in section 325;
    - $15 billion for grants for live venues as described in section 324.

Section 324: Direct Grants for Shuttered Venue Operators.

- Authorizes $15 billion for the SBA to make grants to eligible live venue operators or promoters, theatrical producers, live performing arts organization operators, museum operators, motion picture theatre operators, or talent representatives who demonstrate a 25% reduction in revenues.

Section 325: Extension of Section 1112 Payments, the debt relief program.

- **Provides $3.5 billion in funding for extension of Section 1112 payments—appropriations available through September 30, 2021.**
- Resumes the payment of principal and interest (P&I) on small business loans guaranteed by the SBA under the 7(a), 504 and Microloan programs, established under Section 1112 of the CARES Act.
- Provides that all borrowers with qualifying loans approved by the SBA prior to the CARES Act will receive an additional three months of P&I, starting in February 2021. Going forward, those payments will be capped at $9,000 per borrower per month.
- Provides that, after the three-month period described above, borrowers considered to be underserved—i.e., the smallest and hardest-hit by the pandemic—will receive an additional five months of P&I payments, also capped at $9,000 per borrower per month. These include:
    - Borrowers with SBA microloans or 7(a) Community Advantage loans
    - Borrowers with any 7(a) or 504 loan in the hardest-hit sectors, as measured by the severity of sector-wide job losses since the start of the pandemic, including all those belong to 2- and 3-digit NAICS categories with the most severe job losses since the start of the pandemic: accommodation and food services (72); arts, entertainment, and recreation (71); educational services (61); mining and logging (213); apparel (315); clothing and clothing accessory stores (448); sporting goods, hobby, book, and music stores (451); air transportation (481); transit and ground passenger transportation (485); scenic and sightseeing transportation (487); publishing industries, except Internet (511); motion picture and sound recording industries (512); broadcasting, except Internet (515); rental and leasing services (532); and personal and laundry services (812).
- Provides SBA payments of P&I on the first 6 months of newly approved loans will resume for all loans approved between February 1 and September 30, 2021, also capped at $9,000 per month.

- Specifies that if the SBA projects that appropriations provided for the debt relief program are insufficient to fund the extensions provided, the Administrator may proportionally reduce the number of months provided in each extension.
- Clarifies eligibility and increases program integrity:
  - SBA payments should be made on any loan approved before the applicable deadline, and debt relief payments should be made only once the loan is fully disbursed.
  - SBA may establish a minimum loan maturity period for each loan product covered under this section to prevent program abuse.
  - Any business or applicant may only receive P&I payments for only one loan approved after CARES Act enactment.
- Requires that SBA place program information on its website, conduct outreach to all borrowers, report monthly to Congress on program spending, and educate lenders, borrowers, SBA district offices, and resources partners about the program.

[Division N, Title II, Subtitle B, **Section 278: Clarification of Tax Treatment of Certain Loan Forgiveness and Other Business Financial Assistance.**]

- Specifies that <u>all</u> Section 1112 payments are considered non-taxable income, which shall apply both retroactively to any payment made to any borrower starting with the enactment of Section 1112 of the CARES Act and prospectively.

Section 326: Modifications to 7(a) Loan Programs: Increased Guarantees and Increased Express Loan Size

- Increases to 90% the loan guarantee on 7(a) loans, including for Community Advantage loans, through September 30, 2021.
- Increases the Express Loan amount from $350,000 to $1 million for the period January 1, 2021 through September 30, 2021, with that amount reverting, on a permanent basis to $500,000 beginning October 1, 2021.
- From the date of enactment through September 30, 2021, temporarily increases from 50% to 75% the Express Loan guaranty percentage for loans of $350,000 and less. The guarantee percentage remains at 50% for SBA Express loans over $350,000. On October 1, 2021, the guarantee reverts to 50% for all Express Loans.

Section 327: Temporary Fee Reductions for 7(a) and 504

- Waives lender and borrower fees for both the 7(a) and 504 loan programs through September 30, 2021. [For 7(a) this includes the up-front guaranty fee and the ongoing fee.]

Section 328: Low-Interest Refinancing.

- Enhances the 504 refinancing rules in order to create reciprocity for refinancing between 504 and 7(a) programs.
- Grants authority through September 30, 2023 for SBA to establish a 504 Express Loan Program for the most experienced successful 504 lenders to expedite 504 loans of less than $500,000.

Section 329: Recovery Assistance under the Microloan Program.

- Enhances the microloan program to increase access to micro capital and technical assistance under the program for businesses impacted by the COVID-19 pandemic.
- Temporarily increases the amount of time that borrowers can repay their loans from 6 to 8 years.
- Temporarily increases the outstanding aggregate amount each intermediary may borrow from $6 million to $10 million to expand their capacities to deploy more capital to small businesses.

- Allows intermediaries to access more technical assistance funding if they serve rural areas.
- Maximizes flexibility and reduces red tape for intermediaries by temporarily waiving the limitations for the technical assistance grants and the 50% limitation on pre-loan technical assistance.
- Provides $50 million in additional funding for Microloan Technical Assistance funding for lenders and $7 million to leverage about $64 million more in microloans to businesses.

Section 330: Extension of Participation in 8(a) Program.

Section 331: Targeted EIDL Advance for Small Business Continuity, Adaptation, and Resiliency.

- Provides additional targeted funding for eligible entities located in low-income communities through the EIDL Advance program included in Section 1110 of the CARES Act.
- Makes entities in low-income communities that received an EIDL Advance under Section 1110 of the CARES Act eligible to receive an amount equal to the difference of what the entity received under the CARES Act and $10,000.
- Provides $10,000 grants to eligible applicants in low-income communities that did not secure grants because funding had run out.

Section 332: Emergency EIDL Grants.

- Extends covered period for Emergency EIDL grants through December 31, 2021.
- Allows more flexibility for the SBA to verify that Emergency EIDL grant applicants have submitted accurate information.
- Extends time for SBA to approve and disburse Emergency EIDL grants from 3 to 21 days.

Section 333: Repeal of EIDL Advance Deduction.

- Repeals section 1110(e)(6) of the CARES Act, which requires PPP borrowers to deduct the amount of their EIDL advance from their PPP forgiveness amount.
- Establishes the Sense of Congress that EIDL Advance borrowers should be made whole without regard to whether those borrowers are eligible for PPP forgiveness.
- Requires the Administrator to issue rules that ensure borrowers are made whole if they received forgiveness and their EIDL grant amount was deducted from the forgiveness amount paid.

Section 334: Flexibility in Deferral of Payments of 7(a) Loans.

- Creates parity between bank-held and secondary market-owned 7(a) loans to seek up to a 1-year deferral.
- Requires SBA to buy back loans if secondary market investors refuse to provide the extended deferral unless the SBA determines the extended deferral would cause a positive subsidy for the Secondary Market Guarantee Program.

Section 335: Documentation Required for Certain Eligible Recipients.

- Allows more flexibility for the Administration to accept documentation beyond that enumerated in the CARES Act to determine eligibility for sole proprietors and the self-employed.

Section 336: Election of 12-week Period by Seasonal Employers.

- Expands the seasonal period to any 12-weeks between February 15, 2019 and February 15, 2020, elected by the borrower.
- Applies to loans before, on, or after the date of enactment, except for loan for which the borrower has already received forgiveness.

Section 337: Inclusion of Certain Refinancing in Nonrecourse Requirements.

- Clarifies non-recourse language to include all eligible uses of proceeds (e.g. refinancing of EIDL loans) to provide the same protections to borrowers if they elect to refinance an EIDL loan

Section 338: Application of Certain Terms through Life of Covered Loan.

- Clarifies that provisions related to (1) fee waivers; (2) personal guarantee waivers; and (3) deferral eligibility continues past the covered period and attaches for the life of the PPP loan.

Section 339: Interest Calculation on Covered Loans.

- Clarifies the interest rate on PPP loans is non-compounding and non-adjustable for all new initial PPP loans and second draw PPP loans.

Section 340: Reimbursement for Processing.

- Provides for PPP lender reimbursement by SBA for new PPP loans.
- Establishes a tiered reimbursement rate for PPP loans: (1) Loans of less than $50,000 that is equal to the lesser of 50% of the loan principal or $2,500; (2) loans of more than $50,000 and not more than $350,000 equal to 5% of the loan principal; (3) loans of more than $350,000 and less than $2,000,000 equal to 3% of the loan principal; and (4) loans of more than $2,000,000 equal to 1%.
- Clarifies lender reimbursement by SBA shall be made no later than 5 days after the reported disbursement (prior language did not include the word "reported").
- Prohibits agencies from requiring lender to repay to SBA its processing fee in any claw-back process, except in cases of lender fraud.
- Clarifies that PPP borrowers who knowingly retained a loan agent may not pay agent fees out of the PPP proceeds. This applies to PPP loan before, on, or after the date of enactment, including during forgiveness of such loan.
- Clarifies that a lender shall only be responsible for paying fees to an agent when the lender directly contracted with the agent for any work performed.

Section 341: Duplication Requirements for Economic Injury Disaster Loan Recipients.

- Clarifies text from underlying CARES to permits borrowers to receive both an EIDL and a PPP loan as long as they are for different purposes by specifying that the period extends from January 31, 2020 through the date on which PPP loans are made available. (Previously the dates referenced in underlying CARES did not technically permit for this duplication.)

Section 342: Prohibition of Eligibility for Publicly Traded Companies.

- Excludes publicly traded companies from PPP eligibility.

Section 343: Covered Period for New PPP Loans.

- Extends the covered period for all first draw PPP loans through March 31, 2021.
- Applies to loans made before, on, or after the date of enactment, including the forgiveness of such loan.

Section 344: Applicable Periods for Proration.

- Clarifies that the applicable period for employee's salaries of $100,000 is to be calculated on an annualized basis as prorated during the period in which compensation is paid or incurred.

Section 345: Extension of Waiver of Matching Funds Requirement under the Women's Business Center (WBC).

- Extends CARES Act waiver of WBC matching funds requirement through June 30, 2021.

Section 346: Clarification of Use of CARES Act Funds for Small Business Development Centers (SBDCs).

- Clarifies that any awards made under this bill are in addition to, and separate from, any amounts appropriated under section 21 of the Small Business Act, and any award made under this bill may be used to complement and support such grant. CARES Act funds and annually appropriated funds can be used and tracked together as one funding stream.
- Prioritizes SBDCs impacted by this accounting issue.

Section 347: GAO Report

- Requires the GAO to report to the House and Senate Small Business Committees no later than 120 days after the date of enactment on the SBA's use of administrative funds made through supplemental appropriations during FY 2020.

Section 348: Effective Date; Applicability.

- Clarifies that, except as noted, the amendments made by this bill shall take effect on the date of enactment and apply to loans and grants made on or after the date of enactment.