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CHURCH ALLIANCE

Acting on Behalf of Church Benefits Programs

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May 5, 2020

By electronic submission (<http://www.regulations.gov>)

Administrator Jovita Carranza
 RE: Docket No. SBA–2020–0015
 U.S. Small Business Administration
 409 Third Street SW
 Washington, DC 20416

Dear Administrator Carranza:

The Church Alliance would like to express its continued thanks for your leadership and the tremendous support demonstrated by the U.S. Small Business Administration (SBA) in helping small businesses and nonprofits as they continue to work through the challenges being presented by COVID-19. We are submitting this comment letter in response to the request for comments on the interim final rule issued by the SBA under 13 C.F.R. Part 120 on April 15, 2020 regarding the “Business Loan Program Temporary Changes: Paycheck Protection Program” (Docket No. SBA–2020–0015).

Background

The Church Alliance is composed of thirty-seven church benefits organizations, covering mainline and evangelical Protestant denominations, Jewish entities, and Catholic schools and institutions. The Church Alliance organizations provide employee benefit plans, including retirement and/or health coverage, to approximately one million clergy, lay workers, and their families, serving over 155,000 churches, synagogues, and religious organizations throughout the country, such as crisis centers, disaster aid organizations, schools, universities, early childhood centers, nursing homes, children’s homes, homeless shelters, food banks, and other ministries.

Church Alliance organizations sponsor or administer and maintain retirement and welfare benefit programs, which are generally multiple-employer in nature, for eligible employees within respective denominations. Having a program sponsored by one organization serving multiple church employers helps provide continuity and consistency of benefits for employees, including pastors who may be asked to move between small, local churches with few employees, as well as economies of scale.

Gratitude for Religious Liberty Protections

First, we would like to thank you and your staff for explicitly stating that CARES Act loans guaranteed by the SBA will be made and administered

consistent with constitutional, statutory, and regulatory protections for religious liberty.

Calculation of Loan Forgiveness for Schools

The Church Alliance serves a number of different ministries, including nonprofit religious schools that are seeking or have obtained Paycheck Protection Program (“PPP”) funds. A PPP borrower is eligible for forgiveness of indebtedness for payroll and other costs incurred and payments made during the “covered period,” which is defined as “the eight-week period beginning on the date of the origination of the covered loan.” Loan forgiveness is reduced if employee head count or pay levels are reduced during the covered period. The reduction in head count is dictated by a fraction, the numerator and denominator of which are periods set out in the CARES Act. The reduction in pay is measured by comparing pay during the covered period against a period within the traditional school year.

Unfortunately for many schools, the covered period will include periods of full employment for schools and periods after school is out of session for the year. The covered period will include at least parts of May and June of 2020 since PPP loans are being disbursed in April and May. This will either: 1) result in a lower numerator in the fraction that measures full-time equivalent employees (“FTEs”) because June FTE counts will be dramatically lower than May, or 2) inaccurately appear to create a significant reduction in pay due to certain employees who typically are not paid in the summer.

In measuring whether FTEs have been reduced, for many schools the denominator will always be larger than the numerator and the forgiveness fraction will always be less than 1, since the possible statutory periods in the denominator include and tend to weight toward the earlier full employment periods of the school year. For example, assume a school has a loan disbursed on May 1 and has an average of 50 FTEs in the months of February, March, April and May and has 10 FTEs in June. The numerator of the forgiveness fraction is 30 $\{(50+10) \text{ divided by } 2\}$. The denominator is 42 $\{(50+50+50+50+10) \text{ divided by } 5\}$. This results in a 29% loan forgiveness reduction. This result can occur even if a school maintains the same level of FTEs from one school year to the next, but employees retire or otherwise leave at the end of the school year, and their replacements do not begin until the next school year.

Similarly, the reduction in pay will be measured by comparing an eight-week period that includes time after the end of the school year, against a quarter during which schools are typically in session. Schools should not automatically be penalized because the covered period includes weeks in which schools are typically closed.

To take into account the timing of the pandemic, the loan disbursement time spans and the essentially universal school year ending in May or June, we urge the SBA to allow schools to calculate average number of FTEs per month during the covered period by disregarding the days following the last day of the school year. Alternatively, schools could be allowed to compare the FTEs in the covered period with the FTEs in the same eight-week period in 2019. This would be similar to the interim final rule allowing seasonal borrowers to use an alternative base period for purposes of calculating the loan amount for which they are eligible under the PPP. Forgiveness still would be reduced if a school doesn't spend 75% of the loan proceeds on payroll, so the intent of the PPP loan would be preserved, but the school would not be punished for its seasonality.

For purposes of computing whether salary or wages have been reduced, we urge schools be allowed to exclude employees who are not active employees throughout the covered period. The American Institute of Certified Public Accountants (“AICPA”) also has recommended such an exclusion. With this approach, schools would not automatically be penalized because the end of the school year falls within the covered period.

Alternatively, since the CARES Act allows the SBA Administrator and the Secretary of the Treasury to grant de minimis exemptions, perhaps schools may be granted an exemption or partial exemption from the application of the salary and wage reduction test, for the portion of the covered period that occurs after the end of the school year. Much like with the de minimis exemption granted for employers with employees who refuse to return to work, documentation could be required, but in the school situation it could be documentation of the date the school year ends, and of the employees whose pay ends at that time.

One other recommendation of the AICPA that would be helpful to many schools is to allow borrowers to align the covered period with the beginning of a pay period, rather than with the date loan proceeds are received, including allowing borrowers to use the beginning of the payroll period during which funding was received. Thus, for example, if a school receives PPP loan funds on April 13, and the school’s pay cycle is semi-monthly, the school could elect to start the covered period on April 1. This would at least mitigate some of the impact of the end of the school year falling within the covered period.

Recognizing the particular timeframe for a school year’s operation is consistent with the objective of the CARES Act and the PPP provisions, and would greatly assist with leveling the playing field for educational institutions bound by recognized cycles and teacher contracts.

Clarification Regarding Federal Funding Audit Requirements

The Church Alliance would like to ask the SBA for clarity regarding audit requirements that may be applicable to nonprofit organizations that receive PPP loans, including loans that are ultimately forgiven. Specifically, it is unclear if receipt or forgiveness of a PPP loan may result in a grant of federal funds that would trigger the requirement for a single audit under the [Single Audit Act of 1984, as amended in 1996](#). The Church Alliance strongly supports robust fiscal management and bookkeeping of PPP funds by nonprofit organizations; however, the complexity of the rules surrounding the PPP and potential costs associated with conducting a single audit may be burdensome for these organizations as they navigate the current crisis. Additionally, there may be alternatives that could serve the same purpose, such as verifications conducted by the lender as part of the PPP forgiveness process. In the event that such an audit is required, the Church Alliance suggests that the SBA consider the audit rules utilized by the Internal Revenue Service with respect to church inquiries and examinations under 26 U.S.C. § 7611 to accommodate concerns under the First Amendment.

Guidance on Loan Forgiveness

Finally, the Church Alliance is eagerly anticipating additional guidance regarding forgiveness of loans under the PPP. There are a number of questions regarding the forgiveness process that have been raised that we would like to see addressed, including:

- 1) May a PPP loan recipient use funds to pay for increased payroll costs during the eight-week covered period, such as employee overtime, increased employer retirement or group health plan contributions, or compensation for additional or new employees? The Church Alliance urges that payment of such amounts be allowed, since it is likely that for many churches and other religious organizations, there will be additional and/or new work required during the eight-week period, due to needs of the community during the pandemic.
- 2) Do funds have to be spent on payroll costs prior to the end of the eight-week period, or can they be attributed to costs accrued during the eight-week period but paid after the period has ended, for example, pension or retirement plan contributions made at the end of a month, quarter, or year following the end of the eight-week period? The Church Alliance urges that PPP loan funds should be allowed to be spent on payroll costs and other allowed expenses accrued during the eight-week period, as long as the accrued costs can be ascertained or reasonably estimated by the time forgiveness of the loan is requested.
- 3) Would premiums during the eight-week period for other employee benefits, e.g., welfare benefits such as life insurance/death benefits or disability income insurance, be considered payroll costs eligible for forgiveness? The Church Alliance suggests that such amounts should be considered payroll costs eligible for forgiveness, as long as they are part of gross compensation. We think this should be true for both employer-paid premiums, whether or not taxable, and after-tax employee-paid benefits. Furthermore, consistent with answers in the PPP “How to Calculate Maximum Loan Amounts” document, “any pre-tax employee contributions for health insurance or other fringe benefits excluded from Taxable Medicare wages and tips” should be included within gross compensation.
- 4) Do employer contributions towards employees’ health savings accounts, medical flexible spending accounts and health reimbursement arrangements count as payments required for group health care benefits, for purposes of inclusion in the term “payroll costs”? The Church Alliance suggests that such amounts be included within payroll costs for purposes of the PPP, because this would be consistent with the intent of the PPP that employee health coverage be continued and supported by employers receiving PPP loans. Otherwise, due to the economic constraints currently faced by many employers, these payments may be discontinued by employers, to the detriment of their employees.
- 5) Are employee contributions towards their health savings accounts, medical flexible spending accounts and health care coverage included within “payroll costs”? The Church Alliance urges that such amounts be included within payroll costs for forgiveness purposes consistent with the above-referenced SBA “How to” document, either as part of gross compensation included within taxable Medicare wages and tips or if pre-tax and excluded from taxable Medicare wages and tips.
- 6) Are employee contributions towards their retirement benefits included within “payroll costs”? The Church Alliance urges that such amounts be included within payroll costs for forgiveness purposes, either as part of gross compensation included within taxable Medicare wages and tips or if pre-tax and excluded from taxable Medicare wages and tips. We have

seen confusion by at least one SBA lender about the inclusion of such amounts, and would like to have this clarified.

Conclusion

Thank you for your consideration. We are happy to speak with you and your staff and answer any questions you may have regarding our comments. I am available at (202) 778-9128 if you have any questions or wish to discuss any of the information in this letter further.

Sincerely,

A handwritten signature in black ink, appearing to read 'Karishma Shah Page', with a long horizontal flourish extending to the right.

Karishma Shah Page
Partner
K&L Gates LLP
On behalf of the Church Alliance

CC: Secretary of the Treasury Steven Mnuchin