

United States Senate

WASHINGTON, DC 20510

April 27, 2020

The Honorable Steven Mnuchin
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable Jovita Carranza
Administrator
U.S. Small Business Administration
409 3rd Street, SW
Washington, DC 20416

Secretary Mnuchin and Administrator Carranza:

We write to request information on what your agencies are doing to ensure that funds made available to small business owners through the Small Business Administration's (SBA) Paycheck Protection Program (PPP) are reaching small business owners who need the assistance most in light of the economic turmoil caused by the pandemic—and on what actions your agencies are taking to prevent these funds from unjustly enriching applicants whose businesses are not in need of the same relief.

Small businesses and their workers are under incredible stress right now, and we must continue to do everything in our power to help them stay in business and keep their workers employed. By providing up to \$10 million in loans to eligible small business borrowers—with the loan size tied to monthly payroll and loan forgiveness granted when the proceeds are used primarily to retain or rehire workers—the Paycheck Protection Program was intended to infuse cash directly into the hands of small business owners to help them and their employees weather the current economic crisis.

As small business owners await distribution of the additional funding provided for the program in the Paycheck Protection Program and Health Care Enhancement Act, it is critical that the funding provided by Congress be used to provide loans to the businesses whose owners and employees' livelihoods are truly at risk as a result of the pandemic. Unfortunately, reports indicate that the distribution of the initial round of funding was not limited to struggling small businesses who truly needed the money to remain in operation.

Instead, some of this funding was reportedly granted to further the enrichment of owners whose businesses have not been subjected to the financial strain facing most small businesses at this

time.¹ During the initial weeks that the program was in place, loan recipients included several hedge funds whose headcount falls well under the 500 employee limit set by the Small Business Administration—but whose annual revenues and incomes render them the opposite of “small.”² For these applicants and others who did not meet the criteria of financial need, the funding provided by PPP is simply a windfall—yet their participation in this program crowds out truly deserving applicants whose lack of sophistication and relationships with lenders may have delayed their ability to submit PPP applications.

The Paycheck Protection Program was designed to reach small business owners who truly need the funding. For this reason, as part of the loan process, each small business owner seeking funding must “certify in good faith” that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”³ Under the terms of the lender guidance, “[l]enders are permitted to rely on borrower certifications,” including the certification that the borrower actually needs the money to support ongoing operations.⁴

Although this type of self-certification facilitates the rapid distribution of funding in the face of an extraordinary economic challenge, there must be measures in place to reclaim funding provided to applicants whose certifications turn out to be inaccurate, if not deliberately fraudulent.

For these reasons, we urge you to develop strong supervisory mechanisms to identify instances of unjust enrichment. This is not just a matter of rooting out fraud and abuse—the funding for this program, which we support, is necessarily finite. Every loan that provides a windfall for an applicant who does not truly need it results in one fewer loan made to a struggling small business owner whose employees could be truly helped by this funding.

The guidance your agencies issued on April 23, 2020 creates a new safe harbor for ineligible businesses to return loan proceeds to avoid further scrutiny and confirms the fact that large public companies with access to capital markets are “unlikely” to meet the eligibility requirements of the program.⁵ Similarly, the guidance your agencies issued on April 24, 2020 makes it clear that hedge funds and private equity firms are “ineligible to receive a PPP loan.”⁶ Unfortunately, this new guidance also underscores the agencies’ continued reliance on the “good faith” of Applicants—who are simply reminded to “carefully review” the certification—and does not indicate any forthcoming changes in program administration or supervision that might

¹ https://www.washingtonpost.com/business/on-small-business/hedge-funds-want-taxpayers-to-think-theyre-small/2020/04/16/f2671492-7fd9-11ea-84c2-0792d8591911_story.html

² <https://www.bloomberg.com/news/articles/2020-04-14/hedge-fund-managers-are-claiming-bailouts-as-small-businesses>. On April 24, 2020, eight days after the initial appropriation of funding was exhausted, the agencies issued guidance stating that “[h]edge funds and private equity firms are primarily engaged in investment or speculation, and such businesses are therefore ineligible to receive a PPP loan.” <https://home.treasury.gov/system/files/136/Interim-Final-Rule-on-Requirements-for-Promissory-Notes-Authorizations-Affiliation-and-Eligibility.pdf>

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

⁴ <https://home.treasury.gov/system/files/136/PPP%20Lender%20Information%20Fact%20Sheet.pdf>

⁵ <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>

⁶ <https://home.treasury.gov/system/files/136/Interim-Final-Rule-on-Requirements-for-Promissory-Notes-Authorizations-Affiliation-and-Eligibility.pdf>

address the underlying problem or serve as a check on applications submitted by small businesses that clearly do not satisfy the eligibility criteria.

Given the seriousness of this matter, we ask that you provide answers to the following questions:

1. In addition to considering an Applicant's status as a large public company, hedge fund, or private equity firm, what measures are your agencies taking to identify indicators of unjust enrichment that suggest an Applicant does not meet the criteria for economic need?
2. Will you commit to transparency measures that provide the public with information to assess the propriety of funding distributed under the Paycheck Protection Program?
3. If your agencies identify evidence that Applicants have secured funding in connection with economic conditions that render the loan truly unnecessary, resulting in unjust enrichment of the Applicant, will you commit to taking immediate action in response?⁷

We thank you for your attention to this important matter.

Sincerely,

Amy Klobuchar
United States Senator

Tammy Baldwin
United States Senator

Richard Blumenthal
United States Senator

Catherine Cortez Masto
United States Senator

Richard J. Durbin
United States Senator

Tammy Duckworth
United States Senator

Dianne Feinstein
United States Senator

⁷ With regard to your agencies' consideration of whether a given loan request necessary, we recognize and support the decision to waive the "credit elsewhere test" and believe the relevant inquiry should focus on the applicant's current and anticipated future financial condition rather than the availability of credit. *See* https://www.sba.gov/sites/default/files/2020-04/PPP--IFRN%20FINAL_0.pdf (stating that the "credit elsewhere test" does not apply).

Kirsten Gillibrand
United States Senator

Kamala D. Harris
United States Senator

Mazie K. Hirono
United States Senator

Angus S. King, Jr.
United States Senator

Patrick Leahy
United States Senator

Edward J. Markey
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Jeffrey A. Merkley
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Elizabeth Warren
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