



Defending America's Individually & Family Owned Businesses

April 10, 2020

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

The Honorable David J. Kautter
Assistant Secretary for Tax Policy
U.S Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Dear Messrs. Mnuchin and Kautter:

The capital distribution limitation included in the Main Street New and Expanded Loan Facilities appears to preclude S corporations from participating. The limitation says:

The Eligible Borrower must attest that it will follow compensation, stock repurchase, and capital distribution restrictions that apply to direct loan programs under section 4003(c)(3)(A)(ii) of the CARES Act.

These restrictions under Section 4003(c)(3)(A)(ii) would prohibit distributions to S corporation shareholders. Most S corporations, however, make quarterly distributions to their owners to cover the pass-through taxes they owe. In many cases, these distributions are required under the S corporation's ownership agreement. The business must make them.

Left in place, then, the capital distribution limitations would preclude most S corporations from participating in the new small and medium-sized business loan programs. That obviously was not the intent of Congress.

To address this, we recommend the capital distribution attestations for the loan programs be amended to reflect the contractual exception included in Section 4003(c)(3)(D)(i)(vii) of the CARES Act together with a narrow exception for pass-through distributions that are made solely to finance taxes owed on the businesses' income:

The Eligible Borrower must attest that it will follow compensation, stock repurchase, and capital distribution restrictions that apply to direct loan programs under 4003(c)(3)(D)(i)(vii) of the CARES Act. In the case of pass-through entities, these restrictions do not apply to distributions made to pay taxes attributable to income earned by the eligible entity.

These changes could be made to the term sheets under the broad authority granted to Treasury and the Federal Reserve under Section 4003(c)(3)(D)(ii):

4003(c)(3)(D)(ii) MAIN STREET LENDING PROGRAM.—Nothing in this subparagraph shall limit the discretion of the Board of Governors of the Federal Reserve System to establish a Main Street Lending Program or other similar program or facility that supports lending to small and midsize businesses on such terms and conditions as the Board may set consistent with section 13(3) of the Federal Reserve Act (12 U.S.C. 343(3)), including any such program in which the Secretary makes a loan, loan guarantee, or other investment under subsection (b)(4).

This is not a small matter. There are thousands of S corporations with too many employees to qualify for the Paycheck Protection Program. These businesses operate in every state and every industry, and collectively they employ millions of workers. Many of these businesses have been shut down by the health response to COVID-19 – their doors are closed and their workers are idle. The loans offered under the Main Street Loan Facilities could provide them with a lifeline, but only if the rules are adjusted to allow them to pay their taxes without violating the loan's terms.

We thank you for your consideration of this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Brian Reardon". The signature is fluid and cursive, with a long horizontal stroke at the end.

Brian Reardon
President – S Corporation Association