May 15, 2020

The Honorable Jovita Carranza
Administrator
Small Business Administration
409 Third Street SW
Washington, DC 20416

Submitted Via Internet: www.regulations.gov

Docket Number: SBA–2020–0015

Re: Business Loan Program Temporary Changes; Paycheck Protection Program

We are pleased to submit this statement in response to the request (85 FR 20811) by the U.S. Small Business Administration (SBA) for comments on the implementation of sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). Section 1102 authorized the addition of the Paycheck Protection Program to the SBA's 7(a) Loan Program and Section 1106 provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program.

The League of American Orchestras is the not-for-profit service organization for the field of symphony orchestras. Founded in 1942 and chartered by Congress in 1962, the League represents a diverse membership of orchestras across North America and it links a national network of thousands of instrumentalists, conductors, managers and administrators, board members, volunteers, and business partners. There are more than 1,600 nonprofit orchestras in all 50 states, serving virtually every community, most with annual budgets of under $300,000. As members of the 501(c)(3) charitable sector, orchestras depend upon private philanthropy and civic support to fuel programs that serve community needs.

The impact orchestras create in communities nationwide is supported by a critical combination of earned revenue and private support. The coronavirus pandemic is having very real financial consequences for orchestras, musicians, and the communities they serve. Following concert and program cancellations, the loss of earned revenue has been immediate and sustained. As part of the nonprofit charitable sector, orchestras depend upon private philanthropy for more than 40 percent of the revenue and civic support to fuel programs that serve community needs, and they have suffered lost contributed revenue as donors reassess their capacity to give due to economic uncertainty.

It is within this context that orchestras have pursued Paycheck Protection Program (PPP) loans in order to provide ongoing support to their very considerable workforce of administrators, venue staff, and musicians. As the loss of earned and contributed revenue for nonprofit orchestras will be sustained and will not be recovered, orchestras will rely on qualifying for forgiveness at the conclusion of the loan's eight-week period.

Given the lack of loan forgiveness guidance issued to-date, we urge the SBA's future guidance to permit forgiveness for borrowers that have used good-faith efforts to ensure that expenditures of PPP funds will be forgivable. The interim rules issued on April 15 state that, "SBA will issue additional guidance on loan forgiveness," and yet borrowers continue to await comprehensive information that can guide their immediate use of PPP funds. The interim rules further state (85 FR 20813) that the PPP is "first-come, first-served," which forced loan applicants either to rely on the lean available guidance on forgivability or else risk missing the opportunity to access critically-needed federal assistance as PPP resources were swiftly depleted. Nonprofit orchestras are making good-faith efforts to ensure the use of PPP funds will comply with the requirements for forgivability, based on available information. The SBA should take this information gap into account as further loan forgiveness guidelines are issued and applications are processed.

We urge SBA to exercise flexible and fair consideration of the unique nature of orchestras' W-2 workforce when applying the terms of loan forgiveness related to the volume of retained full-time equivalent (FTE) positions. The interim rules specify (85 FR 20813) that independent contractors do not count for the purpose of loan calculation, thereby limiting eligibility to payroll costs associated with W-2 workers. The rules also specify that the proportion of loan forgiveness depends upon the degree to which "employee and compensation levels are maintained." However, the SBA may be unfamiliar with the highly variable and intermittent engagement of certain W-2 workers within the nonprofit performing arts sector. Orchestras engage musicians, stage professionals, teaching artists, and administrators in a complex combination of full- and part-time positions, on a salaried and per-service basis, in W-2 employment status. The number of part-time artistic and stage personnel is highly variable year-to-year, and dependent on many factors, including the instrumentation and ensemble size required for the music being performed. This variability complicates the outcome of the full-time equivalent comparison when calculating the extent to which PPP loans will be forgiven. The SBA should allow borrowers applying for loan forgiveness the option of excluding from the FTE calculation employees that work less than a certain minimum number of days per year.

The SBA should uphold the intent of the Paycheck Protection Program by clarifying that payroll costs paid to employees are forgivable, regardless of the actual or intended work schedule of the employee. Orchestras may take varying approaches when configuring payroll expenditures, due to the way the COVID-19 pandemic has dramatically altered planned performance schedules. The previously-planned engagement of artistic and stage personnel is highly variable and dependent on many factors including the music being performed, the availability of featured guest artists to be accompanied by the ensemble, and the scheduled availability of community partner venues and schools where programmatic activity takes place. Given that the eight-week period for covered costs begins at a point far beyond the employer's control, the time during which expenditures for the full-time equivalent (FTE) comparison takes place may or may not neatly align with previously planned work engagements. For many organizations, employees have been compensated at levels equivalent to planned rehearsals and engagements that would have taken place during the covered period. However, this may not be feasible for all organizations, given the foregoing scheduling considerations. The SBA has previously acknowledged that the overarching purpose of the CARES Act is to keeping workers paid and employed across the United States (85 FR 20813). Accordingly, as long as compensation was paid to employees, it should be includable as a forgivable payroll cost, regardless of whether that employee would have otherwise been working during the covered period and regardless of whether the employee actually had work to do during the covered period.

We ask the SBA to reconsider the requirement that “not more than 25 percent of loan proceeds may be used for non-payroll costs.” We join the National Council of Nonprofits and other commenters in asking the SBA to provide more flexibility for PPP funds to support expenditures beyond direct payroll costs. For many organizations, the overhead expenses needed to support their workforce will exceed the 25% limit imposed in the interim rules.

We applaud the SBA for specifying nonprofit eligibility in the interim final rules and we request ongoing development of guidance specific to nonprofit organizations. We join our partners in the broader nonprofit sector in offering our support for future efforts by the SBA to provide guidance and public engagement related to the Paycheck Protection Program, specifically tailored to the unique financial and operational models of the nonprofit sector.

Nonprofit orchestras will be an essential partner in jump-starting local, state, and national recovery efforts during and after the COVID-19 crisis. Already, orchestras are innovating to provide online arts experiences and distance learning opportunities that meet the needs of the communities they serve. We thank the SBA for this comment opportunity and stand ready to provide further information that may help to ensure that the workforce of the nonprofit performing arts sector is supported by the Paycheck Protection Program.

Sincerely,

Jesse Rosen,
President & CEO