AMERICAN SENIORS HOUSING ASSOCIATION
Living Longer Better

ARGENTUM
EXPANDING SENIOR LIVING

April 7, 2020

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

Re: Regulatory Amendments to Enable Senior Living Providers' Continued Response to the COVID-19 Pandemic Through Access to the Paycheck Protection Program

Dear Administrator Carranza:

The American Seniors Housing Association (ASHA) and Argentum, write to highlight the urgent need for the Small Business Administration (SBA) to amend the regulatory guidance to allow senior living businesses access to the Paycheck Protection Program (PPP). The senior living industry operators and employees are on the front lines of the response to the COVID-19 pandemic but many, regardless of their structure that otherwise meets the fewer than 500 employees per location standard, may be considered ineligible due to the SBA's affiliation rules.[1] ASHA and Argentum believe there is good cause to waive the affiliation rules for senior living. We respectfully urge you to enable senior living communities and their operators to continue their efforts to fight the COVID-19 pandemic by amending these rules to allow the broadest possible access to PPP loans for senior living providers.

Background

ASHA and Argentum are the leading national associations exclusively dedicated to supporting companies operating professionally managed, resident-centered senior living communities and the older adults and families they serve. ASHA and Argentum member communities offer assisted living, independent living, continuing care retirement communities, and memory care, representing approximately 75 percent of the professionally managed senior living industry. The industry serves over 1.9 million seniors who are the most vulnerable to infection of COVID-19, thus underscoring the significant role this industry is playing in this health crisis.

Senior living providers have played a vital role in the fight to control the pandemic. By protecting the population most susceptible to coronavirus infection, the tireless efforts of employees in senior living facilities have benefitted all Americans and the more critical health care system. Keeping our residents and staff virus free will take an enormous amount of stress off of other health care providers and especially the emergency responders and acute care hospitals. But these efforts have come at a significant cost to senior living providers and their employees.

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[1] 13 C.F.R. § 121.301.

In implementing extraordinary measures to prevent the introduction of coronavirus in senior living communities, our members have incurred significant new costs in purchasing needed personal protective equipment, disinfectants, and additional medical and housekeeping supplies. Senior living providers have also needed to augment staffing levels to ensure that every precaution is taken to protect their residents. To this end, they have hired additional staff and temporary employees, and they have paid a significant amount in overtime wages. At the same time, the pandemic will have a long-term effect on providers' revenues, as senior living communities have halted new move-ins and have greatly curtailed marketing.

Senior living community employees have also paid a high personal cost, continuing their important work caring for seniors despite the risk of infection and the need to attend to children home from school. Senior living operators have sought to alleviate these pressures to the greatest extent possible with incentive pay and extra accommodations for sick leave and childcare.

As the SBA summarized in its interim final rule exempting faith-based organizations from the affiliation rules found in 13 C.F.R. § 121.301, the CARES Act was passed in order to "to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic."[2] In addition, the SBA received funding through the Act in order to "modify existing loan programs and establish [the Paycheck Protection Program] to assist small businesses nationwide adversely impacted by the COVID-19 emergency."[3] We urge you to give effect to these goals by (1) modifying the affiliation rules for senior living facilities, many of which employ fewer than 500 employees but are prevented from applying for loans under the Payroll Protection Program (PPP) due to SBA's affiliation rules; and (2) interpreting SBA's other regulations broadly, to allow the senior living providers the greatest possible access to PPP loans.

<u>There is Good Cause to Waive the Affiliation Rules for Senior Living Providers</u>

The CARES Act waived the affiliation rules for PPP loans for "any business concern with not more than 500 employees that . . . is assigned a North American Industry Classification System code beginning with 72."[4] To effectuate the goals of the CARES Act, the SBA should amend the affiliation rules for senior living providers with NAICS codes that are equivalent to those that begin with 72. For example, the description for NAICS code 623312, "Assisted Living Facilities for the Elderly," is functionally equivalent to the description for NAICS code 721310, "Rooming and Boarding Houses, Dormitories, and Workers' Camps."[5] The main difference between these

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[2] Business Loan Program Temporary Changes; Paycheck Protection Program (to be codified at 13 C.F.R. pt. 121), https://www.sba.gov/sites/default/files/2020-04/SBA%20IFR%202_1.pdf.
[3] *Id.*
[4] Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 1102 (2020).
[5] "Assisted Living Facilities for the Elderly" are defined as "establishments primarily engaged in providing residential and personal care services (i.e., without on-site nursing care facilities) for (1) the elderly or other persons who are unable to fully care for themselves and/or (2) the elderly or other persons who do not desire to live independently. The care typically includes room,

two NAICS codes is that code 623312 is limited to residential services for the elderly. The SBA should avoid treating seniors disparately by amending the affiliation rules for businesses with NAICS codes that are equivalent to those that are expressly excepted by the CARES Act (namely, NAICS codes 623311,[6] 623312,[7] and 623990[8]).

There is also good cause to amend the affiliation rules for businesses with NAICS codes 623311, 623312, and 623990 under SBA's interpretation of the goals of the CARES Act. Senior living providers serve all of the intended recipients of CARES Act funding: residents and their families depend on senior living providers for the essentials of daily life and employees depend on the financial viability of senior living providers. Furthermore, senior living providers play a central role in the health care system's response to the pandemic by preventing infections and quickly isolating confirmed cases of COVID-19. Therefore, it would run counter to the purpose of the CARES Act to deny senior living providers on the front lines of the pandemic response the benefit afforded to functionally equivalent NAICS code 72 businesses.

Recent Clarification Regarding Employee Calculation

The SBA has discretion in interpreting other regulations that may limit access to PPP loans, such as the rules for counting the number of employees.[9] We are pleased to see recent FAQs dated as of April 7, 2020, clarifying that in counting employees for SBA loan eligibility, there is flexibility to rely on 2019 employee count. This will be helpful to determine eligibility for senior living providers, who have hired additional employees in 2020 in response to the pandemic. Hiring additional employees has been necessary to ensure that all precautions are taken to prevent the introduction of coronavirus in senior living communities, including the expansion of sick leave policies. It would be especially punitive to deny senior living providers access to PPP loans based on their proactive response to the pandemic.

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ASHA and Argentum appreciate your attention to the issue of our members' ability to apply for much-needed PPP loans. Amending SBA's affiliation rules, in a manner similar to that which is authorized for NAICS code 72 businesses and faith-based organizations, is essential to senior living providers' response to the COVID-19 pandemic. Similarly, the SBA must exercise its discretion in interpreting other regulations that limit access to PPP loans by senior living

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board, supervision, and assistance in daily living, such as housekeeping services." Office of Management and Budget, North American Industry Classification Manual 537 (2017), https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf. "Rooming and Boarding Houses, Dormitories, and Workers' Camps" are defined as providing "temporary or longer-term accommodations, which, for the period of occupancy, may serve as a principal residence. These establishments also may provide complementary services, such as housekeeping, meals, and laundry services." *Id.* at 560.

[6] *Id.* at 536 ("Continuing Care Retirement Communities").

[7] *Id.* at 537 ("Assisted Living Facilities for the Elderly").

[8] *Id.* at 537 ("Other Residential Care Facilities").

[9] *See* 13 C.F.R. § 121.106.

providers. The ability of senior living providers to respond to this emergency affects the vulnerable residents of senior living communities as well as the success of Federal, state, and local government efforts to limit the spread of coronavirus infections. The precautions taken by senior living providers have come at a significant cost and cannot continue indefinitely. Amending SBA's regulations to permit the greatest possible access to PPP loans for senior living providers will ensure that our members can continue their tireless efforts against this pandemic.

We appreciate all the tremendous work that you and your agency have been doing during this unprecedented crisis. If you have any questions or would like to discuss further, please do not hesitate to reach out to either one of us at DSchless@seniorshousing.org, or JBalda@argentum.org.

Sincerely,

David Schless
President
American Seniors Housing Association

James Balda
President & CEO
Argentum

Cc: The Honorable Steven T. Mnuchin, Secretary, U.S. Department of the Treasury