

May 15, 2020

The Honorable Jovita Carranza
Administrator
U.S. Small Business Administration
Washington, DC 20416

Re: U.S. Small Business Administration Business Loan Program; Paycheck Protection Program Interim Final Rule, No. SBA-2020-0015, RIN 3245-AH34

Dear Administrator Carranza:

The undersigned organizations offer these comments on the Small Business Administration's recently released Interim Final Rule for the Paycheck Protection Program (PPP) and the Business Loan Program. We urge the SBA to reconsider those provisions of the Rule that discriminate against individuals who have a record of arrest or conviction.

Specifically, we call upon the SBA to modify or rescind provisions of the Interim Final Rule that make individuals ineligible for PPP loans based upon current or prior criminal history, or ongoing criminal proceedings. Under the Rule, any individual who owns 20% or more of the equity of a business applying for a PPP loan is ineligible for that loan if they are presently incarcerated, or on probation or parole, or subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction. Additionally, per this Interim Final Rule as supplemented by the PPP application form, any owner of a business is ineligible for the loan if they have in the last 5 years 1) been convicted; 2) pleaded guilty; 3) pleaded nolo contendere; 4) been placed on pretrial diversion; or 5) been placed on any form of parole or probation (including probation before judgment) in a felony case.

These requirements are needlessly restrictive and unfairly discriminatory and jeopardize thousands of local communities and employees who rely upon these businesses and their owners for employment and services. The intention of the emergency relief programs authorized by the CARES Act is to sustain small businesses that are trying to save the economy by keeping people employed. Eligibility requirements should be relaxed in these circumstances, not heightened as SBA proposes. SBA's new restrictions on eligibility for its loan programs, which already operate to exclude many people with a record, contravene the intent of the CARES Act, and are inconsistent with SBA's more general mandate of encouraging entrepreneurship and expanding access to employment.

A significant number of people with arrest or conviction history have established their own small businesses, since it is frequently difficult for them to secure employment with others. Moreover, these businesses also tend to be more willing to hire employees with a record. Driving them out of business will result in a severe impact on employment of a population that is already disadvantaged in the workplace. People with a record are subject to a myriad of disadvantages in seeking to reintegrate into society, notably in bank lending policies but also in housing, employment, licensing, education, voting, and other areas.

The SBA's restrictions will have an adverse impact on minority business owners and employees, who are arrested and convicted at disproportionately high rates due to institutional racism, ensuring that business owners of color will be disproportionately excluded from critical economic assistance.

The Interim Final Rule and PPP application form present a wholly unsubstantiated departure from prior SBA practice and are in tension with the statutory directives in the CARES Act, which provides that “any business concern ... shall be eligible” for a loan guarantee if it has the requisite number of employees.¹ Even the SBA's pre-existing 7(a) regulations include criminal history disqualifications that, while still troubling, were more narrowly drawn.² The SBA has issued no rationale for its expansion of these mandatory disqualifications to all recent felony convictions, criminal charges of any kind, and a variety of non-conviction dispositions. In summary, the agency's choices are misaligned with Congressional intent regarding eligibility, inexplicably depart from prior practice, and are unsupported by any explanation.

While we call upon the SBA to modify or rescind all of the provisions relating to criminal history in the Interim Final Rule, we urge the SBA to immediately remove the provision disqualifying individuals who have merely been indicted or arraigned for a crime, or who have otherwise not been convicted. Punishing individuals who have not been convicted of wrongdoing in a court of law is fundamentally unfair and jeopardizes the economic well-being of thousands of employers and employees.

We also urge the SBA to rescind the 5-year ineligibility period for individuals convicted of a felony, or who have been placed on pretrial diversion/probation/parole for any crime. To the extent that the SBA has authority to promulgate eligibility requirements for the PPP that are related to a history of arrest or conviction,³ those requirements should be limited to felony convictions for financial fraud from the past 3 years, subject to an individualized assessment and waiver in appropriate cases. This narrowing of potential ineligibility to serious convictions that are directly related to qualification for financial assistance, along with a diminished window, ensures that individuals who were convicted of a crime but have worked to reintegrate into society are not unduly punished for a past offense.

Finally, we urge the SBA not to disqualify people who are currently serving a sentence of parole or probation in the community unless they are within the narrow category of felony financial fraud convictions within the past 3 years. Parolees and probationers should also have an opportunity to obtain relief, to ensure that their employees will be able to retain their jobs during this ongoing crisis.

¹ 15 U.S.C. § 636(a)(36)(D)(i)(emphasis added). *See, e.g., DV Diamond Club of Flint, LLC, et al. v. United States Small Business Administration, et al.*, No. 20-CV-10899, 2020 WL 2315880, at *1 (E.D. Mich. May 11, 2020) and *In re: Roman Catholic Church of the Archdiocese of Santa Fe*, No. 18-13027 T11, 2020 WL 2096113 (Bankr. D.N.M. May 1, 2020); *In re Hidalgo County Emergency Service Foundation*, Case no. 19-20497; Adv. pro. No. 20-2006, 2020 WL 2029252 (Bankr. S.D. Tex., Apr. 25, 2020). As the bankruptcy court stated in *In re Roman Catholic Church*, at *6, “While a borrower's bankruptcy status clearly is relevant for a normal loan program, the PPP is the opposite of that. It is not a loan program at all. It is a grant or support program. The statute's eligibility requirements do not include creditworthiness.”

² 13 C.F.R. § 120.110(n).

³ *See* cases cited in note 1, holding that other SBA exclusions from PPP eligibility were unlawful under the CARES Act.

At the very least, the SBA should remove the unauthorized additional restrictions on its application form—restrictions not called for in the Interim Final Rule itself—that apply to *any* owners convicted in the last 5 years, not simply those who own 20% or more of the business, as well as those provisions on the application form that exclude people who were placed on pretrial diversion or probation before judgment in the past 5 years.

In summary, we urge the SBA to reconsider and modify discriminatory PPP eligibility rules, which jeopardize workers, local communities, and individuals who have come into contact with the criminal law system but are working to employ local workers and to reintegrate into society.

Sincerely,

American Civil Liberties Union
Center for Law and Social Policy
Church of Scientology, National Affairs Office
Coalition for Juvenile Justice
Collateral Consequences Resource Center
College and Community Fellowship
Community Legal Services
#cut50
Drug Policy Alliance
FreedomWorks
Georgia Justice Project
Health in Justice Action Lab
Jewish Council for Public Affairs
Justice Action Network
Justice & Accountability Center of Louisiana
Justice Innovations LLC
The Leadership Conference on Civil and Political Rights
National Association of Criminal Defense Lawyers
National Employment Law Project
National Youth Employment Coalition
NORML
Operation Restoration
Power Coalition for Equality and Justice
PREACH/East Baton Rouge Parish Prison Reform Coalition
Public Interest Law Center
Root & Rebound
Safer Foundation
Treatment Communities of America
Washington Lawyers' Committee for Civil Rights and Urban Affairs