

May 14, 2020

The Honorable Steven Mnuchin
Secretary
U.S. Department of Treasury
1500 Pennsylvania Avenue, NY
Washington, D.C. 20220

The Honorable Jovita Carranza
Administrator
Small Business Administration
409 3rd Street, SW
Washington, D.C. 20416

Re: CDFI PPP Borrower Eligibility

Dear Secretary Mnuchin and Administrator Carranza:

On behalf of the members of the Community Development Bankers Association (CDBA), we strongly urge the Small Business Administration (SBA) to amend and clarify the treatment of organizations eligible for Paycheck Protection (PPP) Program loans.

CDBA is the national trade association for banks that are US Treasury designated Community Development Financial Institutions (CDFIs). Our members have a primary mission of promoting community development and target at least 60% of their total lending and activities to low- and moderate-income communities and customers that are underserved by traditional financial service providers. Our members are also active participants in the SBA's lending programs. In fact, 70 of our nearly 80 members responded to the urgent need of small businesses and non-profits through participation in the PPP. Our members have contributed greatly to the SBA's ability to reach low-and moderate-income and otherwise underserved communities, including rural, minority and women-owned businesses.

We are greatly concerned about the real and direct conflict between the CARES Act statute and key elements of the PPP interim rule. The vast majority of our members are small businesses under the CARES Act definition. The CARES Act provides this definition in Title I. Sec. 1102 (a)(2)(D):

“(D) INCREASED ELIGIBILITY FOR CERTAIN SMALL BUSINESSES AND ORGANIZATIONS.—

“(i) IN GENERAL.—During the covered period, in addition to small business concerns, any business concern, nonprofit organization, veterans organization, or Tribal business concern described in section 31(b)(2)(C) shall be eligible to receive a covered loan if the business concern, nonprofit organization, veterans organization, or Tribal business concern employs not more than the greater of—

“(I) 500 employees; or

“(II) if applicable, the size standard in number of employees established by the Administration for the industry in which the business concern, nonprofit organization, veterans organization, or Tribal business concern operates.”

The CARES Act places no restrictions on the types of small businesses that may be PPP borrowers, nor does it give SBA the authority to establish restrictions based on business activity through regulation or other guidance. Yet, the PPP interim rule, which piggybacks on the SBA 7(a) regulations, imposes a set of restrictions on the types of businesses that are eligible PPP borrowers. At 13 CFR § 120.110, the regulations states that “**(b)** *Financial businesses primarily engaged in the business of lending, such as banks, finance companies, and factors (pawn shops, although engaged in lending, may qualify in some circumstances*” are ineligible. The regulatory provisions of 13 CFR § 120.110 are in direct conflict with the CARES Act and should be removed.

Congress clearly intended the CARES Act and PPP to help the broad swath of small businesses that are the economic engine of our economy to retain their employees and weather the great economic storm created by the COVID-19 virus. As the economic crisis intensifies, our members face great stress and declines in income as their borrowers seek payment deferrals, loan restructures, or simply cannot pay their obligations due to job losses and declines in business revenues. The ripple effect of the downturn places jobs at financial institutions at great risk at a time when these institutions are needed to help their customers.

The regulatory provision at 13 CFR § 120.110 has also been cited as a rationale to bar some nonprofit organizations from receiving PPP loans. The CARES Act specifically cites IRS 501(c)(3) nonprofit organizations as eligible PPP borrowers. No exceptions were cited in the statute -- nor was the SBA given authority to establish limits on the eligibility of 501(c)(3) nonprofits based on the type of business activity they engage in. Based on the eligibility standards outlined in the CARES Act, numerous nonprofit CDFIs have applied to CDFI banks for a PPP loan, been approved by the SBA, and received funding. Numerous CDBA members have made PPP loans to 501(c)(3) nonprofit CDFIs in good faith based on the eligibility standards outlined in the CARES Act. Yet, many nonprofit CDFIs have been informed by SBA representatives that the loans are not valid. Furthermore, several CDBA members have affiliated nonprofit loan funds that are 501(c)(3) organizations that have also been told they are ineligible to apply based on their business activities.

All of the aforementioned CDFIs are financial “first responders” in low-income communities and communities of color that have been disproportionately affected by COVID-19 and the recession. By barring organizations that are eligible PPP borrowers under the CARES Act, the SBA is causing direct economic harm to these entities at a time when they are badly needed to help underserved communities and under great stress.

Under the CARES Act, the great majority of CDFI banks qualify as small businesses. Likewise, their nonprofit counterparts are explicitly eligible as nonprofit 501(c)(3) organizations. Yet, the agency has imposed a rule that arbitrarily excludes some organizations as borrowers based on the type of businesses in which they engage.

On Monday, May 11, 2020, the U.S. District Court in the Eastern District of Michigan struck down the agency’s arbitrary exclusion of applicants to PPP based on the businesses in which they engage. The ruling in the case *DV Diamond Club of Flint LLC et al v U.S. Small Business Administration et al, U.S.*

District Court, Eastern District of Michigan, No. 20-10899, makes clear that the restrictions articulated in 13 CFR § 120.110 are in clear violation of the CARES Act.

We urge the agency to immediately and actively adhere to U.S. District Judge Matthew F. Leitman's restraining order blocking SBA from enforcing regulations that deny CDFIs that are otherwise eligible under the CARES Act to access PPP. We urge you to immediately promulgate revised Interim Final Rules and/or FAQs clearly affirming the eligibility of CDFIs to apply for PPP loans, given their qualification as small businesses or nonprofits under the CARES Act. We believe that any resistance or delay in taking these actions will cause financial damage to these entities, as well as damage to the credibility of the PPP program, the SBA, and the Administration's broader implementation of the bipartisan CARES Act.

It should be noted that the SBA has already acted decisively in several instances to clarify the eligibility of organizations that are otherwise excluded under 13 CFR § 120.110. SBA reasoning in these cases extends logically to the case of CDFIs. Further, SBA's previous actions indicate the agency can quickly and clearly take action, especially given the Court's restraining order blocking actions which restrict access to the program. Examples:

- In the case of **13 CFR § 120.110 (g), "Businesses deriving more than one-third of gross annual revenue from legal gambling activities"**, SBA made an explicit exception in the Interim Final Rule for legal gambling. Administrator Carranza stated "this approach is more consistent with the policy aim of making PPP loans available to a broad segment of U.S. businesses."
- In the case of **13 CFR § 120.110 (k), "Businesses principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting,"** SBA forcefully declined to enforce that subsection for PPP in FAQs. Administrator Carranza stated, "*The CARES Act explicitly makes nonprofit entities eligible for the PPP program and it does so without regard to whether nonprofit entities provide secular social services.*" (N.B. This logic applies clearly and without contradiction to any 501(c)(3) CDFIs.)
- In the case of **13 CFR § 120.110 (o), "Businesses in which the Lender or CDC, or any of its Associates owns an equity interest,"** SBA "determined that SBA regulations (including 13 CFR 120.110 and 120.140) shall not apply to prohibit an otherwise eligible business owned (in whole or part) by an outside director or holder of a less than 30 percent equity interest in a PPP Lender from obtaining a PPP loan from the PPP Lender on whose board the director Serves . . ."

We urge you to amend the agency's implementation of 13 CFR § 120.110 to be consistent with the CARES Act and to comply with the ruling of U.S. District Court in the Eastern District of Michigan. If the SBA intends to appeal this case to a higher court, we believe that the agency should extend the May 18 safe harbor indefinitely and hold harmless all lenders that make loans to CDFIs and all CDFIs that receive such loans until such time as the matter can be fully adjudicated in the courts. Given the June 30 expiration of PPP and the clear conflict between 13 CFR § 120.110, all CDFIs interested in PPP should be permitted to submit applications and receive approval (assuming they otherwise meet the requirements of the program) with the understanding that if a higher court upholds the agency's position, the PPP monies will be promptly repaid.

We appreciate your attention to this issue. We urge you to rectify this regulatory inconsistency immediately. Our members are committed to assisting the American people, as well as our employees, in any way we can.

If you have questions, please contact me at jacokesj@pcgloanfund.org or 202-207-8728 or contact Brian Blake, CDBA's Public Policy Director at blakeb@pcgloanfund.org or 646-283-7929.

Thank you for your consideration on this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeannine Jacokes". The signature is written in a cursive, flowing style.

Jeannine Jacokes
Chief Executive Officer

cc:

Senator Marco Rubio, Chairman, U.S. Senate Committee on Small Business and Entrepreneurship
Senator Ben Cardin, Ranking Member, U.S. Senate Committee on Small Business and Entrepreneurship
Senator Mike Crapo, Chairman, U.S. Senate Committee on Banking, Housing and Urban Affairs
Senator Sherrod Brown, Ranking Member, U.S. Senate Committee on Banking, Housing and Urban Affairs
Chairwoman Maxine Water, U.S. House Committee on Financial Services
Representative Patrick McHenry, Ranking Member, U.S. House Committee on Financial Services
Chairwoman Nydia Velázquez, U.S. House Committee on Small Business
Representative Steve Chabot, Ranking Member, U.S. House Committee on Small Business