



The National Voice of the State Credit Union System

May 15, 2020

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

Re: Docket No. SBA-2020-0015: Business Loan Program Temporary Changes;
Paycheck Protection Program (RIN 3245-AH34)

Dear Administrator Carranza,

The National Association of State Credit Union Supervisors (NASCUS)¹ submits the following comments in response to the U.S. Small Business Administration's (SBA's) request for comments on the Interim Final Rule (IFR) implementing the Paycheck Protection Program (PPP).² The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) was enacted to provide emergency assistance to individuals and entities affected by the COVID-19 pandemic.³ Section 1102 of the CARES Act authorized the SBA to establish a new loan program to assist small businesses nationwide: the Paycheck Protection Program. The PPP is to be administered under the SBA's Section 7(a) loan program with the loans fully guaranteed and eligible for full forgiveness if established criteria are met.

Between April 16, 2020 and May 8, 2020, over 5,400 participating lenders have processed over 4.5 million loans. While the program has suffered from technical glitches, confusion regarding eligibility, and shifting guidance from the SBA, NASCUS appreciates the unprecedented scope of the undertaking. State regulators and credit unions have worked diligently to implement the PPP at the retail level. To help the remainder of the PPP implementation run smoothly, we recommend that the SBA consider the following enhancements:

- Rules governing the SBA's forgiveness of qualifying loans must be promulgated promptly and the parameters of the loan forgiveness must be easy for borrowers to understand and lenders to implement
- The SBA should recognize that non-federally insured credit unions are safe, sound, and closely supervised and should be included as eligible lenders
- The SBA should require lender concurrence of the use of borrower agents as a prerequisite for payment of fees
- Safe harbors for lenders acting in good faith to implement elements of the PPP where guidance was lacking at the time of the lender's decisions should be created
- The IFR provisions should be amended to include the specific instructions, metrics and references to forms needed to administer the PPP

¹ NASCUS is the professional association of the nation's 45 state credit union regulatory agencies that charter and supervise over 2,100 credit unions.

² 85 Fed. Reg. 20811 (April 15, 2020).

³ Pub. L. 116-136.

- This IFR, the pending IFR on loan forgiveness, all other modifying rules, and existing PPP specific guidance should be reorganized and codified as a single regulation for ease of reference

We expand on several of our recommendations below.

Lenders and Borrowers Need Additional Clarity on Rules for Loan Forgiveness

Not surprisingly, lenders anticipate that most small business borrowers under the PPP will seek to avail themselves of the loan forgiveness provisions of Section 1106 of the CARES Act. Determining loan forgiveness and tracking loan amounts due for repayment will be essential for lenders and borrowers managing this program going forward. In addition, regulatory authorities charged with supervising lenders need to understand how loan forgiveness will be calculated to accurately evaluate the lenders' systems for risk management and compliance with a myriad of safety and soundness regulations. Of course, the criteria and process for PPP loan forgiveness will be unique and hence uniquely unfamiliar for all participants.

Loan forgiveness is addressed in Sections 2(o) and 3(c) of the IFR as well as in the Frequently Asked Questions (FAQs) published on an ongoing basis by the SBA. However, neither the IFR's provisions nor the FAQs establish with specificity how this process will operate in practice. Critical deadlines are looming for borrowers to avail themselves of eligibility safe harbors, yet necessary additional rules governing loan forgiveness have not been published. Given the importance of loan forgiveness to the entire PPP, it is difficult to fully assess the current IFR absent that critical information. We respectfully submit, therefore, that the SBA needs to expedite release of comprehensive rules for loan forgiveness.

The need for borrowers to understand the loan forgiveness rules is especially urgent for credit union lenders. Small business borrowers are not mere customers of a credit union, they are members of the credit union. For credit unions, the fact that a loan is guaranteed even if not forgiven does not mitigate the full spectrum of risks the credit union is exposed to by participating in the PPP. Although the credit union might not suffer a financial loss, the hardship on the member borrower being unexpectedly declined forgiveness by the SBA could have far reaching effects on the member/credit union relationship and increase litigation and reputation risk. It is vital that the loan forgiveness requirements be settled and explained to borrowers.

The Definition of Eligible Lender should be Expanded to Include Non-Federally Insured Credit Unions

Section 3(a)(iii) of the IFR's definition of eligible lenders is too narrow. SBA should expand the definition to include non-federally insured credit unions. The CARES Act gave the SBA discretion to pre-approve eligible lenders.⁴ Furthermore, when the Paycheck Protection

⁴ "(iii) ADDITIONAL LENDERS.—The authority to make loans under this paragraph shall be extended to additional lenders determined by the Administrator and the Secretary of the Treasury to have the necessary

Program and Healthcare Enhancement Act (the PPP Enhancement Act) was enacted in April of this year to provide additional funds for the PPP, Congress broadened the definition of eligible lenders to include all credit unions as defined by the Federal Credit Union Act (FCUA).⁵ Section 101 of the FCUA defines a credit union to include state chartered credit unions regardless of whether they are federally or non-federally insured.⁶

As we have previously noted in comments submitted in response to *RIN 3245-AH04 – SBA Supervised Lenders Application and Review Process and Capital Requirements*, non-federally insured credit unions (“Non Federally Regulated Lenders” or “NFRLs” in SBA parlance) are thoroughly and effectively regulated and supervised by state regulatory authorities.⁷ Including non-federally insured credit unions as eligible lenders would align SBA’s rules with the PPP Enhancement Act without materially increasing the SBA’s risk as guarantor.

In addition to amending the definition of eligible lender to include non-federally insured credit unions, the SBA should make corresponding amendments throughout the IFR as well as to supporting documentation such as Form 3506 (Lender Agreement) to reflect the broader lender eligibility.

The SBA Must Clarify the Role of Agents, the Payment of Agent Fees, and the Rights of Lenders to Decline Application of Agent Submissions

Section 4(c) of the IFR prohibits an agent from charging the borrower a fee and directs agents to seek fee payment from the lender.⁸ Specifically, the IFR states “Agent fees will be paid by the lender out of the fees the lender receives from SBA.”⁹ Section 1102 of the CARES Act authorizes the SBA to set the limits for agent compensation. While the IFR and CARES Act clearly *allow for* agents to help borrowers assemble documentation needed to support a loan request and in turn receive compensation from the lender paid out of the lender’s reimbursement from SBA, both the IFR and the CARES Act are silent as to how the agent/borrower relationship is verified and made known to the lender. Protection is necessary to guard against fraudulent loan brokers seeking to claim fees in reliance on the

qualifications to process, close, disburse and service loans made with the guarantee of the Administration.” CARES Act § 1102(a)(2).

⁵ Pub. L. 116-139.

⁶ 12 U.S.C. 1752(6).

⁷ “State credit union regulatory agencies supervise credit union NFRLs in the same manner, with the same personnel, as they do the federally insured SBA credit union participants. State regulators also use the same examination platform and risk rating system as the federal credit union regulator. The state regulators supervising the credit union NFRLs are members of the same regulatory network with primary supervisory authority over the nation’s two thousand state-chartered credit unions holding nearly half of the over \$1 trillion in credit union assets. Together, state regulatory agencies supervise institutions with lending portfolios many magnitudes larger than the SBA’s lending exposure in the NFRLs supervised by the states.” See NASCUS Comments on RIN 3245-AH04 – SBA Supervised Lenders Application and Review Process and Capital Requirements (March 13, 2020). Available at <https://www.nascus.org/wp-content/uploads/2020/05/NASCUS-Comments-on-RIN-3245-AH04-SBA-Lenders.pdf>.

⁸ 85 Fed. Reg. 20816 (April 15, 2020).

⁹ *Ibid.*

IFR even in the absence of the lender's consent or even knowledge of the borrower/agent relationship.

To avert abuse and near certain future litigation, the SBA must clarify the roles of agents and the rights and obligations of borrowers and lenders with respect to the use of an agent in a transaction. The SBA could clarify this issue by explicitly requiring agent relationships be documented pursuant to existing SBA 7(a) guidelines with the execution in advance of loan closing of Form 159 *Fee Disclosure and Compensation Agreement*.¹⁰

SBA Should Strengthen Provisions Holding Lenders Harmless

Section 3(c) of the IFR holds lenders harmless for reliance on documentation and attestation of borrowers. However, the nature and extent of this provision remains unsettled and difficult to discern. For example, questions remain on how ineligible borrowers and loans will be treated. If a borrower applied for two PPP loans from two different lenders, the rules are silent as to whether both loans are invalidated. The rules are also silent as to whether lenders will be reimbursed for their work on invalidated or denied loans as part of the Section 3 hold harmless provision.

Lenders, and their regulators, are trying to make risk management and other operational and governance determinations based on the IFR and the FAQs. Many provisions of the IFR have already been interpreted to some extent by the SBA and supplemented by guidance in the form of the FAQs, but the rules and interpretations have shifted, and are still shifting. Indeed, the frequency of changes to the FAQs over the brief time of the existence of PPP bears witness to the complexities and uncertainties faced by program participants. In addition to changing determinations by the SBA, the rules and the FAQs are subject to litigation that could change or invalidate presumptions relied upon by lenders implementing their participation in the program. As one example, the rules are silent on the SBA's view on the permissibility of "gating."

The SBA should also amend the IFR to provide clearer protection for lenders in the event borrowers are later deemed ineligible, loan documentation is discovered to have discrepancies, or rules change or are vacated by litigation. By unequivocally stepping in to assume financial responsibility from lenders for all loans closed in good faith by the lender, the SBA can provide a level of certainty for lenders and regulators as to the risk present on any specific lender's balance sheet. Furthermore, where the SBA intended to extend lenders discretion, the IFR should be amended to explicitly state as much, perhaps by inclusion of a general grant of discretionary authority where the rules are silent. In the "gating" example referenced above, the IFR could clarify whether the SBA intended lenders to accept all applications from any potential borrower, or whether lenders could prioritize along otherwise permissible lines.

¹⁰ See <https://www.sba.gov/sites/default/files/2018-09/Form%20159%20-%2020%28FINAL%29%209.10.18.pdf>.

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SBA Should Expedite Release of Form 1502

To collect the processing fee for fully disbursed loans, lenders must electronically upload revised SBA Form 1502 within 20 days of disbursement of the loan or May 22, 2020. However, as of this writing, revised Form 1502 has not been provided. SBA should further delay the deadline for uploading the completed Form 1502 considering the inability of lenders to access and evaluate the revised form.

NASCUS appreciates the opportunity to submit comments on the SBA's Interim Final Rules implementing the PPP. As noted above, this effort to provide essential economic assistance to millions of small businesses and American workers is critically important to mitigate the financial impact of the COVID-19 pandemic. NASCUS, state credit union regulators, and the state credit union system remain committed to working with the SBA to ensure the successful administration of the PPP in a safe, sound, and effective manner. It is incumbent on the SBA to provide clear guidelines that allow borrowers and lenders to understand their responsibilities and obligations under the PPP. We are available at your convenience to discuss our recommendations further at your convenience.

Sincerely,

- signature redacted for electronic publication -

Brian Knight
Executive Vice President & General Counsel