

**CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA**

April 8, 2020

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

Via Federal eRulemaking Portal <https://www.regulations.gov>

Re: SBA-2020-0015, Comments of U.S. Chamber Institute for Legal Reform and the Chamber of Commerce of the United States on SBA Interim Final Rule on Business Loan Temporary Changes and Paycheck Protection Program

Dear Administrator Carranza:

We are writing on behalf of the U.S. Chamber Institute for Legal Reform (“ILR”) and the Chamber of Commerce of the United States of America (collectively “the Chamber”). Pursuant to the Interim Final Rule (“IFR”) issued by the Small Business Administration (“SBA”) on April 2, 2020 under Section 1114 of the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act, the Chamber submits these comments to address and support the IFR’s hold-harmless provisions regarding lenders who process and underwrite applications for loans and loan forgiveness by small businesses under the Paycheck Protection Program (“PPP”) of the SBA’s Section 7(a) Loan Program established by Section 1102 of the CARES Act and the forgiveness of PPP loans established by Section 1106 of the Act. The Chamber also writes to encourage that additional safeguards be put in place as the IFR is implemented.

The CARES Act reflects Congress’s intent to provide immediate relief to small businesses injured by the COVID-19 pandemic. Lenders would inevitably be slowed down if they are required to ensure they will not be subject to potential False Claims Act liability. This delay could be especially substantial, and contrary to congressional intent, given the CARES Act’s waiver of certain creditworthiness requirements for eligibility.

The purpose of the IFR is to expedite the processing of PPP loans by removing uncertainty about such claims, which otherwise would have led to a substantial slowdown in implementing the program and in processing each loan. As more fully explained below, the IFR’s hold-harmless provisions for lenders acknowledge this reality and are fully consistent with the language and purposes of the CARES Act. Furthermore, the SBA, by itself and working in conjunction with the Department of Justice (“DOJ”), could further effectuate Congress’s intent to offer immediate relief to small businesses without permitting the specter of False Claims Act liability to hamper financial institutions’ efforts to assist in providing such relief.

Specifically, the Chamber agrees with the SBA’s judgment that lenders under the program should be entitled to rely on certifications and information provided by borrowers in order to

determine the eligibility of borrowers and the appropriate use of loan proceeds as well as to determine qualifying-loan amounts and eligibility for loan forgiveness. The Chamber also agrees that lenders should be held harmless for a borrower's failure to comply with PPP or Section 7(a) loan or forgiveness criteria. Furthermore, in order to implement these hold harmless provisions, the SBA should enter into a Memorandum of Understanding ("MOU") with the DOJ formalizing the conditions under which DOJ may file False Claims Act litigation related to the SBA's program and use DOJ's authority to dismiss *qui tam* actions that are at odds with the hold-harmless provisions of the IFR.

The IFR recognizes that the PPP program significantly expands the loans and loan forgiveness available to eligible small businesses through approved lenders (financial institutions) in order to provide quick and meaningful relief to companies and individuals who are suffering extraordinary harm as a result of the COVID-19 pandemic. Section 1102 of the CARES Act authorizes up to \$349 billion for PPP program loans and loan forgiveness for eligible small businesses to provide "paycheck protection" during the period February 15, 2020 and June 30, 2020. The PPP program replaces existing eligibility requirements, such as creditworthiness, with new eligibility requirements.

Absent the hold-harmless provisions of the IFR, lenders could have faced potential abusive and unfair False Claims Act litigation for processing and approving small business loan and loan guarantee applications under the new eligibility criteria of the PPP. The False Claims Act imposes civil liability to the United States for treble damages and civil penalties for "knowingly" submitting or causing the submission of false or fraudulent claims. *See* 31 U.S.C. § 3729(a)(1). The False Claims Act defines "knowingly" to include reckless disregard or deliberate indifference as well as actual knowledge of the truth or falsity of the claim. *See* 31 U.S.C. § 3729(b)(1). This broad definition in past government programs has opened lenders to potential claims for loans that go bad or that are used by the recipient for purposes other than those allowed. Claimants have asserted that the lender acted "recklessly," alleging that it failed to perform adequate due diligence or that it "should have known" that the applicant was not eligible or that the loan would not be used for allowable purposes (*e.g.*, paycheck protection as defined in the statute).

In order to fully implement the IFR's hold-harmless provisions with respect to the False Claims Act, the SBA should enter into a MOU with DOJ along the lines of the MOU that DOJ and the Department of Housing and Urban Development entered into last year regarding the False Claims Act and other enforcement policy concerns related to federal housing. The suggested MOU between the SBA and DOJ should recognize that (1) DOJ will consult with the SBA before pursuing any False Claims Act matter against a lender in connection with its approval of a Section 1102 loan or Section 1106 loan forgiveness and that it will not initiate a False Claims Act matter against a lender for its approval of a loan or forgiveness of a loan under the PPP program based on the information, documents, attestations, or certifications provided by an applicant, and that (2) DOJ shall exercise its statutory authority under the False Claims Act to move to dismiss any *qui tam* action alleging that a lender violated the False Claims Act for its approval of a loan or forgiveness of a loan under the PPP program based on information, documents, attestations, or certifications provided by an applicant.

The Chamber appreciates the work that the SBA is doing to effectuate Congress's intent in this space and by working to further limit speculative False Claims Act litigation, the SBA and DOJ would be able to more fully achieve that critical goal.

Sincerely,



Harold Kim
President
U.S. Chamber Institute for Legal Reform



David Hirschmann
Executive Vice President
U.S. Chamber of Commerce