THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

MAURA HEALEY
ATTORNEY GENERAL

(617) 727-2200
(617) 727-4765 TTY
www.mass.gov/ago

May 15, 2020

Re: SBA Administrative Docket 2020-0015 (Comments on Interim Final Rule, Paycheck Protection Program)

Jovita Carranza
Administrator
Small Business Administration
409 3rd St., SW
Washington, DC 20416

Dear Administrator Carranza,

I write on behalf of the Office of the Massachusetts Attorney General to provide comments concerning the U.S. Small Business Administration's ("SBA") First Interim Final Rule for the Paycheck Protection Program ("PPP"). During this pandemic, we have received numerous complaints and requests for help from small business owners, many of whom are frustrated by the implementation of the PPP. During the course of assisting those Massachusetts residents, we also engaged in extensive discussions with a variety of lenders involved in the program. Based on these combined experiences, we believe the program needs significant improvement so that it can fulfill its goal of effectively providing struggling small businesses with needed assistance and ensuring the protection of their workers. As an initial matter, I have attached hereto a May 6, 2020 letter from Attorney General Healey and 23 other state attorneys general to Congressional leaders urging a variety of reforms for the PPP (Attachment A). We wish to incorporate the letter into the SBA's administrative record for this rulemaking process. The concerns, criticisms and suggestions for improvements in that letter are directly applicable to the SBA's First Interim Final Rule ("FIFR"), which should be amended to address the issues raised in the letter.

In addition, we also have several other comments about the interim rule, as discussed below:

1. PPP Loan Interest Rate. The FIFR sets the PPP loan interest rate at 1%. The SBA based this rate on financial metrics in place at the time the program began, setting the rate significantly above the yields for relevant treasury securities and CD products. For example, during the week of March 30, 2020 (the same week in which the CARES Act establishing the PPP was enacted), the yield on the Treasury two-year note was approximately 23 basis points. That same week, the FDIC's weekly national average rate for a 24-month CD deposit product was 42 basis points for standard sized and 44 basis points for jumbo sized investments (*https://www.fdic.gov/regulations/resources/rates/*). However, since the initiation of the PPP, the rates associated with these benchmarks have dropped significantly. As of last week, the FDIC's weekly national average rate for 24-month CD deposit products had dropped to 37 basis points for standard size and 39 basis points for jumbo size products, respectively. Moreover, the yield on Treasury two-year notes had dropped approximately 50%, to 13 basis points.[1] Both metrics have continued to stay at levels significantly below those used when the PPP was established. Going forward, the SBA should consider how to reduce PPP interest rates to reflect these market changes.

2. Applying for One Loan. The FIFR and other guidance provided by the SBA also discuss the number of loans for which a small business may "apply." *See* FIFR, sec. III(2)(k) ("Can I ***apply*** for more than one PPP loan? ***No***.") (emphasis added). This guidance has been the source of some confusion among small businesses. Many of these businesses have found themselves "in the queue" at banks, with no indication of whether their loan would ever be (or had been) submitted to the SBA. Small businesses have been uncertain whether they are required to stay with the initial bank from which they sought assistance, or whether they can simultaneously approach multiple banks and then follow through with whichever bank actually submits the application to the SBA. In the FIFR, the SBA appears to send the message that the key factor is whether a small business has obtained a loan, not whether it is seeking the loan through multiple pathways. *See* FIFR at sec. III(2)(k) ("… no eligible borrower may ***receive*** more than one PPP loan") (emphasis added). At a minimum, this issue should be clarified.

3. First Come, First Served. As already noted in Attachment A at p. 3, the concept of "first come, first served" is important for the PPP program. The SBA needs to offer clear guidance to banks that they should submit completed applications in the order in which those applications are received. While the FIFR touches on this point, *see* FIFR at sec. III(2)(m) ("Is the PPP 'first-come, first-served'? Yes."), more specific instruction is needed. As written, the statement could be misconstrued to simply be a declaration that the *SBA* processes applications submitted to the agency on a first come, first served basis. The SBA needs to clarify that the statement means *banks* must submit completed loan applications on a first come, first served basis.

[1] The latest data available to us shows the Treasury rate remains significantly below 23 basis points, with the current level reported as 16 bp.

4. Loan Forgiveness. The FIFR makes repeated statements regarding the forgiveness criteria for PPP loans, and discusses in some detail how the forgiveness provisions may be implemented. *See, e.g.*, FIFR secs. III(2)(o), 2(p), 2(r), 2(t) & 3(c). These descriptions are somewhat confusing and far more clarity is needed on these points. Because the SBA has indicated that it "will issue additional guidance on loan forgiveness," and we understand that there are plans to issue this guidance soon, we will make our comments on these points once the clarifications have been published. However, we urge the SBA to issue this guidance promptly.

We thank you for considering our comments, which are set forth in the text above and in Attachment A. Please feel free to contact us should you have any questions.

Sincerely,

Glenn Kaplan

Glenn Kaplan, Chief
Insurance & Financial Services Division

Attachment A

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

MAURA HEALEY
ATTORNEY GENERAL

(617) 727-2200
(617) 727-4765 TTY
www.mass.gov/ago

May 6, 2020

Hon. Nancy Pelosi
Speaker
House of Representatives
Washington, DC 20515

Hon. Mitch McConnell
Majority Leader
United States Senate
Washington, DC 20510

Hon. Kevin McCarthy
Minority Leader
House of Representatives
Washington, DC 20515

Hon. Chuck Schumer
Minority Leader
United States Senate
Washington, DC 20510

Dear Speaker Pelosi, Majority Leader McConnell, Minority Leader McCarthy, and Minority Leader Schumer,

We are writing to highlight our concerns about the ongoing implementation of the Paycheck Protection Program ("PPP"), authorized by sections 1102 and 1106 of the Coronavirus Aid, Relief and Economic Security Act (the "CARES Act"), which was signed into law by President Trump on March 27, 2020. As state attorneys general, many of us have fielded countless grassroots-level complaints and requests for assistance relating to the program. Based on what we have learned, we believe certain key changes should be made to the PPP as part of any additional funding for the program.

There is little doubt that small businesses across the nation – and those they employ – are desperately in need of the infusion of funds the PPP was designed to provide. At present, due to the COVID-19 pandemic and resulting national state of emergency, small businesses are struggling to remain open, while more than 30 million Americans have filed for jobless benefits since mid-March, pushing the nation's real unemployment rate to levels not seen since the Great Depression. The very survival of the country's nearly 31 million small businesses, which comprise the core of our national economy, is at stake.

First, we want to note that the PPP has already helped numerous small businesses and their employees. Given the incredibly short time frame granted for the program's initial implementation, the Small Business Administration ("SBA"), Department of Treasury ("Treasury"), and a large number of small, medium, and large banks and other financial institutions made a significant effort to get the program up and running in order to rapidly inject the initial $349 billion in funding into our struggling economy. In Massachusetts alone, the first round of funding secured nearly 47,000 loans for small businesses, totaling over $10.3 billion. And nationwide, more than 1.6 million PPP loans were originated by nearly 5,000 approved lenders, with an average loan size of $206,000 and the large majority of loans being for $150,000 or less. In the program's second round of funding, launched April 27th, the SBA has been approving loans under an extension of an additional $310 billion in funds. Many small businesses that were unable to receive funding in the initial PPP round have been approved for loans in this follow-up cycle.[1]

Despite these achievements, however, the PPP rollout exposed a variety of shortcomings, many of which can and should be eliminated going forward. First, at the expense of small businesses in desperate need of capital, numerous loans were made to large, publicly traded companies that almost certainly have access to other sources of funding. In addition, $152.4 billion, or nearly 45% of the total funds in the first round, went to loans of over $1 million, suggesting that larger, more well-connected companies may have been better able to navigate the application process.

Second, the program has suffered from a notable lack of transparency, technical savvy, and functionality. Lenders were given insufficient guidance, and the guidance that was provided was issued haphazardly in a variety of confusing forms. This caused different institutions to adopt varying standards for accepting and processing applications. In the end, the first round of funding (which was exhausted within 13 days of the program's launch) left far too many small businesses empty-handed. One survey of 1,260 small business owners, conducted after the first round of funding was exhausted, found that while 60% of the respondents had applied for a PPP loan, only 5% received funding.[2] Even the second round of funding looks likely to leave many small businesses underserved. The chasm between those who need this money and those able to successfully secure funding undermines the program's stated purpose of providing emergency relief to *all* small businesses adversely impacted by the COVID-19 crisis.

As part of the allocation of additional funding, we believe the PPP should be further improved. To make the program more effective and ensure that small businesses are helped in a fair, equitable, and efficient manner that serves the interests of the American taxpayer, any

---

[1] According to the SBA, approximately $175 billion in loans were approved in the first week of round two, with over 90% of the loans being for $150K or less. *See* https://www.sba.gov/sites/default/files/2020-05/PPP2%20Data%2005012020.pdf.

[2] Survey conducted by LendingTree, LLC, with results published on April 22, 2020. *See* https://www.lendingtree.com/business/just-5-percent-small-businesses-received-ppp-money/.

funding extensions should address the following issues:

1. Limit Access to Those That Need Funding: The SBA should ensure the fairest possible distribution of PPP funds by prohibiting applications from publicly traded companies with access to alternative funding sources, as well as other companies that do not require assistance. While recently issued SBA guidance warns against careless "self-certification" by companies that do not truly need PPP funds, it doesn't go far enough. Program rules need to be explicit in ensuring that funds go only to those small businesses truly in need. Congress should mandate this outcome in any future funding rounds for the PPP, thereby ensuring that the program stays true to its principles.

2. Fair Access: Thus far, the SBA has remained largely silent when lenders have given preference to existing business customers. We believe the PPP rules should be revised to eliminate even the appearance of favoritism or impropriety. The rules need to explicitly ensure that lenders cannot favor certain categories of applicants over others, such as existing larger, potentially lucrative customers or customers whose existing debts could appear to create a conflict of interest for the lender.[3]

   Indeed, the businesses in the greatest need of assistance are often the smallest and least sophisticated – those which are unlikely to have lawyers or accountants on retainer or to have longstanding, deep relationships with a particular lender. Accordingly, PPP participants should be directed to process loans for every small business that meets program requirements, not just certain types of preferred pre-existing customers.[4]

   The PPP is a U.S. government, taxpayer-funded program that should be available to all small businesses adversely affected by the COVID-19 pandemic. Lenders not only face essentially no lending risk in extending PPP loans (program compliant loans are 100% guaranteed) but are also paid upfront fees of as high as 5% for each loan they originate.[5] As such, the program rules need to unequivocally state that lenders must process loans on a first-come, first-serve basis. At the same time, the SBA should provide clear guidance to lenders concerning how to provide information about the process to both new and existing customers and what types of additional help they can provide for existing customers seeking assistance through the PPP.

---

[3] This might, for instance, be true when a lender gives priority to a bank customer that is likely to fail without a PPP loan and which would then leave the bank with significant unsecured loan losses from pre-existing credit extensions.

[4] Some lenders have reported that they are turning away new customers because the anti-money laundering rules that apply to new customers (but not existing ones) add time to the application process. Other lenders have indicated that the additional process for most new small business customers is not a difficulty and already accept applications from new customers.

[5] Fee percentages vary depending on the balance of the loan, with larger loans generating a fee based on a smaller percentage of the loan principal. Nevertheless, a $10,000,000 loan under the PPP can still generate a $100,000 fee.

3. Ensuring Fair Distribution: To further ensure that PPP funds are widely and fairly distributed, Congress should allocate a portion of any future funding exclusively for minority-owned small businesses, many of which do not have longstanding relationships with banks or other financial institutions. In addition, future funding should be disbursed fairly throughout the country, based on metropolitan statistical areas weighted by the number and size of small businesses located in those areas. Finally, smaller banks, smaller credit unions, and entities in the Community Development Financial Institutions Program should be adequately represented such that a broad diversity of lending sources are involved in the program. To accomplish these goals, the SBA should be directed to devise an appropriate allocation plan in connection with any future rounds of program funding.

4. Better Communication with Small Business: Many small businesses have been frustrated by their inability to get information or guidance from the SBA. The agency needs to provide more direct information to small businesses during the application process. For example, applicants should have access to a centralized portal maintained by the SBA so they can track the progress of their loan request without having to go through the submitting bank. This should not be left to the discretion of the agency, which typically in PPP deals only with the intermediary lending institution. Instead, Congress should direct the SBA explicitly to provide guidance to small businesses going forward.

5. More Flexibility: We have heard from a variety of small businesses that need help but are not likely to be well served by the current structure of this program. The PPP needs to provide more flexibility for the variety of circumstances small businesses find themselves in, particularly concerning the use of loan proceeds. For example,

   - Some businesses have already been forced to lay off some employees and may have difficulty bringing them back within the time limits currently set out in the program; this is deeply troublesome and goes to the heart of the problem that the PPP should seek to address. Small businesses should not be unduly penalized for having made this difficult choice and will need flexibility to have enough time to rehire their full staff.
   - Certain categories of small businesses (such as restaurants and sole proprietors) normally allocate a smaller percentage of revenue to salaries or "self-pay" and will struggle to satisfy the forgiveness requirement that 75% of loan proceeds be used for this purpose.
   - The structure of sole proprietorships makes it difficult for some of these business owners to fit within the program in a simple way. While the SBA has provided guidance to help them navigate these difficulties, rules and documentation requirements concerning sole proprietors need to be more clearly and simply communicated.
   - Some PPP recipients that need the money will nonetheless not qualify for loan forgiveness. These businesses may need more time to repay the loan than the current program allows, depending on the size and type of business.

6. More Transparency: The program needs to be more transparent so taxpayers can understand how their money is being spent and to ensure no geographic area or type of business is greatly underserved. For example, the SBA should be required to disclose (i) more granular data on the percentage of loans in various size categories; (ii) the number and amount of loans processed by each lender, as well as the size and types of businesses serviced by each lender; (iii) the geographic distribution of all loans by metropolitan statistical area and by borrower demographics, including gender, race, and ethnicity; and (iv) comprehensive data on the businesses that receive funding, which will discourage larger companies with access to other funding sources from seeking loans.

7. Improved Technical Support: The PPP needs far better technical support. Numerous small businesses report being confused by, and frustrated with, the online application platforms used by banks to gather documents and information. This is particularly true for small businesses when they are attempting to upload required documents (many businesses have tried repeatedly to upload documents, often without success). Even the inclusion of fin-tech companies as approved lenders or agents for approved lenders has not resulted in a smooth application process. To ensure uniformity, the SBA should mandate user-friendly standards for processing platforms or require a single application processing platform for use by lenders. Similarly, the SBA needs to invest more in its own processing interfaces. The agency's E-Tran online portal, which banks use to provide the SBA with completed applications, has crashed repeatedly during the loan program and, in many instances, slowed the application flow to a crawl. The SBA should be provided with additional funding to update its computer systems and directed to create a stronger digital infrastructure.

8. Lender Guidance: The SBA should be directed to provide more guidance to lenders about how they can implement the PPP, which should result in a more uniformly positive experience for small businesses. For example, lenders are currently allowed to require different documentation from applicants and draft their own form of promissory note (within certain limitations). Applicants thus have a very different, sometimes far more onerous experience depending on which lender they use. To the extent possible, the SBA should help banks to understand what the process requires and ensure that every applicant goes though as similar a process as possible when applying to this taxpayer-funded public program.

9. Assisting the Unbanked and Ensuring Accessible Lender Alternatives: The SBA should create a simple and straightforward on-ramp for the "unbanked" or "lesser-banked" small businesses or those that do not wish to apply through their current financial institution. This should include a clear explanation of the program and easy-to-follow instructions, as well as a list of institutions that specialize in handling applications from businesses lacking a deep banking relationship.

In these grim and uncertain economic times, the PPP is a vitally important resource. It behooves all of us to ensure that the program accomplishes its stated goal of assisting any and every small business hurt by this unprecedented pandemic. We understand that it was necessary to implement the PPP as quickly as possible, which led to predictable stumbles and delays, given the size of the program. But we can now learn from these mistakes and, as the program moves forward, we can apply those lessons. We thus urge you to take the steps noted above in connection with any future funding rounds. In this way, the program can be improved to better protect the interests of the American taxpayer, the small businesses that are the backbone of the American economy, and the innumerable Americans that work for them.

We thank you for your consideration and stand ready to partner with you in this effort.

Sincerely,

Maura Healey
Massachusetts Attorney General

Xavier Bacerra
Attorney General of California

Philip J. Weiser
Colorado Attorney General

William Tong
Connecticut Attorney General

Kathleen Jennings
Delaware Attorney General

Karl Racine
District of Columbia Attorney General

Clare E. Connors
Hawaiʻi Attorney General

Kwame Raoul
Illinois Attorney General

Tom Miller
Iowa Attorney General

Adam M. Frye
Maine Attorney General

Brian E. Frosh
Maryland Attorney General

Keith Ellison
Minnesota Attorney General

Hector Balderas
New Mexico Attorney General

Josh Stein
North Carolina Attorney General

Josh Shapiro
Pennsylvania Attorney General

Thomas J. Donovan, Jr.
Vermont Attorney General

Bob Ferguson
Washington State Attorney General

Dana Nessel
Michigan Attorney General

Aaron D. Ford
Attorney General of Nevada

Letitia James
New York Attorney General

Ellen F. Rosenblum
Oregon Attorney General

Peter Neronha
Rhode Island Attorney General

Mark R. Herring
Virginia Attorney General

Joshua L. Kaul
Wisconsin Attorney General