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

RE: Comment on Interim Final Rule, *Appeals of SBA Loan Review Decisions under the Paycheck Protection Program*, 85 Fed. Reg. 52,883 (August 27, 2020), Docket No. SBA-2020-0042-0001, RIN 3245-AH55

Dear Administrator Carranza:

The undersigned State Attorneys General of Illinois, California, Connecticut, Delaware, District of Columbia, Hawai'i, Iowa, Maryland, Massachusetts, Minnesota, Nevada, New Mexico, New York, Rhode Island, Oregon, Virginia, Vermont, and Washington submit these comments in response to the interim final rule ("Interim Final Rule") for appeals of Small Business Administration ("SBA") loan review decisions under the Paycheck Protection Program ("PPP").¹ Created as part of the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act), the PPP establishes loans to provide a direct incentive for small businesses to keep their workers on payroll during the pandemic. It gives the SBA authority to guarantee up to 100 percent of qualifying loans and to forgive up to the full principal amount of qualifying loans. Lenders decide at first whether to grant PPP loans to businesses, but, under the Interim Final Rule, the SBA can subsequently investigate those loans at any time and decide that a borrower is

¹ SBA-2020-0042-0001, Appeals of U.S. Small Business Association Loan Review Decisions under the Paycheck Protection Program, 85 Fed. Reg. 52,883-90 (Aug. 27, 2020) (to be codified at 13 C.F.R. pt. 134), available at <https://www.regulations.gov/document?D=SBA-2020-0042-0001> ("Interim Final Rule").

ineligible for a PPP loan guarantee or loan forgiveness (known as a final loan review decision). Although the Interim Final Rule purports to set forth some basic procedures for borrowers to appeal adverse decisions made by the SBA about borrowers' eligibility for a loan or forgiveness, these procedures do not comport with due process and run afoul of the Administrative Procedure Act ("APA").

Our country's small businesses are suffering during the COVID-19 pandemic. For many, a PPP loan from the SBA is the only way to stay in business. However, many small businesses lack the sophistication and resources to defend against an SBA investigation into their PPP loan, and as a result, they rely heavily on effectively appealing adverse SBA final loan review decisions. The appeals procedure for final loan review decisions established by the Interim Final Rule leaves borrowers in the dark about crucial factual and legal findings by the SBA and, as such, at an extreme disadvantage.

We urge the SBA to afford borrowers a full and fair opportunity to maintain a PPP loan and loan forgiveness by amending the Interim Final Rule to: 1) include procedures establishing the factual and legal bases for final PPP loan review decisions by the SBA; 2) hold loan forgiveness applications in abeyance during an administrative appeal; 3) ensure independent and neutral decision-makers conduct appeals of final PPP loan review decisions; and 4) provide borrowers with fair procedures on appeal.

I. The SBA Should Formalize a Procedure for Final PPP Loan Review Decisions

Although the Interim Final Rule provides some procedures for appeals of final PPP loan review decisions, the SBA has failed to provide any guidance on how it either evaluates PPP loans in its initial investigation or how it makes a final loan review decision about whether a borrower is eligible for a loan and loan forgiveness. The Interim Final Rule merely states that, after a lender approves a PPP loan, "[f]or a PPP loan of any size, SBA may undertake a loan review at any time in SBA's discretion."² The Interim Final Rule cites the Loan Review Interim Final Rule ("Loan Review IFR")—an earlier rule purporting to inform borrowers about the PPP loan process—which allows the SBA to make a final loan review decision at the conclusion of its investigation; however, the Loan Review IFR is equally broad and lacking in specifics about this process.³ Significantly, there is no guidance on what a final loan review decision will contain in terms of factual and legal underpinnings.

This void is problematic because, under the Interim Final Rule, "[g]enerally, the Judge may not admit evidence beyond the written administrative record or permit any form of

² Interim Final Rule at 52,884 (emphasis added).

³ See Interim Final Rule at 52,884 (citing Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Eligibility Criteria and Requirements for Certain Pledges of Loans, 13 CFR § 120 (2020), 85 Fed. Reg. 33,010-15 (June 1, 2020) ("Loan Review IFR")); see Loan Review IFR at Part III(1) ("The Administrator may review [(1)] whether a borrower is eligible for the PPP loan based on the provisions of the CARES Act, the rules and guidance available at the time of the borrower's PPP loan application, and the terms of the borrower's loan application...[(2)] whether a borrower calculated the loan amount correctly and used loan proceeds for the allowable uses specified in the CARES Act...[and (3)] whether a borrower is entitled to loan forgiveness in the amount claimed on the borrower's Loan Forgiveness Application.").

discovery” in an appeal of a final loan review decision.⁴ And that administrative record consists entirely of “relevant documents that SBA considered in making its final decision or that were before SBA at the time of the final decision.”⁵ Thus, although an appeal of a final loan review decision hinges on the administrative record, a borrower has no idea what facts or law the SBA considered in its final loan review decision because the SBA has provided no guidance on its criteria for that process.

Further, without formal procedures for final PPP loan review decisions, the SBA has no criteria to consult in making these decisions or in compiling the administrative record supporting its decisions. In turn, borrowers are unable to ensure that they submit appropriate documents to the SBA or otherwise successfully defend their PPP loan eligibility or forgiveness in response to an investigation by the SBA.

The lack of procedures for final PPP loan review decisions also leaves borrowers’ confidential information unprotected from disclosure. The SBA may request confidential information from borrowers in their investigation of PPP loans.⁶ But without a formal process establishing safeguards for such confidential information, borrowers risk its disclosure. Any procedure established by the SBA for final loan review decisions must include a formal mechanism for borrowers to seek protection from disclosure of confidential information.

II. The SBA Should Hold Loan Forgiveness Applications in Abeyance During Administrative Appeal

The Interim Final Rule unfairly denies a borrower the ability to defer payments pending loan forgiveness during the appeal process.⁷ The Interim Final Rule establishes that “an appeal by a PPP borrower of any SBA loan review decision does not extend the deferral period of the PPP loan.”⁸ As a result, the Rule forces borrowers to make payments on a loan during the pendency of their appeal of a final loan review decision denying forgiveness of that loan. Put differently, a borrower’s appeal of a finding by the SBA that the borrower is ineligible for loan forgiveness could be pending, and yet the borrower would still be required to make payment on that loan.⁹ Considering that the entire appeals process takes months and must be exhausted before a borrower can hope for judicial relief in the courts,¹⁰ loan payments would add up in the

⁴ Interim Final Rule at 52,889, § 134.1209(a).

⁵ Id. at 52,888, § 134.1207(a).

⁶ See Loan Review IFR at Part III(1)(D) (“SBA may also request information directly from the borrower.”).

⁷ Interim Final Rule at 52,884 (“Because a PPP borrower must begin making payments of principal and interest on the remaining balance of its PPP loan at the end of the loan payment deferral period or when SBA remits the loan forgiveness amount to the PPP lender (or notifies the lender that no loan forgiveness is allowed), an appeal by a PPP borrower of any SBA loan review decision does not extend the deferral period of the PPP loan.”).

⁸ Id. at 52,884 (emphasis added).

⁹ See id. at 52,887, § 134.1201(b)(3) (borrower can appeal a final decision on whether it “[i]s ineligible for PPP loan forgiveness in the amount determined by the lender in its full approval or partial approval decision issued to SBA (except for the deduction of any Economic Injury Disaster Loan advance in accordance with section 1110(e)(6) of the CARES Act”).

¹⁰ See id. at 52,888-89, § 134.1204—13.

meantime. The Interim Final Rule does not establish any procedures that would allow borrowers to maintain the deferral period while contesting the SBA's loan forgiveness determination.

For all these reasons, the SBA should hold applications for loan forgiveness in abeyance pending resolution of appeal.

III. The Interim Final Rule Raises Due Process and APA Concerns Because Its Administrative Appeal Procedures Are Not Independent and Neutral

The Interim Final Rule deprives borrowers of due process and violates the APA because decision makers on appeal are not independent and neutral.

At the conclusion of the SBA's investigation into a PPP loan, the Loan Review IFR instructs the Administrator to issue a final loan review decision as to whether a borrower is ineligible for a PPP loan, a given loan amount, loan forgiveness, or must repay the loan.¹¹ The Interim Final Rule allows a borrower to appeal that decision to a judge who is part of the SBA Office of Hearings and Appeal ("OHA"), an office subordinate to the Administrator.¹² If the OHA judge issues an adverse ruling, the borrower can then seek reconsideration from the judge who made the appellate decision.¹³ For final review of a loan decision, a borrower "may file and serve a request for review by the Administrator."¹⁴

The U.S. Supreme Court has held that in an administrative "review of an initial decision," "the decisionmaker must be other than the one who made the decision under review" to avoid running afoul of the due process clause.¹⁵ Similarly, for an administrative appeal to be meaningful, it should be adjudicated by someone independent of the initial decision-maker. Yet an unconstitutional, circular review process is exactly what the Interim Final Rule installs. The OHA judge, who reviews the Administrator's final PPP loan review decision, is subordinate to the Administrator yet the Interim Final Rule does nothing to wall off the OHA judge from the Administrator. Thus, the OHA judge cannot issue an appellate ruling that is truly independent of the Administrator. Further, the Interim Final Rule's provision tasks the Administrator with reviewing a judge's appellate decision of the Administrator's own loan review decision. Basically, the Administrator reviews an appeal of her own decision, which creates serious due process concerns.

¹¹ See Loan Review IFR at 33,011—12 ("The Small Business Act authorizes the Administrator to conduct investigations to determine whether a recipient or participant in any assistance under a 7(a) program, including the PPP, is ineligible for a loan, or has violated section 7(a), or any rule, regulation or order issued thereunder. 15 U.S.C. 634(b)(11)...For a PPP loan of any size, SBA may undertake a review at any time in SBA's discretion...If SBA determines that a borrower is ineligible for the PPP loan, SBA will direct the lender to deny the loan forgiveness application. Further, if SBA determines that the borrower is ineligible for the loan amount or loan forgiveness amount claimed by the borrower, SBA will direct the lender to deny the loan forgiveness application in whole or in part, as appropriate. SBA may also seek repayment of the outstanding PPP loan balance or pursue other available remedies.").

¹² See 15 U.S.C. § 634(i)(1)(c) ("The head of the Office of Hearings and Appeals shall be the Chief Hearing Officer appointed under section 633(b)(1) of this title, who shall be responsible to the Administrator.").

¹³ Interim Final Rule at 52,889, § 134.1213(a-c).

¹⁴ Id. at 52,889, § 134.1213(d).

¹⁵ *Withrow v. Larkin*, 421 U.S. 35, 58 n.25 (1975) (citing *Gagnon v. Scapelli*, 411 U.S. 778, 785-86 (1973), *Morrissey v. Brewer*, 408 U.S. 471, 485-86 (1972), *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970)).

The circular review process created by the Interim Final Rule also violates the APA. Under the APA, any SBA employee involved in the investigation of a PPP loan may not “participate or advise” in any subsequent SBA review decision on the same loan.¹⁶ In direct contravention of this APA provision, the Interim Final Rule grants the Administrator final authority to review a PPP loan decision even though it is the Administrator who investigated and entered the challenged decision on the very same loan.

The SBA should create an appeals process for final PPP loan review decisions in which each level of review is adequately independent and neutral and wall off SBA employees who review PPP loans in order to ensure that they are not involved in appeals of their own decisions.

IV. The Interim Final Rule Creates Unfair Appeal Procedures for Borrowers

The Interim Final Rule establishes unfair appeal procedures for briefing, discovery, and standard of review that leave borrowers fatally hamstrung on appeal.

First, the Interim Final Rule directs borrowers to file an appeal petition consisting of “[a] full and specific statement as to why the SBA loan review decision is alleged to be erroneous” without the benefit of the administrative record showing how the SBA made its final loan review decision.¹⁷ This catch-22 sets borrowers up to fail on appeal because they cannot disprove the SBA’s final loan review decision without an understanding of the facts and law underlying it, as evidenced in the administrative record.

Second, the Interim Final Rule permits borrowers to file only one brief in their appeal of a final PPP loan review decision, denying borrowers a guaranteed opportunity to file a reply brief in response to the SBA’s brief.¹⁸ The lack of a reply brief for borrowers is especially problematic considering that the Interim Final Rule orders borrowers to file their brief on appeal before the SBA discloses the administrative record, meaning the Interim Final Rule forces borrowers to attempt to predict and refute arguments that may or may not be contained in the future SBA’s opposition brief.¹⁹

Third, the Interim Final Rule bars borrowers from conducting any discovery or even requesting leave to take discovery from the judge, but allows the SBA to request leave to take

¹⁶ 5 U.S.C. § 554(d) (“An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.”).

¹⁷ Interim Final Rule at 52,888, § 134.1202(a)(3).

¹⁸ See *id.* at 52,889, § 134.1208(d) (“No reply to a response will be permitted unless the Judge directs otherwise.”). Section 1208(d) is unclear as to whether a borrower can seek leave from the judge to file a reply and to the circumstances in which the judge can “direct[]” the filing of a reply. *Id.*

¹⁹ *Id.* at 52,888-89, §§ 134.1202; 134.1204; 134.1206 (“Upon receipt of an appeal challenging a final SBA loan review decision, OHA will assign the matter to either an Administrative Law Judge or an Administrative Judge in accordance with § 134.218. Unless the appeal is dismissed under § 134.1205, the Judge will issue a notice and order establishing a deadline for production of the administrative record and specifying a date for the close of record.”); 134.1207(b) (“SBA will file the administrative record with OHA and serve it on appellant.”).

discovery for good cause.²⁰ This one-sided discovery rule is patently unfair to borrowers. Although the Interim Final Rule has already stacked the chips in the SBA's favor for the reasons previously given, the SBA can also request discovery while borrowers cannot, limiting the entirety of their advocacy on appeal to an opening brief filed before the SBA discloses the administrative record.

Fourth, the standard of review in an appeal of a final PPP loan review decision is confusing and incongruous. The Interim Final Rule states that “[t]he standard of review is whether the SBA loan review decision was based on clear error of fact or law. The appellant has the burden of proof, by a preponderance of the evidence.”²¹ This provision attempts to combine the distinct legal concepts of clear error and preponderance of the evidence. The standard of “preponderance [of the evidence]” is customarily used to prescribe one possible burden or standard of proof before a trier of fact in the first instance.²² In contrast, “clear error” is “customarily used to describe, not a degree of certainty that some fact has been proven in the first instance,” but rather is “normally applied by reviewing courts to determinations of fact made at trial by courts that have made those determinations in an adjudicatory capacity.”²³ The Interim Final Rule's requirement that, on appeal, the borrower “has the burden of proof, by a preponderance of the evidence”²⁴ mistakenly inserts a standard of proof for “the first instance”²⁵ into an appellate posture. In doing so, the Interim Final Rule again disadvantages borrowers, who must decipher “a combination of terms that are categorically ill-matched,”²⁶ and places an illogical burden of proof on them. In addition, the standard of review forces borrowers to demonstrate a clear error in the final loan review decision, despite the fact that borrowers have no access to the administrative record and no idea of the criteria that the SBA applies in its reviews of PPP loans. This places an impossible burden on borrowers, particularly given that the “clear error” standard gives considerable deference to the initial adverse loan review decision.²⁷ Finally, clear error is an inappropriate standard of review because it requires robust review “on the entire evidence,”²⁸ but borrowers are completely deprived of any evidence to review.

V. Conclusion

The Attorneys General urge the SBA to amend its Interim Final Rule to: 1) include the procedures by which the SBA makes final PPP loan review decisions, requiring that the SBA set forth the factual and legal underpinnings for its final decisions; 2) hold loan forgiveness applications in abeyance during an administrative appeal; 3) ensure independent and neutral decision-makers conduct appeals of final PPP loan review decisions; and 4) provide borrowers fair procedures on appeal.

²⁰ Id. at 52,889, § 134.1209(b) (“Discovery will be permitted only if the Judge determines that SBA, upon written submission, has made a showing of good cause for discovery.”).

²¹ Id. at 52,889, § 134.1212.

²² *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993).

²³ Id. at 622-23.

²⁴ Interim Final Rule at 52,889, § 134.1212.

²⁵ *Concrete Pipe & Prods. of Cal.*, 508 U.S. at 622.

²⁶ Id. at 624.

²⁷ Id. at 623 (“review under the ‘clearly erroneous’ standard is significantly deferential, requiring a definite and firm conviction that a mistake has been committed.” (quotation omitted)).

²⁸ Id. at 622.

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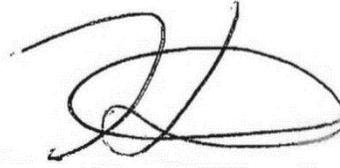
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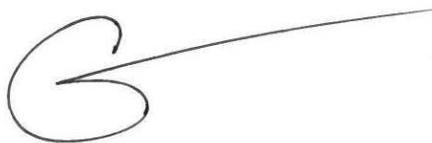
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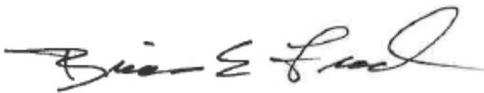
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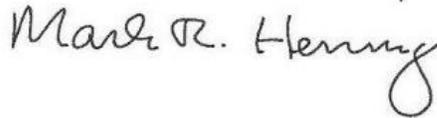
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