

SMALL BUSINESS ADMINISTRATION

13 CFR Parts 113 and 120

Docket Number SBA-2020-0024

RIN 3245-AH40

**Business Loan Program Temporary Changes; Paycheck Protection Program –
Nondiscrimination and Additional Eligibility Criteria**

AGENCY: U. S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: On April 2, 2020, the U.S. Small Business Administration (SBA) posted an interim final rule announcing the implementation of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The CARES Act temporarily adds a new program, titled the “Paycheck Protection Program,” to the SBA’s 7(a) Loan Program. The CARES Act also provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program (PPP). The PPP is intended to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID-19). SBA posted additional interim final rules on April 3, 2020, April 14, 2020, April 24, 2020, April 28, 2020, and April 30, 2020 and the Department of the Treasury posted an additional interim final rule on April 28, 2020. This interim final rule supplements the previously posted interim final rules by providing guidance on nondiscrimination obligations and additional eligibility requirements, and requests public comment.

DATES: Effective date: This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Applicability date: This interim final rule applies to applications submitted under the Paycheck Protection Program through June 30, 2020, or until funds made available for this purpose are exhausted.

Comment date: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by number SBA-2020-0024 through the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. SBA will post all comments on www.regulations.gov. If you wish to submit confidential business information (CBI) as defined in the User Notice at www.regulations.gov, please send an email to ppp-ifr@sba.gov. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: A Call Center Representative at 833-572-0502, or the local SBA Field Office; the list of offices can be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

SUPPLEMENTARY INFORMATION:

I. Background Information

On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID-19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all States, territories, and the District of Columbia. With the COVID-19 emergency, many small businesses nationwide are experiencing economic hardship as a direct result of the Federal, State, tribal, and local public health measures that are being taken to minimize the public's exposure to the virus. These measures, some of which are government-mandated, are being

implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance from others or even stay-at-home orders, are being implemented, resulting in a dramatic decrease in economic activity as the public avoids malls, retail stores, and other businesses.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) (Pub. L. 116-136) to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic. The Small Business Administration (SBA) received funding and authority through the CARES Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID-19 emergency. Section 1102 of the CARES Act temporarily permits SBA to guarantee 100 percent of 7(a) loans under a new program titled the “Paycheck Protection Program.” Section 1106 of the CARES Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program (PPP). On April 24, 2020, the President signed the Paycheck Protection Program and Health Care Enhancement Act (Pub. L. 116-139), which provided additional funding and authority for the PPP.

Prior to the CARES Act, nonprofit organizations were not eligible to participate in SBA’s 7(a) Loan Program (15 U.S.C. 636(a)). Section 1102 of the CARES Act expanded eligibility, limited to PPP, to include certain nonprofit organizations, among other organizations.

SBA regulations at 13 CFR part 113 impose regulatory requirements “to reflect to the fullest extent possible the nondiscrimination policies of the Federal Government as expressed in the several statutes, Executive Orders, and messages of the President dealing with civil rights and equality of opportunity.” 13 CFR 113.1(a). But because SBA’s loan programs previously

served business entities, these regulations did not restate certain limitations and exemptions under federal law primarily pertinent to certain faith-based or nonprofit organizations. In particular, Title IX of the Education Amendments of 1972 permits single-sex admissions practices by preschools, non-vocational elementary or secondary schools, and private undergraduate higher education institutions. *See* 20 U.S.C. 1681(a)(1). Additionally, the Fair Housing Act of 1968 allows religious organizations to reserve housing for coreligionists, *see* 42 U.S.C. § 3607, and allows for single-sex emergency shelters that provide refuge to abused women (or abused men), *see* 24 CFR 5.106; *see also Johnson v. Dixon*, 786 F. Supp. 1, 4 (D.D.C. 1991) (“It is . . . doubtful [that] ‘emergency overnight shelter,’ . . . can be characterized as a ‘dwelling’ within the meaning of the [Fair Housing] Act.”). Finally, the Indian Child Welfare Act of 1978 requires certain placement preferences in the foster care and adoptions of Indian children. *See* 25 U.S.C. 1915. The broadly worded SBA regulations do not articulate these limitations on the application of the relevant nondiscrimination provisions.

In addition, there is a technical discrepancy between SBA’s religious employer exemption at 13 CFR 113.3-1(h) and Title VII of the Civil Rights Act, which allows religious employers to make hiring decisions according to their religious beliefs with respect to all “activities,” not just “religious activities.” *See* An Act to further promote equal employment opportunities for American workers, Pub. L. 92-261, 86 Stat. 103, 104 (1972), *codified at* 42 U.S.C. 2000e-1(a).

Given these various discrepancies, organizations have accordingly faced uncertainty about whether their participation in the PPP program would require them to substantially change their operations for a short period of months. These types of changes are impossible for some organizations, and impractical for many. This uncertainty risks frustrating the purpose of the CARES Act, which was to afford swift stopgap relief to Americans who might otherwise lose

their jobs or businesses because of the economic hardships wrought by the response to the COVID-19 public health emergency. To provide certainty to applicants and recipients of loans and loan forgiveness under the PPP, and to address the large-scale burdens that SBA regulations may impose on recipients participating only on a short-term basis, this interim final rule provides guidance that for purposes of the PPP, nonprofits must meet their nondiscrimination obligations under existing Federal laws and Executive Orders. This interim final rule also provides guidance with respect to the religious employer exemption to ensure harmony with Section 702 of Title VII.

In addition, as described below, to enable certain eligible small educational institutions to participate in PPP, this interim final rule provides that institutions of higher education shall exclude work study students when determining the number of employees for purposes of PPP loan eligibility.

II. Comments and Immediate Effective Date

The intent of the Act is that SBA provide relief to America's small businesses expeditiously. This intent, along with the dramatic decrease in economic activity nationwide, provides good cause for SBA to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act. Specifically, it is critical to meet lenders' and borrowers' need for clarity concerning program requirements as rapidly as possible because the last day eligible borrowers can apply for and receive a loan is June 30, 2020.

This interim final rule supplements previous regulations and guidance on certain important, discrete issues. The immediate effective date of this interim final rule will benefit lenders so that they can swiftly close and disburse loans to small businesses. This interim final rule is effective without advance notice and public comment because section 1114 of the Act authorizes SBA to

issue regulations to implement Title I of the Act without regard to notice requirements. In addition, SBA has determined that there is good cause for dispensing with advance public notice and comment on the ground that it would be contrary to the public interest. Specifically, SBA has determined that advance public notice and comment would delay the ability of certain organizations to implement their nondiscrimination obligations in a manner consistent with the limitations contained in existing Federal laws, and potentially force such organizations to change their operations until SBA adopted a final or interim final rule. Rather than change their operations, the affected organizations could elect not to apply for PPP loans and lay off employees, which would defeat the paycheck protection purposes of the PPP. This rule is being issued to allow for immediate implementation of this program. Although this interim final rule is effective immediately, comments are solicited from interested members of the public on all aspects of the interim final rule, including section III below. These comments must be submitted on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. SBA will consider these comments and the need for making any revisions as a result of these comments.

III. Paycheck Protection Program Nondiscrimination and Additional Eligibility Criteria

Overview

The CARES Act was enacted to provide immediate assistance to individuals, families, and organizations affected by the COVID-19 emergency. Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under the PPP. Loans under the PPP will be 100 percent guaranteed by SBA, and the full principal amount of the loans and any accrued interest may qualify for loan forgiveness. Additional information about the PPP is available in interim final rules published by SBA and the Department of the

Treasury in the Federal Register (85 FR 20811, 85 FR 20817, 85 FR 21747, 85 FR 23450, 85 FR 23917, 85 FR 26321 and 85 FR 26324) (collectively, the PPP Interim Final Rules).

1. Non-Discrimination

Are recipients of PPP loans entitled to exemptions on the grounds provided in Federal nondiscrimination laws for sex-specific admissions practices, sex-specific domestic violence shelters, coreligionist housing, or Indian tribal preferences in connection with adoption or foster care practices?

Yes. With respect to any loan or loan forgiveness under the PPP, the nondiscrimination provisions in the applicable SBA regulations incorporate the limitations and exemptions provided in corresponding Federal statutory or regulatory nondiscrimination provisions for sex-specific admissions practices at preschools, non-vocational elementary or secondary schools, and private undergraduate higher education institutions under Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*), for sex-specific emergency shelters and coreligionist housing under the Fair Housing Act of 1968 (42 U.S.C. 3601 *et seq.*), and for adoption or foster care practices giving child placement preferences to Indian tribes under the Indian Child Welfare Act of 1978 (25 U.S.C. 1901 *et seq.*).

In addition, for purposes of the PPP, SBA regulations do not bar a religious nonprofit entity from making decisions with respect to the membership or the employment of individuals of a particular religion to perform work connected with the carrying on by such nonprofit of its activities.

2. Student Workers and PPP Loan Eligibility

Do student workers count when determining the number of employees for PPP loan eligibility?

Yes, student workers generally count as employees, unless (a) the applicant is an institution of higher education, as defined in the Department of Education’s Federal Work-Study regulations, 34 C.F.R. § 675.2, and (b) the student worker’s services are performed as part of a Federal Work-Study Program (as defined in those regulations¹) or a substantially similar program of a State or political subdivision thereof. Institutions of higher education must exclude work study students when determining the number of employees for PPP loan eligibility, and must also exclude payroll costs for work study students from the calculation of payroll costs used to determine their PPP loan amount. The Administrator, in consultation with the Secretary, has determined that this is a reasonable interpretation of section 1102(a) of the CARES Act’s reference to “individuals employed on a full-time, part-time, or other basis.” Such programs generally provide part-time jobs for students with financial need, and their services are incident to and for the purpose of pursuing a course of study. Work study students are excluded from the definition of employees in other areas of federal law. For example, in the regulations implementing the Affordable Care Act, Treasury defined an employee’s “hours of service” to exclude work study hours.² Explaining this exclusion, the regulation’s preamble states that “[t]he federal work study program, as a federally subsidized financial aid program, is distinct from traditional employment in that its

¹ The Department of Education’s Federal Work-Study Programs described at 34 CFR Part 675 are (1) the Federal Work-Study Program, (2) the Job Location and Development Program, and (3) Work Colleges Program.

² 26 CFR 54.4980H-1(a)(24) (“Hour of service . . . (ii) Excluded hours . . . (B) Work-study program. The term hour of service does not include any hour for services to the extent those services are performed as part of a Federal Work-Study Program as defined under 34 CFR 675 or a substantially similar program of a State or political subdivision thereof.”).

primary purpose is to advance education.”³ Similarly, student work is generally exempt from Federal Insurance Contribution Act (FICA) and Federal Unemployment taxes.⁴

For similar reasons, the Administrator, in consultation with the Secretary of the Treasury, has determined that a limited exception for work study is appropriate here. In particular, the Administrator recognizes that requiring institutions of higher education to count work study students towards employee headcount would result in an anomalous outcome in two respects. First, it would prevent some small educational institutions from receiving PPP loans due solely to their provision of financial aid to students in the form of work study. Second, it would result in the exclusion of small educational institutions whose part-time work study headcount dwarfs their full-time faculty and staff headcounts.

Educational institutions that filed loan applications prior to the issuance of the regulation are not bound by this interpretation but may rely on it. Lenders may continue to rely on borrower certifications as part of their good faith review process.

3. Additional Information

SBA may provide further guidance, if needed, through SBA notices that will be posted on SBA’s website at www.sba.gov. Questions on the Paycheck Protection Program may be directed to the Lender Relations Specialist in the local SBA Field Office. The local SBA Field Office may be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

³ 79 Fed. Reg. 8544, 8550 (Feb. 12, 2014).

⁴ Internal Revenue Code Section 3121(b)(10) excepts from FICA tax “service performed in the employ of— (A) a school, college, university . . . if such service is performed by a student who is enrolled and regularly attending classes at such school, college, university.” Student workers, who are not full time, are excepted where the services are “incident to and for the purposes of pursuing a course of study.” 26 CFR § 31.3121(b)(10)-2(d)(3)(i).

Compliance with Executive Orders 12866, 12988, 13132, 13563, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601-612).

Executive Orders 12866, 13563, and 13771

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563, and is considered a major rule under the Congressional Review Act. SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID-19 emergency. This rule's designation under Executive Order 13771 will be informed by public comment.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

SBA has determined that this rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA has determined that this rule will not impose new or modify existing recordkeeping or reporting requirements under the Paperwork Reduction Act.

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the Federal Register. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a “small entity” as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for such small government jurisdictions, neither State nor local governments are “small entities.” Similarly, for purposes of the RFA, individual persons are not small entities. The requirement to conduct a regulatory impact analysis does not apply if the head of the agency “certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” 5 U.S.C. 605(b). The agency must, however, publish the certification in the Federal Register at the time of publication of the rule, “along with a statement providing the factual basis for such certification.” If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA’s waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the Federal Register at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b). Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other

things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. SBA Office of Advocacy guide: How to Comply with the Regulatory Flexibility Act, Ch.1. p.9. Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

Jovita Carranza,
Administrator.