

April 17, 2020

The Honorable Steven Mnuchin
Secretary
U.S. Department of Treasury
Washington, D.C. 20220

The Honorable Jovita Carranza
Administrator
U.S. Small Business Administration
Washington, D.C. 20416

Dear Secretary Mnuchin and Administrator Carranza,

As a bipartisan and diverse group of organizations working to ensure fair treatment of people with a record of arrest or conviction, we write to express our deep concern over the restrictions imposed by the Small Business Administration on this population's eligibility for benefits under the two programs authorized and funded by the CARES Act (see Appendix). With one in three Americans having a record, and people with records experiencing an unemployment rate five times higher than the average, these restrictions will have a significant and detrimental impact on individuals, families, and communities across the United States. The restrictions will have a particularly harsh effect on minority business owners and employees who are disproportionately affected by the criminal legal system as a result of institutional discrimination. Specifically, these restrictions are:

- **Unnecessary and confusing:**

- There are no statutes requiring the SBA to categorically disqualify individuals from its loan programs based on an arrest or conviction record; the authority to perform a background check does not translate into authority to exclude.
- SBA's Paycheck Protection Program (PPP) Interim Final Rule, and the PPP's even more restrictive application form, are far more exclusionary than the preexisting rule on record restrictions for small business loans under the 7(a) program, which only excludes those with active criminal cases. SBA's new rule excludes anyone convicted of any felony within the last 5 years, and its application form additionally disqualifies anyone who pleaded guilty or no contest, or was placed on pretrial diversion, probation, or parole during that period (see Appendix).
- The lack of new policy guidance for Economic Injury Disaster Loans (EIDL) for people with a record, especially regarding the new advances, also leads to additional exclusion.
- The new restrictions constitute unnecessary overreach that interferes with the ability of small businesses to operate and pay their employees.
- The PPP Interim Final Rule, policy guidance, and application form are confusing and likely to have a chilling effect that will discourage many eligible business owners from applying; and, they may lead to applicants inadvertently answering the records questions incorrectly. The policy guidance and application form for Economic Injury Disaster Loans (EIDL) advances are similarly confusing and are likely to have the same chilling effect.

- **Inconsistent with Congress' intent:**

- The intention of the emergency relief programs authorized by the CARES Act is to sustain small businesses that are trying to save the economy by keeping people employed. Eligibility requirements should be relaxed in these circumstances, not heightened.

- SBA's new restrictions on eligibility for its loan programs, which already operate to exclude many people with a record, contravene the intent of the CARES Act, and are inconsistent with SBA's more general mandate of encouraging entrepreneurship and expanding access to employment, including for people with a record of arrest or conviction.
- A significant number of people with an arrest or conviction history have established their own small businesses, since it is frequently difficult for them to secure employment with others. Moreover, these businesses also tend to be more willing to hire employees with a record. Driving them out of business will result in a severe impact on employment of a population that already is disadvantaged in the workplace.
- A large percentage of small businesses are owned by single owners or a limited number of co-owners, so that any disqualification affecting 20%+ equity owners will have a significant impact on small business owners generally.
- A policy that excludes from loan eligibility small businesses that are owned in whole or in part by people with arrest or conviction history is not only inconsistent with the CARES Act and the mandate of SBA's own authorizing statutes, it also frustrates federal and state efforts to encourage the reintegration of individuals involved in the criminal legal system.
- **Overbroad and unfair:**
 - The PPP's categorical bars based on certain arrest or conviction records mean that there is no opportunity for an individual determination that considers factors such as rehabilitation, the circumstances of the conviction/disposition, or whether the nature of the underlying crime might adversely affect the ability to properly utilize the loan.
 - The EIDL program restrictions go even further by asking about any involvement with the criminal legal system at any time, which could potentially exclude applicants with any arrest or conviction record.
 - The PPP and EIDL restrictions extend to individuals that the criminal legal system has specifically determined should not be convicted of a crime, including those that participate in diversionary programs or obtain deferred adjudications – the very kinds of dispositions that are supposed to help protect people involved in the criminal legal system from harsh economic collateral consequences.
 - The SBA's requirement that people disclose sealed and expunged records circumvents protections in state law for these cleared records and is contrary to the intent and purpose of those laws.
- **Racially discriminatory:**
 - The SBA's restrictions will have a disparate impact on minority business owners and employees, who are disproportionately affected by the criminal legal system as a result of institutional discrimination.
 - People with a record are already subject to myriad disadvantages in seeking to reintegrate into society, notably in bank lending, but also in housing, employment, licensing, education, voting, and other areas.

The SBA must act now to:

- At a minimum, bring the record restrictions for PPP and EIDL programs in line with those that applied to Section 7(a) and 7(b) loans under regulations adopted prior to enactment of the CARES Act.
- Relax existing rules and policies that restrict access to PPP or EIDL financial assistance for people with a record in the urgent circumstances presented by the pandemic, in line with the purposes of the CARES Act.
- Ensure that the application forms for SBA financial assistance accurately reflect the eligibility requirements and are written in a clear manner.

As the COVID-19 crisis continues to devastate communities across this country, federal relief must be made equitably accessible to all who need it.

Sincerely,

American Civil Liberties Union
Chicago Lawyers' Committee for Civil Rights
Collateral Consequences Resource Center
Community Legal Services of Philadelphia
Drug Policy Alliance
FreedomWorks
Georgia Justice Project
Interfaith Action for Human Rights
Jewish Council for Public Affairs
Justice & Accountability Center of Louisiana
Justice Action Network
Leadership Conference on Civil and Human Rights
National Association of Criminal Defense Lawyers
National Employment Law Project
Public Interest Law Center
Reproductive Justice Inside
Safer Foundation
Washington Lawyers' Committee for Civil Rights and Urban Affairs
Women Against Registry

APPENDIX: PROGRAM REQUIREMENTS (Prepared by CCRC, last revised 4/17/20)

Paycheck Protection Program (PPP)

- The [CARES Act](#) authorizes the PPP, which provides small business loans under the SBA's 7(a) loan program, with provisions for expanded eligibility, allowable uses, and forgiveness.¹
- **Barriers based on arrest or conviction for 7(a) loans in general:**
 - **By statute:** The SBA “may verify the applicant’s criminal background, or lack thereof,” prior to approval, including through an FBI background check.²
 - **By regulation:** “Businesses with an Associate who is incarcerated, on probation, on parole, or has been indicted for a felony or a crime of moral turpitude” are ineligible.³
 - **By policy statement:** SBA interprets its regulation to also make ineligible an Associate under deferred prosecution, conditional discharge, order of protection, or a sex offender registry, or currently facing any charges in any jurisdiction.⁴ SBA also states that various principals of a business “must be of good character,” which is determined through a character evaluation, requiring disclosure of any: 1) current charges; 2) arrests in the past 6 months; and 3) time the person has been convicted, pled guilty or no contest, or been placed on pretrial diversion or any form of parole or probation—other than for a minor vehicle violation. Expunged and sealed records must be disclosed, with no exceptions. A person will generally be approved if they provide documentation that they have satisfied all sentencing conditions (presumably including payment of costs and restitution) and do not have a felony conviction, misdemeanor conviction for a crime against a minor, recent misdemeanor conviction, or recent charges. Otherwise, they are subject to a fingerprint-based FBI background check and an opaque individual determination by the SBA.⁵
- **Barriers based on arrest or conviction specific to PPP loans:**
 - **By statute:** The CARES Act does not specifically authorize much less require barriers based on arrest or conviction for PPP loans. To be consistent with its purposes, the CARES Act should be read to say at the least that new barriers based on arrest or conviction should not be applied to PPP assistance.⁶
 - **By regulation:** [SBA Interim Final Rule](#) (Apr. 15): “You are ineligible for a PPP loan if...iii. An owner of 20 percent or more of the equity of the applicant is incarcerated, on probation, on parole; presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction; or has been convicted of a felony within the last five years.”
 - **By application form:** [Borrower Application](#) (Apr. 3): asks two questions; a “yes” to either is disqualifying: 1) “Is the Applicant (if an individual) or any individual owning 20% or more of the equity of the Applicant subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction, or presently incarcerated, or on probation or parole?” 2) “Within the last 5 years, for any felony, has the Applicant (if an individual) or any owner of the Applicant 1) been convicted; 2) pleaded guilty; 3) pleaded nolo contendere; 4) been placed on pretrial diversion; or 5) been placed on any form of parole or probation (including probation before judgment)?” (*Note: this is far broader than the Interim Final Rule: the second question includes “any owner” and covers dispositions other than conviction.*)

Economic Injury Disaster Loans (EIDL)

- EIDL loans are authorized under the SBA's existing 7(b) disaster loan program. The Coronavirus Preparedness and Response Supplemental Appropriations Act (Phase 1) appropriated additional funds and deemed coronavirus a disaster.⁷ Pursuant to the CARES Act, SBA is also [allowing](#) business owners in all states, D.C., and territories to apply for an EIDL advance of up to \$10,000, which "will be made available within days of a successful application, and this loan advance will not have to be repaid."⁸
- **Barriers based on arrest or conviction for EIDL:**
 - **By statute:** Individuals convicted during the past year of a felony during and in connection with a riot or civil disorder or other declared disaster are ineligible.⁹
 - **By regulation:** "Businesses with an Associate who is incarcerated, on probation, on parole, or has been indicted for a felony or a crime of moral turpitude" are ineligible.¹⁰
 - **By policy statement:** The SBA policy statement provides: "It is not in the public interest...to extend financial assistance to persons who are not of good character. If any adverse information develops concerning the character or background of a disaster loan applicant or principal owner [on forms], SBA must make a determination as to the applicant's character before a loan can be approved."¹¹ Thus, the SBA will not approve a loan "if the applicant or principal owner is presently on parole or probation following conviction of a serious criminal offense. However, [it] will consider approving an application submitted by partnerships, corporations, and LLEs, where the apparent bar to eligibility was committed independently of any official act for the business and the individual will divest all direct and indirect interest in the business."
 - **By application form:** Forms, including the [COVID-19 EIDL portal](#), include the usual EIDL three-part question, which requires a "yes" or "no" to the entire question: "a. Are you presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction? b. Have you been arrested in the past six months for any criminal offense? c. For any criminal offense – other than a minor vehicle violation – have you ever been convicted, plead guilty, plead nolo contendere, been placed on pretrial diversion, or been placed on any form of parole or probation (including probation before judgment)?" The SBA has not provided guidance on whether applicants who answer "yes" to this question can obtain an EIDL advance. Under pre-existing policy, if this question is answered "yes," the SBA requires the applicant to provide a [Form 912](#) with an explanation of the offense(s), and in some cases a fingerprint sample, before the SBA will make a character determination.¹²

¹ CARES Act (H.R. 748), secs. 1102-1105; 15 U.S.C. 636(a).

² 15 U.S.C. 636(a)(1)(B).

³ 13 C.F.R. § 120.110(n). An “Associate” includes officers, directors, owners of 20% or more of the equity, key employees, and other specified entities. *See* 13 C.F.R. § 120.10.

⁴ *See* SBA Standard Operating Procedure (SOP) [50 10 5\(K\)](#)(B)(2)(III)(A)(13) (eff. April 1, 2019).

⁵ The good character requirement applies to every proprietor, general partner, officer, director, managing member of an LLC, owner of 20% or more of the equity, trustor, or person who runs day-to-day operations.” *See id.*

⁶ *See* CARES Act (H.R. 748), sec. 1102.

⁷ Coronavirus Preparedness and Response Supplemental Appropriations Act (H.R. 6074), tit. 2.

⁸ CARES Act (H.R. 748), sec. 1110; <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/economic-injury-disaster-loan-emergency-advance>.

⁹ *See* P. L. 90 448, 1106(e), HUD Act of 1968, and 13 CFR § 123.101(a).

¹⁰ 13 C.F.R. § 120.110(n). An “Associate” includes officers, directors, owners of 20% or more of the equity, key employees, and other specified entities. *See* 13 C.F.R. § 120.10.

¹¹ SBA [SOP 50 30 9](#)(3.6) (effective May 31, 2018) at p. 32.

¹² *Id.*