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June 12, 2020

The Honorable Marco Rubio
Chairman
The Honorable Ben Cardin
Ranking Member
Committee on Small Business & Entrepreneurship
United States Senate

The Honorable Nydia M. Velázquez
Chairwoman
The Honorable Steve Chabot
Ranking Member
Committee on Small Business
House of Representatives

Subject: *Small Business Administration: Business Loan Program Temporary Changes; Paycheck Protection Program—Nondiscrimination and Additional Eligibility Criteria*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Small Business Administration (SBA) entitled “Business Loan Program Temporary Changes; Paycheck Protection Program—Nondiscrimination and Additional Eligibility Criteria” (RIN: 3245–AH40). We received the rule on May 29, 2020. It was published in the *Federal Register* as an interim final rule on May 8, 2020. 85 Fed. Reg. 27287. The effective date of the rule is May 8, 2020, but the rule applies to applications submitted under the Paycheck Protection Program (PPP) through June 30, 2020, or until funds run out. SBA is holding a comment period through June 8, 2020.

The interim final rule supplements the previous interim final rules SBA issued to implement provisions of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020). SBA states the CARES Act expanded eligibility, limited to PPP, to participate in SBA’s 7(a) Loan Program to include certain nonprofit organizations that were not previously eligible to participate. According to SBA, because its loan programs previously served business entities, its regulations did not restate certain limitations and exemptions under federal law primarily pertinent to certain faith-based or nonprofit organizations. According to SBA, the rule provides additional guidance on nondiscrimination obligations and additional eligibility requirements, and requests public comment.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). The 60-day delay in effective date can be waived, however, if the agency finds for good cause that delay is impracticable, unnecessary, or contrary to the public interest, and the agency incorporates a statement of the findings and its

reasons in the rule issued. 5 U.S.C. §§ 553(b)(3)(B), 808(2). Here, although SBA did not specifically mention CRA's 60-day delay in effective date requirement, the agency found good cause to waive notice and comment procedures and incorporated a brief statement of reasons. Specifically, SBA stated the intent of the CARES Act to expeditiously provide relief to small businesses, along with the dramatic decrease in economic activity nationwide, provides good cause to dispense with the delayed effective date provided in the Administrative Procedure Act. 5 U.S.C. § 553(d)(3). According to SBA, the immediate effective date 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. SBA also stated the immediate effective date benefits lenders so that they can swiftly close and disburse loans. SBA also determined there is good cause to dispense with notice and comment on the grounds that it would be contrary to the public interest. Specifically, SBA stated such requirements would delay the ability of certain organizations to implement their nondiscrimination obligations consistent with existing federal law and potentially force such organizations to change their operations until SBA adopted a rule. SBA stated that these organizations, rather than change their operations, could elect not to apply for loans and lay off employees, which would defeat the purposes of PPP. Finally, SBA also referred to authority under section 1114 of the CARES Act, which, according to SBA, authorizes the agency to issue regulations to implement title I of the CARES Act without regard to notice requirements.

Enclosed is our assessment of SBA's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shari Brewster, Assistant General Counsel, at (202) 512-6398.



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Enclosure

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Small Business Administration

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
SMALL BUSINESS ADMINISTRATION
ENTITLED
“BUSINESS LOAN PROGRAM TEMPORARY CHANGES;
PAYCHECK PROTECTION PROGRAM—NONDISCRIMINATION
AND ADDITIONAL ELIGIBILITY CRITERIA”
(RIN: 3245–AH40)

(i) Cost-benefit analysis

In its submission to us, the Small Business Administration (SBA) indicated that it did not prepare an analysis of the costs and benefits of the interim final rule.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603-605, 607, and 609

SBA stated RFA requirements do not apply if the rule is exempt from notice and comment procedures. Because the rule is exempt from notice and comment procedures, according to SBA, SBA determined it is not required to conduct a regulatory flexibility analysis.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

SBA did not discuss the Act in the interim final rule. In its submission to us, the agency indicated it did not prepare a written statement under the Act.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

SBA found good cause to waive notice and comment procedures. Specifically, SBA stated the intent of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) to expeditiously provide relief to small businesses, along with the dramatic decrease in economic activity nationwide, provides good cause to dispense with the delayed effective date provided in the Administrative Procedure Act. Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020). According to SBA, the immediate effective date 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. SBA also stated the immediate effective date benefits lenders so that they can swiftly close and disburse loans. SBA also determined there is good cause to dispense with notice and comment on the grounds that it would be contrary to the public interest. Specifically, SBA stated such requirements would delay the ability of certain organizations to implement their nondiscrimination obligations consistent with existing federal law and potentially force such organizations to change their operations until SBA adopted a rule. SBA stated that these organizations, rather than change their operations, could elect not to apply for loans and lay off employees, which would defeat the purposes of the Paycheck Protection Program. Finally, SBA also referred to authority under section 1114 of the CARES

Act, which, according to SBA, authorizes the agency to issue regulations to implement title I of the CARES Act without regard to notice requirements. Pub. L. No. 116-136, § 1114.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3520

SBA determined this interim final rule does not contain a collection of information requiring OMB approval under the Act

Statutory authorization for the rule

SBA promulgated this interim final rule pursuant to section 1114 of Public Law 116-136.

Executive Order No. 12,866 (Regulatory Planning and Review)

SBA determined that this interim final rule is economically significant under the Order. SBA stated that it was proceeding under the emergency provision at section 6(a)(3)(D) of the Order based on the need to move expeditiously to mitigate the current economic conditions arising from the Coronavirus Disease 2019 emergency.

Executive Order No. 13,132 (Federalism)

SBA determined that this interim final rule has no federalism implications warranting preparation of a federalism assessment. SBA determined the 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.