IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
COSI, INC., *et al.*,[1]	)	Case No. 20-10417 (BLS)
	)	
Debtors.	)	Jointly Administered
	)	
COSI, INC., *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Adv. 20-50591 (BLS)
	)	
THE U.S. SMALL BUSINESS ADMINISTRATION, AND JOVITA CORRANZA, AS ADMINISTRATOR OF THE U.S. SMALL BUSINESS ADMINISTRATION,	)	
	)	
Defendants.	)	

OPPOSITION TO PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

The United States of America (the "United States"), on behalf of the Small Business Administration ("SBA") and Jovita Carranza, solely in her capacity as Administrator of the SBA, files this memorandum in opposition to Plaintiffs' motion for a temporary restraining order ("TRO") and/or preliminary injunction.

INTRODUCTION

Plaintiffs' request for preliminary injunctive relief raises broad challenges to the SBA's implementation and administration of the CARES Act Paycheck Protection Program ("PPP"), a

[1] The Debtors in these Chapter 11 Cases are the following entities (the last four digits of each Debtor's respective federal tax identification number, if any, follow in parentheses): Cosi, Inc. (3745); Xando Cosi Maryland, Inc. (2196); Cosi Sandwich Bar, Inc. (0910); Hearthstone Associates, LLC (6267); Hearthstone Partners, LLC (9433); Cosi Franchise Holdings LLC (6984); and Cosi Restaurant Holdings LLC (3461). The Debtors' corporate headquarters are located at 500 Rutherford Avenue, Suite 130, Charlestown, MA 02129.

$659 billion loan guarantee program that must extend hundreds of thousands of loans to small businesses and non-profits across the nation in a matter of days. Specifically, Plaintiffs ask the Court to overturn the SBA's stated, explicit policy of excluding bankrupt entities from the PPP. Granting the injunctive relief Plaintiffs seek risks disrupting the administration of the PPP, in the middle of loan distribution. Such a drastic result would only be justified by a strong showing that Plaintiffs' claims are likely to succeed on the merits, that Plaintiffs will be irreparably harmed absent relief and that the requested injunction is in the public interest. Plaintiffs cannot demonstrate any of those requirements.

Plaintiffs cannot demonstrate that they are likely to succeed on their claims, because their claims are facially invalid. First, the injunctive relief Plaintiffs seek against the SBA is barred by sovereign immunity. Second, Plaintiffs' anti-discrimination claim under 11 U.S.C. § 525 fails because, by its plain terms, section 525 does not apply to loans or loan guarantees. Third, Plaintiffs cannot obtain a preliminary injunction through its Administrative Procedure Act ("APA") claims because those claims are not core, and thus the bankruptcy court lacks jurisdiction to order relief on those claims. Additionally, Plaintiffs' APA claims, and their mandamus claim, fail on their merits because the SBA acted wholly within its delegated authority in implementing the PPP. The bankruptcy exclusion was addressed in two separate agency rules. Congress, through the CARES Act and the Small Business Act, explicitly delegated authority to the Administrator to issue those rules.

Plaintiffs also fail to proffer all but the barest conclusory assertions to support their claim for irreparable harm, which is far from sufficient to support their claim for injunctive relief. Further, awarding an injunction here would be against the public interest. In implementing the PPP, the SBA made a policy decision to limit PPP loans to those who had not filed for

bankruptcy; in essence indicating a preference for what is a limited source of funding. Plaintiffs ask the Court to *replace* the SBA's stated policy with the Plaintiffs' policy preference. Doing so would eviscerate Congress' choice to vest the SBA with the authority to implement the PPP and oversee its own lending program.

BACKGROUND

A. The Small Business Administration

Through the Small Business Act, 15 U.S.C. § 631, *et seq.*, Congress created the SBA to "aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns," in order to preserve the system of free competitive enterprise that is "essential" to the economic well-being and security of the Nation. 15 U.S.C. § 631(a). To promote that objective, Congress placed the SBA under the management of a single Administrator, *id*., § 633(a), (b)(1), who is given "extraordinarily broad powers" under section 7(a) of the Act, 15 U.S.C. § 636(a), to provide a wide variety of technical, managerial, and financial assistance to small-business concerns. *See SBA v. McClellan*, 364 U.S. 446, 447 (1960); *see generally* 15 U.S.C. § 636(a) (describing numerous varieties of general small-business loans the Administrator is "authorized" and "empowered" to make); 13 C.F.R. § 120.1. In the performance of these authorized functions, the Administrator is further empowered to "make such rules and regulations as [she] deems necessary to carry out the authority vested in [her]," and in addition to "take any and all actions . . . [that] [she] determines . . . are necessary or desirable in making . . . loans." 15 U.S.C. § 634(b)(6), (7).

B. Section 7(a) Lending

The section 7(a) loan program is the SBA's primary program for providing financial assistance to small businesses. Under the terms of the Small Business Act, SBA financial

assistance to a small business under section 7(a) may take the form of a direct loan, an immediate participation (joint) loan with a lender, or a deferred participation (guaranteed) loan initiated by a lender but a portion of which the SBA will purchase from the lender in the event of a borrower default. 13 C.F.R. § 120.2(a); *see Valley Nat'l Bank v. Abdnor*, 918 F.2d 128, 129 (10th Cir. 1990); *California Pac. Bank v. SBA*, 557 F.2d 218, 219 (9th Cir. 1977). In practice, however, the SBA ordinarily guarantees loans made by private lenders rather than disbursing funds directly to borrowers, *see United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 719 (1979), thus "reduc[ing] risk for lenders . . . mak[ing] it easier for them to access capital," and thereby "mak[ing] it easier for small business to get loans." *See* https://www.sba.gov/funding-programs/loans.

C. Section 7(a) Loan Underwriting

The Small Business Act requires that "[a]ll loans made under this subsection *shall* be of such sound value or so secured as reasonably to assure repayment." 15 U.S.C. 636(a)(6) (emphasis added). For regular 7(a) loans, the factors to reasonably assure repayment are described in general terms in 13 C.F.R. § 120.150. Ordinarily, to qualify for an SBA general business loan, an applicant must be an operating business organized for profit that is located in the United States, 13 C.F.R. § 120.100(a)-(c); meet the size standards for a "small" business set forth under the statute and SBA rules (usually stated in terms of number of employees, or average annual receipts), *see* 15 U.S.C. § 632(a)(2); 13 C.F.R. § 120.100(d); 13 C.F.R. Part 121; and demonstrate that the desired credit is not available elsewhere on reasonable terms, 15 U.S.C. § 632(h); 13 C.F.R. §§ 120.100(e), 120.101.

Further factors are described in greater detail in Standard Operating Procedures ("SOP") and on the official application form for 7(a) loans. *See* SOP 10-50-05 (attached as Exhibit 1); SBA Form 1919 (attached as Exhibit 2). Among other considerations, SOP 50-10-05 specifies

that lenders may consider "bankruptcy history." Ex. 1 at 37. Official Form 1919 also considers whether the applicant has "ever filed for bankruptcy protection." Ex. 2. By regulation, requirements listed on this form, and other official SBA forms, comprise part of the "Loan program requirements." 13 C.F.R. § 120.10. Lenders in turn agree to abide by these Loan program requirements when joining the section 7(a) lending program. 13 C.F.R. § 120.10; *see also* SBA Forms 3506 and 3507 (addressing new PPP lenders).

D. The CARES Act

On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Stimulus ("CARES") Act, Pub. L. 116-136, 134 Stat. 281, passed by Congress to provide an unprecedented package of emergency economic assistance and other support to help individuals, families, businesses, and healthcare providers cope with the enormous economic and public health crises—unlike any experienced in the lifetime of the Nation—triggered by the worldwide coronavirus ("COVID-19") pandemic. *See* SBA, Interim Final Rule, "Business Loan Program Temporary Changes; Paycheck Protection Program" (the "First Interim Final Rule"), 85 Fed. Reg. 20,811 (April 15, 2020).

Among the numerous measures taken by the CARES Act to address the COVID-19 crisis, is the PPP, CARES Act. § 1102, enacted to extend relief to small businesses experiencing economic hardship as a result of the public-health measures being taken to minimize the public's exposure to the COVID-19 virus. *See* First Interim Final Rule, 85 Fed. Reg. 20,811. Specifically, section 1102(a)(2) of the CARES Act adds a new paragraph (36) to section 7(a) of the Small Business Act, 15 U.S.C. § 636(a)(36), to extend loans to eligible small businesses for certain covered uses, including "payroll costs," the "payment of interest on any mortgage

obligation," and "rent," among other approved uses. CARES Act § 1102(a)(2); 15 U.S.C. § 636(a)(36)(F)(i).

Otherwise, the existing section 7(a) requirements and limitations remain unaltered and govern PPP lending. The CARES Act provides that "*[e]xcept as otherwise provided in this paragraph*, the [SBA] *may* guarantee [PPP] covered loans"—not make loans directly, however—"under the same terms, conditions, and processes as a loan made under this subsection," *i.e.*, section 7(a). 15 U.S.C. § 636(a)(36)(B) (emphasis added).

The PPP then sets forth in extensive detail the precise ways in which PPP covered loans differ from other section 7(a) loans. *Id*. § 636(a)(36)(D)-(R). Among these differences, the PPP authorizes the SBA to guarantee covered loans to various non-profit organizations, independent contractors, and self-employed individuals, as well as to small business concerns, *id*. § 636(a)(36)(D)(i), (ii); relaxes size limitations to allow businesses with as many as 500 employees (or more, depending on the industry in which they operate) to receive assistance, *id*. § 636(a)(36)(D)(i)(I); and (iii) selectively waives certain of the SBA's affiliation rules used to determine small business "size."

The CARES Act leaves unaltered the requirement that "[a]ll loans made under this subsection *shall* be of such sound value or so secured as reasonably to assure repayment." 15 U.S.C. § 636(a)(6) (emphasis added).

The CARES Act initially allocated $349 billion to guarantee PPP loans. CARES Act § 1102(b)(1). On April 16, 2020, the SBA issued a notice stating that the PPP was closed to new applications. Congress then passed the Paycheck Protection Program and Health Care Enhancement Act ("CARES Act II") on April 24, 2020 to add an additional $310 billion to the PPP. PL 116-139 § 101(a)(1). The SBA posted notice on its website that it would begin

accepting new PPP applications from participating lenders on Monday, April 27, 2020 at 10:30 a.m. *See* "Notice: PPP Resumes April 27, 2020," available at https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program#section-header-0.

E. Emergency Rulemaking Authority

The CARES Act authorizes the Administrator of the SBA to issue emergency regulations to implement the PPP without complying with typical notice and comment requirements. CARES Act § 1114. The Administrator of the SBA posted her First Interim Final Rule on the SBA website on April 3, 2020. The First Interim Final Rule was subsequently published in the Federal Register on April 15, 2020. 85 Fed. Reg. 20,811. The First Interim Final Rule "streamlin[es] the requirements of the regular 7(a) loan program." *Id.* at 20,812. For instance, the rule states that lenders need not comply with case-by-case underwriting requirements of 13 CFR 120.150. *Id.* at 20,812. Instead, under a section titled "What Do Lenders Have to Do in Terms of Loan Underwriting," the rule states that "Each lender's underwriting obligation under the PPP is limited to [the enumerated] items above and reviewing the 'Paycheck Protection Application Form.'" The Paycheck Protection Application Form itself requires the borrower to certify, among other things, that it is "not presently involved in a bankruptcy." SBA Form 2483.

On April 24, concurrent with Congress' extension of additional funding for the PPP, SBA posted a new interim final rule, which was subsequently published in the Federal Register on April 28, 2020. "Business Loan Program Temporary Changes; Paycheck Protection Program – Requirements – Promissory Notes, Authorizations, Affiliation, and Eligibility" (the "Fourth Interim Final Rule[2]) (attached as Exhibit 3). 85 Fed. Reg. 23,450. The Fourth Interim Final

[2] The SBA also issued a second interim final rule addressing affiliation rules, 85 Fed. Reg. 20,817, and a third interim final rule addressing additional eligibility criteria and certain pledges of loans. 85 Fed. Reg. 21,747.

Rule provides additional information regarding a number of eligibility requirements. Section III(4) of the Fourth Interim Final Rule specifically addresses applicants in bankruptcy. It provides:

> *4. Eligibility of Businesses Presently Involved in Bankruptcy Proceeding.*
>
> *Will I be approved for a PPP loan if my business is in bankruptcy?*
>
> No. If the applicant or the owner of the applicant is the debtor in a bankruptcy proceeding, either at the time it submits the application or at any time before the loan is disbursed, the applicant is ineligible to receive a PPP loan. If the applicant or the owner of the applicant becomes the debtor in a bankruptcy proceeding after submitting a PPP application but before the loan is disbursed, it is the applicant's obligation to notify the lender and request cancellation of the application. Failure by the applicant to do so will be regarded as a use of PPP funds for unauthorized purposes.
>
> The Administrator, in consultation with the Secretary, determined that providing PPP loans to debtors in bankruptcy would present an unacceptably high risk of an unauthorized use of funds or non-repayment of unforgiven loans. In addition, the Bankruptcy Code does not require any person to make a loan or a financial accommodation to a debtor in bankruptcy. The Borrower Application Form for PPP loans (SBA Form 2483), which reflects this restriction in the form of a borrower certification, is a loan program requirement. Lenders may rely on an applicant's representation concerning the applicant's or an owner of the applicant's involvement in a bankruptcy proceeding.

Fourth Interim Final Rule. 85 Fed. Reg. at 23,451.

ARGUMENT

I. LEGAL STANDARD

Preliminary injunctive relief is an "extraordinary and drastic remedy" that is "never awarded as of right," *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (citation omitted), and "may only be awarded upon a clear showing that the plaintiff is entitled to such relief," *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). *See Issa v. School District of Lancaster*, 847 F.3d 121, 131 (3d Cir. 2017); *Groupe SEB USA, Inc. v. Euro-Pro Operating LLC*, 774 F.3d 192, 197 (3d Cir. 2014).

A plaintiff seeking a TRO or a preliminary injunction must show that (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *Winter*, 555 U.S. at 20; *see Groupe SEB USA*, 774 F.3d at 197. "[W]hen evaluating whether interim equitable relief is appropriate, '[t]he first two factors of the traditional standard are the most critical.'" *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009). The last two factors "merge when the Government is the opposing party." *Nken*, 556 U.S. at 435.

The primary purpose of preliminary injunctive relief is "maintenance of the status quo until a decision on the merits of a case is rendered." *Acierno v. New Castle Cty.*, 40 F.3d 645, 647 (3d Cir. 1994); *see Kos Pharmaceuticals, Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004) (defining status quo as the "last, peaceable, noncontested status of the parties"). "[W]here the relief ordered by the preliminary injunction is mandatory and will alter the status quo, the party seeking the injunction must meet a higher standard of showing irreparable harm in the absence of an injunction." *Bennington Foods LLC v. St. Croix Renaissance, Group LLP*, 528 F.3d 176, 179 (3d Cir. 2008); *see Acierno*, 40 F.3d at 653 ("A party seeking a mandatory preliminary injunction that will alter the status quo bears a particularly heavy burden in demonstrating its necessity."). Plaintiffs seek a mandatory injunction here. Dkt. 3-1 at ¶¶ 6-8.

Here, the status quo is that Plaintiffs are excluded from the PPP program because they are in bankruptcy. Plaintiffs have not received a PPP loan and the SBA loan guarantee Plaintiffs seek is available for eligible applicants. Because Plaintiffs seek to disrupt this status quo with a mandatory injunction, they "bear[] a particularly heavy burden in demonstrating its necessity." *See Acierno*, 40 F.3d at 653.

For the reasons that follow, Plaintiffs have not carried this heavy burden.

II. PLAINTIFFS FAIL TO ESTABLISH A LIKELIHOOD OF SUCCESS ON THE MERITS.

A. The Small Business Act's Jurisdiction-Stripping Provision Precludes The Injunctive Relief Plaintiffs Seek.

While the Small Business Act does contain a waiver of sovereign immunity, that waiver is limited. It provides that the SBA may:

> sue and be sued in any court of record of a State having general jurisdiction, or in any United States district court, and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy; *but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the [agency] or [its] property[.]*

15 U.S.C. § 634(b)(1) (emphasis added).

"Federal courts have consistently held that this provision precludes the issuance of an injunction against the Administrator because the court has no subject matter jurisdiction and therefore no power to order such relief. *Palmer v. Weaver*, 512 F. Supp. 281, 285 (E.D. Penn. 1981) (collecting cases). "This language is too clear for misunderstanding that there is no waiver by Congress as to injunction suits." *United States v. Mel's Lockers, Inc.*, 346 F.2d 168, 170, (10th Cir. 1965). "The decisions have uniformly considered that this statute effectively precludes injunctive relief against the Administrator." *Mar v. Kleppe*, 520 F.2d 867, 869 (10th Cir. 1975) (collecting cases). Plaintiffs ignore this clear prohibition and do not address it in their memorandum. *See* Dkt. 4.

While the Third Circuit has not addressed this issue, other circuit courts have reached the same conclusion. *See J.C. Driskill, Inc. v. Abdnor*, 901 F.2d 383, 386 (4th Cir. 1990) (explaining that "courts have no jurisdiction to award injunctive relief against the SBA"); *Enplanar, Inc. v. Marsh*, 11 F.3d 1284, 1290 (5th Cir. 1994) (same). Because Congress has removed authority to enjoin the SBA, Plaintiffs' request for preliminary injunctive relief must be denied.

B. Plaintiffs' Anti-Discrimination Claim Will Fail Because Section 525 of the Bankruptcy Code Does Not Apply to Loans.

Section 525(a) of the Bankruptcy Code prohibits a governmental unit from denying, revoking, suspending, or refusing to renew "a license, permit, charter, franchise, or other similar grant . . ." on the basis of being or having been a debtor in bankruptcy. By its plain language, the prohibition in 525(a) does not apply to lending or loan guarantees.

Indeed, the only mention of lending in Section 525 is found in subsection (c), added in 1994 to address government student loan programs. 103 P.L. 394 § 313. Subsection (c) provides: "[a] governmental unit that operates a student grant or loan program . . . may not deny a grant, loan, loan guarantee, or loan insurance to a person that is or has been a debtor under this title or . . . under the Bankruptcy Act . . . " 28 U.S.C. § 525(c). If Section 525 applied to government guaranteed loans more broadly, Congress would not have needed to amend the law to include government student loan programs. And in amending the law to address government student lending, Congress could have addressed other government lending programs, but chose not to.

The Third Circuit has determined that a government entity conditioning a loan on whether the party receiving the loan is in bankruptcy *does not* violate section 525 because a loan is not "grant" that is similar to a "license, permit, charter, [or] franchise." *See Watts v. Pennsylvania Housing Fin. Co.*, 876 F.2d 1090, 1094 (3d Cir. 1989) (holding that an emergency home loan assistance program in which payments were suspended if an entity filed for bankruptcy and the automatic stay was not lifted did not violate section 525); *accord Ayes v. U.S. Department of Veterans Affairs*, 473 F.3d 104, 110 (4th Cir. 2006) (holding that veteran loan guarantee was not within the scope of section 525); *Toth v. Michigan State Housing Development Authority*, 136 F.3d 477, 480 (6th Cir. 1998) (holding that section 525 does not apply to state issued home improvement loans). The Second Circuit reached the same conclusion

in a case concerning student loans prior to the amendment of section 525 in 1994 to include 525(c). *In re Goldrich*, 771 F.2d 28, 30 (2d Cir.1985) (interpreting omission of post-discharge credit arrangements from language of § 525 as intentional and declining to extend § 525 to student loan guarantees).

A number of district and bankruptcy courts have reached the same conclusion. *See, e.g*., *In re Jasper*, 325 B.R. 50, 55 (Bankr. D. Me. 2005) (revoking credit union privileges on the basis of filing for bankruptcy did not violate section 525); *United States v. Cleasby*, 139 B.R. 897, 900 (Bankr. W.D. Wis. 1992) (holding a loan is not a "similar grant" within the meaning of § 525 and declining to extend § 525 protection to applications for debt restructuring); *Lee v. Yuetter*, 106 B.R. 588, 592 (Bankr. D. Minn.1989) (declining to extend § 525 protection to applications for debt restructuring program and analogizing program to extensions of credit), *aff'd*, 917 F.2d 1104 (8th Cir.1990).

A bankruptcy court in the District of Utah extensively reviewed the statutory history of 11 U.S.C. and existing case law. *In re Rees*, 61 B.R. 114, 116-24 (Bankr. D. Utah 1986). The Bankruptcy court explained that 11 U.S.C. § 525 "intended to codify the rule of *Perez v. Campbell*, 402 U.S. 637 (1971), which held that a state could not frustrate the Congressional policy of a fresh start for a bankrupt by refusing to renew a driver's license based on a discharged judgment resulting from an automobile accident." *In re Rees*, 61 B.R. at 116-17. An early proposal for the provision contained broad language prohibiting "discriminatory treatment because he, or any person with whom he is or has been associated, is or has been a debtor or has failed to pay a debt discharged in a case under the Act. *Id*. "The credit industry was extremely concerned about the wording . . . , and urged that it be redrafted to limit its application to *Perez*-type situations and prevent its application in the field of credit granting." *Id*. at 118.The provision

was subsequently redrafted to hue more closely to the *Perez* decision, prohibiting discrimination in the issuance of "a license, permit, charter, franchise, or other similar grant." *Id.*

The PPP is in no way like the archetypal driver's license in *Perez*, nor the other items enumerated in Section 525(a). The PPP does not provide a right to engage in a specific activity or profession, like a license, permit, charter or franchise." 11 U.S.C. § 525(a); see *Ayes*, 473 F.3d at 109 (the enumerated items in 525(a) "implicate 'government's role as a gatekeeper in determining who may pursue certain livelihoods' . . . and show that Congress intended § 525(a)'s protections to be limited to situations sufficiently similar to *Perez*") (quoting *Toth*, 136 F.3d at 480). The PPP operates to provide emergency funding to certain eligible small businesses. Business that are excluded from funding are not prohibited from operating, as with a refusal to provide a license, permit, charter or franchise.[3] And, unlike the archetypal driver's license, where the state is the sole entity to provide licensing, the PPP is not the sole source of funding. Indeed, entities in active bankruptcy may be eligible for other relief under the CARES Act itself, including Emergency EIDL grants. *See* CARES Act § 1110.[4]

[3] In passing Section 525, the Senate explained that the section is "not exhaustive." S. Rep. 95-989, 81, 1978 U.S.C.C.A.N. 5787, 5867. It "permits further development to prohibit actions by governmental or quasi-governmental organizations that perform licensing functions, such as a state bar association or a medical society, or by other organizations that can seriously affect the debtors' livelihood or fresh start, such as exclusion from a union on the basis of discharge of a debt to the union's credit union." *Id.* These potential "further development[]" mirror the driver's license in *Perez*, and demonstrate that Congress did not intend Section 525(a) to prohibit the alleged "discrimination" here.

[4] The PPP is indisputably a lending and loan guarantee program. *See e.g.*, CARES Act § 1102(a)(2) (addressing "covered loans"), § 1102(b) (appropriated funding available "for commitments for general business loans authorized under section 7(a) of the Small Business Act, including loans made under paragraph (36) of such section [PPP loans]." Plaintiff concedes as much. *See, e.g.*, Compl. ¶ 4 (The PPP "provides forgivable loans of up to $10 million to small businesses."). Even if one assumes that the PPP loan guarantees are so generous as to be effectively grants of money, the question of whether the PPP extends loan guarantees or grants is not relevant here. The proper question is whether the PPP is "similar to a license, permit,

Plaintiffs rely heavily on the out-of-jurisdiction *Matter of Rose*, 23 B.R. 662 (Bankr. D. Conn. 1982). Dkt. 4 at 11-12. However, that case offers little support for Plaintiffs' argument. First, the court conducted no analysis of whether home financing could qualify as a "grant" under section 525. Second, the court focused on the "fresh start" involved in "acquiring a home," *id.* at 667, a very different circumstance from Plaintiffs' demand for money here. Moreover, the Third Circuit called the holding into question for its "broad reach," finding that "Congress meant what it said when it limited the scope of section 525 to specified types of transactions." *Watts v. Penn. Housing Finance Co.*, 876 F.2d 1090, 1094 (3d Cir. 1989). Plaintiffs fail to address *Watts*.

C. The Bankruptcy Court Lacks Authority to Enter Orders on Plaintiffs' APA Claims Because Those Claims Are Not "Core."

The Third Circuit has held that a core proceeding "invokes a substantive right provided by [T]itle 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case." *In re Cadence Innovation LLC*, 440 B.R. 622, 624 (Bankr. D. Del. 2010) (quoting *Beard v. Braunstein*, 914 F.2d 434, 444 (3d Cir. 1990). "To be a core proceeding, an action must have as its foundation the creation, recognition, or adjudication of rights which would not exist independent of a bankruptcy environment although of necessity there may be a peripheral state law involvement." *Id.*

Although bankruptcy courts have jurisdiction pursuant to 28 U.S.C. § 1334(b) to hear matters that are related to a case arising under chapter 11, they possess authority only to enter findings of fact and conclusions of law if the matters being heard are non-core proceedings. 28 U.S.C. § 157(c)(1). "For non-core proceedings . . . a bankruptcy court has advisory power and

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charter, franchise." 11 U.S.C. § 525(a). As described above, the PPP is not similar to those enumerated items.

shall submit proposed findings of fact and conclusions of law to the district court subject to de novo review by that court. In this circumstance, the district court enters final orders." *In re Weiand Automotive Indus.*, 612 B.R. 824, 854 (Bankr. D. Del. 2020) (quotation omitted). "Non-core" proceedings are those that do not depend on the bankruptcy laws for their existence and that could proceed in another court even in the absence of bankruptcy.

Plaintiffs' APA claims do not arise in or under title 11, but rather arise from the Plaintiffs' assertion that the SBA failed to properly implement the CARES Act. As such, the bankruptcy court may, at most issues findings of fact and conclusions of law, which must then be reviewed by the district court before any order may be entered. Thus, this court lacks jurisdiction to award injunctive relief on the APA claims. *Aimtree Co. v. AT & T Corp. (In re Aimtree Co.)*, 202 B.R. 154, 156 (D. Kan. 1996) (noting "bankruptcy court lacked statutory authority to enter an injunction in this 'non-core' proceeding").

D. Plaintiffs' APA Claims will Fail Because the Bankruptcy Exclusion is Authorized by Explicit Rules and Congress Delegated the Administrator Broad Discretion to Issue Those Rules.

Plaintiffs are also unlikely to succeed on their APA claims that the SBA exceeded its statutory authority or acted in a manner that was arbitrary or capricious because the claims lacks merit. Plaintiffs argues that the bankruptcy exclusion must be unlawful because "[n]o law, regulation, or rule of any kind disqualifies, or authorizes the SBA to disqualify, bankruptcy debtors from participating in the PPP." Compl. ¶ 72. But the fact that the CARES Act is silent on bankruptcy ineligibility[5] is far from dispositive. The courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program unless that interpretation is arbitrary, capricious, or manifestly contrary to the statute.

[5] The PPP Application Form includes other limitations not specifically addressed in the CARES Act. For instance, the PPP excludes entities that have been debarred from federal programs.

Katsis v. I.N.S., 997 F.2d 1067, 1070 (3d Cir. 1993) (quotation omitted) (citing *INS v. Cardoza–Fonseca*, 480 U.S. 421, 448 (1987); *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 844 (1984)).

The power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. *Id.* at 1069 (quotation omitted) (citing *Chevron*, 467 U.S. at 843). "Under a well settled principle of deference, 'considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.'" *Id.* (quoting *Chevron*, 467 U.S. at 843). "[I]f [a] statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 1069 (quoting *Chevron*, 467 U.S. at 843).

The SBA was delegated broad authority to implement its lending programs and the bankruptcy exclusion falls within this authority. The SBA Administrator is explicitly empowered to "make such rules and regulations as [she] deems necessary to carry out the authority vested in [her]," and in addition to "take any and all actions … [that] [she] determines … are necessary or desirable in making … loans." 15 U.S.C. § 634(b)(6), (7). The CARES Act did not amend or otherwise limit this authority. Instead, Congress explicitly included the PPP in the section 7(a) lending program, thus vesting the Administrator with broad discretion over the PPP. Indeed, rather than curtailing the Administrator's discretion over the PPP, the CARES Act expanded it, by giving the Administrator authority to issue new regulations and rules to implement the PPP without complying with typical notice and comment requirements. CARES Act § 1114.

The Administrator exercised this explicit delegation of authority to issue two rules addressing the bankruptcy exclusion. The First Interim Final Rule incorporated the PPP application form and the bankruptcy exclusion provided on that form. The Fourth Interim Final

Rule further addresses ineligibility of entities in active bankruptcy and describes the policy reason animating that agency decision. These rules were well within the explicit authority Congress delegated to the SBA.

First, nothing in the CARES Act precludes excluding bankrupt entities from the PPP; the law instead gives the Administrator broad discretion. Second, the CARES Act builds upon the section 7(a) lending program, which explicitly considers the borrower's bankruptcy history to ensure that loans be of "sound value . . . as reasonably to assure repayment." 15 U.S.C. § 636(a)(6); SOP 50-10 at 39 (allowing lenders to consider "bankruptcy history"); SBA Form 1919 (Questions 6 and 24, considering whether applicant, its owners, affiliates or any business controlled by applicants principals have "ever" been in bankruptcy).

The bankruptcy exclusion in the PPP stems from these pre-existing section 7(a) requirements. The pre-existing bankruptcy questions of section 7(a) were "streamlined" for the PPP to meet SBA's determination that PPP loans must be processed "expeditiously." First Interim Final Rule, 85 Fed. Reg. 20,811. To streamline the processing, the SBA eliminated the requirement to perform an individual credit assessment for each PPP loan, as with other 7(a) loans. Instead, the PPP program imposed a bright line rule to exclude those in bankruptcy through its official application form.

This "streamlin[ing] of the consideration of bankruptcy status through the PPP application form is wholly within the SBA's delegated discretion. The CARES Act did not amend the "shall" requirement in 15 U.S.C. 636(a)(6) that loans be of "sound value." The CARES Act instead explicitly left that provision unaltered, along with Section 7(a) lending procedures more broadly, except where specifically altered. CARES Act § 1102(a)(2) (providing that "[e]xcept as otherwise provided in this paragraph, the Administrator may

guarantee covered loans under the same terms, conditions, and processes as a loan made under this subsection."); 15 U.S.C. § 636(a)(36)(B). SBA reconciled the "shall" requirement concerning the sound value of loan-making under 15 U.S.C. 636(a)(6) with the obligation to expeditiously process CARES Act PPP loans by replacing the case-by-case consideration of bankruptcy history with a bright line rule on the application form.[6]

Plaintiffs ask this court to reject the SBA Administrator's reasoned implementation of the PPP and instead impose their own preferred solution. But Congress delegated the SBA authority to implement the PPP, and otherwise gave the SBA broad discretion over its lending programs. The Court must defer to that discretion.

E. Plaintiffs' Claim for Mandamus Will Fail Because Congress Delegated Discretion to Implement the PPP.

"Mandamus is an 'extraordinary remedy.'" *Palamarachouk v. Chertoff*, 568 F.bSupp.b2d 460, 465-66 (D. Del. 2008) (quoting *Mallard v. United States Dist. Ct. for the S. Dist. Of Iowa*, 490 U.S. 296, 308 (1989)). "It is 'seldom issued and its use is discouraged.'" *Id.* (quoting *In re Patenaude*, 210 F.3d 135, 140 (3d Cir. 2000)).

"[R]elief is available to a plaintiff under Section 1361 'only if he has exhausted all other avenues of relief and only if the defendant owes him a clear, nondiscretionary duty.'" *Harmon Cove Condominium Ass'n, Inc. v. Marsh*, 815 F.2d 949, 951 (3d Cir. 1987) (quoting *Heckler v. Ringer*, 466 U.S. 602, 616 (1984)). "[I]n order for mandamus to issue, a plaintiff must allege

[6] Plaintiffs find it significant that Section 4003 of the CARES Act contains a requirement that recipient "not" be a "debtor in a bankruptcy proceeding." Dkt. 4 at 17; *see* CARES Act § 4003(c)(3)(D)(i)(V). But Plaintiffs ignore that Section 4003 creates an entirely *new* program, whereas the PPP, as explained above, is an addition to the SBA's existing 7(a) loan program. The CARES Act provides that "*[e]xcept as otherwise provided in this paragraph*, the [SBA] *may* guarantee [PPP] covered loans under the same terms, conditions, and processes as a loan made under this subsection," *i.e.*, section 7(a). 15 U.S.C. § 636(a)(36)(B) (emphasis added). As also explained above, the 7(a) loan program has underwriting standards and procedures that specifically reference a potential borrower's bankruptcy history.

that an officer of the Government owes him a legal duty which is a specific, plain ministerial act 'devoid of the exercise of judgment or discretion.' An act is ministerial only when its performance is positively commanded and so plainly prescribed as to be free from doubt." *Id.* "There are two prerequisites to issuing a writ of mandamus. [Plaintiffs] must show that (1) they have no other adequate means to attain their desired relief; and (2) their right to the writ is clear and indisputable. *Hinkel v. England*, 349 F.3d 162, 164 (3d Cir. 2003) (citations omitted); *see Dunn-McCampbell Royalty Interest, Inc. v. National Park Service*, 112 F.3d 1283, 1288 (10th Cir. 1997) ("[g]eneral claims of agency overreaching are simply insufficient to create a legal duty under the Mandamus Act").

Plaintiffs have not even attempted to establish these elements and thus cannot demonstrate entitlement to the extraordinary remedy of mandamus. Moreover, implementing the PPP is far from a ministerial, non-discretionary act. The CARES Act, for instance, does not describe the application form or process in any detail. As discussed above, Congress instead created the PPP through the existing section 7(a) lending program, over which the Administrator has broad discretion. Congress then gave the Administrator emergency rule making authority to implement the PPP. *Id*. This discretion delegated by Congress defeats any claim to mandamus.

III. PLAINTIFFS HAVE NOT ESTABLISHED IRREPARABLE HARM.

Plaintiffs fail to allege facts demonstrating that they would be irreparably injured by Defendants' actions in the absence of prospective injunctive relief. Instead, Plaintiffs allege only the barest conclusory statements. This does not suffice.

"More than a risk of irreparable harm must be demonstrated. The requisite for injunctive relief has been characterized as a 'clear showing of immediate irreparable injury,' or a 'presently existing actual threat; [an injunction] may not be used simply to eliminate a possibility of a remote future injury.'" *Acierno v. New Castle County*, 40 F.3d 645, 655 (3d Cir. 1994) (quoting

Continental Group, Inc. v. Amoco Chemicals Corp., 614 F.2d 351, 358 (3d Cir. 1980). "The injury contemplated by the denial of a preliminary injunction must be actual and of serious consequence, not merely theoretical." *A. L. K. Corp. v. Columbia Pictures Industries, Inc.*, 440 F.2d 761, 764 (3d Cir. 1971). "Economic loss does not constitute irreparable harm." *Acierno*, 40 F.3d at 655.

Plaintiffs devote less than one page of their 25-page memorandum to demonstrating irreparable harm. Dkt. 4 at 22. And that section contains only one unsupported statement alleging irreparable harm: "[A] PPP loan will be what allows the Plaintiffs to remain in business and reorganize if the pandemic effect continues, as opposed to liquidating, laying off their employees, and leaving their creditors with no recovery." *Id.* First, the alleged harm here is purely economic, which is insufficient to support injunctive relief. Second, Plaintiffs assertion is virtually identical to the assertion they made in asking the Court to order DIP financing only two months ago. Bankr. Dkt. 12 at ¶ 21 ("Absent immediate and uninterrupted access to adequate financing, the Debtors will not have sufficient liquidity to sustain their business and maximize the value of the Debtors' assets. In addition, without the DIP Facility, it would be impossible to continue operations and maintain enterprise value for any of the Debtors."). The Court ordered the DIP financing the Debtors demanded last month. Bankr. Dkt. 104. Plaintiffs do not explain in their memorandum what has changed in the short period of time since they obtained the DIP financing they claimed would allow them to "sustain their business" and "continue operations."[7]

Moreover, if additional capital is what Plaintiffs now need to "remain in business," neither their memorandum or the supporting declaration contain any details regarding what

[7] Presumably, recognizing the low interest rate and potential forgiveness of a PPP loan, Plaintiffs now seek to take advantage of a business opportunity. But losing a business opportunity is not irreparable harm.

Plaintiffs have done to seek funding from alternative sources. Presumably, recognizing that even if deemed eligible for a PPP loan, they might not receive one, Plaintiffs should be able to describe Herculean efforts to obtain alternative financing that have left them no option but a PPP loan. But, the memorandum and declaration are silent as to such effort – there is not even a discussion of Plaintiffs seeking additional financing from their DIP lender.

IV. THE PUBLIC INTEREST WEIGHS AGAINST ENJOINING THE SBA.

Finally, to obtain preliminary injunctive relief in a case against the Government, Plaintiffs must show that the sweeping injunction they seek would be in the public interest. *Nken*, 556 U.S. at 435. Plaintiffs cannot make that showing for at least three reasons: (1) the resolution of complex and competing policy interests at stake in administering the PPP is best left to Congress and the SBA; (2) the SBA has already determined that it should apply eligibility restrictions contrary to those Plaintiffs prefer when administering the PPP and Congress has determined that the SBA's implementation of the PPP should not be subject to injunction; and (3) the relief Plaintiffs seek has "potentially unknowable effects." *Profiles, Inc. v. Bank of Am. Corp.*, 2020 WL 1849710, at *11 (D. Md. Apr. 13, 2020).

First, if granted, Plaintiffs' proposed injunction would short-circuit the rapidly-evolving political and administrative landscape of responding to COVID-19. Plaintiff seeks broad, nationwide relief on behalf of all "bankruptcy debtors" and asks the Court to compel SBA to alter "all PPP Applications." Dkt. 3-1 at ¶ 6 (Proposed Order stating "The SBA is directed to immediately remove from all PPP Applications and certifications the language disqualifying applicants from participation in the PPP by virtue of their status as bankruptcy debtors."). But during this unprecedented situation, the public interest is best served by permitting the SBA to carry out the duties Congress assigned it, namely ensuring the swift flow of loan guarantees that Congress has deemed essential to protecting small businesses and the overall economy, in

accordance with the law without disrupting that process mid-stream. As one court has already observed, "given the competing policy interests, the need to balance the desire to assist the widest swath of small businesses with the need to incentivize lender participation, and the overall fluidity of this epidemic, Congress is better positioned to remedy any defects in the CARES Act, and to pass the supplemental legislation it believes best aimed at ameliorating the effects of the COVID-19 crisis." *Profiles, Inc. v. Bank of America Corp.*, 2020 WL 1849710, at *12 (D. Md. April 13, 2020). In short, Plaintiffs' preliminary injunctive relief "may undermine Congress's goal to maximize relief for American small businesses" and therefore run directly counter to the public interest. *Id.* at *11; *see Am. Ass'n of Political Consultants v. SBA*, 2020 WL 1935525, at *7 (D.D.C. Apr. 21, 2020) (denying a TRO motion seeking to overturn the prohibition on political or lobbying groups from receiving section 7(a) loans).

Second, imposing Plaintiffs' requested injunction would reverse the SBA's stated policy preference, which Congress chose to make immune from injunction. The SBA has a clear policy to exclude bankrupt entities from PPP lending because such lending "would present an unacceptably high risk of an unauthorized use of funds or non-repayment of unforgiven loans." Fourth Interim Final Rule, 85 Fed. Reg. 23,450. Plaintiffs wish to replace this judgment with their own policy preference. But Congress chose to empower the SBA to implement the PPP, thus its policy carries the force of law. Congress also chose to immunize the SBA from injunctive relief. Issuing an injunction here would run directly against that public policy, which provides further proof that the balance of the equities must be struck in the Government's favor.

Third, as another court has already explained, the broad injunctive relief Plaintiffs seek could "have consequences reaching far beyond the litigants in this particular case." *Profiles, Inc.*, 2020 WL 1849710, at *11. Its impacts would cost "valuable time" for both Congress and

Defendants to effectively respond to changing circumstances and for small businesses applying for current or potential future PPP loans to receive funds. *Id.* In short, preliminary injunctive relief here would throw a wrench into policymakers' evolving responses to the pandemic's economic fallout and would adversely affect thousands of small businesses that need help now. In these circumstances, "[t]he proper balance between the competing and compelling public interests implicated in this incredibly complex situation must be struck by the legislative branch." *Id.* at *4. Under these unprecedented circumstances, the Court should strike the balance in the Government's favor and deny Plaintiffs' unprecedented request for preliminary injunctive relief.

V. PLAINTIFF MAY NOT SEEK RELIEF ON BEHALF OF OTHERS.

Plaintiff seeks relief on behalf of all "bankruptcy debtors" and asks the Court to compel SBA to alter "all PPP Applications." Compl. at 25 (seeking "preliminary and permanent injunctive relief compelling the SBA to remove from all PPP Applications its disqualification of bankruptcy debtors as viable applicants."). But, even if Plaintiffs were entitled to relief – they are not – they lack standing to seek an injunction on behalf of others. *See Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018) ("a plaintiff's remedy must be limited to the inadequacy that produced his injury in fact") (internal marks omitted) (rejecting standing for a statewide gerrymandering challenge because a Plaintiffs' remedy must be limited to his injury).

Further, "[i]njunctions . . . must be tailored to remedy the specific harms shown." *Davis v. Romney*, 490 F.2d 1360, 1370 (3d Cir. 1974). Plaintiffs requested nationwide injunction goes far beyond the minimum necessary to preserve Plaintiffs' claims until a final decision is entered on the merits, and thus should be denied.

CONCLUSION

For the foregoing reasons, Plaintiffs' request for preliminary injunctive relief should be denied.

Dated: April 30, 2020

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

DAVID C. WEISS
United States Attorney

ELLEN W. SLIGHTS
Assistant United States Attorney

/s/ Marc S. Sacks
RUTH A. HARVEY
MARGARET M. NEWELL
MARC S. SACKS
Commercial Litigation Branch
Civil Division
United States Department of Justice
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044
Tel. (202) 307-1104
Fax (202) 514-9163
marcus.s.sacks@usdoj.gov

ATTORNEYS FOR THE UNITED STATES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 30, 2020, I electronically filed the foregoing OPPOSITION TO DEBTORS' MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants.

/s/ Marc S. Sacks
MARC S. SACKS
Commercial Litigation Branch
Civil Division
United States Department of Justice

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
COSI, INC., *et al.*,	)	Case No. 20-10417 (BLS)
	)	
Debtors.	)	Jointly Administered
_____	)	
	)	
COSI, INC., *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Adv. 20-50591 (BLS)
	)	
THE U.S. SMALL BUSINESS ADMINISTRATION, AND JOVITA CORRANZA, AS ADMINISTRATOR OF THE U.S. SMALL BUSINESS ADMINISTRATION,	)	
	)	
Defendants.	)	
_____	)	

OPPOSITION TO PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

EXHIBIT 1

SBA

SOP 50 10 5(K)

Lender and Development Company Loan Programs

Office of Financial Assistance

U.S. Small Business Administration

SMALL BUSINESS ADMINISTRATION
STANDARD OPERATING PROCEDURE

SUBJECT:	S.O.P.		REV
	SECTION	NO.	
Lender and Development Company Loan Programs	50	10	5(K)

INTRODUCTION

1. Purpose: Update SOP 50 10 5(K) Lender and Development Company Loan Programs.
2. Personnel Concerned: All SBA Employees
3. SOP Canceled: None. Previous edition of SOP 50 10 will continue to have applicability to loans that were approved during their effective time periods.
4. Updated Information: This full update of SOP 50 10 5 is necessary for the SOP to conform to recently revised regulations in 13 CFR Part 120, and to provide guidance that clarifies and streamlines policy and procedures affecting the 7(a) and 504 programs. This version, which will be SOP 50 10 5(K), includes revised guidance in the following general areas:

   a) Incorporates regulatory changes published in the May 7, 2018, Final Rule on Debt Refinancing in 504 Loan Program (83 FR 19915), effective June 6, 2018;

   b) Incorporates the availability of 504 Debentures with a maturity of 25 years, in accordance with the Federal Register Notice published April 4, 2018, available for 504 Projects approved on or after April 2, 2018;

   c) Incorporates policy changes published in SBA Policy Notice 5000-17057, effective April 3, 2018, including:

      i. Revised guidance on credit elsewhere for 7(a) and 504 loans;

      ii. Clarified the minimum equity requirements for 7(a) loans involving change of ownership transactions between existing owners;

      iii. Provided additional guidance regarding the eligibility of marijuana-related businesses and hemp-related businesses; and

      iv. Reduced the minimum monitoring requirements for Working Capital CAPLines; and

   d) Clarifies guidance for SBA Lenders (7(a) lenders and CDCs) on the delivery of 7(a) loans (including SBA Express, Export Express, Export Working Capital Program and International Trade) and 504 program loans.

5. Originator: Office of Capital Access

AUTHORIZED BY:		EFFECTIVE DATE
William M. Manger Associate Administrator Capital Access		April 1, 2019
		Page 1

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SUBPART A
SBA LENDER AND CERTIFIED DEVELOPMENT COMPANY PARTICIPATION REQUIREMENTS

PURPOSE OF THIS SUBPART

This Subpart contains the requirements for Lenders and Certified Development Companies (CDCs) to participate in SBA lending programs. This Subpart also explains the different types of delegated authority SBA grants to Lenders and CDCs, as well as how Lenders and CDCs maintain their participating status with SBA. Finally, this Subpart provides a brief overview as to how SBA oversees its participating Lenders and CDCs.

When the policy set forth in this Subpart does not adequately address the unique circumstances regarding a particular matter, an exception to policy may be approved by the Director of the Office of Financial Assistance (D/FA). For Export Working Capital Program (EWCP) and International Trade loans (ITL), an exception to policy may be approved by the Director, International Trade Finance (D/ITF). For Export Express loans, an exception to policy may be approved by the D/ITF with the concurrence of the Director, Office of Credit Risk Management (D/OCRM). The D/FA or D/ITF may not approve an exception to policy if such exception would be inconsistent with a statute or regulation. A request for an exception to policy must be submitted to the Loan Guaranty Processing Center (LGPC) for 7(a) applications, including EWCP, ITL and Export Express loan applications, and to the Sacramento Loan Processing Center (SLPC) for 504 applications. The processing center will analyze the request and make a recommendation to the D/FA or D/ITF, as applicable, or an individual acting in that capacity, who will make the final decision (with the concurrence of the D/OCRM for Export Express loans). The decision must be documented in the appropriate Agency loan file. This procedure may only be used in situations where a minor deviation from standard policy is necessary for the specific situation. Exceptions to policy will be considered on a case-by-case basis and the decision will only apply to the specific request.

CHAPTER 1: 7(a) LENDERS

I. THE 7(A) LOAN PROGRAM

A. The 7(a) Loan Program is authorized by section 7(a) of the Small Business Act and is governed by the regulations outlined in Parts 103, 105, 120, and 121 of Title 13 of the Code of Federal Regulations (CFR).

B. This multi-purpose business loan program is administered as a deferred participation program where SBA guarantees a portion of the loan made by a Lender. The Lender initiates the loan to a small business and, if the SBA agrees to guarantee the loan, the Lender funds and services the loan. In the event of default, the Lender conducts the work-out or the liquidation efforts and the Lender and SBA share in the loss, if any, in accordance with the percentage guaranteed by the SBA.

C. Definitions applicable to this subpart can be found in 13 CFR §§103.1, 105.201, 120.10, and 120.420.

II. BECOMING A 7(A) LENDER

A. The following lenders may apply to participate with SBA as a 7(a) Lender:

1. Federally Regulated Lenders, including those lenders regulated by Federal Financial Institution Regulators (e.g., the Federal Deposit Insurance Corporation, the Federal Reserve Board, the Office of the Comptroller of the Currency, the National Credit Union Administration, and the Farm Credit Administration); and

2. SBA Supervised Lenders:

   a. Non-Federally Regulated Lenders (NFRLs, including State-regulated lenders without Federal deposit or share insurance protection; and

   b. Small Business Lending Companies (SBLCs).

B. The following lenders may not apply to participate with SBA as a 7(a) Lender:

1. SBA-licensed Small Business Investment Companies (SBICs);

2. Certified Development Companies (see 13 CFR § 120.820(c), except with respect to the Community Advantage Pilot Program); and

3. Bank holding companies.

C. Process to Become a 7(a) Participating Lender:

1. Federally Regulated Lenders:

   a. An institution that has Federal deposit or share insurance protection and is a State or National bank, a State or federally-chartered thrift institution or a State or federally-chartered credit union must submit a request in writing to the SBA Field Office serving the geographic area where the lender's principal office is located. With the exception of State-chartered credit unions, these institutions automatically comply with the Agency's examination and supervision requirements.

   b. When a State-chartered credit union applies to become a participating Lender:

      i. If the credit union has Federal deposit or share insurance protection, it must submit an

application to the SBA Field Office servicing the geographic area where its principal office is located.

ii. If the credit union does not have Federal deposit or share insurance protection, it must send to the SBA Field Office the items required in paragraph II.C.2.b) below for Non-Federally Regulated Lenders.

iii. The SBA Field Office must contact the Office of Credit Risk Management (OCRM) and ask for a written determination by OCRM regarding the State's level of regulatory supervision and examination.

iv. The SBA District Counsel must review the application for legal sufficiency. As part of that review, District Counsel must determine that the credit union has the authority to apply for participation with SBA and, specifically, that the person who submitted the application has the authority to act on behalf of the credit union. Applications submitted on behalf of a credit union by a Credit Union Service Organization (CUSO) or Lender Service Provider (LSP) are not acceptable.

c. A lender must be considered in good standing with its state regulator and considered to be Satisfactory by its Federal Financial Institution Regulator (FFIR) as determined by SBA. For purposes of participation in the 7(a) program, SBA considers a lender to be in good/satisfactory standing with its state/FFIR if it has satisfactory financial condition and satisfactory small business credit administration and servicing policies, procedures and practices. Accordingly, the lender's written request to participate must include a written statement that to the best of its knowledge, the lender has satisfactory: i) financial condition (e.g., capital and liquidity); ii) small business credit administration policies, procedures, and practices that it continues to adhere to in its operations; and iii) small business servicing policies, procedures, and practices that it continues to adhere to in its operations. When reviewing good standing or whether a lender is considered Satisfactory, SBA will look to see that a lender does not have significant deficiencies or weaknesses in these areas. "Significant" may be evidenced by the number or seriousness of the deficiencies, as determined by SBA in its discretion. SBA will verify any good standing/satisfactory status statement where possible with public (e.g., Cease and Desist Orders and Call Reports) and/or non-public information from the lender's primary and/or other regulators.

d. The SBA Field Office must determine whether the lender meets the requirements of 13 CFR § 120.410 to be a 7(a) participant. If the Field Office determines that the lender meets these requirements, it may enter into a Loan Guaranty Agreement with the lender. Both parties will execute a Loan Guaranty Agreement (Deferred Participation), SBA Form 750, and/or a Loan Guaranty Agreement (Deferred Participation) for Short-Term Loans, SBA Form 750B. Once the SBA Form 750 is executed, the SBA Field Office will add the lender to the SBA Partner Information Management System (PIMS), which identifies the lender as an SBA participating Lender.

e. If a Lender makes a major change in its structure or organization after execution of the SBA Form 750/750B, it must notify the SBA Field Office in writing. Major changes that may impact continued SBA participation include:

i. Acquisition by another entity;

ii. Merger into another legal entity;

iii. A change of name;

iv. Substantial changes in management;

v. Substantial changes in how the Lender handles SBA loans; or

vi. Takeover or closure of the Lender by a regulatory agency.

2. Non-Federally Regulated Lenders:

a. Non-Federally Regulated Lenders (NFRLs) are entities engaged in small business lending that are subject to the oversight and supervision by a state regulator authorized to evaluate the safety and soundness of its regulated members. These entities operate without Federal deposit or share insurance protection (such as Business and Industrial Development Companies (BIDCOs)). NFRLs are authorized by the Administrator to make loans pursuant to section 7(a) of the Small Business Act. NFRLs are subject to additional regulations specific to SBA Supervised Lenders (see 13 CFR §§ 120.460-120.465) as well as all other 7(a) regulations specific to loan processing, servicing, and liquidation. NFRLs must have internal controls that meet the requirements set forth for SBLCs in Chapter 2, Paragraph I.B.3 of this Subpart.

To become a 7(a) participant, the lender must submit an application containing the information and documents specified below to the Office of Financial Assistance (OFA) at SBA's Headquarters in Washington, D.C. The applicant must submit two (2) complete binders of fully executed paper copies and one (1) executed electronic scanned copy (in pdf format) to OFA addressing each of the elements set forth below ("NFRL Application"). The NFRL Application must be complete and organized in tabular format. Incomplete NFRL Applications will not be processed by SBA and will be returned to the applicant. An applicant that submits an incomplete NFRL Application (as determined by SBA) must wait 30 calendar days before reapplying.

SBA reserves the right to deny any applicant requesting to become an NFRL in its sole discretion. In addition to SBA's evaluation of the elements required in paragraph b. below, SBA may consider risk factors in its evaluation of an NFRL Application. These factors include, but are not limited to, historical performance measures (such as default, purchase and loss rate), and other performance data associated with the lender or its senior management team, along with other relevant information (such as SBA-observed gaps in small business lending not served by the existing 7(a) Lender population).

b. The lender's application must include:

i. Lender's name, address, telephone number and email address;

ii. A copy of the lender's organizational formation documents and bylaws filed with the appropriate authority and certified by an appropriate officer of the applicant;

iii. The identification of all classes of stock, partnership interest or members interests, the rights and preferences accorded to these forms of ownership, including voting rights, redemption rights, distribution rights and rights of convertibility and any conditions for the transfer, sale or assignment of such interests;

iv. The lender's proposed geographical area of operations, as authorized by the lender's state regulator;

v. A list of officers, directors, managing partners, managing members, Associates, and holders of 10% or more of any class of the lender's capital stock or ownership interest ("Associates" are defined in 13 CFR § 120.10);

vi. An organizational chart showing all officers, directors, managers and key employees of the lender, including any relationships between the lender and any Associates;

vii. An executed SBA Form 1081, "Statement of Personal History," and either Form FD-258 (fingerprint card) or electronic fingerprint submission, each signed and dated within 90 days of submission to SBA ("electronic fingerprint submission" is defined in Subpart B, Chapter 2, Paragraph III.A.13.d.iv of this SOP), for:

a) Each officer, managing partner, and managing member of lender, and all holders of 10% or more of any class of stock or ownership, limited partnership or member's interest; and

b) Each director and key employee (an employee who manages daily operations, e.g., overseeing a department or a division, not a clerical staff position) of the lender organization. Directors and key employees must only submit either Form FD-258 (fingerprint card) or electronic fingerprint submission along with SBA Form 1081 if the individual answered affirmatively to questions 10a, 10b, 10c, 11a, and/or 11b on the SBA Form 1081.

viii. A copy of the most recent audited financial statements of the lender;

ix. A copy of the most recent audited financial statements on any entity, other than natural persons, holding 10% or more of any class of the lender's stock or ownership interest;

x. An operations plan detailing the nature of the lender's proposed loan activity, the volume of activity projected over the first 3 years as a 7(a) Lender, projected balance sheets, income statements and statement of cash flows of the lender, with alternative profit and loss scenarios based on run rates equivalent to 70% and 50% of projected loan activity, the type and projected amount of financing needed to support its lending plan, along with a discussion of lender's proposed wind-down plan in the event the lender decides to leave the program;

xi. A detailed analysis of the lender's projected secondary market activities during the first 3 years of operation, including a sensitivity analysis of the effect any changes in premium from the sale of the guaranteed portion of 7(a) loans in SBA's secondary market may have on the lender's prospective earnings. The analysis must also include a description of the lender's plans (if any) to securitize or sell participations in the unguaranteed portion of 7(a) loans;

xii. If the lender intends to acquire any 7(a) loans, a written plan detailing the extent of this acquisition activity in its operating plan, and how the lender intends to manage the transition of the 7(a) loan portfolio;

xiii. A copy of the lender's policies and procedures governing business loan origination, servicing, and liquidation;

xiv. A certification that the lender will not be engaged primarily in financing the operations of an Affiliate, as defined in 13 CFR §§ 121.103 and 121.301.

xv. A copy of the State or Federal statute or regulations governing the lender's operations, including those pertaining to audit, examination and supervision of the lender. Each lender bears the burden of demonstrating that it is subject to continuing supervision by a State or Federal regulatory authority satisfactory to SBA;

xvi. A copy of the latest report covering the examination of the lender, and/or any regulatory orders if such reports can be released to SBA. If the report cannot be released or the lender is newly formed and has not been examined by its primary regulator include a statement to that effect;

xvii. A copy of the license, if any, issued to the lender by a regulatory authority;

xviii. A certified copy of a Resolution of the Board of Directors designating the person(s) authorized to submit the application on behalf of the lender;

xix. Disclosure of any and all actions, proceedings, investigations or litigation, pending or threatened, against the lender, including complete details of any actions disclosed; and

xx. A written legal opinion of independent counsel ("Independent Counsel" is counsel that is not an "Associate" of the lender under 13 CFR § 120.10.), satisfactory to SBA that addresses whether the lender:

a) Is duly formed, organized, and validly existing in good standing under the laws of the State of its organization, and is in full compliance with all Federal, State, and local laws in connection with the formation and organization of the lender;

b) Has the power, legal right, and authority to conduct business in the lender's proposed operating area; and

c) Is in full compliance with all appropriate Federal and State securities laws.

c. Once received, the D/FA or designee, in consultation with the Director, Office of Credit Risk Management (D/OCRM), makes the final determination on the application and notifies the SBA Field Office. If the application is approved, the SBA Field Office executes an SBA Form 750 and/or SBA Form 750B, with the Lender and sends a copy of the executed agreement to the D/FA. The D/FA or designee will add the Lender to the SBA Partner Information Management System (PIMS), which identifies the Lender as an SBA participating Lender.

d. Change of Ownership or Control: SBA's prior written consent is required for any change of ownership or control of ten percent (10%) or more of any class of an NFRL's stock or ownership interests. SBA's prior written consent is also required for any proposed transaction or event that results in control by any entity or person(s) not previously approved by SBA. Control, as defined in this paragraph, means the possession, direct or indirect, or the power to direct or cause the direction of the management or policies of an NFRL, whether through the ownership of voting securities, by contract, or otherwise.

i. A new application in accordance with paragraph II.C.2.b. above must be submitted for SBA's prior written consent with respect to a change of ownership or control

transaction. For change of control transactions, the Lender must reapply for any delegated authorities.

ii. If the proposed change of ownership is for less than a majority interest, SBA, in its sole discretion, may limit the items required by the Lender in paragraph II.C.2.b) to support a request for prior SBA consent.

3. Small Business Lending Companies ("SBLCs") (13 CFR §§ 120.460 - 120.490):

A Small Business Lending Company (SBLC) is a non-depository lending institution that is authorized by SBA to only make loans pursuant to section 7(a) of the Small Business Act and loans to Intermediaries in SBA's Microloan program. See Chapter 2 of this Subpart for more information on becoming an SBLC.

D. Loan Guaranty Agreement – SBA Form 750 and SBA Form 750B:

1. The Loan Guaranty Agreement (SBA Form 750) provides a basic framework for the responsibilities and duties of the Lender and SBA when making, closing, and administering any individual SBA-guaranteed loan. (13 CFR § 120.400) This agreement is subject to SBA's rules and regulations, as amended from time to time.

2. SBA Form 750 governs loans with a maturity greater than 12 months. A Lender must execute this agreement prior to submitting any applications for guaranty to SBA.

3. SBA Form 750B governs loans with a maturity of 12 months or less. If the Lender intends to approve loans with a maturity of 12 months or less, it must also execute SBA Form 750B.

E. Responsibilities of 7(a) Lenders:

1. In making SBA-guaranteed loans, 7(a) Lenders must:

a. Submit applications for guaranty with all required forms, documentation and credit analyses, to the designated SBA processing center for review;

b. Execute the Authorization;

c. Close the loan in accordance with the Authorization and all SBA policies and regulations;

d. Maintain complete loan files;

e. Service the loan in accordance with SOP 50 57 and regulations;

f. Liquidate the loan in accordance with SOP 50 57 and regulations;

g. Comply with SBA Loan Program Requirements (as defined in 13 CFR § 120.10) for the 7(a) program, as such requirements are revised from time to time. SBA Loan Program Requirements in effect at the time that a Lender takes an action in connection with a particular loan govern that specific action. For example, although loan closing requirements in effect when a Lender closes a loan will govern closing actions, a Lender's liquidation actions on the same loan are subject to the liquidation requirements in effect at the time that a liquidation action is taken (13 CFR § 120.180). SBA Loan Program Requirements, Center contacts, and other information can be found at https://www.sba.gov/partners/lenders/7a-loan-program;

h. Individuals and entities suspended, debarred, revoked, or otherwise excluded under the SBA

or Government-wide debarment regulations are not permitted to conduct business with SBA, including participating in an SBA-guaranteed loan. Lenders are responsible for consulting the System for Awards Management's (SAM) Excluded Parties List System (EPLS) or any successor system to determine if an employee or an Agent has been debarred, suspended or otherwise excluded by SBA or another Federal agency (https://www.sam.gov/portal/SAM/); and

i. SBA expects Lenders to exercise due diligence and prudent oversight of their third party vendors, including Lender Service Providers (LSPs) and other loan agents, which should include having written policies governing such relationships and monitoring performance of loans referred by an Agent or where an Agent provided assistance. SBA will review evidence of such due diligence and oversight of such relationships when conducting lender oversight activities. Federally-regulated Lenders are reminded that they must comply with the requirements of their primary Federal Financial Institution Regulator regarding third party vendors.

2. Preferences:

a. A Lender may not take any action in connection with an SBA-guaranteed loan that establishes a preference in favor of the Lender (13 CFR § 120.411). A Lender must be particularly careful to avoid establishing a preference when using its delegated authority (for example, reducing its existing exposure to the Borrower through the use of an SBA-guaranteed loan).

b. A Lender must not:

i. Take any side collateral or guaranty that would secure only its own interest in a loan;

ii. Obtain a separate guaranty on the unguaranteed portion of the 7(a) loan without SBA's approval, such as through a co-guaranty program or arrangement;

iii. Require a Borrower to purchase certificates of deposit;

iv. Maintain a compensating balance not under the control of the Borrower;

v. Take a side loan which would have the effect of ensuring a risk-free or limited-risk investment on the participant's share; or

vi. Have an SBA-guaranteed loan in a "piggyback" structure.

a) Piggyback financing occurs when one or more lenders provide more than one loan to a single Borrower at or about the same time, financing the same or similar purpose, and where the SBA-guaranteed loan is secured with a junior lien position or no lien position on the collateral securing the non-guaranteed loan(s).

b) SBA does not consider a scenario where both loans are for working capital and the non-SBA guaranteed loan is secured only by working capital assets to be a piggyback structure.

c) SBA does not consider a shared lien position with the lender (pari passu) as a piggyback structure.

c. Under the following circumstances, a Lender may make a side loan to the Borrower to

purchase stock of the participating Lender (as may be required by certain Lenders, such as Farm Credit Administration entities):

i. The enabling authority of the Lender requires the purchase as a condition for making the loan.

ii. The Lender makes a separate side loan not guaranteed by SBA for the Borrower to buy the stock or debentures. The side loan must be subordinated to the SBA loan, but the Lender may hold a first lien on any stock collateralizing the side loan.

iii. The interest to be charged on the side loan must not exceed the maximum rate of interest acceptable for SBA-guaranteed loans, and the maturity of the side loan must not be less than that of the SBA-guaranteed loan.

iv. In the event of default, either on the side loan or the SBA-guaranteed loan, the Lender may not take any action to collect or liquidate the side loan, except canceling or retiring the stock securing the side loan, until the SBA loan has been fully liquidated.

3. Ethical Requirements Placed on a Lender:

SBA Lenders must act ethically and exhibit good character (13 CFR § 120.140). Conduct of a Lender's Associates (including Agents and Lender Service Providers) and staff will be attributed directly to the Lender. Lenders are required to notify SBA immediately upon becoming aware of any unethical behavior by its staff or its Associates. Examples of unethical behavior ae found at 13 CFR § 120.140.

a. Conflicts of Interest:

Neither a Lender nor its Associates may have a real or apparent conflict of interest with a small business or SBA (13 CFR § 120.140 and 13 CFR Part 105). Lenders must exercise care and judgment in determining whether a conflict of interest exists and document the file in detail. SBA will not guarantee a loan if the Lender, its Associates, partner(s) or a close relative:

i. Has a direct or indirect financial or other interest in the Applicant; or

ii. Had such interest within 6 months prior to the date of application.

SBA reserves the right to deny liability on its guaranty in the event that the Borrower defaults if the Lender, its Associates, partner(s) or a close relative acquires such an interest at any time during the term of the loan.

b. The Standards of Conduct Counselor for the Agency is the Designated Agency Ethics Official. (13 CFR § 105.402(a))

c. Standards of Conduct ("Conflict of Interest") Approvals:

i. If an Applicant has, as an employee, owner, general partner, managing member, attorney, agent, owner of stock, officer, director, creditor or debtor, an individual who, within one (1) year prior to the loan application, was an SBA Employee (as defined by 13 CFR § 105.201(a)), the loan application must be approved by the Standards of Conduct Counselor. (13 CFR § 105.203(a))

ii. If an Applicant has, as its sole proprietor, general partner, managing member, officer,

director, or stockholder with a 10% or more interest, an individual who is an SBA Employee (as defined by 13 CFR § 105.201(a)) or a Household Member of an SBA Employee, the loan application must be approved by the Standards of Conduct Committee at SBA Headquarters. (13 CFR § 105.204) A "Household Member" of an SBA Employee includes:

a) The spouse of the Employee;

b) The minor children of the Employee; and

c) The blood relatives of the Employee, and the blood relatives of the Employee's spouse, who reside in the same place of abode as the Employee. (13 CFR § 105.201(d))

iii. If an Applicant has, as its sole proprietor, general partner, managing member, officer, director, or stockholder with a 10% or more interest, or a Household Member of such individual, an individual who is a Member of Congress, an appointed official of the legislative or judicial branch of the Federal Government, a member or employee of a Small Business Advisory Council, or a SCORE volunteer, the loan application must be approved by the Standards of Conduct Committee. (13 CFR §§ 105.301(c) and 105.302(a))

d. When a Standards of Conduct approval is required, the application should be processed by the appropriate processing center and, if appropriate, be conditionally approved and forwarded to the Standards of Conduct Counselor or Standards of Conduct Committee (through the Standards of Conduct Counselor). The Standards of Conduct Counselor will notify the processing center of the final Agency decision and the processing center will notify the lender accordingly.

e. Other Government Employees:

The Applicant must submit a statement of no objection from the pertinent department or military service ethics officer if its sole proprietor, general partner, managing member, officer, director, or stockholder with a 10% or more interest, or a Household Member of such individual, is an employee of another department or agency of the Federal Government (Executive Branch) in a grade of at least GS-13 (or its equivalent) or higher. Lenders must submit the statement to SNOMemos@sba.gov and receive written clearance from SBA prior to submitting the application to LGPC (non-delegated) or processing the application under their delegated authority. Non-delegated Lenders must submit a copy of SBA's written clearance with the application to the LGPC. (13 CFR § 105.301(a))

4. Forward Commitments:

A forward commitment exists when a Lender issues a commitment to a builder or developer to finance future sales of real estate. The SBA will not guarantee loans made by the Lender to small businesses to purchase such real estate. This is a potential conflict of interest for the Lender because of its predisposition to make SBA loans in order to honor their prior agreement with the builder or developer. Such loans are ineligible for SBA's guarantee regardless of whether the Lender gets a fee for issuing the commitment.

5. Advertising of Relationship with SBA (13 CFR §120.413):

a. General Advertising. A Lender may publicize its relationship with SBA, including identifying itself as an SBA participating Lender, by placing the appropriate SBA-approved decal on the window of the lending institution or placing identical decal icons on its website. A Lender may not use the SBA logo in any manner in any advertisement, brochure, publication or promotional piece, or state or imply that the Lender or its Borrowers will receive any preferential treatment by SBA.

b. Use of Window Decals. The SBA-approved Lender decal may only be used to inform the public of the Lender's relationship with SBA and may not be used to promote, or appear to promote, the Lender's non-SBA products or services. Window decals are available from SBA Field Offices.

c. Use of Decal Icons on Website. The SBA-approved Lender decal icon is an exact replica of the window decal and may only be used to inform the public of the Lender's relationship with SBA and may not be used to promote, or appear to promote, the Lender's non-SBA products or services.

i. When using the SBA-approved Lender decal icon on a website, the Lender must include the following public statement: "Approved to offer SBA loan products under SBA's Preferred Lender Program" (or SBA Express Program, etc.).

ii. The Lender decal icon may be downloaded from and must be used in accordance with SBA's Lender decal guidelines found at https://www.sba.gov/document/support-object-object-advertising-your-sba-relationship.

d. Oversight. A Lender's usage of the window/building decal and any identical decal icons on its website may be reviewed as part of the Agency's Lender oversight activities.

6. Record Retention:

a. Lenders must retain the original Note; Guaranty(ies); Security/Collateral documents such as mortgages, deeds of trust, security agreements; SBA application (SBA Form 1919, SBA Form 1920 and any SBA Forms 912); and SBA Form(s) 159. Hard-copy records of those documents requiring original signatures must be retained unless the original signature was made electronically in accordance with applicable standards governing electronic signatures. (See Appendix 8 for guidance on electronic signature standards.)

b. Federally-regulated Lenders must comply with the requirements of their FFIR's requirements governing how long to retain documentation.

c. SBA Supervised Lenders must comply with 13 CFR § 120.461.

III. HOW SBA OVERSEES 7(A) LENDERS

SBA oversees 7(a) Lenders through:

A. Loan and Lender Monitoring System (L/LMS):

1. L/LMS is an internal SBA data system that includes the use of historical data and predictive small business credit scoring. All SBA 7(a) loans with an outstanding balance are credit-scored quarterly. Data on 7(a) loans are aggregated, analyzed and evaluated to assess the credit quality of each

individual 7(a) Lender's portfolio of SBA-guaranteed loans. SBA uses this information to monitor the performance of 7(a) Lenders individually and in comparison to their peers.

2. Using SBA's L/LMS system, SBA assigns all 7(a) Lenders a composite rating. The composite rating reflects SBA's assessment of the potential risk to the government of that 7(a) Lender's SBA portfolio. The specific performance factors which comprise the composite rating are published from time to time by SBA's Office of Credit Risk Management (OCRM). In general, these factors reflect both historical 7(a) Lender performance and projected future performance. SBA performs quarterly recalculations on the common factors for each 7(a) Lender, so 7(a) Lenders' composite risk ratings are updated on a quarterly basis.
3. SBA has established peer groups to minimize the differences that could result from changes in loan performance for portfolios of different sizes. The peer groups are based upon gross outstanding SBA loan dollars. For 7(a) Lenders, they are:
    a. $350,000,000 or more
    b. $100,000,000 - $349,999,999
    c. $10,000,000 - $99,999,999
    d. $4,000,000 - $9,999,999
    e. $1,000,000 - $3,999,999
    f. $0 - $999,999B (active with at least one loan disbursed in past 12 months)
    g. $0 - $999,999A (inactive with no loans disbursed within the past 12 months)
4. SBA assigns a composite rating of "1" to "5" to each 7(a) Lender generally based upon its portfolio performance, as reported in L/LMS. A rating of "1" indicates strong portfolio performance, the least risk, and requires the lowest degree of SBA management oversight (relative to other 7(a) Lenders in its peer group). A "5" rating indicates weak portfolio performance, the highest risk, and requires the highest degree of SBA management oversight. (See 13 CFR § 120.10 (definitions related to Risk Rating); 13 CFR § 120.1015 (Risk Rating System); 75 FR 9257, March 1, 2010; 75 FR 13145, March 18, 2010; and 79 FR 24053, April 29, 2014 (Risk Rating Notices)) As set forth in the Risk Rating Notices, SBA may take into account rapid growth that may skew metrics and other factors in considering a Lender's risk.

B. Lender Portal:

1. SBA communicates Lender performance to individual 7(a) Lenders through the use of SBA's Lender Portal (Portal). The Portal allows a 7(a) Lender to view its own quarterly performance data, including, but not limited to, its current composite risk rating, peer and portfolio averages, and its PARRiS score (as discussed below). Portal data includes both summary performance and credit quality data. Summary performance data is largely derived from data that 7(a) Lenders provide to SBA through SBA Form 1502 and 172 Reports; therefore, 7(a) Lenders bear much of the responsibility for ensuring data accuracy. If a 7(a) Lender reviews its performance components and finds a discrepancy with its records, the 7(a) Lender should contact OCRM.
2. SBA 7(a) Lenders with at least 1 outstanding SBA loan may apply for the Portal access. Currently, SBA issues only one Portal user account per 7(a) Lender. Submission of initial requests for a Portal user account must be submitted to SBA's OCRM, and must include the following information:

a. Request must be made by a senior officer with proper authority of the 7(a) Lender (Senior Vice President or higher);

b. Request must be sent via regular or overnight mail to the SBA's OCRM at 409 Third Street SW, Washington DC 20416, ATTN: Director, Office of Credit Risk Management;

c. Request must be made using the 7(a) Lender's stationery;

d. Request must include the user's business card;

e. The stationery and business card should include the 7(a) Lender's name and address;

f. The request should include the following data:

i. SBA FIRS ID Number(s);

ii. Account user's name and title;

iii. Account user's mailing address, telephone number and email address at the 7(a) Lender;

iv. Requesting officer's name and title; and

v. Requesting officer's mailing address, telephone number and email address at the 7(a) Lender.

g. Once SBA receives and approves the user's request, SBA will forward the approval to SBA's Portal contractor for issuance of a user account name and password. The Portal contractor will email the user his or her user name and password within approximately 2 weeks of account approval. The user can then access its data by logging into the SBA Lender Portal web page. Before accessing the Portal, Lenders must agree to the terms of a Confidentiality Agreement, which is found on the SBA Lender Portal web page.

h. Lenders are responsible for complying with and maintaining the Portal user accounts and passwords as set forth in the Confidentiality Agreement on the Portal web page, and as published by SBA from time to time. Lenders are also responsible for timely informing SBA to terminate or transfer an account if the person to whom it was issued no longer holds that responsibility for the 7(a) Lender. Lenders must take full responsibility for protecting the confidentiality of the user password and the 7(a) Lender risk rating, PARRiS score, and confidential information and for ensuring the security of the data. See 13 CFR § 120.1060.

C. Monitoring and Reviews: (13 CFR §§ 120.1025 and 120.1050 - 1060)

L/LMS provides performance information that allows SBA to monitor and conduct reviews of all Lenders. L/LMS-related monitoring/reviews serve as the primary means of reviewing Lenders with less than $10 million in gross outstanding SBA loan dollars although SBA may determine, in its discretion, to conduct other more in-depth reviews (e.g., Analytical, Targeted, Full, or Delegated Authority Renewal) of these Lenders. ("L/LMS-related" refers to the L/LMS reviews and the SBA Lender Profile Assessment (LPA) including the PARRiS Score.) SBA will contact the Lender if the review detects performance issues or trends requiring further discussion.

1. For Lenders with more than $10 million in gross outstanding SBA loan dollars, L/LMS details historical and projected performance data:

a. For use in planning and conducting more in-depth reviews or examinations;

b. To assist in prioritizing more in-depth reviews or examinations; and

c. To monitor Lenders between the more in-depth reviews or examinations.

2. SBA's 7(a) risk-based reviews generally feature a composite risk measurement methodology and scoring guide, known as "PARRiS." PARRiS is an acronym for the specific risk areas or components that SBA reviews: **P**ortfolio Performance; **A**sset Management; **R**egulatory Compliance; **Ri**sk Management; and **S**pecial Items.

3. Additionally, in accordance with 13 CFR § 120.1010, a Lender must allow SBA's authorized representatives, including representatives authorized by SBA's Inspector General, during normal business hours, access to its files to review, inspect and/or copy all records and documents relating to SBA-guaranteed loans or as requested for SBA oversight.

4. SBA may request reports on a case-by-case basis.

5. Additional information regarding reviews and examinations can be found in 13 CFR §§ 120.1050-1060, SBA Policy Notice 5000-1332: Revised Risk-Based Review Protocol for SBA Operations of Federally Regulated 7(a) Lenders (December 29, 2014), SBA Information Notice 5000-1397: Updated PARRiS Methodology for Oversight of SBA Operations of Federally Regulated 7(a) Lenders (November 15, 2016), SBA Policy Notice 5000-1940: Revised Risk-Based Review/Examination Protocol for SBA Supervised Lenders (January 18, 2017), and SBA's SOP 51 00.

6. Lender oversight fees. Lenders are required to pay SBA fees to cover the costs of examinations and reviews and, if assessed by SBA, other Lender oversight activities. (13 CFR § 120.1070)

   a. The fees may cover:

      i. The cost of conducting L/LMS-related reviews/monitoring of a 7(a) Lender;

      ii. The cost of conducting more in-depth reviews of a 7(a) Lender (e.g., Analytical, Targeted, and Full Reviews, Delegated Authority Reviews, Quarterly Condition and Certification of Capital Compliance Reviews (for SBA Supervised Lenders), Secondary Market Evaluations, and related review activities, such as corrective action assessments);

      iii. The cost of conducting loan reviews (e.g., Secondary Market loan-by-loan reviews);

      iv. The cost of conducting safety and soundness examinations of an SBA Supervised Lender (SBLCs and NFRLs); and

      v. Any additional expenses that SBA incurs in carrying out Lender oversight activities (e.g., technical assistance and analytics to support the monitoring and review program, supervision and enforcement activity costs, salaries and travel expenses of SBA employees, and equipment expenses directly related to Lender oversight.

   b. In general, where the costs that SBA incurs for a review, examination, monitoring, or other Lender oversight activity are specific to a particular 7(a) Lender, SBA will charge that Lender a fee for the actual costs of the oversight activity. For example, for most examinations or reviews conducted under a)ii and a)iv above, SBA will invoice each Lender for the amount owed following completion of the examination or review.

c. In general, where the costs that SBA incurs for the Lender oversight activity are not sufficiently specific to a particular Lender, SBA will assess a fee based on each 7(a) Lender's portion of the total dollar amount of SBA guaranties in SBA's total portfolio or in the relevant portfolio segment being reviewed or examined, to cover the costs of such activity. For these fees, such as the L/LMS related reviews/monitoring conducted under subparagraph a)i above and other Lender oversight activity expenses incurred under a)v above, SBA will invoice each Lender on an annual basis.

   i. The invoice will state the charges, the date by which payment is due and the approved payment method(s).

   ii. The payment due date will be no less than 30 calendar days from the invoice date.

   iii. SBA may waive the fees assessed under this paragraph 5.c) for those Lenders owing less than a threshold amount if SBA determines that it is not cost effective to collect the fee.

d. Payments that are not received by the due date shall be considered delinquent, and SBA will charge interest and other applicable charges and penalties as authorized by 31 U.S.C. 3717. A Lender's failure to pay any of the fee components described above, or to pay interest, charges and penalties that have been charged, may result in a decision to suspend or revoke a Lender's eligibility to participate in SBA's loan programs or participant's delegated authority or other remedy available under law. (13 CFR § 120.1070)

D. Supervision and Enforcement:

An integral part of overseeing the 7(a) loan program is SBA's authority to supervise and take enforcement actions as necessary. For further guidance on Lender Supervision and Enforcement, see SOP 50 53(A).

E. Suspension or Revocation:

1. SBA may suspend or revoke the authority of a Lender to conduct 7(a) program activities, in accordance with 13 CFR §§ 120.1400-1600.

2. Examples of circumstances that may result in suspension or revocation under the above cited regulation include but are not limited to:

   a. Failure to comply materially with any requirement imposed by Loan Program Requirements, including but not limited to Lender eligibility requirements and prudent lending requirements (SBA will consider the severity and frequency of violations among other factors);

   b. Repeated failure to properly report on loan disbursements and status; or

   c. Less Than Acceptable examination/review assessment or repeated Less Than Acceptable Risk Rating, the latter generally in conjunction with other grounds.

3. SBA will notify the Lender of a proposed suspension or revocation in accordance with 13 CFR § 120.1600. The Lender will be provided an opportunity to respond prior to final action.

F. Receiverships of NFRLs:

1. Upon SBA's determination that grounds for an enforcement action against a NFRL exist under 13 CFR § 120.1400, SBA may, pursuant to 13 CFR § 120.1500(c)(3), apply to a Federal court for the

appointment of a receiver. Typically, SBA will use its receivership authority as a remedy of last resort. The appointment of a receiver is only one of several types of enforcement actions set forth in 13 CFR § 120.1500.

2. SBA will review the facts and circumstances of the enforcement action when deciding whether or not to seek the appointment of a receiver. SBA will also make a determination regarding the scope of the receiver's duties and powers, including whether the receivership will be limited to the NFRL's assets related to the SBA loan programs. In deciding whether to seek a receiver and in determining the scope of a receivership, SBA will consider the following:
    a. The existence of fraud or false statements;
    b. A NFRL's refusal to cooperate with SBA enforcement action instructions or orders;
    c. A NFRL's insolvency (legal or equitable);
    d. The size of the NFRL's SBA loan portfolio(s) in relation to other activities of the NFRL;
    e. The dollar amount of any claims SBA may have against the NFRL; and/or
    f. The existence of other non-SBA enforcement actions against the NFRL.
3. Under 13 CFR § 120.1400(a)(2), a NFRL that makes 7(a) guaranteed loans after October 20, 2017, has consented to SBA's right to seek a receivership in appropriate circumstances. As described in 50 10 5(J), such consent is deemed to apply only if the NFRL makes 7(a) loans on or after January 1, 2018. The NFRL's consent does not in any way preclude the NFRL from contesting whether or not SBA has established the grounds for seeking the remedy of receivership. A NFRL's consent to receivership as a remedy does not require SBA to seek the appointment of a receiver in any particular SBA enforcement action.

IV. DELEGATED AUTHORITY IN THE 7(A) LOAN PROGRAM

A. Delegated Authority Criteria:

1. In making its decision to grant or renew a delegated authority, SBA considers whether the Lender, as determined by SBA in its discretion:
    a. Has the continuing ability to evaluate, process, close, disburse, service, liquidate and litigate SBA loans. This includes the ability to develop and analyze complete loan packages. SBA may consider the experience and capability of Lender's management and staff;
    b. Has satisfactory SBA performance (as defined in 13 CFR § 120.410(a)(2)). The Lender's Risk Rating, among other factors, will be considered in determining satisfactory SBA performance. Other factors may include, but are not limited to, review/examination assessments, historical performance measures (like default rate, purchase rate and loss rate), loan volume to the extent that it impacts performance measures, and other performance related measurements and information (such as contribution toward SBA's mission);
    c. Is in compliance with SBA Loan Program Requirements (i.e., SBA Form 1502 reporting, timely payment of all fees to SBA);
    d. Has completed, to SBA's satisfaction, all required corrective actions;
    e. Is in good standing with SBA as defined in 13 CFR § 120.420(f) (as determined by SBA in its discretion), and, as applicable, with its state regulator and is considered Satisfactory by its

FFIR (as determined by SBA and based on, for example, information in published orders/agreements and call reports) (13 CFR § 120.410(e)):

i. The Lender's written request to participate must include a written statement that to the best of its knowledge, the Lender has satisfactory: (a) financial condition (i.e., is deemed well-capitalized based on size of entity, has sufficient liquid assets, etc.); (b) small business credit administration policies, procedures, and practices that it continues to adhere to in its operations; and (c) small business servicing policies, procedures, and practices that it continues to adhere to in its operations. When reviewing good standing/Satisfactory status, SBA will look to see that a Lender does not have significant deficiencies or weaknesses in these areas. "Significant" may be evidenced by the number or seriousness of the deficiencies, as determined by SBA in its discretion. SBA will verify any good-standing/Satisfactory status statement where possible with public (e.g., Cease and Desist Orders and Call Reports) and/or non-public information from the Lender's primary and/or other regulators.

ii. In conjunction with this eligibility criteria, SBA reviews whether Lender is subject to any enforcement action, order or agreement with a regulator or the presence of other regulatory concerns as determined by SBA;

f. Is not subject to any SBA enforcement actions;

g. Has not received a major substantive objection from its lead SBA Field Office relating to the delegated authority criteria; and

h. Exhibits other risk/program integrity factors (i.e., has rapid growth; low SBA activity; SBA loan volume; Lender, an officer or director is under investigation or indictment, inadequate capital, inadequate governance or management).

2. Delegated authority decisions are made by the appropriate SBA official in accordance with Delegations of Authority, and are final.

3. If delegated authority is approved or renewed, Lender must execute a Supplemental Guarantee Agreement, which will specify a term not to exceed 2 years. SBA may grant shorter renewals based on risk or any of the other delegated authority criteria. Lenders with less than 3 years of SBA lending experience will be limited to a term of 1 year or less.

B. Certified Lenders Program (CLP):

As CLP authority has been eliminated from 13 CFR Part 120, no new CLP loans may be made. However, any existing CLP loans must comply with applicable Loan Program Requirements, including but not limited to those set forth in SOP 50 57.

C. Preferred Lenders Program (PLP) (13 CFR § 120.450)

The most experienced Lenders may be designated as PLP Lenders and delegated the authority to process, close, service, and liquidate most SBA guaranteed loans without prior SBA review.

1. The PLP Lender:

PLP Lenders are authorized to make SBA guaranteed loans without prior SBA review of eligibility or creditworthiness. An SBA Loan Number is assigned by SBA upon notification by the PLP Lender

of approval of the loan. In addition, they are expected to handle servicing and liquidation of all of their SBA loans with limited involvement of SBA.

2. Qualifications for Initial PLP Consideration:

   The Lender must demonstrate to SBA's satisfaction that it:

   a. Has disbursed at least five (5) SBA loans within the past 24 months; and

   b. Meets the criteria for delegated authority set forth in Paragraph IV.A above.

3. Process to obtain PLP authority:

   A Lender's initial request for PLP authority must be submitted electronically to D/OCRM or designee at 7aDeleAuthNomination@sba.gov.

   A Lender requesting to reinstate or expand existing delegated authority must submit a request electronically to D/OCRM or designee at 7aRedelegationNominations@sba.gov.

   a. The Lender's request should include:

      i. Legal name and address of Lender;

      ii. Legal name of any holding company of Lender;

      iii. Name, title, address, phone number, e-mail address and fax number for contact person at Lender;

      iv. Lender's lead SBA Field Office (the SBA Field Office serving the area in which the Lender's headquarters is located);

      v. A copy of the Lender's SBA Form 750 and SBA Form 750B, if applicable;

      vi. If Lender was previously a PLP Lender, an explanation of why the Lender left the Preferred Lenders Program;

      vii. A description of the Lender's history, organization, and management, including:

         a) When the Lender was chartered; and

         b) Any recent mergers or acquisitions;

      viii. Personnel who will be in charge of PLP loans for the Lender, have PLP loan approval authority, and their experience with the Lender, in the industry, and with SBA loans, including any training they have received.

      ix. Where and how PLP loans will be processed, closed, serviced and liquidated;

      x. A good standing/Satisfactory statement (as described in paragraph IV.A.1.e. i. above).

   b. D/OCRM or designee will consider:

      i. Any SBA Field Office concerns regarding the Lender;

      ii. The processing, servicing and liquidation Centers' written opinion of Lender's ability to process, close, service and liquidate SBA loans, as applicable; and

      iii. The Lender's commitment to SBA lending.

   c. D/OCRM or designee then informs the Lender of SBA's decision.

d. Upon approval, OCRM notifies the Lender and the SBA Field Office:

   i. That the request for delegated authority is approved; and

   ii. The term of the delegated authority (not to exceed 2 years). For Lenders with less than 3 years of SBA lending experience/data, the Agency may consider performance over the period of time that the Lender has been a participating Lender, but will limit the Lender's initial term of delegated authority to 1 year or less. Lenders that identify significant differences between the performance numbers developed by the Lender and those developed by SBA (not related to a lack of accurate SBA Form 1502 reporting) should contact OCRM.

e. OCRM sends the Lender a Supplemental Guaranty Agreement, Preferred Lenders Program (SBA Form 1347) signed by the appropriate SBA official. The Lender must sign and return the SBA Form 1347 to OCRM before the Lender's PLP authority is effective. (Agreements must be signed and returned to OCRM within 30 days of receipt or a new application to the program will be required.)

f. OCRM sends the appropriate SBA Field Office a copy of the approval letter. OCRM will enter the effective term of the Lender's PLP authority on the SBA Partner Information Management System (PIMS). This is an essential step for Lenders processing PLP loans.

g. Decline of PLP application:

   If the PLP application is declined, OCRM notifies the Lender and SBA Field Office with the reason(s) for decline. The Lender may re-apply for PLP authority when it has overcome the reason(s) for decline. To do so, the Lender must file a request with OCRM and must show how it has overcome the reason(s) for decline. OCRM will review the request, make a recommendation and send it to the appropriate SBA official for a final Agency decision. OCRM will notify the Lender in writing of SBA's final decision.

4. Process for Renewal of PLP Authority:

   a. OCRM automatically starts the renewal process just prior to the expiration of a Lender's PLP authority. OCRM asks for comments from the SBA Field Office and the SBA's processing, servicing and liquidation centers. The comments should pertain to the Lender's most recent PLP term and must include:

      i. Whether they recommend renewal;

      ii. If they do not recommend renewal, why not;

      iii. Whether the Lender can process, close, service and liquidate SBA loans;

      iv. Changes in Lender's organization or management;

      v. Any recurring denial of liability or repair situations with the Lender;

      vi. Reasons for any unfavorable loan volume or repurchase rate data;

      vii. Identification of any areas of concern; and

      viii. An explanation of any discussions with the Lender that may impact the PLP decision.

   b. OCRM contacts the Lender to obtain a good standing/Satisfactory status statement.

c. OCRM gathers the information relevant to a Lender's renewal. OCRM performs an analysis, makes a decision and informs the Lender of SBA's decision.

d. For renewal of its PLP authority, the Lender must demonstrate to SBA's satisfaction that it meets the criteria for delegated authority set forth in Paragraph IV.A.

5. Notification of Renewal:

   OCRM notifies the Lender and SBA Field Office that:

   a. The renewal is approved; and

   b. The term of the renewal.

   c. OCRM sends the Lender a new signed by OCRM on behalf of the appropriate SBA official. The Lender must sign and return the SBA Form 1347 to OCRM before the Lender's PLP renewal is effective.

6. If Renewal is Declined:

   OCRM notifies the Lender and SBA Field Office of the reason(s) for decline of the PLP renewal. The Lender may not make PLP loans after its PLP authority expires. The Lender may re-apply for PLP authority when it has overcome the reason(s) for decline. To do so, the Lender must file a request with OCRM and must show how it has overcome the reason(s) for decline. OCRM will review the request, make a recommendation and send it to the appropriate SBA official for a final Agency decision. OCRM will notify the Lender in writing of SBA's final decision.

7. Temporary Extension of PLP Authority:

   If a Lender's PLP authority is expiring and SBA has not completed the renewal process, OCRM may extend a Lender's PLP authority for a short, interim period as determined by the D/OCRM.

8. Non-Renewal and Shortened Renewals:

   a. If SBA determines in its discretion that a Lender does not meet delegated authority criteria or increased supervision may be necessary, SBA may either not grant or renew delegated authority or may grant a shortened renewal period. See SOP 50 53(A), Chapter 3 on Increased Supervision.

9. Reinstatement:

   If a Lender's PLP authority was revoked, declined or voluntarily terminated, the Lender may ask SBA to reinstate its PLP authority. However, the Lender must generally wait 6 months before requesting reinstatement and follow paragraph IV.C.3.) of this chapter.

10. PLP - Export Working Capital Program (EWCP) Authority:

    a. This program offers the opportunity for SBA 7(a) Lenders with experience making EWCP loans or who are participants in the Delegated Authority Lender Program of the Export-Import Bank to apply for PLP authority to underwrite EWCP loans. Lenders with PLP-EWCP authority are delegated the same level of authority to process, close, service, and liquidate EWCP loans as is granted to approved 7(a) Lenders with PLP authority.

    b. Application requests include the following elements:

       i. Legal name and address of Lender;

ii. Address, city and state where Lender's EWCP underwriting will be performed;

iii. Name, title, telephone and fax numbers and e-mail address of the lending unit's primary contact for the EWCP program;

iv. A copy of the Lender's SBA Form 750EX;

v. Identification of the USEAC offices the lending unit works through on EWCP loans;

vi. A description of the lending unit's experience in international trade lending, including its level of EWCP lending over the last 2 years, Export-Import Bank ("Ex-Im") lending activity over the same 2-year period, and identification of any form of delegated lender authority with Ex-Im Bank or other trade finance agencies;

vii. Identification of personnel in charge of EWCP lending and explanation of their experience in export trade finance for small concerns; and

viii. Documentation supporting the bank's delegation of authority to the contact person filing this PLP expansion request.

c. Completed applications should be directed to the Office of International Trade ("OIT") at SBA. OIT staff will be responsible for screening and collecting information from the applicable SBA offices on the current regulatory authority of the Lender and the Lender's unit's capabilities as an EWCP participant. OIT will electronically forward its recommendation and the comments of the other offices to OCRM for a final decision. The Lender must demonstrate to SBA's satisfaction that it:

i. Has a satisfactory history of providing trade finance to exporters (both the Lender and the Lender's loan officers); and

ii. Has been an active participant in the EWCP with SBA and/or with Ex-Im Bank for at least 6 consecutive months immediately prior to the SBA Field Office's recommendation and, if not an Ex-Im Bank delegated lender, has booked no fewer than three (3) SBA EWCP loans during the 24 months prior to application; and

iii. Meets the criteria for delegated authority in Paragraph IV.A. above.

d. Lenders are notified of the final decision by written letter from OCRM with a copy to OIT and the appropriate SBA Field Office. If approved, OCRM will provide the Lender with SBA Form 2310, "Supplemental Guaranty Agreement – Preferred Lender Program (PLP) for Export Working Capital Program (EWCP) Loans," which the Lender must execute and return to SBA before the Lender can submit any loan applications under its PLP-EWCP authority. (Agreements must be signed and returned within 30 days of receipt or a new application to the program will be required.)

e. If the PLP-EWCP application is declined, OCRM notifies the Lender, OIT, and SBA Field Office with the reason(s) for decline. The Lender may re-apply for PLP-EWCP authority when it has overcome the reason(s) for decline. To do so, the Lender must file a request with OIT and must show how it has overcome the reason(s) for decline. OIT will review the request, make a recommendation and send it to OCRM for a final Agency decision. OCRM will notify the Lender in writing of SBA's final decision.

f. All PLP-EWCP expansion approvals will be for a period not to exceed the existing term of

the Lender's PLP authority. The succeeding PLP renewal of the Lender will include a section on the Lender's EWCP lending, with comment requests from OCRM directed to the OIT.

g. Lenders that are participating in the Delegated Authority Lender Program of the Export-Import Bank of the United States (Ex-Im Bank) (or any successor Program) are eligible to participate in the PLP-EWCP program. Lenders should be aware that they must comply with 13 CFR § 120.410(d), which requires SBA Lenders to "be supervised and examined by either a Federal Financial Institution Regulator or a state banking regulator satisfactory to SBA." Ex-Im Bank Delegated Authority Lenders must comply with the PLP-EWCP application procedures described above; however, such lenders are not required to have prior experience with SBA 7(a) lending and are deemed to be an active participant with Ex-Im Bank for purposes of the application.

11. Authority and Responsibilities:

a. Eligibility Requirements:

In addition to the SBA's primary business loan eligibility standards set forth in Subpart B, Chapter 2 of this SOP, the following additional restrictions apply to PLP Loans.

i. Lenders may use PLP only for 7(a) loans. Lenders may not use PLP for any pilot program unless SBA authorizes use of PLP for the pilot.

ii. The following types of loans are not eligible under PLP processing:

a) Disabled Assistance Loans (DAL);

b) Qualified Employee Trusts (ESOP) (loans made to an ESOP or 401K under 13 CFR §§ 120.350 through 120.354);

c) Cooperatives;

d) Pollution Control program;

e) International Trade Loans not secured by a first lien position on the assets being financed;

f) Applications Previously Submitted to LGPC for Processing. Once submitted to LGPC, an application withdrawn by the Lender, screened-out, or declined by LGPC may not be approved by any Lender under its PLP Authority. No Lender may knowingly submit an application for the same project under its PLP authority that was previously submitted through LGPC by a different Lender. E-Tran will not permit the submission of such an application under any Lender's PLP authority for a period of 12 months from the date of the withdrawal, screen-out, or decline of the application; and

g) Revolving credits are not eligible except under CAPLines and, if the Lender has authority from SBA to make PLP-EWCP loans, under the EWCP.

iii. The same types of businesses that are not eligible under standard 7(a) also are not eligible under PLP. See Subpart B, Chapter 2.

iv. Additional restrictions specific to PLP refinancing are found in (13 CFR § 120.452), and explained further in Subpart B, Chapter 2.

b. PLP Lenders' Processing Responsibilities (13 CFR § 120.452(a)):

SBA's business loan eligibility requirements, credit policy, and procedures apply to PLP loans. The PLP Lender must stay informed on and must apply all of SBA's Loan Program Requirements.

i. Lender's Eligibility Review:

a) A PLP Lender must analyze a PLP loan Applicant's eligibility in the same way that SBA analyzes eligibility for a regular 7(a) Applicant. The PLP Lender must keep in its loan file documentation supporting its eligibility analysis. SBA will not conduct an eligibility review prior to issuing a loan number. SBA may review the Lender's documentation supporting its eligibility determination as part of any guaranty purchase request or when conducting lender oversight activities.

b) For a PLP loan, size of the Applicant is determined as of the date of the Lender's approval of the loan. A PLP Lender may accept as true the size information provided by the Applicant, unless credible evidence to the contrary is apparent.

ii. Credit Analysis:

SBA has authorized PLP Lenders to make the credit decision without prior SBA review. The Lender must perform a thorough and complete credit analysis of the applicant, establish that the loan is of such sound value as to reasonably assure repayment and document its analysis in the loan file. See Subpart B, Chapter 4 of this SOP for specific guidance on processing loan guaranty requests.

iii. The Authorization:

PLP Lenders draft the Authorization without SBA review and execute it on behalf of SBA. The Lender must make sure that all collateral and other requirements documented in the Lender's credit analysis are in each Authorization. The Lender also must include all SBA-required authorization provisions. See Subpart B, Chapter 5 of this SOP.

iv. Closing Requirements:

SBA closing requirements are the same for PLP loans as for non-delegated 7(a) loans. The same SBA forms are required. The Lender must obtain all required collateral positions and must meet all other required conditions before loan disbursement. SBA delegates to the PLP Lender responsibility for all pre-disbursement Authorization requirements in this SOP. The only actions that the Lender may not take on a PLP loan are those specifically reserved to SBA. See Subpart B, Chapter 7 of this SOP.

After closing the loan, the PLP Lender must submit electronically to SBA through E-Tran a copy of the executed Authorization. The Lender should not send SBA any other closing documentation, including disbursement information, except through the required periodic loan status reports (SBA Form 1502).

v. Servicing and Liquidation Responsibilities:

See SOP 50 57 and 13 CFR § 120.453 and 13 CFR Part 120, Subpart E for guidance.

c. Change of PLP Lender's Structure:

i. To determine the effect on a Lender's delegated authority due to a change in the Lender's structure, please see the chart below.

ii. If a PLP Lender changes its structure or organization in any of the following ways, it must inform OCRM in writing:

a) The Lender is acquired by another lender;

b) The Lender is merged into another legal entity;

c) The Lender changes its name;

d) The Lender substantially changes the management of its SBA business;

e) The Lender substantially changes how it handles SBA loans; or

f) A regulatory agency takes over or closes the Lender.

iii. An SBA Field Office that discovers any of the above circumstances also must immediately notify OCRM in writing.

iv. Requests for New SBA Guaranty Agreements:

When necessary, the Lender may obtain:

a) A new SBA Form 750 from the SBA Field Office; and

b) New SBA Form 1347 from OCRM.

If a PLP Lender continues as the same legal entity that signed the SBA Form 1347 (PLP) and	**Then**
(1) The PLP Lender changes its name.	OCRM records the name change. The Lender's PLP authority is not changed. A new SBA Form 1347 (PLP) is not needed.
(2) The PLP Lender is acquired by another entity. The PLP Lender continues as a separate legal entity.	OCRM records the holding company name. The Lender's PLP authority is not changed. A new SBA Form 1347 (PLP) is not needed.
(3) The PLP Lender acquires another lender. The acquired lender does not continue as a separate legal entity.	The PLP Lender may continue to make PLP loans under its PLP authority unless there is a substantial change in its ability to make PLP loans.
(4) The PLP Lender acquires another lender. The acquired lender continues as a separate legal entity.	The acquired lender may not make PLP loans. The acquired lender may apply for PLP authority.

If a PLP Lender continues as the same legal entity that signed the SBA Form 1347 (PLP) and	**Then**
(5) The PLP Lender is closed or taken over by a regulatory authority.	The Lender's PLP authority automatically terminates and the Lender must cooperate with SBA to transfer responsibility for servicing and liquidating its SBA portfolio. OCRM notifies the Lender, SBA Field Office(s) and appropriate Centers that the Lender may not make any new loans.
(6) The PLPLender changes its operations so much that it cannot show that it handles SBA loans appropriately.	SBA will not renew the Lender's PLP authority or will suspend or revoke the lender's PLP authority.

If a PLP Lender does not continue as the legal entity that executed the SBA Forms 1347 (PLP) and	**Then**
(1) The PLP Lender is merged into a non-PLP Lender. The original PLP Lender's SBA operations are unchanged.	The original PLP Lender no longer has the authority to make PLP loans. The surviving lender may apply for PLP authority and execute a PLP agreement.
(2) The PLP Lender is merged into another PLP Lender.	The original PLP Lender no longer has the authority to make PLP loans under its agreements with SBA. However, PLP loans may be made under the surviving PLP Lender's agreements and the surviving PLP Lender is responsible for servicing and liquidating the acquired SBA loan portfolio.
(3) The PLP Lender is dissolved. It does not merge into another lender.	PLP authority terminates automatically and the Lender must cooperate with SBA to transfer responsibility for servicing and liquidating its SBA portfolio. OCRM notifies the Lender, SBA Field Office(s) and appropriate Centers that the Lender may not make any new loans.

c) Monitoring and reviews:

See Paragraph III.A through C of this Chapter for further information on monitoring and reviews.

d) Supervision and enforcement:

See Paragraph III.D of this Chapter for further information on supervision and enforcement.

e) Suspension and revocation:

SBA may suspend or revoke a Lender's PLP authority in accordance with 13 CFR §§ 120.1400-1600.

D. SBA Express Program:

1. SBA Express was established as a permanent SBA program under P.L.108-447 and signed into law on December 8, 2004. The program reduces the number of government mandated forms and procedures, streamlines the processing and reduces the cost of smaller, less complex SBA loans. The program allows Lenders to utilize, to the maximum extent practicable, their respective loan analyses, procedures, and documentation. In return for the expanded authority and autonomy provided by the program, Lenders agree to accept a maximum SBA guaranty of 50 percent.

2. The SBA Express Lender:

To the maximum extent practicable, SBA Express Lenders may use their own forms, internal credit memoranda, notes, collateral documents, and servicing and liquidation documentation. In using their documents and procedures, Lenders must follow their established and proven internal procedures used for their similarly sized non-SBA guaranteed commercial loans. See Subpart B, Chapter 6 for a listing of the forms SBA requires for SBA Express.

3. Qualifications for Initial SBA Express Lender Authority:

a. An existing SBA Lender must demonstrate to SBA's satisfaction that it meets the criteria for delegated authority set forth in Paragraph IV.A. above.

b. For SBA Lenders with less than 3 years of SBA lending experience/data, the Agency may consider performance over the period of time the Lender has been an SBA Lender, but will limit the Lender's initial term of participation to 1 year or less. Lenders that identify significant differences between the performance numbers developed by the Lender and those developed by SBA (not related to a lack of accurate SBA Form 1502 reporting) may contact OCRM.

c. Lenders that do not currently participate with SBA:

In addition to meeting the Agency's Lender requirements as set forth in paragraph II.C. of this chapter, a lender that does not currently participate with SBA also must demonstrate to SBA's satisfaction that it:

i. Is in good standing or considered Satisfactory by its state/FFIR, as applicable. The Lender's written request to participate must include a written statement that to the best of its knowledge, the Lender has satisfactory: i) financial condition (e.g., capital and liquidity); ii) small business credit administration policies, procedures, and practices

that it continues to adhere to in its operations; and iii) small business servicing policies, procedures, and practices that it continues to adhere to in its operations. When reviewing good standing/Satisfactory status, SBA will look to see that a Lender does not have significant deficiencies or weaknesses in these areas. "Significance" may be evidenced by the number or seriousness of the deficiencies, as determined by SBA in its discretion. SBA will verify any good standing/Satisfactory status statement where possible with public (e.g., Cease and Desist Orders and Call Reports) and/or non-public information from the Lender's primary and/or other regulators.

ii. Has at least 20 commercial or business loans for $350,000 or less at its most recent fiscal year end;

iii. Ensures its primary SBA loan personnel have received appropriate training on SBA's policies and procedures (such training could include SBA Field Office training and/or trade association training that adequately addresses SBA's regulations and Standard Operating Procedures, including SBA's loan processing, servicing, and liquidation requirements); and

iv. Has no major substantive objections from the D/OCRM (e.g., relating to risk or program integrity).

4. Process to become an SBA Express Lender:

   a. A Lender's initial request for delegated authority must be sent electronically to D/OCRM or designee at 7aDeleAuthNomination@sba.gov.

      A Lender requesting to reinstate or expand existing delegated authority must submit a request electronically to D/OCRM or designee at 7aRedelegationNominations@sba.gov.

   b. As noted above, lenders not currently participating with the SBA must meet the Agency's Lender requirements as set forth in paragraph II.C. of this chapter and must become an approved SBA Lender before participating in SBA Express. (An application for SBA Express authority may be made simultaneously with the application for SBA Lender authority.)

   c. OCRM gathers the information relevant to a Lender's participation request. OCRM performs an analysis, makes the final determination, and notifies the Lender and SBA Field Office(s) of SBA's decision.

   d. SBA may limit a new SBA Lender to a yearly maximum of $25 million of SBA Express in its first year of participation.

5. Supplemental Guaranty Agreement:

   a. If the Lender's request for SBA Express authority is approved, OCRM notifies the Lender of the decision and sends the Lender an SBA Express SBA Form 2424, "Supplemental Loan Guaranty Agreement SBA Express Program" Agreement to sign and return. OCRM also sends the Lender instructions for submitting SBA Express applications.

   b. The Lender must sign and return the agreement to OCRM before the Lender's SBA Express authorityis effective. (Agreements must be signed and returned to the Center within 30 days of receipt or a new application to the program will be required.)

c. If the Lender is a PLP Lender, the term of its SBA Express authority, when possible, will be tied to the Lender's remaining PLP term.

d. Lenders not currently participating in SBA's loan programs that are approved for SBA Express will be limited to an initial SBA Express term of 1 year.

6. Decline of SBA Express Authority:

   If SBA declines a request for nomination for SBA Express authority, OCRM notifies the Lender and SBA Field Office of the reason(s) for decline of the request. The Lender may re-apply for SBA Express authority when it has overcome the reason(s) for decline. To do so, the Lender must file a request with OCRM and must show how it has overcome the reason(s) for decline. OCRM will review the request, make a recommendation and send it to the appropriate SBA official for a final Agency decision. OCRM will notify the Lender in writing of SBA's final decision.

7. Renewals of SBA Express Authority:

   a. OCRM will automatically start the renewal process a few months prior to the expiration of a Lender's SBA Express authority. OCRM contacts the Lender to obtain a current statement of Satisfactory status (as described in paragraph 3 above).

   b. OCRM will also contact the Lender's SBA Field Office and the SBA's processing, servicing and liquidation Centers. The comments of those offices should pertain to the Lender's most recent SBA Express term and must include:

      i. Whether renewal is recommended;

      ii. If renewal is not recommended, why not;

      iii. Whether the Lender can effectively process, close, service and liquidate SBA loans;

      iv. Changes in Lender's organization or management;

      v. Any recurring denial of liability or repair situations with the Lender;

      vi. Reasons for any unfavorable loan volume or repurchase rate data;

      vii. Identification of any areas of concern; and

      viii. An explanation of any discussions with the Lender that may impact the SBA Express decision.

   c. OCRM gathers the information relevant to a Lender's renewal. OCRM performs an analysis, makes a recommendation and sends it to the appropriate SBA official who makes a decision and notifies OCRM. OCRM then informs the Lender of SBA's decision.

   d. Lenders that have participated in SBA Express for 2 years or more may be renewed in the program for a term up to 2 years, but SBA may renew for less than 2 years if Lender or program circumstances warrant. Lenders participating in SBA Express for less than 2 years may be renewed in SBA Express for an additional year and may be renewed for up to 2 years thereafter.

   e. For renewal of a Lender's SBA Express authority and to determine its renewal term for SBA Express, the Lender must demonstrate to SBA's satisfaction that it meets the criteria for delegated authority in Paragraph IV.A. above.

f. OCRM notifies the Lender of SBA's decision and, if the renewal is approved, OCRM sends the Lender a new SBA Express Supplemental Guaranty Agreement to sign.

g. The Lender must sign and return the agreement to OCRM before the Lender's SBA Express renewal is effective. (Agreements must be signed and returned to OCRM within 30 days of receipt or a new application to the program will be required.)

h. If the renewal is declined, the Lender will be notified of the reason(s) for the decline, and it may not make SBA Express loans after its SBA Express authority expires. The Lender may re-apply when it has overcome the reason(s) for decline. To do so, the Lender must file a request with OCRM and must show how it has overcome the reason(s) for denial. OCRM will review the request, make a recommendation and send it to the appropriate SBA official for a final Agency decision. OCRM will notify the Lender in writing of SBA's final decision.

i. If a Lender's SBA Express authority was revoked, declined or voluntarily terminated, the Lender may ask SBA to reinstate its SBA Express authority. However, the Lender must follow paragraph C.4 of this section.

8. Authority and Responsibilities:

a. SBA Express Lenders may make SBA Express loans in any area of the country.

b. SBA Express Lenders must apply and comply with all of SBA's Loan Program Requirements.

c. Eligibility Requirements: In addition to the SBA's primary business loan eligibility standards set forth in Subpart B, Chapter 2 of this SOP, the following restrictions apply to SBA Express loans.

i. Lenders may not use SBA Express for any pilot program unless SBA authorizes use of SBA Express for the pilot.

ii. The following types of loans are not eligible under SBA Express processing:

a) Disabled Assistance Loans (DAL);

b) Qualified Employee Trusts (ESOP) (loans made to an ESOP or 401k under 13 CFR §§ 120.350 through 120.354);

c) Cooperatives;

d) Pollution Control program; and

e) CAPLines program.

f) Applications Previously Submitted to LGPC for Processing. Once submitted to LGPC, an application withdrawn by the Lender, screened-out, or declined by LGPC may not be approved by any Lender under its SBA Express Authority. No Lender may knowingly submit an application for the same project under SBA Express that was previously submitted by a different Lender. E-Tran will not permit the submission of such an application under any Lender's SBA Express authority for a period of 12 months from the date of withdrawal, screen-out, or decline of the application.

g) An application that did not receive an acceptable credit score under 7(a) Small

Loan procedures may be withdrawn prior to submission through E-Tran or SBA One and may be processed under SBA Express. See Subpart B, Chapters 4 and 6 of this SOP.

d. SBA Express Lender's Processing Responsibilities:

i. Lender's Eligibility Review:

a) SBA Express is a streamlined program, so complex or ambiguous eligibility issues should be processed using standard 7(a) procedures rather than through SBA Express. SBA grants SBA Express Lenders increased responsibility for screening applicants and loans for SBA eligibility. SBA Express Lenders must be fully familiar with SBA's eligibility requirements as set forth in the SBA Loan Program Requirements and must screen all SBA Express Applicants and loans to ensure they meet those requirements.

b) Lenders may rely, in many instances, on certifications provided by the Applicant, several of which are included in the SBA Express application documents. In the case of size, the Lender may rely on information provided by the Applicant at the date of application, unless the Lender has credible evidence to the contrary.

c) Certain eligibility issues require additional lender review and/or verification. Lenders must follow all standard 7(a) eligibility requirements and maintain appropriate documentation supporting their eligibility screening in the loan file.

d) Lenders must carefully review and screen SBA Express Applicants and loans to ensure they meet SBA's eligibility requirements before transmitting the SBA Express guaranty request and supplemental information via E-Tran.

e) Lenders must ensure all required forms/information are obtained, complete, and properly executed. Appropriate documentation must be maintained, including adequate information to support the eligibility of the Applicant and the loan, in the Lender's loan file.

ii. Credit Analysis:

a) SBA has authorized SBA Express Lenders to make the credit decision without prior SBA review. The credit analysis must demonstrate that there is a reasonable assurance of repayment. The Lender is required to use appropriate, prudent and generally accepted industry credit analysis processes and procedures (which may include credit scoring), and these procedures must be consistent with those used for its similarly sized non-SBA guaranteed commercial loans. Lenders that do not use credit scoring for their similarly sized non-SBA guaranteed commercial loans may not use credit scoring for SBA Express. Lenders must validate (and document) with appropriate statistical methodologies that their credit analysis procedures are predictive of loan performance, and they must provide that documentation to SBA upon request. SBLCs are required to provide credit scoring model validation to SBA on an annual basis. In addition, the credit scoring results must be documented in each loan file and available for SBA review.

b) Lenders must not make an SBA Express loan which would be inconsistent with SBA's "credit not available elsewhere" standard (see Subpart B, Chapter 2 of this SOP), i.e., Lenders must not make an SBA-guaranteed loan that would be available on reasonable terms from non-Federal, non-State, or non-local government sources, including from the Lender, without an SBA guaranty.

c) The credit decision, including how much to factor in a past bankruptcy or whether to require an equity injection, is left to the business judgment of the Lender. Also, if the Lender requires an equity injection and, as part of its standard processes for non-SBA guaranteed loans verifies the equity injection, it must do so for SBA Express loans. While the credit decision is left to the business judgment of the Lender, early loan defaults will be reviewed by SBA pursuant to SOP 50 57.

iii. Application Documents and Authorization:

a) After the loan is closed, the Lender must continue to apprise SBA of certain critical performance data as well as changes in certain basic Borrower information, such as trade name and address. See Subpart B, Chapters 7 and 8 of this SOP.

b) The Lender completes the SBA Express Authorization without SBA review and signs it on behalf of SBA. See Subpart B, Chapter 5 of this SOP.

e. Closing, Servicing and Liquidation:

The SBA Express Lender must close, service, and liquidate its SBA Express loans using the same reasonable and prudent practices and procedures that the Lender uses for its non-SBA guaranteed commercial loans.

9. Monitoring and reviews:

SBA uses the L/LMS system to assess SBA Express Lenders quarterly through the composite risk rating. In addition, those SBA Express Lenders with outstanding SBA balances of $10 million or more are also reviewed in accordance with SOP 51 00. See Paragraph III.A through C of this Chapter for further information on monitoring and reviews.

10. Supervision and enforcement:

See Paragraph III.D of this Chapter for further information on supervision and enforcement.

11. Suspension or revocation:

See Paragraph III.E of this Chapter for further information on suspension and revocation.

E. Export Express Program:

1. The Export Express Program is designed to help SBA meet the export financing needs of small businesses too small to be effectively met by existing SBA export loan guaranty programs. It is generally subject to the same loan processing, making, closing, servicing, and liquidation requirements as well as the same maturity terms, interest rates, and applicable fees as the SBA Express Loan Program. Any differences between the Export Express requirements are set forth in the appropriate section of this SOP. (For example, certain uses of loan proceeds are allowed under Export Express that are not allowed under SBA's other lending programs. See Subpart B, Chapter 2

of this SOP.)

2. Becoming an Export Express Lender:
   a. Lenders must have a signed Export Express Supplemental Guaranty Agreement to make Export Express loans.
   b. The procedures for receiving Export Express authority are different based on the Lender's existing authority:
      i. Active SBA Express Lenders:

         Lenders that currently have SBA Express authority that would like to make Export Express loans must submit a request to SBA. The request should be submitted to the Lender's local SBA Field Office or U.S. Export Assistance Center (USEAC). These offices should submit the Lender's request to the OCRM, at 7aRedelegationNomination@sba.gov. OCRM will send the Lender the Export Express Supplemental Guaranty Agreement (Agreement), with a copy of the approval letter to OIT, and the Lender will have 30 days to execute and return the Agreement to OCRM.

      ii. Existing 7(a) Lender that Does Not Participate in the SBA Express Program:

         An existing 7(a) Lender that would like to participate in the Export Express Program must submit a request to its local SBA Field Office or U.S. Export Assistance Center (USEAC). These offices should submit the request to OCRM at 7aDeleAuthNomination@sba.gov. OCRM will contact the local SBA USEAC for comments and process the request in accordance with the procedures and process for the SBA Express Program, as described in Paragraph IV.C.4. above. Lenders can request SBA Express and Export Express authority simultaneously, but are not required to do so. OCRM will send the Lender the Export Express Supplemental Guaranty Agreement, with a copy of the approval letter to OIT, and the Lender will have 30 days to execute and return the Agreement to OCRM.

   c. To retain or renew Export Express authority, SBA Express Lenders must:
      i. Effectively process, make, close, service, and liquidate Export Express loans;
      ii. Remain in compliance with SBA Loan Program Requirements;
      iii. Have received no major substantive objections regarding renewal from the Field Office(s) covering the territory where the Lender generates significant numbers of Export Express loans; and
      iv. Received acceptable review results on the Export Express portion of any SBA-administered Lender reviews.
   d. SBA will generally grant Lenders Export Express loan authority for a term that coincides with the Lender's SBA Express term, unless the D/OCRM determines a shorter term is appropriate. The maximum term for all Export Express Lenders is 2 years. For 7(a) Lenders who have not participated with SBA previously, the term may be less than 2 years at the discretion of the D/OCRM.

3. Monitoring and reviews:

SBA uses the L/LMS system to assess Export Express Lenders quarterly through the composite risk rating and other performance metrics. In addition, those Lenders with outstanding SBA balances of $10 million or more may also receive more in-depth reviews. See Paragraph III.A through C of this Chapter for further information on monitoring and reviews.

4. Supervision and enforcement:

   See Paragraph III.D of this Chapter for further information on supervision and enforcement.

5. Suspension or revocation:

   See Paragraph III.E of this Chapter for further information on suspension and revocation.

F. Export Working Capital Program (EWCP):

To participate in the Export Working Capital Program (EWCP):

1. An existing SBA Lender may contact the local United States Export Assistance Center (USEAC) or the local SBA Field Office to request authority to participate in the EWCP. (A complete listing of USEAC locations and personnel may be found at https://www.sba.gov/tools/local-assistance/eac.) The USEAC or Field Office staff will provide the Lender with SBA Form 750EX, "Supplemental Guarantee Agreement Export Working Capital Program," which the Lender must execute and return to the USEAC.
2. Non-SBA lenders must be approved by SBA to participate in the 7(a) loan guaranty program before they can participate in EWCP. Such lenders may also contact the local USEAC or local SBA Field Office to request authority to participate in SBA lending. If the lender meets the criteria set forth above for 7(a) Lenders, the USEAC or Field Office staff will provide the lender with SBA Form 750 and/or SBA Form 750B, as appropriate, and SBA Form 750EX, which the lender must execute and return to the USEAC.
3. The Regional Manager of SBA's Export Solutions Group located at each USEAC will consult, advise and train Lenders and small business exporters on the procedures and benefits of SBA's EWCP.
4. To request authority to participate in the Preferred Lender Program (PLP) for EWCP, see paragraph IV.C.10 of this Chapter.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
COSI, INC., *et al.*,	)	Case No. 20-10417 (BLS)
	)	
Debtors.	)	Jointly Administered
_____	)	
	)	
COSI, INC., *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Adv. 20-50591 (BLS)
	)	
THE U.S. SMALL BUSINESS ADMINISTRATION, AND JOVITA CORRANZA, AS ADMINISTRATOR OF THE U.S. SMALL BUSINESS ADMINISTRATION,	)	
	)	
Defendants.	)	
_____	)	

OPPOSITION TO PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

EXHIBIT 2

SBA 7(a) Borrower Information Form

For use with all 7(a) Programs

OMB Control No.: 3245-0348
Expiration Date: 07/31/2020

Purpose of this form:

The purpose of this form is to collect information about the Small Business Applicant ("Applicant") and its principals, the loan request, indebtedness, information about current or previous government financing, and certain other topics. The information also facilitates background checks as authorized by section 7(a)(1)(B) of the Small Business Act, 15 U.S.C. 636(a)(1)(B). This form is to be completed by the Applicant and all individuals identified below and ***submitted to your SBA Participating Lender***. Submission of the requested information is required for SBA or the Lender to make a determination regarding eligibility for financial assistance. Failure to submit the information would affect that determination.

Instructions for completing this form:

This form is divided into two sections. Section I requests information about the Small Business Applicant and must be completed in its entirety, signed and dated by an authorized representative of the Small Business Applicant that is requesting a business loan. *A separate Section I is required to be completed and signed for each co-applicant (e.g. "Eligible Passive Company (EPC)"or "Operating Company (OC)").*

Section II of this form requests information about each of the Small Business Applicant's principals. This section must be completed in its entirety, signed and dated by the following:

- For a sole proprietorship, the sole proprietor;
- For a partnership, all general partners, and all limited partners owning 20% or more of the equity of the firm; or any partner that is involved in management of the applicant business;
- For a corporation, all owners of 20% or more of the corporation, and each officer and director;
- For limited liability companies, all members owning 20% or more of the company, each officer, director, and managing member;
- Any Person hired by the business to manage day-to-day operations ("key employee"); and
- Any Trustor (if the Small Business Applicant is owned by a trust).

All parties listed above are considered "Associates" of the Small Business Applicant as defined in 13 CFR § 120.10, as well as "principals." *A separate Section II is required to be completed and signed by each principal of the Small Business Applicant.*

For clarification regarding any of the questions, please contact your Lender.

Definitions:

1. **Affiliation –** Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party (or parties) controls or has power to control both. For example, affiliation may arise through ownership, common management (including through a management agreement), or when there is an identity of interest between close relatives with identical, or substantially identical, business interests. The complete definition of "affiliation" is found at 13 CFR § 121.301(f).
2. **Close Relative -** Close Relative is a spouse; a parent; or a child or sibling, or the spouse of any such person.
3. **Eligible Passive Company ("EPC") –** is a small entity or trust which does not engage in regular and continuous business activity which leases real or personal property to an Operating Company for use in the Operating Company's business, and which complies with the conditions set forth in 13 CFR § 120.111.
4. **Household Member** – A "household member" of an SBA employee includes: a) the spouse of the SBA employee; b) the minor children of said individual; and c) the blood relatives of the employee, and the blood relatives of the employee's spouse who reside in the same place of abode as the employee. [13 CFR § 105.201(d)]
5. **Operating Company ("OC") –** is an eligible small business actively involved in conducting business operations now or about to be located on real property owned by an Eligible Passive Company, or using or about to use in its business operations personal property owned by an Eligible Passive Company.

SBA 7(a) Borrower Information Form
(Section I: Applicant Business Information)

OMB Control No.: 3245-0348
Expiration Date: 07/31/2020

Applicant Business Legal Name (☐ OC / ☐ EPC)	DBA or Tradename if applicable	
Applicant Business Primary Business Address	**Applicant Business Tax ID**	**Applicant Business Phone**
		( ) -
Project Address (if other than primary business address)	**Primary Contact**	**Email Address**

Amount of Loan Request:	$	# of existing employees employed by business? (including owners):	
		# of jobs to be created as a result of the loan? (including owners):	
		# of jobs that will be retained as a result of the loan that otherwise would have been lost? (including owners):	
Purpose of the loan:			

Small Business Applicant Ownership

List all proprietors, partners, officers, directors, and holders of outstanding stock. 100% of ownership must be reflected. Attach a separate sheet if necessary. Based on this form's instructions not all owners will need to complete the Principal Information section of this form.

Owner Name	Title	Ownership %	Address

Unless stated otherwise, if any of the questions below are answered "Yes," please provide details on a separate sheet.

#	Question	Yes	No
1	Are there co-applicants? (*If "Yes," please complete a separate Section I: Applicant Business Information for each.)*	☐	☐
2	Has an application for the requested loan ever been submitted to the SBA, a lender, or a Certified Development Company, in connection with any SBA program? *(If "Yes," provide details on a separate sheet.)*	☐	☐
3	Is the Small Business Applicant presently suspended, debarred, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency?	☐	☐
4	Does the Small Business Applicant operate under a Franchise/License/Distributor/Membership/Dealer/ Jobber or other type of Agreement? *(If "Yes," provide copies of your agreement(s) and any other relevant documents.)*	☐	☐
5	Does the Small Business Applicant have any Affiliates? (*If "Yes," please attach a listing of all Affiliates.)*	☐	☐
6	Has the Small Business Applicant and/or its Affiliates ever filed for bankruptcy protection?	☐	☐
7	Is the Small Business Applicant and/or its Affiliates presently involved in any pending legal action?	☐	☐
8	Has the Small Business Applicant and/or its Affiliates ever obtained a direct or guaranteed loan from SBA or any other Federal agency or been a guarantor on such a loan?	☐	☐
	a) If you answered "Yes" to Question 8, is any of the financing currently delinquent?	☐	☐
	b) If you answered "Yes" to Question 8, did any of this financing ever default and cause a loss to the Government?	☐	☐
9	Are any of the Small Business Applicant's products and/or services exported or is there a plan to begin exporting as a result of this loan?	☐	☐
	If "Yes," provide the estimated total export sales this loan will support: $ _____		
10	Is the Small Business Applicant using (or intending to use) a packager, broker, accountant, lawyer, etc. to assist in (a) preparing the loan application or any related materials and/or (b) referring the loan to the lender?	☐	☐
11	Are any of the Small Business Applicant's revenues derived from gambling, loan packaging, or from the sale of products or services, or the presentation of any depiction, displays or live performances, of a prurient sexual nature?	☐	☐

SBA 7(a) Borrower Information Form
(Section I: Applicant Business Information)

OMB Control No.: 3245-0348
Expiration Date: 07/31/2020

#		True	False

SBA may not provide financial assistance to an applicant where there is any appearance of a conflict of interest with an SBA or other governmental employee. With the exception of question 15, if any of the questions below are answered "False," this application may not be submitted under any delegated processing method, but must be submitted to the LGPC for non-delegated processing. Note: This does not mean that your loan will be denied, only that your lender will need to use different SBA procedures to process this loan. If the answer to question 15 is "no," the application may be processed under a lender's delegated authority only after the lender received clearance from SBA.

12	No SBA employee, or the household member (see definition on page 1) of an SBA employee, is a sole proprietor, partner, officer, director, or stockholder with a 10 percent or more interest, of the Applicant. [13 CFR 105.204]	☐	☐
13	No former SBA employee, who has been separated from SBA for less than one year prior to the request for financial assistance, is an employee, owner, partner, attorney, agent, owner of stock, officer, director, creditor or debtor of the Applicant. [13 CFR 105.203]	☐	☐
14	No member of Congress, or an appointed official or employee of the legislative or judicial branch of the Federal Government, is a sole proprietor, general partner, officer, director, or stockholder with a 10 percent or more interest, or household member of such individual, of the Applicant. [13 CFR 105.301(c)]	☐	☐
15	No Government employee having a grade of at least GS-13 or higher is a sole proprietor, general partner, officer, director, or stockholder with a 10 percent or more interest, or a household member of such individual, of the Applicant. [13 CFR 105.301(a)]	☐	☐
16	No member or employee of a Small Business Advisory Council or a SCORE volunteer is a sole proprietor, general partner, officer, director, or stockholder with a 10 percent or more interest, or a household member of such individual, of the Applicant. [13 CFR 105.302(a)]	☐	☐

By Signing Below, You Make the Following Representations and Certifications

REPRESENTATIONS

I represent that:

- I have read the Statements Required by Law and Executive Order included in this form, and I understand them.
- I will comply, whenever applicable, with the hazard insurance, lead-based paint, civil rights and other limitations in this form.
- All SBA loan proceeds will be used only for business related purposes as specified in the loan application.
- To the extent feasible, I will purchase only American-made equipment and products.

ACCURACY CERTIFICATION

I certify that the information provided in this application and the information that I have provided in all supporting documents and forms is true and accurate. I realize that the penalty for knowingly making a false statement to obtain a guaranteed loan from SBA is that I may be fined up to $250,000 and/or be put in jail for up to 5 years under 18 USC § 1001 and if false statements are submitted to a Federally insured institution, I may be fined up to $1,000,000 and/or be put in jail for up to 30 years under 18 USC § 1014.

_____ _____
Signature of Authorized Representative of Applicant Business Date

_____ _____
Print Name Title

SBA 7(a) Borrower Information Form
(Section II: Principal Information)

OMB Control No.: 3245-0348
Expiration Date: 07/31/2020

Applicant Business:

Principal Name	Social Security Number or Tax ID if an Entity	Date of Birth	Place of Birth (City & State or Foreign Country)
		/ /	
Home Address		**Home Phone**	**% of Ownership in the Small Business Applicant**
		( ) -	

Veteran/Gender/Race/Ethnicity data is collected for program reporting purposes only.
Disclosure is voluntary and has no bearing on the credit decision.

		Enter Response Below
Veteran	1=Non-Veteran; 2=Veteran; 3=Service-Disabled Veteran; 4=Spouse of Veteran; X=Not Disclosed	
Gender	M=Male; F=Female; X=Not Disclosed	
Race (more than 1 may be selected)	1=American Indian or Alaska Native; 2=Asian; 3=Black or African-American; 4=Native Hawaiian or Pacific Islander; 5=White; X=Not Disclosed	
Ethnicity	H=Hispanic or Latino; N=Not Hispanic or Latino; X=Not Disclosed	

Unless stated otherwise, if any of the questions below are answered "Yes," please provide details on a separate sheet.

#	Question	Yes	No
17	Are you presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction? *(If "Yes," the loan request is not eligible for SBA assistance.)*	☐	☐
	Initial here to confirm your response to question 17 ➔		_____
18	Have you been arrested in the last 6 months for any criminal offense?	☐	☐
	Initial here to confirm your response to question 18 ➔		_____
19	For any criminal offense – other than a minor vehicle violation – have you ever: 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)?	☐	☐
	Initial here to confirm your response to question 19 ➔		_____

If you answer "Yes" to questions 18 or 19, you must complete SBA Form 912, "Statement of Personal History." You will need to furnish details, including dates, location, fines, sentences, level of charge (whether misdemeanor or felony), dates of parole/probation, unpaid fines or penalties, name(s) under which charged, and any other pertinent information. If you answer "Yes" to question 19 and are currently on parole or probation, the loan request is not eligible for SBA assistance.

20	Are you presently suspended, debarred, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency?	☐	☐
21	If you are a 50% or more owner of the Small Business Applicant, are you more than 60 days delinquent on any obligation to pay child support arising under an administrative order, court order, repayment agreement between the holder and a custodial parent, or repayment agreement between the holder and a state agency providing child support enforcement services.	☐	☐
22	☐ I am a U.S. Citizen OR ☐ I have Lawful Permanent Resident status Registration Number: _____		
	☐ I am not a U.S. Citizen or Lawful Permanent Resident Country of Citizenship: _____		
	Initial here to confirm your responses to question 22 ➔		_____
23	Do you have any ownership in other businesses which would be defined as an Affiliate in the definition found on page 1? *(If "Yes," attach a listing of all businesses and your ownership percentage or position in the business.)*	☐	☐
24	Have you, or any business you controlled, ever filed for bankruptcy protection?	☐	☐
25	Are you, or any business you control, presently involved in any legal action (including divorce)?	☐	☐
26	Have you or any business owned or controlled by you ever obtained a direct or guaranteed loan from SBA or any other Federal agency or been a guarantor on such a loan? (This includes student loans.)	☐	☐
	(a) If you answered "Yes" to Question 26, is any of the financing currently delinquent?	☐	☐
	(b) If you answered "Yes" to Question 26, did any of this financing ever default and cause a loss to the Government? *(If Yes to (a) or (b) above, please provide Lender with a written explanation.)*	☐	☐

SBA 7(a) Borrower Information Form
(Section II: Principal Information)

OMB Control No.: 3245-0348
Expiration Date: 07/31/2020

By Signing Below, You Make the Following Representations, Authorizations, and Certifications

REPRESENTATIONS AND AUTHORIZATIONS

I represent that:

- I have read the Statements Required by Law and Executive Order and I understand them.
- I will comply, whenever applicable, with the hazard insurance, lead-based paint, civil rights or other limitations in this form.
- All SBA loan proceeds will be used only for business related purposes as specified in the loan application.
- To the extent feasible, I will purchase only American-made equipment and products.

I authorize the SBA to request criminal record information about me from criminal justice agencies for the purpose of determining my eligibility for programs authorized by the Small Business Act, as amended.

ACCURACY CERTIFICATION

I certify that the information provided in this application and the information that I have provided in all supporting documents and forms is true and accurate. I realize that the penalty for knowingly making a false statement to obtain a guaranteed loan from SBA is that I may be fined up to $250,000 and/or be put in jail for up to 5 years under 18 USC § 1001 and if false statements are submitted to a Federally insured institution, I may be fined up to $1,000,000 and/or be put in jail for up to 30 years under 18 USC § 1014.

_____ _____
Signature Date

_____
Print Name/Title

SBA 7(a) Borrower Information Form

Statements Required by Law and Executive Order

OMB Control No.: 3245-0348
Expiration Date: 07/31/2020

Please read the following notices regarding use of federal financial assistance programs and then sign and date the certification.

SBA is required to withhold or limit financial assistance, to impose special conditions on approved loans, to provide special notices to applicants or borrowers and to require special reports and data from borrowers in order to comply with legislation passed by the Congress and Executive Orders issued by the President and by the provisions of various inter-agency agreements. SBA has issued regulations and procedures that implement these laws and executive orders. These are contained in Parts 112, 113, and 117 of Title 13 of the Code of Federal Regulations and in Standard Operating Procedures.

Privacy Act (5 U.S.C. 552a) -- Under the provisions of the Privacy Act, you are not required to provide your social security number. Failure to provide your social security number may not affect any right, benefit or privilege to which you are entitled. Disclosures of name and other personal identifiers are, however, required for a benefit, as SBA requires an individual seeking assistance from SBA to provide it with sufficient information for it to make a character determination. In determining whether an individual is of good character, SBA considers the person's integrity, candor, and disposition toward criminal actions. Additionally, SBA is specifically authorized to verify your criminal history, or lack thereof, pursuant to section 7(a)(1)(B), 15 USC Section 636(a)(1)(B) of the Small Business Act (the Act). Further, for all forms of assistance, SBA is authorized to make all investigations necessary to ensure that a person has not engaged in acts that violate or will violate the Act or the Small Business Investment Act, 15 USC Sections 634(b)(11) and 687(b)(a), respectively. For these purposes, you are asked to voluntarily provide your social security number to assist SBA in making a character determination and to distinguish you from other individuals with the same or similar name or other personal identifier.

Any person can request to see or get copies of any personal information that SBA has in his or her file when that file is retrieved by individual identifiers such as name or social security numbers. Requests for information about another party may be denied unless SBA has the written permission of the individual to release the information to the requestor or unless the information is subject to disclosure under the Freedom of Information Act.

The Privacy Act authorizes SBA to make certain "routine uses" of information protected by that Act. One such routine use is the disclosure of information maintained in SBA's system of records when this information indicates a violation or potential violation of law, whether civil, criminal, or administrative in nature. Specifically, SBA may refer the information to the appropriate agency, whether Federal, State, local or foreign, charged with responsibility for, or otherwise involved in investigation, prosecution, enforcement or prevention of such violations. Another routine use is disclosure to other Federal agencies conducting background checks; only to the extent the information is relevant to the requesting agencies' function. See, 74 F.R. 14890 (2009), and as amended from time to time for additional background and other routine uses.

Right to Financial Privacy Act of 1978 (12 U.S.C. 3401) -- This is notice to you as required by the Right to Financial Privacy Act of 1978, of SBA's access rights to financial records held by financial institutions that are or have been doing business with you or your business, including any financial institutions participating in a loan or loan guaranty. The law provides that SBA shall have a right of access to your financial records in connection with its consideration or administration of assistance to you in the form of a Government guaranteed loan. SBA is required to provide a certificate of its compliance with the Act to a financial institution in connection with its first request for access to your financial records, after which no further certification is required for subsequent accesses. The law also provides that SBA's access rights continue for the term of any approved loan guaranty agreement. No further notice to you of SBA's access rights is required during the term of any such agreement. The law also authorizes SBA to transfer to another Government authority any financial records included in an application for a loan, or concerning an approved loan or loan guarantee, as necessary to process, service or foreclose on a loan guaranty or collect on a defaulted loan guaranty.

Freedom of Information Act (5 U.S.C. 552) -- This law provides, with some exceptions, that SBA must supply information reflected in agency files and records to a person requesting it. Information about approved loans that will be automatically released includes, among other things, statistics on our loan programs (individual borrowers are not identified in the statistics) and other information such as the names of the borrowers (and their officers, directors, stockholders or partners), the collateral pledged to secure the loan, the amount of the loan, its purpose in general terms and the maturity. Proprietary data on a borrower would not routinely be made available to third parties. All requests under this Act are to be addressed to the nearest SBA office and be identified as a Freedom of Information request.

Flood Disaster Protection Act (42 U.S.C. 4011) -- Regulations have been issued by the Federal Insurance Administration (FIA) and by SBA implementing this Act and its amendments. These regulations prohibit SBA from making certain loans in an FIA designated floodplain unless Federal Flood insurance is purchased as a condition of the loan. Failure to maintain the required level of flood insurance makes the applicant ineligible for any financial assistance from SBA, including disaster assistance.

Executive Orders -- Floodplain Management and Wetland Protection (42 F.R. 26951 and 42 F.R. 26961) -- SBA discourages settlement in or development of a floodplain or a wetland. This statement is to notify all SBA loan applicants that such actions are hazardous to both life and property and should be avoided. The additional cost of flood preventive construction must be considered in addition to the possible loss of all assets and investments due to a future flood.

Occupational Safety and Health Act (15 U.S.C. 651 et seq.) -- This legislation authorizes the Occupational Safety and Health Administration in the Department of Labor to require businesses to modify facilities and procedures to protect employees or pay penalty fees. Businesses can be forced to cease operations or be prevented from starting operations in a new facility. Therefore, SBA may require additional information from an applicant to determine whether the business will be in compliance with OSHA regulations and allowed to operate its facility after the loan is approved and disbursed. Signing this form as an applicant is certification that the OSHA requirements that apply to the applicant business have been determined and that the applicant, to the best of its knowledge, is in compliance. Furthermore, applicant certifies that it will remain in compliance during the life of the loan.

SBA 7(a) Borrower Information Form
Statements Required by Law and Executive Order

OMB Control No.: 3245-0348
Expiration Date: 07/31/2020

Civil Rights Legislation (13 C.F.R. 112, 113, 117) -- All businesses receiving SBA financial assistance must agree not to discriminate in any business practice, including employment practices and services to the public on the basis of categories cited in 13 C.F.R., Parts 112, 113, and 117 of SBA Regulations. This includes making their goods and services available to handicapped clients or customers. All business borrowers will be required to display the "Equal Employment Opportunity Poster" prescribed by SBA.

Equal Credit Opportunity Act (15 U.S.C. 1691) -- The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status or age (provided the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program, or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

Executive Order 11738 -- Environmental Protection (38 F.R. 251621) -- The Executive Order charges SBA with administering its loan programs in a manner that will result in effective enforcement of the Clean Air Act, the Federal Water Pollution Act and other environment protection legislation.

Debt Collection Act of 1982, Deficit Reduction Act of 1984 (31 U.S.C. 3701 et seq. and other titles) -- These laws require SBA to collect aggressively any loan payments which become delinquent. SBA must obtain your taxpayer identification number when you apply for a loan. If you receive a loan, and do not make payments as they come due, SBA may take one or more of the following actions: (1) report the status of your loan(s) to credit bureaus, (2) hire a collection agency to collect your loan, (3) offset your income tax refund or other amounts due to you from the Federal Government, (4) suspend or debar you or your company from doing business with the Federal Government, (5) refer your loan to the Department of Justice or other attorneys for litigation, or (6) foreclose on collateral or take other action permitted in the loan instruments.

Immigration Reform and Control Act of 1986 (Pub. L. 99-603) -- If you are an alien who was in this country illegally since before January 1, 1982, you may have been granted lawful temporary resident status by the United States Immigration and Naturalization Service pursuant to the Immigration Reform and Control Act of 1986. For five years from the date you are granted such status, you are not eligible for financial assistance from the SBA in the form of a loan guaranty under Section 7(a) of the Small Business Act unless you are disabled or a Cuban or Haitian entrant. When you sign this document, you are making the certification that the Immigration Reform and Control Act of 1986 does not apply to you, or if it does apply, more than five years have elapsed since you have been granted lawful temporary resident status pursuant to such 1986 legislation.

Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821 et seq.) -- Borrowers using SBA funds for the construction or rehabilitation of a residential structure are prohibited from using lead-based paint (as defined in SBA regulations) on all interior surfaces, whether accessible or not, and exterior surfaces, such as stairs, decks, porches, railings, windows and doors, which are readily accessible to children under 7 years of age. A "residential structure" is any home, apartment, hotel, motel, orphanage, boarding school, dormitory, day care center, extended care facility, college or other school housing, hospital, group practice or community facility and all other residential or institutional structures where persons reside.

Executive Order 12549, Debarment and Suspension (2 CFR 180, adopted by reference in 2 CFR Part 2700 (SBA Debarment Regulations)) -- By submission of this loan application, you certify and acknowledge that neither you nor any Principals have within the past three years been: (a) debarred, suspended, declared ineligible from participating in, or voluntarily excluded from participation in a transaction by any Federal department or agency; (b) formally proposed for debarment, with a final determination still pending; (c) indicted, convicted, or had a civil judgment rendered against you for any of the offenses listed in the Regulations; or (d) delinquent on any amounts due and owing to the U.S. Government or its agencies or instrumentalities as of the date of execution of this certification.

If you are unable to certify and acknowledge (a) through (d), you must obtain and attach a written statement of exception from SBA permitting participation in this loan. You further certify that you have not and will not knowingly enter into any agreement in connection with the goods and/or services purchased with the proceeds of this loan with any individual or entity that has been debarred, suspended, declared ineligible from participating in, or voluntarily excluded from participation in a Transaction. All capitalized terms have the meanings set forth in 2 C.F.R. Part 180.

NOTE: According to the Paperwork Reduction Act, you are not required to respond to this collection of information unless it displays a currently valid OMB Control Number. The estimated burden for completing this form, including time for reviewing instructions, gathering data needed, and completing and reviewing the form is 8 minutes per response. Comments or questions on the burden estimates should be sent to U.S. Small Business Administration, Director, Records Management Division, 409 3rd St., SW, Washington DC 20416, and/or SBA Desk Officer, Office of Management and Budget, New Executive Office Building, Rm. 10202, Washington DC 20503.
PLEASE DO NOT SEND FORMS TO THESE ADDRESSES.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
COSI, INC., *et al.*,	)	Case No. 20-10417 (BLS)
	)	
Debtors.	)	Jointly Administered
_____	)	
	)	
COSI, INC., *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Adv. 20-50591 (BLS)
	)	
THE U.S. SMALL BUSINESS ADMINISTRATION, AND JOVITA CORRANZA, AS ADMINISTRATOR OF THE U.S. SMALL BUSINESS ADMINISTRATION,	)	
	)	
Defendants.	)	
_____	)	

OPPOSITION TO PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

EXHIBIT 3

85 FR 23450-01, 2020 WL 1985019(F.R.)
RULES and REGULATIONS
SMALL BUSINESS ADMINISTRATION
[Docket Number SBA-2020-0021]
13 CFR Parts 120 and 121
RIN 3245-AH37

Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Promissory Notes, Authorizations, Affiliation, and Eligibility

Tuesday, April 28, 2020

AGENCY: U.S. Small Business Administration.

***23450** ACTION: Interim final rule.

SUMMARY: On April 2, 2020, the U.S. Small Business Administration (SBA) posted an interim final rule (the First PPP Interim Final Rule) announcing the implementation of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act). The Act temporarily adds a new program, titled the "Paycheck Protection Program," to the SBA's 7(a) Loan Program. The 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, and April 14, 2020. This interim final rule supplements the previously posted interim final rules with additional guidance. SBA requests public comment on this additional guidance.

DATES: Effective date: This rule is effective April 28, 2020.
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 May 28, 2020.

ADDRESSES: You may submit comments, identified by number SBA-2020-0021 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 or the 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 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 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 Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program.

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 several 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. 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 May 28, 2020. SBA will consider these comments and the need for making any revisions as a result of these comments.

III. Paycheck Protection Program Requirements for Promissory Notes, Authorizations, Affiliation, and Eligibility

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 Paycheck Protection Program (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 the First PPP Interim Final Rule (85 FR 20811), a second interim final rule (85 FR 20817) (the Second PPP Interim Final Rule), and a third interim final rule (the Third PPP Interim Final Rule) (85 FR 21747) (collectively, the PPP Interim Final Rules).

1. Requirements for Promissory Notes and Authorizations

This guidance is substantively identical to previously posted FAQ guidance.

a. Are lenders required to use a promissory note provided by SBA or may they use their own?

***23451** Lenders may use their own promissory note or an SBA form of promissory note. See FAQ 19 (posted April 8, 2020).

b. Are lenders required to use a separate SBA Authorization document to issue PPP loans?

No. A lender does not need a separate SBA Authorization for SBA to guarantee a PPP loan. However, lenders must have executed SBA Form 2484 (the Lender Application Form—Paycheck Protection Program Loan Guaranty) [FN1] to issue PPP loans and receive a loan number for each originated PPP loan. Lenders may include in their promissory notes for PPP loans any terms and conditions, including relating to amortization and disclosure, that are not inconsistent with Sections 1102 and 1106 of the CARES Act, the PPP Interim Final Rules and guidance, and SBA Form 2484. See FAQ 21 (posted April 13, 2020). The decision not to require a separate SBA Authorization in order to ensure that critical PPP loans are disbursed as efficiently as practicable.

1 This requirement is satisfied by a lender when the lender completes the process of submitting a loan through the E-Tran system; no transmission or retention of a physical copy of Form 2484 is required.

2. Clarification Regarding Eligible Businesses

a. Is a hedge fund or private equity firm eligible for a PPP loan?

No. Hedge funds and private equity firms are primarily engaged in investment or speculation, and such businesses are therefore ineligible to receive a PPP loan. The Administrator, in consultation with the Secretary, does not believe that Congress intended for these types of businesses, which are generally ineligible for section 7(a) loans under existing SBA regulations, to obtain PPP financing.

b. Do the SBA affiliation rules prohibit a portfolio company of a private equity fund from being eligible for a PPP loan?

Borrowers must apply the affiliation rules that appear in 13 CFR 121.301(f), as set forth in the Second PPP Interim Final Rule (85 FR 20817). The affiliation rules apply to private equity-owned businesses in the same manner as any other business subject to outside ownership or control.[FN2] However, in addition to applying any applicable affiliation rules, all borrowers should carefully review the required certification on the Paycheck Protection Program Borrower Application Form (SBA Form 2483) stating that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant."

2 However, the Act waives the affiliation rules if the borrower receives financial assistance from an SBA-licensed Small Business Investment Company (SBIC) in any amount. This includes any type of financing listed in 13 CFR 107.50, such as loans, debt with equity features, equity, and guarantees. Affiliation is waived even if the borrower has investment from other non-SBIC investors.

c. Is a hospital owned by governmental entities eligible for a PPP loan?

A hospital that is otherwise eligible to receive a PPP loan as a business concern or nonprofit organization (described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code) shall not be rendered ineligible for a PPP loan due to ownership by a state or local government if the hospital receives less than 50% of its funding from state or local government sources, exclusive of Medicaid.

The Administrator, in consultation with the Secretary, determined that this exception to the general ineligibility of government-owned entities, 13 CFR 120.110(j), is appropriate to effectuate the purposes of the CARES Act.

d. Part III.2.b. of the Third PPP Interim Final Rule (85 FR 21747, 21751) is revised to read as follows:

Are businesses that receive revenue from legal gaming eligible for a PPP Loan?

A business that is otherwise eligible for a PPP Loan is not rendered ineligible due to its receipt of legal gaming revenues, and 13 CFR 120.110(g) is inapplicable to PPP loans. Businesses that received illegal gaming revenue remain categorically ineligible. On further consideration, the Administrator, in consultation with the Secretary, believes this approach is more consistent with the policy aim of making PPP loans available to a broad segment of U.S. businesses.

3. Business Participation in Employee Stock Ownership Plans

Does participation in an employee stock ownership plan (ESOP) trigger application of the affiliation rules?

No. For purposes of the PPP, a business's participation in an ESOP (as defined in 15 U.S.C. 632(q)(6)) does not result in an affiliation between the business and the ESOP. The Administrator, in consultation with the Secretary, determined that this is appropriate given the nature of such plans. Under an ESOP, a business concern contributes its stock (or money to buy its stock or to pay off a loan that was used to buy stock) to the plan for the benefit of the company's employees. The plan maintains an account for each employee participating in the plan. Shares of stock vest over time before an employee is entitled to them. However, with an ESOP, an employee generally does not buy or hold the stock directly while still employed with the company. Instead, the employee generally receives the shares in his or her personal account only upon the cessation of employment with the company, including retirement, disability, death, or termination.

4. Eligibility of Businesses Presently Involved in Bankruptcy Proceedings

Will I be approved for a PPP loan if my business is in bankruptcy?

No. If the applicant or the owner of the applicant is the debtor in a bankruptcy proceeding, either at the time it submits the application or at any time before the loan is disbursed, the applicant is ineligible to receive a PPP loan. If the applicant or the owner of the applicant becomes the debtor in a bankruptcy proceeding after submitting a PPP application but before the loan is disbursed, it is the applicant's obligation to notify the lender and request cancellation of the application. Failure by the applicant to do so will be regarded as a use of PPP funds for unauthorized purposes.

The Administrator, in consultation with the Secretary, determined that providing PPP loans to debtors in bankruptcy would present an unacceptably high risk of an unauthorized use of funds or non-repayment of unforgiven loans. In addition, the Bankruptcy Code does not require any person to make a loan or a financial accommodation to a debtor in bankruptcy. The Borrower Application Form for PPP loans (SBA Form 2483), which reflects this restriction in the form of a borrower certification, is a loan program requirement. Lenders may rely on an applicant's representation concerning the applicant's or an owner of the applicant's involvement in a bankruptcy proceeding.

5. Limited Safe Harbor With Respect to Certification Concerning Need for PPP Loan Request

Consistent with section 1102 of the CARES Act, the Borrower Application Form requires PPP applicants to certify that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant."

Any borrower that applied for a PPP loan prior to the issuance of this regulation and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.

The Administrator, in consultation with the Secretary, determined that this safe harbor is necessary and appropriate ***23452** to ensure that borrowers promptly repay PPP loan funds that the borrower obtained based on a misunderstanding or misapplication of the required certification standard.

6. 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.

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.

[FR Doc. 2020-09098 Filed 4-27-20; 8:45 am]