



December 31, 2020

The Honorable Paul Ray
Administrator
Office of Information and Regulatory Affairs
The Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Dear Administrator Ray:

The Office of Advocacy at the U.S. Small Business Administration (SBA) is an independent office within SBA. Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. On August 13, 2020, OMB published a Guidance for Grants and Agreements in the Federal Register. Among other things, the guidance requires a small entity to obtain a number on the System for Award Management (SAM) to apply for a loan.

The Guidance for Grants and Agreements Is Not a Guidance

Preliminarily, the document that OMB published is not a guidance. Although the document is titled as a guidance, if made final it would revise regulations in the Code of Regulations. The D.C. Circuit Court distinguishes a substantive rule from an interpretive rule or guidance based on whether the statement has a binding effect. Since the guidance is clearly intended to have binding effect with regard to its new requirements, it is not a guidance. The process would have been less confusing if OMB had made clearer the difference between the guidance and the rules that are being revised.

OMB Should Grant SBA's Request for Exemption

In accordance with 2 CFR 25.110, an agency may either exempt an applicant or recipient from this requirement or request an exception from OMB on a case-by-case for a class of applicants or recipients. It is Advocacy's understanding that the Administrator of SBA has submitted a request pursuant to 2 CFR 25.110(d). That provision states that OMB may allow exceptions for classes of federal awards, applicants, and recipients subject to these requirements when exceptions are not prohibited by statute. SBA has made the request in order to allow for the rapid and efficient distribution of the additional Paycheck Protection Program (PPP) funds that were recently authorized by Congress.

Advocacy encourages OMB to grant SBA's request for an exception. The pandemic has devastated small entities and the funding is necessary for their survival. The goal of PPP is to provide small businesses

with funding as quickly as possible. Requiring lenders to have a SAM number to issue the funds will undermine that goal.

Although the guidance allows an agency to make a determination that there are exigent circumstances that prohibit the applicant from receiving a unique entity identifier and completing SAM registration prior to receiving a Federal award, the requirement is problematic. Even with the determination, the business must file for a SAM number within 30 days of the award date. In this instance, it is Advocacy's understanding that it is the lender that will have to file for the SAM number. If the lender does not comply with the requirement, the small business borrower's loan forgiveness may be compromised. As such, the small entity could possibly be punished for the lender's behavior.

Small entities have many challenges to overcome during this difficult time. They should not have to worry about suffering consequences for a lender's non-compliance. Granting SBA's request for an exception would address this problem.

OMB Should Exempt All SBA Disaster Programs from the SAM Requirement

Advocacy further asserts that OMB should exempt all of SBA's disaster programs from the SAM registration requirement. For disaster loans, SBA is a direct lender to small business owners and homeowners. Under the "guidance," an applicant would have to obtain a SAM number to participate in the SBA disaster program. The cost of filing the SAM application is \$597.

During a disaster, small entities have enough problems to overcome. They should not have to navigate the bureaucratic process of filling out multiple forms to obtain funding. Even if the SBA loan is made with the understanding that the applicant will register for SAM within 30 days, it could be burdensome to ask a small business that is trying to recover from the disaster to file additional paperwork. For example, in the event of a natural disaster like a hurricane, there may be problems with the infrastructure in the community that may prevent compliance with the requirement to register for SAM.

Moreover, there is something fundamentally wrong about asking someone to pay \$597 at a time where they may have lost almost everything. That same \$597 could be used towards the business. A business should not have to weigh whether it should pay a fee to obtain a loan or use the funds to take the necessary steps to reopen. Accordingly, Advocacy encourages OMB to exempt all SBA disaster loan programs from the requirement to register for SAM.

If you have any questions, please contact me. Thank you for your consideration.

Sincerely,



Major L. Clark, III
Acting Chief Counsel
Office of Advocacy
U.S. Small Business Administration