

November 13, 2023

Small Business Administration
409 Third St. SW
Washington, DC 20416

Re: SBA-2023-0013-0001—*Criminal Justice Reviews for the SBA Business Loan Programs and Surety Bond Guaranty Program*

Due Process Institute [and other organizations] appreciate this opportunity to submit comments regarding the Small Business Administration's (SBA) proposed rule, *Criminal Justice Reviews for the SBA Business Loan Programs and Surety Bond Guaranty Program*. Additionally, we applaud the SBA for its effort through this proposed rule to provide second chances for individuals who have had interactions with the criminal legal system.

Recent legislative efforts at the federal and state levels have brought a sea change in how we, as a society, view our criminal legal system. One of the most important aspects of these efforts has been the focus on recidivism reduction and second chance initiatives. More than 40 states provide some form of record-sealing or expungement for individuals convicted of at least misdemeanor offenses.¹ Thirty-seven states provide record-sealing or expungement for misdemeanors and at least some felonies.

We know that individuals who have been impacted by the criminal legal system have a better chance of success when they have access to employment. For example, a 2020 study that explored Michigan's expungement law found that the five-year recidivism rate, measured for reconviction, for beneficiaries of the law was 4.2 percent.² For those convicted of violent offenses, the recidivism rate was less than 1 percent.

Beneficiaries of Michigan's expungement law experienced greater economic success than compared to work training programs. The average annualized wage gain for female beneficiaries of the expungement was \$4,594 and \$4,295 for men. Those wage gains were far greater than wage gains experienced through working training programs, which saw average wage gains of \$832 for women and \$471 for men.

At the federal level, Congress passed the bipartisan Fair Chance Act in December 2019.³ The Fair Chance Act prohibits federal agencies and federal contractors from asking about a

¹ Collateral Consequences Resource Center, "50-State Comparison: Expungement, Sealing & Other Record Relief," October 2021, <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-judicial-expungement-sealing-and-set-aside/>.

² J.J. Prescott and Sonja B. Starr, "Expungement of Criminal Convictions: An Empirical Study," University of Michigan School of Law, 2020, <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=3167&context=articles>.

³ Pub.L. 116-92 (Division A, Title XI, Subtitle B, §§1121-1124)

prospective employee's criminal history. Inquiries into criminal history may be conducted only at the conditional job offer stage. The Office of Personnel Management issued a final rule related to the Fair Chance Act in early October 2023.⁴

SBA's approach to small business owners with criminal histories, to this point, has been mixed. After initially placing significant limitations on small business owners with criminal histories from the Paycheck Protection Program authorized under the Coronavirus Aid, Relief, and Economic Security (CARES) Act during a time of extreme economic duress,⁵ SBA and the Department of the Treasury, in June 2020, revised eligibility requirements to provide more small business owners with criminal histories relief during the global COVID-19 pandemic.⁶ The eligibility requirements were revised again in February 2021 to further expand eligibility to business owners with criminal histories.⁷

The Criminal Justice Reviews for the SBA Business Loan Programs and Surety Bond Guaranty Program Rule proposed by SBA is long overdue and will provide much-needed capital to small business owners who have been impacted by the criminal justice system.

Research published by the RAND Corporation found that roughly 4 percent of small business owners have a criminal record and 1.5 percent have a felony record.⁸ The initial restrictions published by SBA in April 2020 prohibited more than 140,000 small business owners with a criminal record from participating in the Paycheck Protection Program, impacting more than 212,000 businesses and more than 343,000 employees. Roughly 30 percent of affected small businesses were owned by a person of color. Revisions to the restrictions reduced the number of ineligible business owners with a criminal record to fewer than 18,000.

Although the revisions to the rules for the Paycheck Protection Program helped business owners with a criminal record access crucial funds to make payroll during an economically uncertain time, access to capital after the pandemic was still a hurdle to overcome for small business owners with a criminal record. The proposed rule takes a critical step toward providing that capital through the 7(a) Loan Program, the 504 Loan Program, the Disaster Loan Program, the Microloan Program, the Intermediary Loan Program (excluding the COVID Economic Injury Disaster Loan Program), and the Surety Bond Guarantee Program. In FY 2022, the programs provided nearly \$43 billion in capital to small businesses.⁹

⁴ 88 FR 60317

⁵ Nick Sibilla, "SBA Excludes Small Business Owners With Criminal Records From Relief Loans," *Forbes*, May 27, 2020, <https://www.forbes.com/sites/nicksibilla/2020/05/27/sba-excludes-small-business-owners-with-criminal-records-from-relief-loans>.

⁶ 85 FR 38301

⁷ 86 FR 13149

⁸ Shawn D. Bushway, Dulani Woods, Denis Agniel, and David M. Adamson, "Small Businesses, Criminal Histories, and the Paycheck Protection Program," RAND Corporation, 2021, https://www.rand.org/pubs/research_reports/RR1295-1.html.

⁹ Small Business Administration, "SBA Announces End-of-Year Capital Benchmarks Showing Historic Support for Small Businesses Under Administrator Guzman," December 14, 2022, <https://www.sba.gov/article/2022/dec/13/sba-announces-end-year-capital-benchmarks-showing-historic-support-small-businesses-under>.

The proposed rule eliminates existing criminal background requirements for SBA-backed loan and surety programs for small business owners. The only prohibition for access to SBA-backed loan and surety programs would be the incarceration status of the applicant, which would be subject to verification. An applicant who is incarcerated would not be eligible. Applicants would be reviewed for any connection to fraud related to pandemic programs or other federal programs.

The proposed rule does not prevent lenders of SBA-backed loans from conducting their own criminal history background checks of an applicant to determine the risk as long as lenders' procedures comply with existing law.

We applaud the SBA for proposing this rule to provide access to these loan and surety programs to small business owners who have a criminal record. Individuals who have completed the terms of their sentence and paid their debt to society should have the same access to federal programs like those provided by SBA that any other small business owner could receive. That is basic fairness that is missing in our country's approach to criminal justice.

We strongly support the proposed rule and look forward to future efforts from SBA that provide support for small business owners who have been impacted by the criminal justice system. Thank you for the consideration of our comment. Please reach out to jpve@idueprocess.org for any further needed feedback or as SBA looks for other ways to promote second chances.

Respectfully submitted,

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