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August 7, 2020

The Honorable Steven Mnuchin  
Secretary  
U.S. Treasury  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

The Honorable Jovita Carranza  
Administrator  
US Small Business Administration  
409 3<sup>rd</sup> Street, SW  
Washington, DC 20416

Re: Paycheck Protection Program Agent Fees

Dear Secretary Mnuchin and Administrator Carranza:

The Independent Community Bankers of America (ICBA)<sup>1</sup> would like to thank the Department of the Treasury and the U.S. Small Business Administration (SBA) for their tireless work to implement and administer the Paycheck Protection Program (PPP) on behalf of the thousands of community banks across the nation that have been able to bring emergency liquidity to small businesses and non-profit organizations in desperate need. History will show that your leadership in facilitating the origination and processing of PPP loans had an overwhelming impact on supporting the survival of small businesses amid the coronavirus pandemic. ICBA and its community bankers are appreciative of your efforts and look forward to working with you as the PPP evolves.

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<sup>1</sup> The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With more than 52,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 760,000 Americans and are the only physical banking presence in one in five U.S. counties. Holding more than \$4.9 trillion in assets, \$3.9 trillion in deposits, and \$3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at [www.icba.org](http://www.icba.org).

*The Nation's Voice for Community Banks.®*

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An issue of increasing concern in the PPP is the payment of agent fees to third parties as part of processing PPP loan applications. In April, 2020 SBA issued an interim final rule titled *Business Loan Program Temporary Changes; Paycheck Protection Program* describing some details of the PPP. This interim final rule indicates that agents assisting the borrower are to be paid from the lender fees received from the SBA. Agents are not to be paid by borrowers or from PPP loan proceeds. The SBA has also stated that an agent may collect a fee from the lender for assistance in preparing an application for a PPP loan (including referral to the lender), not to exceed specified limits.

However, the rules and guidance are unclear as to how the agency relationship between the lender and its agent is to be formed. Common law requires a prior express contractual relationship between the principal (i.e., the bank) and its agent before a formal agency relationship is created. ICBA requests that Treasury and the SBA confirm that this is the case for PPP agency arrangements—that an express prior contractual arrangement, identifying the services to be rendered and the amount of the fee to be paid, is required to establish agency between the lender and the agent for the agent to be entitled to compensation for its services. Indeed, Secretary Mnuchin alluded to this when answering a question during a June 30, 2020 hearing before the House Financial Services Committee, saying: “What our guidance did say is that banks could pay agent fees out of the fees that they received. That was intended to be based upon a contractual relationship between the agent and the bank. And to the extent that there is any confusion on that we will look into clarifying that.”

Unfortunately the lack of clarification regarding the need to enter into a formal agreement to set the responsibilities and compensation of the agent has caused third parties to demand fees from PPP lenders with no formal agreement in place under the view that they are entitled to a fee simply because they communicated with the borrower in some manner. Many times one or more parties to a PPP loan transaction are not aware of who the agent is because they have not been identified through any formal agreement. A growing number of lawsuits have been filed by would-be agents against PPP lenders claiming entitlement to agent fees.

ICBA requests that Treasury and SBA issue an interim final rule clarifying that the agency relationship, while permitted under the PPP, should follow a formal agreement executed between the agent and the lender that specifies who each party represents, what their respective duties are, and the amount of the agent’s fee. Such clarification will protect the legitimate interests of borrowers, lenders, and agents while ensuring that third parties with bad intentions do not unjustly take advantage of a sensitive situation for personal gain. Because bad actors in the PPP

are moving quickly to take advantage of borrowers, we request that you act immediately to protect borrowers and lenders as soon as reasonably possible.

Thank you for your attention to our concerns.

Sincerely,

/s/

Rebeca Romero Rainey  
President and CEO

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