EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

William Bookmyer, *et al.*,	:	Case No. 2:20-cv-02284
Plaintiffs,	:	Judge Edmond A. Sargus, Jr.
v.	:	Magistrate Judge Kimberly A. Jolson
PNC Bank, N.A., *et al.*,	:	
Defendants.	:	

<u>DEFENDANTS' JOINT MOTION TO DISMISS</u>

Pursuant to Federal Rule of Civil Procedure 12(b)(6), defendants PNC Bank, N.A., The Huntington National Bank, and Fifth Third Bank, N.A. respectfully move to dismiss Ppaintiffs' amended complaint with prejudice.

A memorandum of law supporting this motion follows. For judicial efficiency, defendants have combined their joint arguments in that memorandum.

Dated: June 16, 2020

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Plaintiffs,	:	Judge Edmond A. Sargus, Jr.
v.	:	Magistrate Judge Kimberly A. Jolson
PNC Bank, N.A., *et al.*,	:	
Defendants.	:	

DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF JOINT MOTION TO DISMISS

PRELIMINARY STATEMENT

This action concerns the Paycheck Protection Program ("PPP"), an emergency loan program created by the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116–136 (the "CARES Act"). The PPP provides assistance to small businesses that have been affected by the COVID-19 pandemic. To date, more than 4.5 million borrowers have received over $510 billion in emergency relief. U.S. Small Business Administration ("SBA"), *Paycheck Protection Program (PPP) Report* (June 12, 2020). The loans are processed and funded by private lenders, who receive a statutorily mandated processing fee from the government for each funded loan.

Plaintiffs are Ohio-based accountants who seek to divert "millions and perhaps billions" of dollars in statutory PPP fees from lenders to unknown third parties. Am. Compl. ¶ 52. On behalf of all "agents," they demand that lenders pay *every* person who even *claims* to have helped a borrower obtain a PPP loan—regardless of whether the "agent" had any kind of agreement with that lender. Plaintiffs' claim is based on a flawed reading of the CARES Act and on snippets of regulations that they never quote in full.[1]

The amended complaint must be dismissed for several reasons. First, although plaintiffs seek to recover under the CARES Act and the Small Business Act (which it amends), there is no private right of action under either statute. Plaintiffs concede as much, relying instead on a supposed implied cause of action for which they cite no statutory basis. No such right

[1] This action is one of several actions filed around the country making similar claims against different banks. In one such action, *Alliant CPA Grp., LLC* v. *Bank of Am. Corp.*, No. 1:20-cv-02026 (N.D. Ga. *filed* May 11, 2020), plaintiff's counsel has filed a petition pursuant to 28 U.S.C. § 1407 with the Judicial Panel on Multidistrict Litigation to consolidate all such actions in the Northern District of Georgia or, alternatively, the District of Arizona. Defendants here will be opposing that petition. Moreover, a separate plaintiff filed another similar action in the Western Division of this District. That action, captioned *Lowry, CPA, Ltd.* v. *U.S. Bancorp.*, No. 1:20-cv-00348 (S.D. Ohio *filed* Apr. 30, 2020), names PNC Bank, N.A., The Huntington National Bank, and Fifth Third Bank, N.A. (all defendants here), among others, and is currently pending before Judge McFarland. Defendants have also filed a motion to dismiss that action.

exists, as the only court to address the question held just days after the CARES Act was passed. And it has been settled for decades that the Small Business Act creates no private right of action—express or implied.

Second, even if Congress had created a private right of action, lenders have no duty to pay unauthorized agents under any statute, regulation, or at common law. The CARES Act and related regulations merely impose *limits* on the fees that agents may collect *if* there is an agreement with the lender to pay them. The regulations do not, and cannot, undo the clear statutory mandate that lenders, not agents, "shall" be paid set processing fees. Nothing in the statute or regulations requires lenders to pay *customers'* agents when the *lender* did not agree to pay them. On the contrary, existing SBA regulations *prohibit* any payment to agents absent a written agreement among the borrower, lender, and agent. Because plaintiffs do not allege any such agreement, payments to them are prohibited as a matter of law.

Finally, plaintiffs fail to establish either of their remaining claims for conversion or unjust enrichment. The common law requires, at a minimum, that a plaintiff demonstrate some right to the property at issue. Here, plaintiffs do not establish that lenders had knowledge of their alleged role in loan applications, much less that they agreed to pay plaintiffs for their services. To the extent plaintiffs created any value at all, those services were volunteered.

In short, unauthorized agents have no claim to the statutory fees that lenders are paid as part of the federal pandemic response. The amended complaint should be dismissed in its entirety.

STATEMENT OF FACTS

A. The Coronavirus Pandemic and the CARES Act

The CARES Act was enacted on March 27, 2020, just two weeks after the World Health Organization recognized the COVID-19 pandemic. The purpose of the new law was to provide "emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic." Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,811 (Apr. 15, 2020) ("First IFR").

As part of that relief, Congress established the PPP to provide emergency loans to small businesses. The PPP, like other loan programs for small businesses, was codified in Section 7(a) of the Small Business Act. Under the PPP, the SBA guarantees 100% of loans made by SBA-approved lenders to eligible borrowers. The SBA also reimburses lenders for the cost of making PPP loans by paying a mandatory loan-processing fee that depends on the size of the loan. *See* 15 U.S.C. § 636(a)(36)(P)(i); *see also* Am. Compl. ¶¶ 3–4. The statutory language is express: "The [SBA] *shall* reimburse a lender authorized to make a covered loan at a rate" set by the statute. 15 U.S.C. § 636(a)(36)(P)(i) (emphasis added). Indeed, plaintiffs concede that "[l]enders *are to be reimbursed* the [statutory] amounts per loan." Am. Compl. ¶ 5 (emphasis added).

In contrast, the CARES Act does not specify if, how, or by whom *agents* may be paid. The statute addresses agent fees in a single paragraph, entitled "FEE LIMITS." 15 U.S.C. § 636(a)(36)(P)(ii). That provision instructs that agents "may not collect a fee in excess of the limits established by the [SBA]," to the extent they may be paid at all. *Id.* Congress did not adjust any other terms applicable to agents under the Section 7(a) loan program or direct the SBA to do so.

B. The Regulatory Background

On April 2, 2020, hours before the PPP application window opened, the SBA issued the First IFR to provide guidance on the operation of the program. As directed by Congress, the SBA set clear limits on the "total amount that an agent *may* collect" for "assistance in preparing an application for a PPP loan." 85 Fed. Reg. 20,811, 20,816 (emphasis added).

Under the First IFR, total agent fees "may not exceed" (i) 1% for loans up to $350,000, (ii) 0.5% for loans of more than $350,000 and less than $2 million, and (iii) 0.25% for loans of at least $2 million. *Id.* The First IFR also provides that agent fees, to the extent they are paid at all, will be paid by the lender. *Id.*

Like the CARES Act, the First IFR does not state that lenders *must* pay any person who purports to be an agent of a customer. Rather, because the PPP is an extension of the Small Business Act's Section 7(a) Loan Guarantee Program, it is subject to all the "same terms, conditions, and processes" as other Section 7(a) loans—including with respect to agents—unless those terms, conditions, or processes are expressly abrogated by the CARES Act. 15 U.S.C. § 636(a)(36)(B); *see also* 85 Fed. Reg. 20,811, 20,812 (describing the PPP as a "new 7(a) program"). Existing SBA regulations *prohibit* any payment to agents absent a written "compensation agreement" among the borrower, lender, and agent. 13 C.F.R. § 103.5(a).

C. Plaintiffs Had No Reason to Believe They Would Be Paid Agent Fees.

Plaintiffs do not allege that any of the defendants in this action ever agreed to pay agent fees for PPP loans, much less that they would pay for unsolicited work performed by self-declared agents. In fact, shortly after the First IFR was issued, defendants began giving notice that they would *not* pay customers' agents in connection with PPP loans. For example, plaintiffs acknowledge that, in the first week of April, PNC Bank, N.A. "openly" stated that it would "not pay Agents for assistance they may provide an applicant in obtaining a PPP loan." Am. Compl. ¶¶ 10, 11."[2]

[2] Similarly, Bank of America stated that "[i]n the absence of a pre-loan approval written agreement between the agent and Bank of America, Bank of America does not pay fees or other compensation to agents who represent or assist borrowers." BANK OF AMERICA, *CARES Act Paycheck Protection Program Frequently Asked Questions*, https://about.bankofamerica.com/promo/assistance/faqs/small-business-paycheck-protection-program (last visited June 15, 2020). And The Huntington National Bank stated that it would "not pay fees to any firm claiming to be a

All of this is common knowledge in plaintiffs' field. Just days after the First IFR was published, the Association of International Certified Public Accountants ("AICPA") warned potential agents that neither the CARES Act nor the related guidance requires lenders to pay agent fees absent a written agreement with the lender: "CPAs should note, that even though the Treasury has outlined guidelines related to agency fees, there is a possibility that you will not be paid for your services." Ex. 1 (*Small Business Loans Under the Paycheck Protection Program: Issues Related to CPA Involvement* (2020)).[3] Accordingly, the AICPA recommended that potential agents "discuss this issue with clients and the banks to ensure there is an understanding, preferably in writing, as to how and when any fees will be paid." *Id.*

D. Plaintiffs Sue More Than 100 Lenders on Behalf of All Purported Agents.

On May 5, 2020, less than a month after lenders began funding emergency loans, plaintiff William Bookmyer filed this action against four named defendants (PNC Bank, N.A., The Huntington Bank, Fifth Third Bank, N.A., and CME Federal Credit Union) and 100 unnamed lenders. On June 4, Bookmyer filed an amended complaint adding Alex Boytan (and Boytan's firm) as named plaintiffs and naming eight additional defendants (Bank of America, N.A., Bluevine Capital Inc., Celtic Bank, JPMorgan Chase Bank, N.A., Kabbage, Inc., Radius Bank, TD Bank, N.A., and Telhio Credit Union).

The amended complaint seeks to recover "millions and perhaps billions" of dollars on behalf of all purported agents "who assist applicants in preparing their PPP loan." Am. Compl. ¶¶ 7, 72. Although plaintiffs' calculations are not entirely clear, the upper bound of

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borrower's agent." HUNTINGTON, *Commercial Banking Resources and Support for COVID-19,* https://www.huntington.com/coronavirus/ commercial-resources (last visited June 15, 2020).

[3] Submitted herewith is the Declaration of Anthony J. O'Malley. References to "Ex. 1" refer to the O'Malley Declaration. On a motion to dismiss, a court may take judicial notice of "reports published by industry or consumer organizations." *In re Frito-Lay N. Am., Inc. All Nat. Litig.*, No. 12-MD-2413, 2013 WL 4647512, at *4 (E.D.N.Y. Aug. 29, 2013); *see also In re Bear Stearns Cos., Inc. Sec., Derivative & ERISA Litig.*, 763 F. Supp. 2d 423, 582 (S.D.N.Y. 2011) (taking notice of industry reports).

their estimate appears to assume that every single loan issued by every single bank involved an agent, and that every single agent is entitled to the maximum fee allowed under the First IFR.

The rest of the amended complaint is similarly vague. Plaintiffs do not allege that they had an agreement with any lender, that they sought authorization from any lender, or that their actions were in fact authorized by any lender. In fact, they acknowledge that one defendant, CME Federal Credit Union, told Bookmyer directly that it had "not employed [Bookmyer's] firm as an agent and [did] not have an agreement for [Bookmyer's] services." *Id.* Ex. A at 1. Moreover, although plaintiffs claim that defendants "were aware" that plaintiffs were "conferring a benefit upon them," plaintiffs plead absolutely no facts in support of that conclusion. *Id.* ¶ 111.

The amended complaint is also very short on details about any actual work done. Plaintiffs allege that they "prepared and submitted" an unspecified number of loan applications on behalf of unidentified clients, that some of those applications were approved, that lenders did not pay plaintiffs' claimed fees, and that plaintiffs did not even request payment from defendant PNC Bank, N.A. *Id.* ¶¶ 38, 41, 54. Plaintiffs apparently believe that they may sue lenders, even where they did not "submit[] a request for payment," so long as their claimed fees (even those they did not communicate to any lender) were "simply not paid." *Id.* ¶¶ 75(c), 76(c).

Citing the "combined effect of the CARES Act and the [First IFR]," plaintiffs assert that lenders "unlawfully withheld" fees from so-called agents. *Id.* ¶¶ 7, 9. On that basis, plaintiffs purport to bring statutory claims for supposed violations of the CARES Act and the Small Business Act and claims for conversion and unjust enrichment under Ohio common law.

ARGUMENT

I. LEGAL STANDARD

"To survive a motion to dismiss, the complaint must present 'enough facts to state a claim to relief that is plausible on its face.'" *Total Benefits Planning Agency, Inc.* v. *Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 434 (6th Cir. 2008) (*quoting Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)). The Court "is not required . . . to accept as true mere legal conclusions unsupported by factual allegations." *King* v. *City of Columbus*, No. 2:18-cv-1060, 2019 WL 6352611, at *2 (S.D. Ohio Nov. 27, 2019) (Sargus, J.) (citing *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009)). Instead, a complaint's factual allegations "must be enough to raise a right to relief above the speculative level." *Id.* (quoting *Twombly*, 550 U.S. at 555).

II. PLAINTIFFS' STATUTORY CLAIMS MUST BE DISMISSED.

A. There Is No Private Right of Action under the CARES Act or the Small Business Act.

Plaintiffs claim that lenders violated the CARES Act and the Small Business Act by refusing to pay unauthorized, self-declared agents. Even if lenders had such an open-ended payment obligation (they do not, *see* Point II.B), plaintiffs' statutory claims must be dismissed because neither the CARES Act nor the Small Business Act creates a private right of action. Plaintiffs concede that neither law does so expressly. Instead, they attempt to conjure an *implied* cause of action purportedly "arising under" both statutes. Am. Compl. ¶¶ 89, 97. But as courts have repeatedly held, no such private right exists.

"[P]rivate rights of action to enforce federal law must be created by Congress." *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001). Where, as here, a plaintiff asserts only an implied right of action, it must identify specific "rights-creating language" that is "clear and unambiguous." *Ohlendorf* v. *United Food & Commercial Workers Int'l Union, Local 876*, 883

F.3d 636, 641 (6th Cir. 2018); *see also Stoneridge Inv. Partners, LLC* v. *Sci.-Atlanta*, 552 U.S. 148, 164 (2008) ("[I]t is settled that there is an implied cause of action only if the underlying statute can be interpreted to disclose the intent to create one."). As the Sixth Circuit has recognized, implied rights of action are "increasingly rare creature[s]" because plaintiffs must show that Congress "created a private right and provided for a private remedy, all without taking the conventional route of doing so expressly." *Ohlendorf*, 883 F.3d at 640.

Plaintiffs do not come close to pleading the required congressional intent. *See Stew Farm, Ltd.* v. *Nat. Res. Conservation Serv.*, 767 F.3d 554, 562 (6th Cir. 2014) ("[T]he burden is on [the plaintiff] to demonstrate that Congress intended to make a private remedy available") (citation omitted). They simply claim, citing no provision of any statute, that "[t]here is an implied cause of action arising under" the CARES Act and the Small Business Act. Am. Compl. ¶¶ 89, 97. Such bald assertions plainly are not enough. *See, e.g.*, *Howard* v. *Pierce*, 738 F.2d 722, 726 (6th Cir. 1984) (finding no implied cause of action "absent specific language" in the statute).[4]

In any event, there is no language in either the CARES Act or the Small Business Act that even arguably confers a private right of action. For decades, courts have consistently held that the Small Business Act, which the CARES Act amends in limited part, creates no private right—express or implied. *See, e.g.*, *Crandal* v. *Ball, Ball & Brosamer, Inc.*, 99 F.3d 907, 909 (9th Cir. 1996) ("[C]ircuits that have considered the question have unanimously agreed that the Small Business Act does not create a private right of action in individuals."); *Aardwoolf Corp.* v. *Nelson Capital Corp.*, 861 F.2d 46, 48 (2d Cir. 1988) ("[T]he Small Business Act does

[4] It is not clear whether plaintiffs also mean to assert a private right of action under the First IFR. But even if the regulation contained language purporting to creating such a right (it does not), an agency "may not create a right that Congress has not." *Sandoval*, 532 U.S. at 291. Language in a regulation may only "invoke a private right of action that Congress through statutory text created." *Id.*

not provide [plaintiff] with a private cause of action"); *Tectonics, Inc. of Fla.* v. *Castle Const. Co.*, 753 F.2d 957, 960 (11th Cir. 1985) ("[T]here was no intent [in the Small Business Act] to create civil rights of action in private persons") (quoting *Royal Servs., Inc.* v. *Maintenance, Inc.*, 361 F.2d 86, 92 (5th Cir. 1966)); *see also Hooven-Dayton Corp.* v. *Ctr. City Mesbic, Inc.*, 918 F. Supp. 193, 195 (S.D. Ohio 1996) ("[T]here exists no private right of action under the [Small Business Investment] Act").

Nothing in the CARES Act changes the analysis. Indeed, the only court to address whether the CARES Act creates a private right of action held that it does not. *See Profiles, Inc.* v. *Bank of Am. Corp.*, No. SAG-20-0894, 2020 WL 1849710, at *7 (D. Md. Apr. 13, 2020) ("The Court is not persuaded that the language of the CARES Act evidences the requisite congressional intent to create a private right of action."). If the CARES Act does not even grant a private right of action to small businesses, the statute's intended beneficiaries, it clearly does not confer a private right on purported agents. As noted, the only statutory provision that addresses such agents directs the SBA to set limits on their fees. *See* 15 U.S.C. § 636(a)(36)(P)(ii); *see also Care Choices HMO* v. *Engstrom*, 330 F.3d 786, 789 (6th Cir. 2003) ("[T]he statute does not confer any affirmative rights to reimbursement, much less contain an implied private right of action."). For that additional reason, plaintiffs' statutory claims must be dismissed.[5]

B. Agents Are Not Entitled to Fees under the CARES Act or Its Regulations.

Even if plaintiffs had a private right of action, their entire case rests on the baseless claim that PPP lenders "are required under the CARES Act and the [First IFR] to pay

[5] In addition, the Small Business Act, as modified by the CARES Act, contains a robust criminal and civil enforcement regime. *See, e.g.*, 15 U.S.C. §§ 645, 650. "The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Sandoval*, 532 U.S. at 290.

agents," even if those purported agents have no agreement with the lenders. Am. Compl. ¶ 63. Lenders have no such payment obligation. To hold otherwise would conflict with the unambiguous language of the CARES Act, PPP-related guidance, the broader regulatory scheme, settled common law, and the SBA's historical concerns about agent fraud.

1. The CARES Act Does Not Create an Entitlement to Agent Fees.

Although plaintiffs allege supposed "violations of the CARES Act," the statute's plain language bars their claims. *Id.* ¶ 14; *see Lamie* v. *United States Tr.*, 540 U.S. 526, 534 (2004) ("[W]hen the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms.") (citation omitted).

The CARES Act imposes a limit on agent fees; nothing more. Congress directed that "[a]n agent that assists an eligible recipient to prepare an application for a covered loan may not collect a fee in excess of the limits established by the [SBA] Administrator." 15 U.S.C. § 636(a)(36)(P)(ii). That provision—defining what an agent "may not collect" and directing the SBA to establish "limits"—is the statute's only reference to agent fees. Plainly, a restraint on agents cannot impose an affirmative duty on lenders. *See, e.g., Reasor* v. *Walmart Stores E., L.P.*, No. 3:19-CV-27-CRS, 2019 WL 5597302, at *3 (W.D. Ky. Oct. 30, 2019) (law that "*prohibits*" pharmacists from filling certain prescriptions "does not create an *affirmative* duty to fill" other prescriptions); *see also Sexton* v. *Panel Processing, Inc.*, 754 F.3d 332, 339 (6th Cir. 2014) ("When faced with 'clear language,' . . . a court may not 'conclude that what Congress omitted from the statute is nevertheless within its scope.'") (citation omitted).

Citing nothing, plaintiffs contend that the CARES Act "specifically provided that agents will obtain fees for assisting small businesses." Am. Compl. ¶ 65. But the statute does not even suggest such an entitlement, much less "specifically provide" for one. By contrast, as plaintiffs concede, Congress *did* provide that "the [SBA] Administrator . . . 'shall reimburse a *lender*'" at set rates. Am. Compl. ¶ 4 (emphasis added); *see* 15 U.S.C. § 636(a)(36)(P)(i). There is a stark and purposeful difference in the statutory language concerning lenders and agents: the SBA "*shall* reimburse" lender fees, but agents "*may not* collect" fees in excess of limits set by the SBA. Where "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *U.S.*, 464 U.S. 16, 23 (1983). In short, the CARES Act does not create an entitlement to fees for any agent who claims to have assisted a PPP borrower. The amended complaint should be dismissed for that reason alone.

2. The PPP Regulations Do Not Create an Entitlement to Agent Fees.

Plaintiffs also claim that the First IFR dictates "the total amount that an agent *shall* receive from the Lender." Am. Compl. ¶ 8 (emphasis added). Not so. What the IFR actually does, in language conspicuously absent from the amended complaint, is impose caps on the "total amount that an agent *may* collect." 85 Fed. Reg. 20,811, 20,816 (emphasis added). In addition, to ensure that agent fees would not deplete the emergency funds that Congress intended for borrowers, the SBA directed that "[a]gent fees will be paid by the lender out of the fees the lender receives from the SBA" and that "[a]gents may not collect fees from the borrower or be paid out of the PPP loan proceeds." *Id.*

Nothing in the PPP regulations requires lenders to pay agent fees that they did not authorize. Indeed, any contrary reading would run afoul of the statute, which, as noted, mandates that lenders "shall" be reimbursed in the form of stated processing fees, while agents "may not" be paid certain amounts. It is, of course, bedrock administrative law that regulations cannot "conflict[] with the enabling statute." *Hachem* v. *Holder*, 656 F.3d 430, 438 (6th Cir.

2011); *see also Lyng* v. *Payne*, 476 U.S. 926, 937 (1986) ("[A]n agency's power is no greater than that delegated to it by Congress.").[6]

3. Other SBA Regulations Confirm There Is No Entitlement to Agent Fees.

Under the CARES Act, the PPP is governed by "the same terms, conditions, and processes" as other Section 7(a) programs, except where the statute directs otherwise. 15 U.S.C. § 636(a)(36)(B); *see also* 85 Fed. Reg. 20,811, 20,815 (PPP regulations supersede only "conflicting" Section 7(a) program requirements). The broader regulatory scheme imposes substantial checks on the role of "agents," including the circumstances under which an agent may be paid. The PPP-related guidance creates *additional* limits—it does not remove them and certainly does not mandate an unchecked transfer of compensation from lenders (who incurred significant expense to make the PPP loans on an expedited basis) to purported agents.

Plaintiffs' argument directly conflicts with this governing regulatory scheme. The SBA does not require borrowers or lenders to use agents in connection with Section 7(a) loans. *See* 13 C.F.R. § 103.2(a) (borrowers and lenders may "conduct business with SBA without a representative"). But if agents are used, SBA regulations are clear that lenders, agents, and applicants must execute written agreements to govern agent compensation. *See* 13 C.F.R. § 103.5(a) ("Any Applicant, Agent, or Packager must execute and provide to SBA a compensation agreement, and any Lender Service Provider must execute and provide to SBA a Lender Service Provider agreement. Each agreement governs the compensation charged for services rendered or to be rendered to the Applicant or lender in any matter involving SBA assistance."). Nothing in the CARES Act or rules governing the PPP abrogates this requirement,

[6] Plaintiffs also cite an "Information Sheet" issued by the Department of the Treasury. Am. Compl. ¶ 59 & Ex. B. The Information Sheet merely paraphrases the statute and regulations which do not mandate the payment of agent fees.

and plaintiffs make no claim that any written agreements were ever executed to govern the compensation they now demand. Indeed, plaintiffs do not allege any agreement with any lender or, for that matter, with their purported clients.

Requiring lenders to pay unidentified agents for unauthorized and unverified work would read this basic check out of existence and invite fraud and abuse. The SBA has recently identified a "pattern of fraud by loan packagers and other for-fee agents in the 7(a) Loan Program, involving hundreds of millions of dollars." U.S. SMALL BUS. ADMIN., Off. of the Inspector Gen., *Report on the Most Serious Management and Performance Challenges Facing the Small Business Administration in Fiscal Year 2019*, at 8, 9 (Oct. 11, 2018).[7] And the reason the SBA requires a written compensation agreement is to prevent "agents" and "loan packagers" from "charging inappropriate or unreasonable fees to applicants or lenders." Immediate Disaster Assistance Program, 75 Fed. Reg. 60,588, 60,594 (Oct. 1, 2010); *see also* SBA, Lender and Development Company Loan Programs, Standard Operating Procedures (SOP) 50 10 5(K), Subpart B, Ch. 3 at 170 (2019).[8]

Given heightened legislative and regulatory interest in preventing fraud and abuse under the PPP, it would defy common sense to require lenders to pay agents who have no written agreement governing their fees. Plaintiffs' demand for relief here—demanding the maximum fee allowed despite conceding there was no meeting of the minds to pay a fee, much less a specified amount—illustrates the type of abuse that a written compensation agreement is intended to prevent. And there is nothing that would prohibit multiple purported agents from claiming fees for work purportedly performed on behalf of a single borrower.

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[7] *Available at* https://www.sba.gov/sites/default/files/2019-08/SBA-OIG-Report-19-012.pdf.
[8] *Available at* https://www.sba.gov/document/sop-50-10-5-lender-development-company-loan-programs.

4. The Common Law Confirms There Is No Entitlement to Agent Fees.

Mandating payment of claimed agent fees would also upend settled common law. By requiring a written agreement, the SBA makes agent compensation a question of contract. It is well-established that "[t]here can be no contract without the mutual assent of the parties." *Utley* v. *Donaldson*, 94 U.S. 29, 47 (1876); *see also* Restatement (Second) of Contracts § 17 ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration."). The agreement is what creates the payment obligation: "it is inferred that a person promises to pay for services *which he requests or permits another to perform for him* as his agent." Restatement (Second) of Agency § 441 (emphasis added).

By contrast, "one has no duty to pay for services officiously rendered without request although resulting in benefit to him." *Id.*; *accord* Restatement (First) of Restitution § 2. "A person is not required to deal with another unless he so desires." Restatement (First) of Restitution § 2(a). And, "ordinarily, a person should not be required to become an obligor unless he so desires." *Id.*

The SBA's pre-existing regulations reflect these common law principles. The SBA generally recognizes three kinds of agents: (i) lender service providers, who work for and are paid by the lender; (ii) "[p]ackagers," who are "employed and compensated by the Applicant"; and (iii) referral agents, who "may be employed and compensated by either the Applicant or the SBA Lender." 13 C.F.R. § 103.1.[9] In each case, the payor requests or agrees to the agent's services. The amended complaint does not identify any SBA regulation to the contrary.

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[9] The CARES Act rescinded certain amendments to 13 C.F.R. § 103.1. *See* Pub. L. 116–136, § 1102(e). Accordingly, the controlling version of that regulation is the version effective prior to March 11, 2020.

The CARES Act does not displace these common law rules. The Supreme Court has required that "[i]n order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *United States* v. *Texas*, 507 U.S. 529, 534 (1993) (citation omitted). Even then, courts "construe statutes in derogation of the common law strictly and narrowly." *Portalatin* v. *Blatt, Hasenmiller, Leibsker & Moore, LLC*, 900 F.3d 377, 385 (7th Cir. 2018). Plaintiffs do not quote any statutory language that "speaks directly" to common law rules. Nor could they. The statute simply directs the SBA to establish "limits" on agent fees. 15 U.S.C. § 636(a)(36)(P)(ii). And the regulations, for their part, merely provide that PPP agents will be paid, if at all, by lenders.

In short, in recognition of these common law (and common sense) principles, the statute and regulations leave it to the lender and the agent to agree as to whether a fee will be paid and, if so, what that fee will be (subject to the regulatory cap). The amended complaint ignores these governing principles by demanding potentially billions of dollars without any such agreement. Plaintiffs' claims thus fail as a matter of law and must be dismissed.

III. PLAINTIFFS' COMMON-LAW CLAIMS MUST BE DISMISSED.

A. Plaintiffs Fail to Plead Conversion.

Plaintiffs' conversion claim fails because they cannot establish a legal entitlement to agent fees from any defendant. Under Ohio law, the "elements of a conversion cause of action are (1) plaintiff's ownership or right to possession of the property at the time of the conversion; (2) defendant's conversion by a wrongful act or disposition of plaintiff's property rights; and (3) damages." *Lee* v. *Ohio Educ. Ass'n*, 951 F.3d 386, 393 (6th Cir. 2020). As detailed above, plaintiffs have no right to compensation in connection with PPP loans, absent an agreement with a lender. Because they do not allege any such agreement, their conversion claim must be dismissed.

Moreover, "[i]n Ohio, as in most jurisdictions, the standard for proving conversion of money is an exacting one." *In re McWeeney*, 255 B.R. 3, 5 (Bankr. S.D. Ohio 2000). "A claim for conversion will lie ***only when the money at issue is 'earmarked' or is . . . capable of identification***, e.g., money in a bag, coins or notes that have been entrusted to defendant's care, or funds that have been otherwise sequestered, ***and where there is an obligation to keep intact and deliver this specific money rather than merely deliver a certain sum.***" *Smith* v. *Boston Mut. Life Ins. Co.*, No. C-12-668, 2013 WL 3148719, at *3 (Ohio Ct. App. June 19, 2013) (emphasis added) (internal quotation marks omitted) (citation omitted); *see also Haul Transp. of Va., Inc.* v. *Morgan*, No. 14859, 1995 WL 328995, at *4 (Ohio Ct. App. June 2, 1995) (finding no conversion as a matter of law when defending party was not required by agreement to return specific funds and, instead, could fulfill its obligations by paying a sum certain of money generally).

Plaintiffs fail to allege any facts to satisfy the "exacting" standard necessary to assert a claim for conversion of money. Even if defendants were obligated to pay plaintiffs (they are not), plaintiffs do not—because they cannot—allege that the money they are purportedly owed is "earmarked" or otherwise "capable of identification." At most, plaintiffs could receive an undetermined sum, which is insufficient to state a conversion claim.

B. Plaintiffs Fail To Plead Unjust Enrichment.

The only remaining claim is for unjust enrichment under Ohio law. Unjust enrichment occurs when a person "has and retains money or benefits which in justice and equity belong to another." *Johnson* v. *Microsoft Corp.*, 834 N.E.2d 791, 799 (Ohio 2005). Plaintiffs therefore cannot establish an unjust enrichment claim unless they allege: "(1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment." *Id.* The amended complaint does not meet this standard.

Plaintiffs do not allege any facts that would establish that any defendant was aware of their work or knowingly acquired any benefit from it. They assert (without any factual support) that "Defendants were aware" that plaintiffs were "conferring a benefit upon them." Am. Compl. ¶ 111. But that is precisely the kind of "formulaic recitation of the elements of a cause of action" that "will not do" under Rule 8(a)(2). *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Plaintiffs plead no "factual content that allows the court to draw the reasonable inference" that defendants *had any idea* what they were doing. *Id.*; *see Ohio Edison Co.* v. *Direct Energy Bus., LLC*, No. 5:17-cv-746, 2017 WL 3174347, at *4 (N.D. Ohio July 26, 2017) (dismissing unjust enrichment claim where plaintiffs baldly alleged that defendant "knew that it was obliged to pay"). Indeed, the only alleged communications between plaintiffs and lenders took place after the purported work was done. Am. Compl. ¶¶ 40–43, 51–52; *see In re Gregg*, 409 B.R. 464, 467 (Bankr. S.D. Ohio 2009) (no unjust enrichment where defendants were not aware of plaintiff's conduct "at the time that [plaintiff] was . . . conferring the benefit").

Likewise, any benefit conferred by plaintiffs was to their alleged clients, not defendants, which is insufficient to state a unjust enrichment claim under Ohio law. *See, e.g.*, *Three-C Body Shops, Inc.* v. *Nationwide Mut. Fire Ins. Co.*, 81 N.E.3d 499, 506 (Ohio Ct. App. April 20, 2017) (holding that a benefit to a third party was too indirect to constitute a "benefit conferred" on the defendant); *LIZard Apparel & Promotions, LLC* v. *Impact Design, LLC*, No. 3:16-cv-238, 2017 WL 2061404, at *5 (S.D. Ohio May 11, 2017) ("Plaintiffs cite to no caselaw suggesting that this indirect benefit can form the basis for an unjust enrichment claim").

For example, in *Three-C Body Shops*, the plaintiff body shop argued that it "properly pled a claim for unjust enrichment when it alleged that it had conferred a benefit on [the defendant insurer] by performing repair work that restored the [insured customer's] vehicle to its pre-accident condition, as such repairs fulfilled [the defendant's] obligation to its insured to restore and insure the vehicle." 81 N.E.3d at 506. The court rejected the claim because the plaintiff body shop had conferred no direct benefit on the defendant insurer. *See id.* at 507.

The same is true here. Plaintiffs allege that they "assisted each of [their clients] in gathering and analyzing documents, making the necessary calculations, and preparing and submitting [PPP] applications." Am. Compl. ¶¶ 46, 55. As in *Three-C Body Shops*, plaintiffs base their unjust enrichment claim against defendants on the alleged benefit they conferred on their clients. *See* Am. Compl. ¶¶ 110. This alleged indirect benefit is insufficient as matter of law, and plaintiffs' unjust enrichment claim should be dismissed.

There is also nothing "unjust" about defendants' retention of a potential benefit here. That standard is exacting: plaintiffs must "show that under the circumstances they have a superior equity so that as against them it would be *unconscionable* for the defendants to retain the benefit." *Liberty Mut. Ins. Co.* v. *Three-C Body Shop, Inc.*, No. 19-AP-775, 2020 WL 2042916, at *2 (Ohio Ct. App. Apr. 28, 2020) (emphasis added). The amended complaint does not meet that high bar.

As noted, plaintiffs are not entitled to fees under the CARES Act or the SBA regulations, and they knew or should have known that before performing any work. Although plaintiffs claim that they and other agents "assist[ed] applicants in preparing their PPP loan," they do not allege that anyone promised to pay for their services. Am. Compl. ¶ 7. Where, as here, plaintiffs "volunteer to do something without some kind of an agreement as to who's going to do what and who's going to pay," those plaintiffs have "made a gift of" their services. *HAD Enters.* v. *Galloway*, 948 N.E.2d 473, 480 (2011). "Restitution is the remedy for the unjust enrichment of one party at the expense of another," *Barrow* v. *Village of New Miami*, 104 N.E.3d 814, 818 (Ohio Ct. App. 2018), and "one who officiously confers a benefit upon another is not entitled to restitution," *Props. Dev., Ltd.* v. *Sto-Kent Lanes, Inc.*, No. 17059, 1995 WL 314679, at *3 (Ohio Ct. App. May 24, 1995) (citing *Wendover Rd. Prop. Owners Ass'n* v. *Kornicks*, 502 N.E.2d 226, 220 (Ohio Ct. App. 1985)); *see also* Restatement (First) of Restitution § 2.

In any event, it is not "unconscionable" for defendants to refuse to pay fees that they said they would not pay or never agreed to pay (and that are statutorily due to them). For example, as plaintiffs acknowledge, PNC "openly" stated in no uncertain terms that it "will not pay" PPP agent fees. Am. Compl. ¶ 10. And plaintiffs, as certified public accountants, should have been aware of the AICPA's advice that potential agents "discuss this issue with clients and the banks to ensure there is an understanding, preferably in writing, as to how and when any fees will be paid." Ex. 1. Plaintiffs apparently did not heed these warnings and chose to perform anyway.[10] Thus, even if defendants "enjoyed a windfall," the unjust enrichment claim fails because defendants expressly "did not consent." *Wendover*, 502 N.E.2d at 230–31.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court dismiss the amended complaint with prejudice under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

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[10] Indeed, because plaintiffs' purported injuries were self-inflicted, there are serious questions about plaintiffs' standing to bring any claims at all. *See, e.g.*, *Buchholz* v. *Meyer Njus Tanick, PA*, 946 F.3d 855, 866 (6th Cir. 2020) (dismissing complaint for lack of standing because a "self-inflicted injury, by definition, is not traceable to anyone but the plaintiff").

Dated: June 16, 2020

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 16th day of June, 2020 a true and accurate copy of the foregoing Joint Motion to Dismiss was sent to counsel of record via the Court's ECF system.

/s/ Angelyne E. Lisinski
Angelyne E. Lisinski (0089699)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

William Bookmyer, *et al.*,	:	Case No. 2:20-cv-02284
Plaintiffs,	:	Judge Edmond A. Sargus, Jr.
v.	:	Magistrate Judge Kimberly A. Jolson
PNC Bank, N.A., *et al.*,	:	
Defendants.	:	

DECLARATION OF ANTHONY J. O'MALLEY IN SUPPORT OF DEFENDANTS' JOINT MOTION TO DISMISS

I, ANTHONY J. O'MALLEY, declare under the penalty of perjury and state as follows:

1. I am a partner at the law firm Vorys, Sater, Seymour and Pease, LLP and am counsel for defendant PNC Bank, N.A. ("PNC") in the above-captioned matter. I am over the age of eighteen, have personal knowledge of the facts set forth herein, and if called as a witness under oath, I could and would competently testify thereto. I submit this Declaration in support of Defendants' Joint Motion to Dismiss.

2. I attach to this Declaration a true and accurate copy of a document referenced in Defendants' Joint Motion to Dismiss.

3. Specifically, attached hereto as Exhibit 1 is a true and accurate copy of the April 22, 2020 Special Report published by American Institute of Certified Public Accountants ("AICPA") entitled, *Small Business Loans Under the Paycheck Protection Program: Issues Related to CPA Involvement*.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on this 16th day of June, 2020 in Cleveland, Ohio.

/s/ Anthony J. O'Malley
Anthony J. O'Malley

EXHIBIT 1

AICPA

Special Report
April 22, 2020

Center for Plain English Accounting

AICPA's National A&A Resource Center

Small Business Loans Under the Payroll Protection Program
Issues Related to CPA Involvement

By: Kristy Illuzzi and Jim Brackens

The CPEA has received several questions regarding CPAs assisting clients with applications, including working as Agents under the definition of the CARES Act and the Paycheck Protection Program (PPP), which provides forgivable loans to help small businesses cover fees including payroll, mortgage expenses, rent, and utilities.

We know there is frustration around providing services to small business clients as they apply for PPP loans being issued through the Small Business Administration (SBA). The AICPA's Private Companies Practice Section (PCPS) has been adding developments daily to their webpages, but we wanted to cover some of the more commonly asked questions and complexities that we have been hearing from members, including those related to acting as agents and whether performing certain services in association with these PPP loans would violate independence, create a conflict of interest, or result in receipt of a contingent fee.

First Things First: See the Bigger Picture and Advise Clients

Before we begin with the common issues surrounding the PPP loans, we want to offer this counsel to our members:

As clients deal with a cauldron of pandemic-imposed problems and uncertainties, and as they attempt to navigate a sea of government relief programs, CPAs must act as a trusted source of advice and guidance. Providing advice and guidance during challenging times is nothing new for CPAs. Businesses and organizations have deep relationships with their CPAs and normally look to them for assistance and reassurance. CPAs should step back and consider the best course of action for each client. Not every relief program or every course to maneuver through the arduous effects of the pandemic will fit every client. CPAs should take a thoughtful approach in helping each client find the financial assistance, loan and tax credit relief programs, and other solutions that make the most sense for each client's unique circumstances. We encourage CPAs to provide these advisory services which are deemed to be outside the scope of loan processing application assistance as referred to within this report.

<u>Acting as Agents and Agent Fees</u>

One of the hottest topics related to these PPP loans is exactly what is intended by the term "agent" as used on the loan application. According to a Q&A document issued by the Treasury, an agent is an authorized representative and can be:

- An attorney
- An accountant
- A consultant
- Someone who prepares an applicant's application for financial assistance and is employed and compensated by the applicant
- Someone who assists a lender with originating, disbursing, servicing, liquidating, or litigating SBA loans
- A loan broker
- Any other individual or entity representing an applicant by conducting business with the SBA

There has been a lot of confusion as to whether CPA firms can act as agents for attest clients, and what acting as agents really entail. One of the key issues points to the fact that the Treasury defines an agent as an "authorized representative," which could imply that an agent is taking on a level of management responsibility.

There has been much discussion about whether acting as an agent for purposes of PPP loans was intended to meet a legal definition of agent (acting on behalf of another) or was meant to be a broader definition that would scope in CPAs providing nonattest services to clients. The AICPA ethics division has been carefully monitoring developments and continues to answer questions, and the Professional Ethics Executive Committee (PEEC) was recently asked to weigh in on the issue from an independence perspective.

As posted in an update on April 13, 2020, the AICPA made the following statement (in part):

> "While the AICPA understands that a fee paid by a lender is referred to as an 'agent fee', we don't believe this should be an impediment to allowing CPAs to fulfill the intent of the CARES Act. Rather, the AICPA's Professional Ethics Executive Committee (PEEC) believes members may advise and assist their attest clients in understanding the information required to be submitted and in the determination of amounts to be included on the application, provided the member does not

prepare or sign the application form itself or perform other management responsibilities on behalf of the applicant."

Practice Note: CPAs should note, that even though the Treasury has outlined guidelines related to agency fees, there is a possibility that you will not be paid for your services, even when noting you are an agent to the application. Every bank seems to understand the rules regarding agents and fees a bit differently, and some are agreeing to pay CPAs for assisting while others are not agreeing to pay CPAs for assisting. It is important to discuss this issue with clients and the banks to ensure there is an understanding, preferably in writing, as to how and when any fees will be paid.

It is our understanding that many firms do not intend to charge clients for the PPP application process for several reasons:

- It is in the firm's interest that clients weather the economic crisis caused by the pandemic. Helping clients get any assistance possible will strengthen long-term relationship with clients.
- The application itself is fairly straight forward and can be completed by the small business. The only challenge is determining the average monthly payroll cost.
- Average payroll costs can easily be derived by any third-party payroll provider, plus any benefits the small business pays that comes from the general ledger. Payroll companies are not charging customers for this work.
- The PPP asks for a self-certification from the business and <u>not</u> any type of certification from the CPA, as may be the case in other loan packages. CPAs should not be providing any certification, as it isn't required according to the guidelines.

CPEA Observation: An additional complication is whether banks, in agreeing to pay CPAs for services, infer that CPAs are taking on certain client representations that could result in placing CPAs at risk. Some banks are agreeing to pay CPAs without requiring them to sign as authorized representatives (i.e., agents under the Code of Federal Regulations definition). However, it's possible those banks may assume CPAs are taking on certain client representations. The AICPA is working with the SBA, the American Bankers Association, and other key stakeholders to clarify this issue. However, in the interim, CPAs could be putting themselves at risk as some banks could make an assumption that paying CPA firms agent fees means they are acting as "authorized agents" or "authorized representatives" of attest clients. CPAs are encouraged to consult with professional liability carriers or legal counsel to understand any legal implications.

<u>Contingent Fee Question Clarified</u>

Some have asked whether fees set by Treasury to be paid to agents could be considered contingency fees under ET section 302 of the AICPA's Code of Professional Conduct. As a refresher, paragraph .01 of ET section 302 indicates the following:

> "A contingent fee is a fee established for the performance of any service pursuant to an arrangement in which no fee will be charged unless a specified finding or result is attained, or in which the amount of the fee is otherwise dependent upon the finding or result of such service. Solely for purposes of this rule, fees are not regarded as being contingent if fixed by courts or other public authorities, or, in tax matters, if determined based on the results of judicial proceedings or the findings of governmental agencies."

The AICPA made a statement on April 13, 2020, that they believe, considering substance over form, the fee paid by lenders is *not* a contingent fee. The amount of the loan is an objective mathematical calculation (based on payroll) with the amount of the fee set by the CARES Act. In addition, it is Congress' intent that all loans will be funded, so there is no need for any advocacy by anyone assisting the attest client to convince the lender to make the loan.

CPEA Observation: While the AICPA has indicated they do not believe the fee paid by lenders would be considered a contingent fee, some state boards of accountancy could believe otherwise. We encourage CPAs to check with state boards before agreeing to accept agent fees to ensure there is agreement with the AICPA position.

<u>Additional Independence Considerations</u>

As noted earlier, CPAs may advise and assist attest clients in gathering information for the attest clients to prepare and submit loan applications to lenders without impairing independence. Additionally, if lenders pay CPAs "agent fees" for those services, CPAs are not, simply by nature of receiving fees, agents – nor does receipt of these fees constitute contingent fees.

PEEC believes that, simply advising or assisting attest clients in understanding the information gathering and lending application process under the PPP, even if "agent fees" are paid by lenders, would not constitute performing management responsibilities for purposes of applying the AICPA Code of Professional Conduct if CPAs do not in fact assume management responsibilities. In other words, assisting attest clients with COVID-19 PPP loan applications is a nonattest service. If CPAs comply with the interpretations of the <u>Nonattest Services</u> subtopic, independence will not be impaired.

Special Considerations Related to Assisting Attest Clients

As noted earlier, for attest clients, we suggest not signing as authorized representatives on PPP loan applications. Also, make no certifications as to the information the small business is providing with the application (this is covered in more detail in the “Other Requests of CPAs” section of this report). However, advising clients is totally appropriate, and we encourage it.

For opportunities to receive “agent fees” from banks for performing nonattest services related to client loan applications, we suggest considering contacting lenders before embarking on engagements and getting a written agreement related to the fees. There should be a conflict waiver in the agreement with the lender, just like there is in the loan assistance engagement letter with the client. Disclose these arrangements with clients as well.

The majority of the certifications and authorizations contained in the “Representations, Authorizations and Certifications” section of the PPP loan application are management responsibilities; the signature required on page 2 of the application should be made by the company applying for the loan or its authorized representative.

As noted earlier, signing as a client’s authorized representative will impair independence because ability to exercise authority on behalf of a client has been accepted. This is a management responsibility.

Special Considerations Related to Nonattest Clients

For situations where CPAs choose to act as authorized representatives and receive agent fees from banks for nonattest clients, we suggest considering the following:

- Contact lenders before embarking on engagements and get written agreements related to the fees. There should be a conflict waiver in the agreement with the lender, just like there is in the loan assistance engagement letter with the client. Disclose these arrangements with clients as well.
- Generally, firms do not sign client loan applications. In instances where firms sign these applications, hold harmless/indemnification agreements from the clients related to client-provided information should be obtained, and should indicate the firm is not making or joining the client in making any of the client’s certifications in the application. Many professional liability insurance carriers have examples of this language.
- Whether clients later may ask for attest services to be performed in conjunction with these PPP loans. See the practice note in the “Loan Reporting Considerations” section for additional information.

Practice Note: Before signing PPP loan applications for nonattest clients, firms may want to consult with professional liability carriers or legal counsel to understand any legal implications there might be for signing these applications. Some professional liability insurance carriers have even developed sample engagement letters related to these services that include indemnification clauses.

CPA Firms Applying for PPP Loans

It should be noted that CPA firms may be eligible to apply for PPP loans if all of the SBA requirements are met, whereby a CPA might be preparing and signing the loan application on behalf of the firm. As long as the bank is not an attest client of the firm, this would not result in an independence violation under the Code of Professional Conduct.

Other Requests of CPAs

A small number of banks are requesting some form of third-party verification related to the PPP loan applications when CPAs are involved. In circumstances where PPP lenders request this type of service of CPAs, reference should be made to the AICPA's *Third-Party Verification Toolkit for CPAs*.

Loan Forgiveness Considerations

Additional guidance is expected to be provided by Treasury to correctly determine the information required to substantiate that funds dispersed under these PPP loans were used in accordance with the SBA guidelines.

It is possible that entities will engage CPA firms to assist on the back end with the application for loan forgiveness as well, especially in cases where the CPAs assisted in some way with the initial application.

It could be that clients simply would engage CPAs to perform nonattest services, similar to how many of the loan applications are being done. However, when nonattest services are performed for attest clients (for example, an audit client), CPAs would need to follow Section 1.295, of the AICPA Code of Professional Conduct to not impair independence for purposes of attest engagements. If CPAs are not engaged to perform nonattest services, another option for service to attest clients would be to perform Agreed Upon Procedures (AUP) engagements in accordance with AT-C section 215.

For audits of financial statements for periods during which PPP loan transactions occurred, it goes without saying that those transactions should be audited and the auditor's risk assessment may likely identify heightened fraud risk in this area.

Practice Note: One thing to consider when performing services in association with loan applications is whether clients would expect any attest services on the back end when reporting to the bank. CPAs should be aware, if they choose to perform certain services related to these loan applications that would impair independence, they would not be permitted to perform any attest services on the back end with regard to reporting on how the loan proceeds were spent and whether that spending was in accordance with the SBA guidelines.

Conclusion and Additional Resources

The CPEA will continue to monitor issues and questions related to the A&A impacts of COVID-19 and stand ready to issue additional guidance as new developments arise. The AICPA also has a Coronavirus Resource Center to keep the profession up-to-date on this issue, including information on business continuation, economic impact, workforce issues and other resources to help members serve their clients. View a list of all available resources.

As always, the CPEA technical inquiry service is available for all CPEA members to answer inquiries on this topic as well as most other accounting and assurance topics. The inquiry service can be accessed on our website. For non-CPEA members, call the AICPA technical hotline at 1-888-777-7077. Questions related to auditor independence (which certainly could arise in the current environment) should be directed to the AICPA Ethics Hotline at **1-888-777-7077** (select option 2, then 3) or ethics@aicpa.org. CPEA refers all independence questions to the independence hotline.

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