AMERICAN BANKRUPTCY INSTITUTE

Southeast Bankruptcy Workshop 2021

Fast, but Not So Fast: Recent Developments in PPP Loans and the CARES Act

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CONCURRENT SESSION

2021

Fast, but Not So Fast: Recent Developments in PPP Loans and the CARES Act

American Bankruptcy Institute
2021 Southeast Regional Workshop
West Palm Beach, FL
July 29-August 1, 2021

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United States Bankruptcy Court
District of Maine

Paycheck Protection Program

- Established March 2020 in the CARES Act –$349 billion toward job retention and certain other expenses for small businesses.

  Second Round added $349 billion.
  - Funds were to be earmarked for certain expenses
  - Eligible for Forgiveness *IF* funds were used for qualified expenses
  - 1% interest for loans not forgiven

- CARES Act II in Dec. 2020 modified the Paycheck Protection Program and provided $284.45 billion in "PPP Second Draw Loans" or "Third Round"
  - Higher qualification threshold
  - Expanded use

Certifications

Paycheck Protection Program
Borrower Application Form Revised March 18, 2021

If questions (1), (2), (5), or (6) are answered "Yes," the loan will not be approved.

Question	Yes	No
1. Is the Applicant or any owner of the Applicant presently suspended, debarred, proposed for debarment, declared ineligible, voluntarily excluded from participation in this transaction by any Federal department or agency, or presently involved in any bankruptcy?	☐	☐
2. Has the Applicant, any owner of the Applicant, or any business owned or controlled by any of them, ever obtained a direct or guaranteed loan from SBA or any other Federal agency (other than a Federal student loan made or guaranteed through a program administered by the Department of Education) that is (a) currently delinquent, or (b) has defaulted in the last 7 years and caused a loss to the government?	☐	☐
3. Is the Applicant or any owner of the Applicant an owner of any other business, or have common management (including a management agreement) with any other business? If yes, list all such businesses (including their TINs if available) and describe the relationship on a separate sheet identified as addendum A.	☐	☐
4. Did the Applicant receive an SBA Economic Injury Disaster Loan between January 31, 2020 and April 3, 2020? If yes, provide details on a separate sheet identified as addendum B.	☐	☐
5. Is the Applicant (if an individual) or any individual owning 20% or more of the equity of the Applicant presently incarcerated or, for any felony, presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction? Initial here to confirm your response to question 5 →	☐	☐
6. Within the last 5 years, for any felony involving fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance, has the Applicant (if an individual) or any owner of the Applicant 1) been convicted; 2) pleaded guilty; 3) pleaded nolo contendere; or 4) commenced any form of parole or probation (including probation before judgment)? Initial here to confirm your response to question 6 →	☐	☐
7. Is the United States the principal place of residence for all employees included in the Applicant's payroll calculation above?	☐	☐
8. Is the Applicant a franchise?	☐	☐
9. Is the franchise listed in SBA's Franchise Directory? If yes, enter SBA Franchise Identifier Code here:	☐	☐

PPP Funds Disbursed

Summary of all PPP-approved lending (as of May 31, 2021):

Loans Approved	Total Net Dollars	Total Lenders
11,823,594	$799,832,866,520	5,467

Summary of all 2021 PPP-approved lending (as of May 31, 2021):

Loans Approved	Total Net Dollars	Total Lenders
6,681,929	$277,700,108,079	5,242

Source: www.sba.gov/ SBA Paycheck Protection Program Data

Who Took the Cash?

Industry for 2021 PPP

NAICS Sector Description	Loan Count	Net Dollars	% of Amount
Accommodation and Food Services	462,478	$41,506,221,571	15%
Construction	558,180	$33,443,602,502	12%
Health Care and Social Assistance	485,668	$28,820,477,425	10%
Professional, Scientific, and Technical Services	657,326	$28,559,859,211	10%
Other Services (except Public Administration)	1,107,768	$27,345,366,128	10%
Manufacturing	221,216	$22,148,692,329	8%
Transportation and Warehousing	763,810	$15,772,271,550	6%
Retail Trade	468,043	$15,263,246,977	5%
Administrative and Support and Waste Management and Remediation Services	393,563	$12,955,372,474	5%
Wholesale Trade	187,490	$10,379,776,487	4%
Agriculture, Forestry, Fishing and Hunting	532,884	$10,022,835,191	4%
Arts, Entertainment, and Recreation	223,882	$7,452,355,755	3%
Real Estate and Rental and Leasing	262,908	$7,335,291,000	3%
Educational Services	101,773	$5,122,704,390	2%
Information	75,128	$4,123,673,365	1%
Finance and Insurance	127,068	$3,423,154,208	1%
Mining	21,676	$2,383,826,599	1%
Public Administration	18,359	$784,812,141	0%
Management of Companies and Enterprises	6,812	$464,310,239	0%
Utilities	5,827	$392,258,537	0%

Approvals through 05/31/2021

See handout and SBA website for additional statistics

PPP Forgiveness Statistics

Forgiveness | ~63% of loans have completed the forgiveness process, totaling ~54% of total 2020 PPP volume

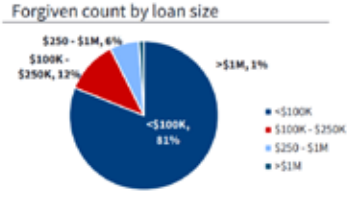
	Total 2020 PPP Volume	Forgiven	Amount Not Forgiven	In Process	Applications not yet received
Count	5.2M	3.3M	-	145k	1.7M
Volume	$521.2B	$279.4B	$1.0B	$81.5B	$159.1B

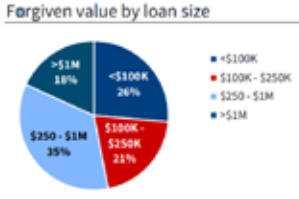
Source: *Report on SBA's COVID Relief Programs including PPP and EIDL - data as of May 24, 2021*

PPP Forgiveness by Size of Loans

Forgiveness | Across all loan sizes, over 99% of loan value has been forgiven on loans that have completed the forgiveness process

	Forgiven (Amt)	Not Forgiven (Amt)	% Forgiven of Processed	In Process (Amt)	Apps Not Yet Received (Amt)	Total PPP Volume	% Sub. for Forgiveness (Amt)
<$100K	$73.7 B	$0.3 B	99.6%	$2.6 B	$33.6 B	$110.2 B	69.5%
$100K - $250K	$57.4 B	$0.2 B	99.7%	$2.6 B	$25.7 B	$85.9 B	70.1%
$250 - $1M	$97.5 B	$0.3 B	99.6%	$7.1 B	$42.3 B	$147.3 B	71.3%
>$1M	$50.8 B	$0.2 B	99.6%	$69.2 B	$57.5 B	$177.9 B	67.7%
Total	**$279.4 B**	**$1.0 B**	**99.6%**	**$81.5 B**	**$159.1 B**	**$521.2 B**	**69.5%**





Source: *Report on SBA's COVID Relief Programs including PPP and EIDL - data as of May 24, 2021*

Debtors Need Not Apply

Debtors (and their creditors) were unhappy, to say the least, with the SBA's decision to exclude any debtor "presently involved in any bankruptcy" from the PPP.

- But how could a debtor get its hand on the free money?
- The first arrow in the debtor's quiver was 11 U.S.C. § 525.
- The second arrow was the Administrative Procedures Act, 5 U.S.C. §§ 701-706.

11 U.S.C. § 525

- In general, section 525 prohibits a governmental unit from discriminating against a debtor solely because of that's person's status as a debtor.
- But the prohibition only relates to discrimination with respect to "a license, permit, charter, franchise, or other similar grant . . . ."
- So, the question that courts grappled with was whether eligibility for (or entitlement to?) a PPP was a license, permit, charter, franchise, or other similar grant
- Answer: Maybe yes, maybe no.

11 U.S.C. § 525 (continued)

- Several courts held that section 525 extends to PPP eligibility. See, for example, the following cases:
- In re Roman Catholic Church of the Archdiocese of Santa Fe, 615 B.R. 644 (Bankr. D. N.M. 2020)
- In re Springfield Hospital, Inc., 618 B.R. 70 (Bankr. D. Vt. 2020)

11 U.S.C. § 525 (continued)

- A substantial majority of courts held that section 525 does not extend to PPP eligibility. See, for example, the following cases:
- In re Penobscot Valley Hospital, 2020 WL 3032939 (Bankr. D. Me. June 3, 2020), accepted in part, 620 B.R. 1 (D. Me. 2020).
- In re Henry Anesthesia Associates, LLC, 2020 WL 3002124 (Bankr. N.D. Ga. June 4, 2020)

APA Claims

- Debtors also challenged the SBA's decision as arbitrary and capricious and, therefore, unlawful under the APA.
- These APA claims centered on the fundamental idea that debtors were no more risky than PPP borrowers outside of bankruptcy.
- The streamlined underwriting (some would say no underwriting) meant that PPP lenders weren't really concerned with a recipient's ability to repay the loan (in the event that it wasn't forgiven).
- The result generally turned on the court's view of the proper deference to agency action under Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984).

APA Claims (continued)

- Some courts sided with the SBA on this question:
  - In re Penobscot Valley Hospital, 626 B.R. 350 (Bankr. D. Me. 2021).
  - Diocese of Rochester v. SBA, 466 F. Supp. 3d 363 (W.D.N.Y. 2020)

APA Claims (continued)

- Other courts sided with the debtors:
  - Alaska Urological Inst., P.C. v. SBA, 619 B.R. 689 (D. Alaska 2020)
  - In re Astria Health, 2020 Bankr. LEXIS 1720 (Bankr. E.D. Wash. June 10, 2020)
  - In re Roman Catholic Church of the Archdiocese of Santa Fe, 615 B.R. 644 (Bankr. D. N.M. 2020)

APA Claims (continued)

- Only one Circuit Court of Appeals has addressed this question on the merits. See In re Gateway Radiology Consultants, P.A., 983 F.3d 1239 (11th Cir. 2020). The 11th Circuit held that the bankruptcy exclusion did not violate the APA.
- The 11th Circuit did not address the section 525 question in Gateway Radiology.
- There is also one Circuit Court of Appeals decision, In re Hidalgo Cnty. Emergency Serv. Found., 962 F.3d 838 (5th Cir. 2020), holding that injunctive relief was not available against the SBA as a result of 15 U.S.C. § 634(b)(1).

Observations about these cases. . .

- While there are cases going both ways on the section 525 and APA questions, in general, debtors have had better success with the APA claims.
- SBA has prevailed in the majority of the cases brought against it.
- There are several appeals pending at the Circuit Courts of Appeal (including Second and Ninth).
- Some of the decisions are in the context of requests for preliminary injunctive relief. The standard is different from the standard applied on the merits.
- In the context of the APA, consider the remedy or remedies available generally and whether they are available against the government under controlling case law.
- The core/non-core distinction matters a lot when time is of the essence.

No need to fight the government. . .

Some debtors opted away from a litigation approach with the SBA. See, for example:

- In re Advanced Power Technologies, LLC, Case No. 20-13304, Dkt. No. 67 (Bankr. S.D. Fla. May 12, 2020) (granting motion to reconsider dismissal order and reinstate chapter 11 case)
- In re Chip's Southington, 2021 Bankr. LEXIS 1900 (Bankr. D. Ct. July 16, 2021) (granting motion to vacate order dismissing chapter 11 case)

Presently Involved in any bankruptcy?

- On January 19, 2021, after Congress clarified Debtors *could be* permitted to take PPP funds, the SBA reiterated in an Interim Final Rule that "[i]f 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"
- But now, confirmation of a plan is not presently involved in bankruptcy to the SBA
- Is confirmation enough? Or does the plan need to be effective according to its terms?

Forgiveness: The Qualifications

- Qualifications for loan forgiveness are the same for PPP First and Second Draw Loans:
  - Borrower's employee and compensation levels must have been maintained during the "Covered Period"
  - A Borrower must have spent:
    - the loan proceeds on payroll costs and other eligible expenses
    - at least 60% of the loan proceeds on payroll costs

The Forgiveness Period

- Alternatives
  - 8-weeks beginning on the date of loan disbursement ("Covered Period")
  - First day of the first payroll period after disbursement ("***Alternative*** Covered Period")
- A Borrower may apply for forgiveness if it believes it has met the forgiveness qualifications after it has used all of the loan proceeds and must apply within 10 months after the relevant Covered Period ends.

Payroll Costs –What is Included?

- Salaries, wages, commissions, tips, "similar compensation"
  - Compensation to self-employed "partners"
  - Bonuses
  - Hazard Pay
  - **Capped at $15,385 (= 8/52 of $100k)**
- Vacation, parental, family medical, or sick leave;
- "Allowances" for separation or dismissal;
- Retirement; health care benefits, including insurance premiums; and
- Employee-side FICA.

Payroll Costs – Cash Versus Accrual

- "Eligible payroll costs":
  - **incurred** during the forgiveness period (incurrence date = "the day that the employee's pay is earned") and
  - **paid** during the forgiveness period **or on or before the borrower's FIRST regularly-scheduled payroll date AFTER** such forgiveness period.
- But … Other provisions say "paid or incurred"

Payroll Costs – Cash Versus Accrual

- "Reconciling paid "and" vs "or" incurred
  - AND: **Requires all costs incurred during** forgiveness period to be paid:
    - **during** the forgiveness period **or**
    - **on or before first payroll date** thereafter
  - OR:
    - Allows costs incurred during forgiveness period to be paid **on or before first payroll date** thereafter; and
    - ***MAY* allow** costs incurred **prior** to forgiveness period to be paid during forgiveness period (*or by next payroll date?)*

Reductions: FTE

- Pro rata fractional reduction in forgiveness amount
  - Numerator: Average FTE during forgiveness period
  - Denominator: Average FTE during "reference period"
- Reference period is, at Borrower's election:
  i. Feb. 15, 2019 to June 30, 2019;
  ii. Jan. 1, 2020 to Feb. 29, 2020; or
  iii. For seasonal employers, either of above or any **12-week period** between May 1, 2019 and Sept. 15, 2019.

Reductions: FTE

- FTE Calculations: Based on 40-hour week
  - Cannot exceed 1.0 (*e.g., employees working 50 hours / week = 1.0 FTE)*
  - *"Simplified method"*
    - *Employees working 40+ hours / week = 1.0 FTE*
    - *Employees working <40 hours / week = 0.5 FTE*
  - (*Borrowers should run the math both ways to see which is more beneficial)*.
- Borrowers can exclude **unfilled positions** for employees who **during the forgiveness period**:
  - Were offered jobs back in writing on the same terms and who rejected such offer;
  - Were fired for cause;
  - Voluntarily resigned; or
  - Voluntarily requested and received a reduction in hours.

FTE Reduction Calculation

Actual Average FTE Method				
Employee	Base Period		Covered Period	
	Hours	FTE	Hours	FTE
A	45	1.00	40	1.00
B	40	1.00	40	1.00
C	39	0.98	25	0.63
D	30	0.75	12	0.30
E	20	0.50	10	0.25
Total		4.23		3.18
FTE Reduction Fraction				**0.75**

"Simplified" Method				
Employee	Base Period		Covered Period	
	Hours	FTE	Hours	FTE
A	45	1.00	40	1.00
B	40	1.00	40	1.00
C	39	0.50	25	0.50
D	30	0.50	12	0.50
E	20	0.50	10	0.50
Total		3.50		3.50
FTE Reduction Fraction				**1.00**

Reductions: Salary/Hourly Wage

- Hourly Employee Ambiguity: Is base amount:
  - Total hourly wages during reference period
    - Probably more consistent with CARES Act
    - Reduction in hours "double dips" on reduction
      - Reduces FTE in numerator **AND**
      - Impacts "Salary/Hourly Wage Reduction"
  - "Hourly wage" during reference period (without regard to hours worked)
    - Probably the more consistent reading of the Application form
    - Avoids double dip;
    - But creates (or exacerbates) loophole

Reductions: Salary/Hourly Wage

Step 1. Determine if pay was reduced more than 25%.
- a. Enter average annual salary or hourly wage during Covered Period or Alternative Payroll Covered Period: _____.
- b. Enter average annual salary or hourly wage between January 1, 2020 and March 31, 2020: _____.
- c. Divide the value entered in 1.a. by 1.b.: _____.
  If 1.c. is 0.75 or more, enter zero in the column above box 3 for that employee; otherwise proceed to Step 2.

Step 2. Determine if the Salary/Hourly Wage Reduction Safe Harbor is met.
- a. Enter the annual salary or hourly wage as of February 15, 2020: _____.
- b. Enter the average annual salary or hourly wage between February 15, 2020 and April 26, 2020: _____.
  If 2.b. is equal to or greater than 2.a., skip to Step 3. Otherwise, proceed to 2.c.
- c. Enter the average annual salary or hourly wage as of June 30, 2020: _____.
  If 2.c. is equal to or greater than 2.a., the Salary/Hourly Wage Reduction Safe Harbor has been met – enter zero in the column above box 3 for that employee. Otherwise proceed to Step 3.

Step 3. Determine the Salary/Hourly Wage Reduction.
- a. Multiply the amount entered in 1.b. by 0.75: _____.
- b. Subtract the amount entered in 1.a. from 3.a.: _____.

If the employee is an hourly worker, compute the total dollar amount of the reduction that exceeds 25% as follows:
- c. Enter the average number of hours worked per week between January 1, 2020 and March 31, 2020: _____.
- d. Multiply the amount entered in 3.b. by the amount entered in 3.c. _____. Multiply this amount by 8: _____. Enter this value in the column above box 3 for that employee.

If the employee is a salaried worker, compute the total dollar amount of the reduction that exceeds 25% as follows:
- e. Multiply the amount entered in 3.b. by 8: _____. Divide this amount by 52: _____. Enter this value in the column above box 3 for that employee.

Potential loophole?

- As Drafted, Can Borrowers Combine
  - + Simplified FTE Method
  - + Reduction in Hours for All <1.0 FTEs
  - + 25% Reduction in Hourly Wages
  - = **NO Forgiveness Reduction?**

(Stay tuned on this, as we may get corrective guidance.)

Salary/hourly wage reduction - example

Comparison of Salary/Hourly Wage Reduction Methodologies										
EE	Base Period			Covered Period			Reduction in Actual Compensation		Reduction in Hourly Wage	
	Avg. Hours	Hourly Wage	Total Comp	Avg. Hours	Hourly Wage	Total Comp	Reduction %	Over 25%	Reduction %	Over 25%
A	45	**36.00**	$ 1,620	40	**27.00**	$ 1,080	-33.33%	$ -	-25.00%	$ -
B	40	**30.00**	$ 1,200	40	**22.50**	$ 900	-25.00%	$ -	-25.00%	$ -
C	39	**24.00**	$ 936	25	**18.00**	$ 450	-51.92%	$ 252.00	-25.00%	$ -
D	30	**20.00**	$ 600	12	**15.00**	$ 180	-70.00%	$ 270.00	-25.00%	$ -
E	20	**12.00**	$ 240	10	**9.00**	$ 90	-62.50%	$ 90.00	-25.00%	$ -
Total			$ 4,596			$ 2,700	-41.25%	$ 612.00		0.00
Salary/Hourly Wage Reduction								**$ 612.00**		**0.00**

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FTE Reduction – Safe Harbor

- FTE reduction does not apply if:
  - Borrower reduced FTE levels in the period beginning February 15, 2020, and ending April 26, 2020; and
  - Borrower then restored FTE levels:
    - **By not later than June 30, 2020**
    - to its FTE levels for its **pay period that included February 15, 2020**

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FTE Reduction – Safe Harbor

- Salary/Hourly Wage Reduction does not apply for any individual employee if:
  1) Borrower reduced such employee's "salary or hourly wage" between Feb. 15, 2020, and April 26, 2020; **and**
  2) Borrower then restored such employee's "salary or hourly wage" as of June 30, 2020

Open Question: Can borrowers fire and/or reduce comp for employees as of July 1?

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Asset Sales and Investments

- SBA Procedural Notice - Control No. 50000-20057
  - Technical Terms
    - Sale of assets
    - Change of ownership
  - Preserving Forgiveness Per SBA
    - Prior Approval
      - Requirements
    - Escrow
      - Requirements
    - Implications Outside of Bankruptcy
    - Implications Inside of Bankruptcy

Asset Sales and Investments

- Implication of Violations
  - Terms of the 7(a) Guaranty
    - Chapter 24 - Obligations of the Lender
  - Preserving Guaranty
    - Outside of Bankruptcy
    - Inside of Bankruptcy
      - Obligation to Object

Asset Sales and Investments

- Examples
  - Texas
    - In re Wellflex Energy Partners Fort Worth, LLC, Case No. 20-43267 (Bankr. N.D. Tex. 2020)
  - Delaware
    - In re CarbonLite Industries, Case No. 21-10528 (Bankr. D. Del. 2021)
    - In re BC Hospitality Group, Inc., Case No. 20-13103 (Bankr. D. Del. 2020)

PPP Loans in Bankruptcy

- Nature of Claims – Secured vs. Unsecured
  - Intent Versus Reality
    - Preexisting Loan Relationships
  - Loan Language

CROSS-COLLATERALIZATION. In addition to the Note, this Agreement secures all obligations, debts and liabilities, plus interest thereon, of Grantor to Lender, or any one or more of them, as well as all claims by Lender against Grantor or any one or more of them, whether now existing or hereafter arising, whether related or unrelated to the purpose of the Note, whether voluntary or otherwise, whether due or not due, direct or indirect, determined or undetermined, absolute or contingent, liquidated or unliquidated, whether Grantor may be liable individually or jointly with others, whether obligated as guarantor, surety, accommodation party or otherwise, and whether recovery upon such amounts may be or hereafter may become barred by any statute of limitations, and whether the obligation to repay such amounts may be or hereafter may become otherwise unenforceable.

  - Impact on Claims

PPP Loans in Bankruptcy

- Nature of Claims – Guarantor Obligations
  - Intent Versus Reality
    - Preexisting Loan Relationships
  - Loan Language

INDEBTEDNESS. The word "Indebtedness" as used in this Guaranty means all of the principal amount outstanding from time to time and at any one or more times, accrued unpaid interest thereon and all collection costs and legal expenses related thereto permitted by law, attorneys' fees, arising from any and all debts, liabilities and obligations of every nature or form, now existing or hereafter arising or acquired, that Borrower individually or collectively or interchangeably with others, owes or will owe Lender. "Indebtedness" includes, without limitation, loans, advances, debts, overdraft indebtedness, credit card indebtedness, lease obligations, liabilities and obligations under any interest rate protection agreements or foreign currency exchange agreements or commodity price protection agreements, other obligations, and liabilities of Borrower, and any present or future judgments against Borrower, future advances, loans or transactions that renew, extend, modify, refinance, consolidate or substitute these debts, liabilities and obligations whether: voluntarily or involuntarily incurred; due or to become due by their terms or acceleration; absolute or contingent; liquidated or unliquidated; determined or undetermined; direct or indirect; primary or secondary in nature or arising from a guaranty or surety; secured or unsecured; joint or several or joint and several; evidenced by a negotiable or non-negotiable instrument or writing; originated by Lender or another or others; barred or unenforceable against Borrower for any reason whatsoever; for any transactions that may be voidable for any reason (such as infancy, insanity, ultra vires or otherwise); and originated then reduced or extinguished and then afterwards increased or reinstated.

  - Impact on Claims

PPP Loans in Bankruptcy

- Nature of Bankruptcy
  - Prepackaged Bankruptcy
    - Issues for Lender
    - Options
  - Asset Sale
    - Issues for Lender
    - Options
  - Reorganized Debtors
    - Distinction Versus Other Outcomes
  - Issuance of Stock
    - Consideration of Potential Impact

PPP Loans in Bankruptcy

- Incentivizing Forgiveness
  - DIP Financing
  - RSA
  - Restructuring
  - Other Options

Questions

American Bankruptcy Institute
Southeast Bankruptcy Workshop
July 29-August 1, 2021

FAST, BUT NOT SO FAST:
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FAST, BUT NOT SO FAST:
Recent Developments In Ppp Loans And The Cares Act

I. PPP Loans – Overview of Funds Disbursed

The Paycheck Protection Program ("PPP") originally provided $349 billion in SBA-backed loans that were aimed at businesses keeping their workforce employed during the COVID-19 crisis in the spring of 2020. PPP loans are low-interest loans entited to forgiveness if the funds were used for specific purposes. PPP funds were based on the applicant's payroll costs (2.5x monthly payroll cost). For some entities, PPP funds were available for a second round of funding in 2021. The following are statistics regarding the funds that were distributed:[1]

- Total Loans Approved :11,823,594 (6,681,929 in 2021)
- Net Dollars Loaned: $799,832,866,520 ($277,700,108,079 in 2021)
- Number of Lenders: 5,467 (5,242 in 2021)
- Total Loans Forgiven: 3,300,000
- Net Dollars Forgiven: $279,400,000

Data and transparency into who and how much is vast (see Index).

II. Original issues presented in Bankruptcy Court and decisions regarding access to PPP Loans

Enabled by Congress, the SBA promulgated regulations on the eligibiilty requirements of PPP funds. One determination was that a debtor in a bankruptcy procueeding was inelgible to receive a PPP loan.[2] As a result, some debtors voluntarily dismissed their bankruptcy filings and other debtors with less flexibility chose to challenge the SBA's decision to preclude debtors from

[1] U.S. Small Business Administration website, Paycheck Protection Program, PPP data, https://www.sba.gov/funding-programs/loans/covid-19-relief-options/paycheck-protection-program/ppp-data#section-header-4 (as of May 31, 2021)
[2] Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Promissory Notes, Authorizations, Affiliation, and Eligibility, 85 Fed. Reg. 23,450, 23,451 (Apr. 28, 2020).

the program. These challenges created several issues in bankruptcy courts across the country on issues including:

- Section 525 claims for discrimination
- Administrative Procedures Act claims
- Eligibility vs. Procedural Denial
- Scope of Review

Notable cases:

- In re Penobscot Valley Hosp., 626 B.R. 350 (Bankr. D. Me. 2021)
- Hartshorne Mining, LLC v. Carranza (In re Hartshorne Holdings, LLC), Nos. 20-40133-thf, 20-04012-thf, 2020 Bankr. LEXIS 1694 (Bankr. W.D. Ky. June 1, 2020)
- Henry Anesthesia Assocs. LLC v. Carranza (In re Henry Anesthesia Assocs. LLC), No. 20-06084-LRC, 2020 Bankr. LEXIS 1471 (Bankr. N.D. Ga. June 4, 2020)
- Schuessler v. United States SBA, Nos. 20-02065-bhl, 20-02068-bhl, 20-02069-bhl, 2020 Bankr. LEXIS 1347 (Bankr. E.D. Wis. May 22, 2020)

III. Forgiveness and Investigations

A. Forgiveness (see Index - SBA Forgiveness Application and guidance)

PPP loans made to eligible borrowers qualify for full loan forgiveness must meet the following requirements:

- Employee and compensation levels are maintained
- The loan proceeds are spent on payroll costs and other eligible expenses; and
- At least 60% of the proceeds are spent on payroll costs

B. Investigations

The SBA announced that it intends to audit every borrower of PPP loans of US$2 million or more, and it may audit "any" borrower at "any time" regardless of the amount of the loan. Audits may occur even after loans are forgiven. SBA audits will focus on whether documentation supports borrower certifications that loans were "necessary" to support the ongoing operation of the

business, whether businesses were qualified for loans, whether borrowers were entitled to the amount of loans for which they applied, whether loan proceeds were used for only "authorized" purposes, and numerous other factors. The SBA has sent mixed messages with regard to the degree of fraud in the PPP loan program but has foreshadowed that it intends to refer to law enforcement suspected fraud discovered during audits. See Index for additional materials regarding investigations and audits by SBA.

IV. Asset Sales and Investments

A. SBA Procedural Notice Control 5000-20057 (see Index)

- Imposes certain conditions on asset sales and ownership interest transfers that qualify as "change of ownership"

  For purposes of the PPP, a "change of ownership" will be considered to have occurred when (1) at least 20 percent of the common stock or other ownership interest of a PPP borrower (including a publicly traded entity) is sold or otherwise transferred, whether in one or more transactions, including to an affiliate or an existing owner of the entity, (2) the PPP borrower sells or otherwise transfers at least 50 percent of its assets (measured by fair market value), whether in one or more transactions, or (3) a PPP borrower is merged with or into another entity.
- If the sale is for less than 50% of the common stock or assets, then no approval or other procedures required.

B. Two Scenarios to Maintain Right to Forgiveness If Over 50%

- Obtain Approval from the SBA
- Comply with Escrow Procedures

1. Obtain Approval from the SBA

To obtain prior approval of requests in change of ownership, the PPP Lender must submit (which means the borrower must provide to the PPP Lender), the following:

- the reason that the PPP borrower cannot fully satisfy the PPP Note or escrow funds;
- the details of the requested transaction;
- a copy of the executed PPP Note;

- any letter of intent and the purchase or sale agreement setting forth the responsibilities of the PPP borrower, seller (if different from the PPP borrower), and buyer;
- disclosure of whether the buyer has an existing PPP loan and, if so, the SBA loan number;
- a list of all owners of 20 percent or more of the purchasing entity

If approved, the SBA will require that buyer assuming all of the PPP borrower's obligations under the PPP loan.

2. Comply with Escrow Procedures

A PPP borrower may sell 50 percent or more of its assets (measured by fair market value) without the prior approval of SBA only if the PPP borrower:

(i) completes a forgiveness application reflecting its use of all of the PPP loan proceeds and submits it, together with any required supporting documentation, to the PPP Lender, and

(ii) an interest-bearing escrow account controlled by the PPP Lender is established with funds equal to the outstanding balance of the PPP loan. After the forgiveness process (including any appeal of SBA's decision) is completed, the escrow funds must be disbursed first to repay any remaining PPP loan balance plus interest.

C. Implications of Violation

1. SBA Standard Operating Procedure 50 57 2 – 7(a) Loan Servicing and Liquidation

- As a result of SBA Standard Operating Procedure 50 57 2 -7(a), uncertainty has arisen with respect to the obligations of the PPP Lender to object to any proposed sale or asset transfer.
- More pointedly, does a PPP lender risk their SBA guaranty if they do not oppose a sale or asset transfer.
- As a result, some PPP lender's, out of an abundance of caution, are objecting to asset sales and plans which provide for a sale of substantially all of the debtor's assets or a transfer of more than 20% of the debtor's shares.

- Counsel should be careful to examine plan which provide for a reorganization in which more than 20% of the shares of the company are transferred to the lenders or through a stock option

D. Examples

1. Texas

- *In re Wellflex Energy Partners Fort Worth, LLC*, Case No. 20-43267

  "… in the context of bankruptcy, … the requirement effectively to escrow funds on what amounts to an unsecured loan not only constitutes an unenforceable and unreasonable restraint on alienation of assets in the context of bankruptcy, but also runs afoul of the priority provisions of the Bankruptcy Code and the use and sale provisions that are contemplated by Section 363 of the Bankruptcy Code.

- "Section 363(f) obviously allows for the sale of assets free and clear of liens, but only under certain circumstances. And the circumstances here are that … a creditor with a secured interest in those assets is entitled to receive the benefit of the value of that lien position. And if I were to sustain the objection of [the PPP lender], I would effectively be running afoul of Section 363(f) and not be in a position to be able to approve the sale free and clear of liens.

2. Delaware

- *In re CarbonLite Industries*, Case No. 21-10527 (Bankr. D. Del 2021)

  - Debtor was generally in the business of recycling plastics.
  - In connection with bankruptcy, three of the debtor entities sought to sell their primary assets – a recycling facility.
  - Sale terms and asset purchase agreement did not provide for the escrow of the funds and debtors did not seek advance approval
  - Court ruled that Bankruptcy Code does not require for such terms and Procedural Notice does not override terms of the Bankruptcy Code

- *In re BC Hospitality Group, Inc*., Case No. 20-13103 (Bankr. D. Del. 2020)

- Debtors operated a fast-casual, 100% vegan restaurant chain known as "by CHLOE."
- Debtors had approximately $2.6 million in outstanding PPP loans. Debtors had applied for forgiveness but had not yet received a response.
- Debtors sought to sell substantially all of their assets and had a proposed plan of liquidation after initial reorganization efforts failed
- Plan was confirmed over the objection of the bank on similar grounds as *CarbonLite.*

V. PPP Loans in Bankruptcy

A. Nature of Claims – Secured v. Unsecured

- The general consensus is that PPP loans were intended to be unsecured loans.
- https://www.foley.com/en/insights/publications/2020/04/cares-act-paycheck-protection-borrowers-lenders (PPP loans are unsecured)
- https://www.williamsmullen.com/news/unintended-impacts-ppp-loans-under-existing-credit-agreements (PPP loans not intended to be secured)
- https://www.morganlewis.com/pubs/2020/04/paycheck-protection-program-loans-advice-for-borrowers-and-lenders-cv19-lf (PPP loans will be unsecured)
- https://www.nada.org/Use-and-Forgiveness-PPP-Loans/ (PPP loans are not secured)
- However, where the borrower had a preexisting relationship with the PPP lender and such loan documents contain cross-collateralization provisions, there is nothing in the CARES ACT which precludes a finding that the PPP loan is secured.
- Example of cross-collateralization language:

CROSS-COLLATERALIZATION. In addition to the Note, this Agreement secures all obligations, debts and liabilities, plus interest thereon, of Grantor to Lender, or any one or more of them, as well as all claims by Lender against Grantor or any one or more of them, whether now existing or hereafter arising, whether related or unrelated to the purpose of the Note, whether voluntary or otherwise, whether due or not due, direct or indirect, determined or undetermined, absolute or contingent, liquidated or unliquidated, whether Grantor may be liable individually or jointly with others, whether obligated as guarantor, surety, accommodation party or otherwise, and whether recovery upon such amounts may be or hereafter may become barred by any statute of limitations, and whether the obligation to repay such amounts may be or hereafter may become otherwise unenforceable.

- As a result, PPP lenders have a justifiable basis for asserting the PPP loan is secured. To date, however, there do not appear to be any published decisions on the topic.

- Otherwise, the claim is a general unsecured claim treated in parity with other unsecured debt.

B. Nature of Claims – Guarantor Obligations

- Similar to the issues which arise with respect to cross-collateralized obligations for borrower is pre-existing relationships with the PPP lender, the same issue arises with respect to guaranties.

- If a borrower and a principal/guarantor have a preexisting relationship with a PPP lender, traditionally, the guaranty contains a cross-guaranty provision

- Example provision:

INDEBTEDNESS. The word "Indebtedness" as used in this Guaranty means all of the principal amount outstanding from time to time and at any one or more times, accrued unpaid interest thereon and all collection costs and legal expenses related thereto permitted by law, attorneys' fees, arising from any and all debts, liabilities and obligations of every nature or form, now existing or hereafter arising or acquired, that Borrower individually or collectively or interchangeably with others, owes or will owe Lender. "Indebtedness" includes, without limitation, loans, advances, debts, overdraft indebtedness, credit card indebtedness, lease obligations, liabilities and obligations under any interest rate protection agreements or foreign currency exchange agreements or commodity price protection agreements, other obligations, and liabilities of Borrower, and any present or future judgments against Borrower, future advances, loans or transactions that renew, extend, modify, refinance, consolidate or substitute these debts, liabilities and obligations whether: voluntarily or involuntarily incurred; due or to become due by their terms or acceleration; absolute or contingent; liquidated or unliquidated; determined or undetermined; direct or indirect; primary or secondary in nature or arising from a guaranty or surety; secured or unsecured; joint or several or joint and several; evidenced by a negotiable or non-negotiable instrument or writing; originated by Lender or another or others; barred or unenforceable against Borrower for any reason whatsoever; for any transactions that may be voidable for any reason (such as infancy, insanity, ultra vires or otherwise); and originated then reduced or extinguished and then afterwards increased or reinstated.

C. Prepack/Sale/Reorganized Debtors/Issuance of Stock

- Prepackaged Bankruptcy

- Presents a number of issues:

  (1) PPP lender likely not aware of the impending bankruptcy unless publicized.

  (2) As a result, opportunity to negotiate for submission of forgiveness, get SBA approval or obtain escrow, as applicable, is unlikely.

  (3) Only remedy is likely to object to the plan, which will likely come immediately.

- Sale

- In the case of an asset sale, effectuated either through a plan (exclusively) or in connection with a sale motion, the PPP lender has a few options:

(1) Work to obtain forgiveness. However, unlikely to achieve this given that SBA has been extremely slow processing forgiveness applications

(2) Request an escrow of funds. Also a difficult proposition unless you can convince the lenders or debtors to go along with this.

- Reorganized Debtors
- A plan which provides for the transfer of assets to a newly formed entity would technically violate the SBA's procedural guidelines, absent SBA consent
- A question exists as to whether or not a PPP lender would need to object to such a plan in order to preserve their guaranty.

(1) Generally restructurings are permitted if certain criteria are satisfied.

- Best course of action is likely to object.
- Issuance of Stock
- If the exit financing or reorganization contemplates an issuance of new stock, PPP lenders should be cognizant of whether or not the new stock will effectuate a change of 20%. The answer is likely yes as typically, most stock is cancelled and new stock is issued.
- As a result, the PPP lender will likely need to object to a plan which provides for such treatment or obtain approval

D. Incentivizing Forgiveness

- If a preexisting relationship and other obligations, could offer a potential discount or restructure the debt (extend payment terms, etc.).
- Offer DIP Financing
- Other options?

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1. PPP Loan Statistics

Paycheck Protection Program (PPP) Report

Approvals through 05/31/2021

Summary of All PPP Approved Lending

Loans Approved	Total Net Dollars	Total Lender Count
11,823,594	$799,832,866,520	5,467

Summary of 2021 PPP Approved Lending

Loans Approved	Net Dollars	Lender Count
6,681,929	$277,700,108,079	5,242

Loan Breakdown for 2021 PPP

First Draw Loans	Loans Approved	Net Dollars	Average Loan Size	Lender Count
Total First Draw Loans	3,768,309	$68,915,276,574	$18,288	5,168
First Draw Loans with 10 or fewer employees	3,724,470	$56,216,754,824	$15,094	5,156
First Draw Loans LMI & Less than $250k	1,343,538	$21,951,817,118	$16,339	4,640

Second Draw Loans	Loans Approved	Net Dollars	Average Loan Size	Lender Count
Total Second Draw Loans	2,913,620	$208,784,831,505	$71,658	5,216
Second Draw Loans with 10 or fewer employees	2,395,644	$63,660,158,141	$26,573	5,199
Second Draw Loans LMI & Less than $250k	733,471	$26,754,426,803	$36,476	4,731

First & Second Draw Loans	Loans Approved	Net Dollars	Average Loan Size	Lender Count
Total First & Second Draw Loans	6,681,929	$277,700,108,079	$41,560	5,242
PPP Loans by Community Financial Institutions	1,604,140	$34,095,035,498	$21,254	501
PPP Loans by Insured Depository Institutions <$10B in Assets	1,812,102	$101,504,685,266	$56,015	4,105
PPP Loans by Credit Unions <$10B in Assets	152,366	$5,160,428,953	$33,869	851
PPP Loans by Farm Credit System Institutions <$10B in Assets	19,581	$406,682,354	$20,769	41

Lender Types for 2021 PPP

Lender Type	Lender Count	Loans Approved	Net Dollars
Banks and S&Ls($10B or more)	112	1,807,532	$118,331,350,203
Banks and S&Ls(less than $10B)	4,105	1,812,102	$101,504,685,266
Fintechs (and other State Regulated)	41	1,210,098	$21,918,632,833
Small Business Lending Companies	13	823,576	$15,463,750,507
Microlenders	34	532,480	$8,540,740,467
Credit Unions (less than $10B)	851	152,366	$5,160,428,953
Non Bank CDFI Funds	9	276,271	$5,047,040,642
Farm Credit Lenders	47	35,923	$870,150,045
Credit Unions ($10B or more)	8	14,903	$438,573,935
Certified Development Companies	19	16,409	$419,677,207
To Be Confirmed	2	250	$4,779,785
BIDCOs	1	19	$298,236
Total	**5,242**	**6,681,929**	**$277,700,108,079**

Approvals through 05/31/2021 4

States and Territories

State	Loan Count	Net Dollars
AK	11,911	$746,342,883
AL	107,193	$3,337,720,387
AR	61,701	$1,745,660,603
AS	37	$1,187,913
AZ	89,715	$3,871,793,005
CA	692,692	$35,907,059,637
CO	87,088	$4,737,513,800
CT	55,612	$3,240,741,724
DC	17,351	$1,185,815,859
DE	15,742	$756,466,258
FL	598,506	$19,036,179,898
GA	416,058	$11,056,741,932
GU	1,445	$106,584,393
HI	20,002	$1,362,722,476
IA	111,964	$2,973,773,610
ID	21,961	$923,819,720
IL	435,736	$15,328,824,895
IN	110,397	$4,440,953,031
KS	74,634	$2,384,522,529
KY	80,225	$2,563,145,675

State	Loan Count	Net Dollars
LA	150,147	$4,954,034,653
MA	103,507	$6,896,694,622
MD	111,317	$5,105,480,074
ME	19,471	$994,866,271
MI	176,993	$8,418,112,644
MN	126,388	$5,371,253,729
MO	142,243	$4,606,412,713
MP	452	$25,757,685
MS	96,324	$2,340,660,847
MT	23,463	$823,366,188
NC	139,472	$5,613,843,059
ND	31,291	$1,113,121,201
NE	70,810	$1,937,788,407
NH	16,617	$1,156,553,713
NJ	153,261	$8,412,871,701
NM	19,027	$1,136,917,414
NV	79,176	$2,758,914,488
NY	415,741	$22,734,700,124
OH	218,210	$9,038,248,426
OK	90,821	$2,927,281,933

State	Loan Count	Net Dollars
OR	51,276	$3,050,876,119
PA	179,088	$9,958,345,781
PR	30,740	$949,028,507
RI	17,282	$1,000,161,994
SC	90,624	$3,058,629,335
SD	40,837	$1,047,427,807
TN	138,929	$4,552,364,106
TX	559,159	$22,263,165,930
UT	32,814	$1,840,771,407
VA	113,491	$5,571,715,395
VI	1,373	$76,067,379
VT	9,541	$564,206,007
WA	91,086	$5,887,464,009
WI	102,837	$4,391,796,235
WV	15,831	$810,639,493
WY	12,316	$602,941,034
To be confirmed	4	$57,419

Approvals through 05/31/2021 5

Loan Size for 2021 PPP

Loan Size	Loan Count	Net Dollars	% of Count	% of Amount
$50K and Under	5,822,120	$90,807,493,443	87.1%	32.7%
>$50K - $100K	371,459	$26,487,929,663	5.6%	9.5%
>$100K - $150K	181,705	$22,584,777,740	2.7%	8.1%
>$150K - $350K	186,798	$42,273,269,020	2.8%	15.2%
>$350K - $1M	93,092	$51,987,085,335	1.4%	18.7%
>$1M - $2M	26,004	$39,535,939,472	0.4%	14.2%
>$2M - $5M	422	$1,335,740,553	0.0%	0.5%
>$5M	329	$2,687,872,852	0.0%	1.0%

*** Overall average loan size is: $42K.**

Top PPP Lenders for 2021 PPP

Rank	Lender Name	Loans Approved	Net Dollars	Average Loan Size
1	JPMorgan Chase Bank	158,345	$12,189,061,552	$76,978
2	Bank of America	147,548	$8,934,221,969	$60,551
3	Prestamos CDFI, LLC	494,415	$7,676,108,813	$15,526
4	Capital Plus Financial, LLC	472,036	$7,582,023,560	$16,062
5	Harvest Small Business Finance, LLC	429,098	$7,437,279,355	$17,332
6	Cross River Bank	288,932	$6,583,843,429	$22,787
7	Itria Ventures LLC	178,807	$4,983,368,254	$27,870
8	BSD Capital, LLC dba Lendistry	245,894	$4,729,176,754	$19,233
9	Benworth Capital	334,434	$4,612,404,344	$13,792
10	Customers Bank	221,116	$4,541,659,856	$20,540
11	PNC Bank	45,454	$4,322,632,852	$95,099
12	Fountainhead SBF LLC	286,208	$4,050,986,737	$14,154
13	TD Bank	47,403	$3,709,558,661	$78,256
14	Truist Bank	37,843	$3,657,551,842	$96,651
15	Wells Fargo Bank	87,817	$3,496,896,632	$39,820

Industry for 2021 PPP

NAICS Sector Description	Loan Count	Net Dollars	% of Amount
Accommodation and Food Services	462,478	$41,506,221,571	15%
Construction	558,180	$33,443,602,502	12%
Health Care and Social Assistance	485,698	$28,820,477,425	10%
Professional, Scientific, and Technical Services	657,326	$28,559,859,211	10%
Other Services (except Public Administration)	1,107,768	$27,345,366,128	10%
Manufacturing	221,216	$22,148,692,329	8%
Transportation and Warehousing	763,810	$15,772,271,550	6%
Retail Trade	468,043	$15,263,246,977	5%
Administrative and Support and Waste Management and Remediation Services	393,563	$12,955,372,474	5%
Wholesale Trade	187,490	$10,379,776,487	4%
Agriculture, Forestry, Fishing and Hunting	532,884	$10,022,835,191	4%
Arts, Entertainment, and Recreation	223,882	$7,452,355,755	3%
Real Estate and Rental and Leasing	262,928	$7,335,291,000	3%
Educational Services	101,773	$5,122,704,390	2%
Information	75,128	$4,123,673,365	1%
Finance and Insurance	127,088	$3,423,154,208	1%
Mining	21,676	$2,383,826,599	1%
Public Administration	18,359	$784,812,141	0%
Management of Companies and Enterprises	6,812	$464,310,239	0%
Utilities	5,827	$392,258,537	0%

Demographics for 2021 PPP

Gender	Loans Approved	Net Dollars
Female	1,158,031	$33,351,949,494
Male	1,781,672	$90,700,213,878
Unknown/NotStated	3,742,226	$153,647,944,708

Veteran	Loans Approved	Net Dollars
Non-Veteran	2,488,683	$99,267,441,277
Unknown/NotStated	4,057,994	$172,058,427,883
Veteran	135,252	$6,374,238,919

Race	Loans Approved	Net Dollars
American Indian or Alaska Native	55,378	$2,473,827,119
Asian	162,151	$7,774,961,578
Black or African American	825,959	$16,115,604,264
Eskimo & Aleut	14	$375,666
Multi Group	22	$571,645
Native Hawaiian or Other Pacific Islander	7,886	$253,155,627
Puerto Rican	320	$11,331,553
Unanswered	4,712,859	$207,532,206,289
White	917,340	$43,538,074,339

Ethnicity	Loans Approved	Net Dollars
Hispanic or Latino	252,517	$9,013,651,378
Not Hispanic or Latino	1,955,130	$83,675,290,951
Unknown/NotStated	4,474,282	$185,011,165,750

U.S. Small Business Administration

Paycheck Protection Program (PPP) Report

Approvals through 12 PM EST 4/16/2020

Summary

Loan Count	Net Approved Dollars	Lender Count
1,661,367	$342,277,999,103*	4,975

*Net Approved Dollars do not reflect the amount required for reimbursement to lenders per statute within the CARES Act.

States and Territories

State	Approved PPP Loans	Approved PPP Amount
AK	4,842	$921,927,504
AL	27,922	$4,862,690,120
AR	21,754	$2,722,726,557
AS	2	$419,583
AZ	19,280	$4,846,959,062
CA	112,967	$33,413,693,192
CO	41,635	$7,392,960,359
CT	18,435	$4,151,934,451
DC	3,253	$1,247,218,727
DE	5,171	$1,090,415,848
FL	88,997	$17,863,199,837
GA	48,332	$9,464,475,442
GU	508	$102,418,346
HI	11,553	$2,046,450,982
IA	29,424	$4,315,688,444
ID	13,627	$1,850,034,026
IL	69,893	$15,972,578,071
IN	35,990	$7,491,445,351
KS	26,245	$4,288,652,108
KY	23,797	$4,149,467,684

State	Approved PPP Loans	Approved PPP Amount
LA	26,635	$5,100,534,501
MA	46,937	$10,360,907,178
MD	26,068	$6,537,733,687
ME	14,993	$1,944,425,549
MI	43,438	$10,381,310,070
MN	46,383	$9,014,060,040
MO	46,481	$7,547,822,023
MP	56	$12,619,835
MS	20,748	$2,481,000,606
MT	13,456	$1,470,300,136
NC	39,520	$8,005,752,270
ND	11,002	$1,548,384,035
NE	23,477	$2,988,890,489
NH	11,582	$2,006,858,477
NJ	33,519	$9,527,794,260
NM	8,277	$1,424,408,711
NV	8,674	$2,013,939,889
NY	81,075	$20,345,681,101
OH	59,800	$14,108,889,927
OK	35,557	$4,615,708,450

State	Approved PPP Loans	Approved PPP Amount
OR	18,732	$3,806,104,476
PA	69,567	$15,697,648,689
PR	2,856	$658,573,638
RI	7,732	$1,335,777,801
SC	22,933	$3,807,578,397
SD	11,324	$1,369,616,339
TN	34,035	$6,542,045,089
TX	134,737	$28,483,710,273
UT	21,257	$3,695,399,459
VA	40,371	$8,721,170,223
VI	240	$62,242,612
VT	6,983	$1,000,127,478
WA	30,421	$6,959,680,159
WI	43,395	$8,317,705,842
WV	7,861	$1,351,223,328
WY	7,618	$837,018,372

Approvals through 4/16/20

Loan Size

Loan Size	Approved Loans	Approved Dollars	% of Count	% of Amount
$150K and Under	1,229,893	$58,321,791,761	74.03%	17.04%
>$150K - $350K	224,061	$50,926,354,675	13.49%	14.88%
>$350K - $1M	140,197	$80,628,410,796	8.44%	23.56%
>$1M - $2M	41,238	$57,187,983,464	2.48%	16.71%
>$2M - $5M	21,566	$64,315,474,825	1.30%	18.79%
>$5M	4,412	$30,897,983,582	0.27%	9.03%

- Overall average loan size is $206K.

Approvals through 4/16/20

Industry by NAICS Subsector

NAICS Subsector Description	Approved Loans	Approved Dollars	% of Amount
Construction	177,905	$44,906,538,010	13.12%
Professional, Scientific, and Technical Services	208,360	$43,294,713,938	12.65%
Manufacturing	108,863	$40,922,240,021	11.96%
Health Care and Social Assistance	183,542	$39,892,493,481	11.65%
Accommodation and Food Services	161,876	$30,500,417,573	8.91%
Retail Trade	186,429	$29,418,369,063	8.59%
Wholesale Trade	65,078	$19,489,410,472	5.69%
Other Services (except Public Administration)	155,319	$17,707,077,167	5.17%
Administrative and Support and Waste Management and Remediation Services	72,439	$15,285,814,286	4.47%
Real Estate and Rental and Leasing	79,784	$10,743,430,227	3.14%
Transportation and Warehousing	44,415	$10,598,076,231	3.10%
Finance and Insurance	60,134	$8,177,041,995	2.39%
Educational Services	25,198	$8,062,652,288	2.36%
Information	22,825	$6,675,630,276	1.95%
Arts, Entertainment, and Recreation	39,670	$4,939,280,138	1.44%
Agriculture, Forestry, Fishing and Hunting	46,334	$4,374,343,877	1.28%
Mining	11,168	$3,894,793,207	1.14%
Public Administration	5,570	$1,197,353,586	0.35%
Management of Companies and Enterprises	3,211	$1,170,748,130	0.34%
Utilities	3,247	$1,027,575,137	0.30%

Approvals through 4/16/20

PPP Lenders – Highest Approved Dollars

Lender	Approved Loans	Approved Dollars	Average Approved Size
1	27,307	$14,071,396,427	$515,304
2	32,097	$10,309,843,746	$321,209
3	21,062	$9,612,090,368	$456,371
4	33,594	$7,778,303,458	$231,538
5	27,929	$6,555,028,971	$234,703
6	25,820	$6,114,676,731	$236,819
7	26,238	$6,057,787,355	$230,878
8	10,681	$4,406,088,115	$412,516
9	14,215	$4,356,840,783	$306,496
10	9,457	$4,267,336,254	$451,236
11	12,001	$4,190,129,500	$349,148
12	25,151	$3,889,799,524	$154,658
13	9,673	$3,392,990,074	$350,769
14	10,642	$2,978,045,260	$279,839
15	40,746	$2,966,427,908	$72,803

Approvals through 4/16/20

2. In re Calais – Temporary Restraining Order

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re: CALAIS REGIONAL HOSPITAL, Debtor	Chapter 11 Case No. 19-10486
CALAIS REGIONAL HOSPITAL, Plaintiff, v. JOVITA CARRANZA, in her capacity as Administrator for the U.S. Small Business Administration, Defendant	Adv. Proc. No. 20-1006

TEMPORARY RESTRAINING ORDER

On April 27, 2020, the Debtor filed the Emergency Motion for Temporary Restraining Order and Request for Hearing Date and Briefing Schedule with Respect to the Debtor's Request for a Preliminary Injunction [Dkt. No. 2] (the "Motion"). At a hearing on the Motion on April 30, 2020, the Court heard arguments from the parties and considered the contents of the Motion; the verified allegations in the Debtor's complaint; the objections to the Motion filed by First National Bank [Dkt. No. 12] and by Jovita Carranza, in her capacity as Administrator for the U.S. Small Business Administration [Dkt. No. 13]; and the Debtor's Reply in Support of the Motion [Dkt. No. 14]. The Court further considered the text and purpose of the Coronavirus Aid, Relief and Economic Security Act (the "CARES Act"); the Paycheck Protection Program ("PPP"), enacted in § 1102 of the CARES Act; § 7(a) of the Small Business Act (15 U.S.C. §

636(a)); and the Administrator's interim final rules promulgated on April 15, 2020, and April 24, 2020, Docket Nos. SBA-2020-0015 and SBA 2020-0021.

Before deciding whether the Debtor is entitled to a temporary restraining order ("TRO"), the Court must address a threshold question: is the Administrator immune from the Debtor's claims for preliminary and permanent injunctive relief? The analysis begins with the Bankruptcy Code, which, in relevant part, provides as follows:

> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to . . .
> (1) [11 U.S.C. §§ 105 and 525.]
> (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.
> (3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. . . .
> (4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit[.]
> (5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

11 U.S.C. § 106(a). In this proceeding, the Debtor seeks (among other things) injunctive relief against the Administrator to remedy an alleged violation of 11 U.S.C. § 525(a), invoking Fed. R. Bankr. P. 7065 and 11 U.S.C. § 105(a).[1] In isolation, section 106(a) of the Bankruptcy Code would appear to permit such an action. The Administrator, however, asserts immunity from injunctive relief under the following provisions of applicable nonbankruptcy law:

[1] To the extent that the claims are based on 11 U.S.C. § 525 and other provisions of the Bankruptcy Code, this is a proceeding arising in or under the Code, and as a result, is a core proceeding. *See* 28 U.S.C. § 157(b).

> **(b) Powers of Administrator**
>
> In the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter the Administrator may —
>
> (1) sue and be sued . . . 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 Administrator or his property[.]

15 U.S.C. § 634(b). In the Administrator's view, this anti-injunction provision bars any and all injunctive relief against her or her property.

The Administrator's perspective fails to account for binding caselaw interpreting 15 U.S.C. § 634(b) to permit certain forms of relief against the Small Business Administration ("SBA") that might be characterized as injunctive. In Ulstein Maritime, Ltd. v. United States, 833 F.2d 1052 (1st Cir. 1987), the First Circuit Court of Appeals affirmed an order invalidating a certificate issued by the SBA for failure to comply with applicable laws and regulations. In so doing, the Court indicated that the anti-injunction provision of 15 U.S.C. § 634(b) "protects the [SBA] from interference with its internal workings by judicial orders attaching agency funds, etc., but does not provide blanket immunity from every type of injunction." Ulstein, 833 F.2d at 1057. After examining the purposes of the statute, the Court suggested that the anti-injunction language "should not be interpreted as a bar to judicial review of agency actions that exceed agency authority where the remedies would not interfere with internal agency operations." Id.

In this proceeding, as in Ulstein, the plaintiff seeks an order invalidating an SBA decision due to the Administrator's asserted failure to comply with applicable law. The Debtor seeks no relief that would interfere with the SBA's "internal workings" as distinguished from the product of those workings. An award of preliminary injunctive relief directing the Administrator to reserve sufficient authority to grant the Debtor's application if the Debtor later prevails on the

merits will not interfere with the SBA's internal agency operations in the sense contemplated by Ulstein. As such, the Court may enter a carefully tailored temporary restraining order against the Administrator, notwithstanding the anti-injunction provision of 15 U.S.C. § 634(b). *See* 11 U.S.C. § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."); 11 U.S.C. § 525(a) (providing in relevant part that "a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to . . . a person that is or has been a debtor under this title . . . solely because such . . . debtor is or has been a debtor under this title"). This conclusion is consistent with the purpose of section 106(a)(4), which requires an order against a governmental unit to be enforced in accordance with appropriate nonbankruptcy law. As explained in the legislative history of section 106, although "an order against a governmental unit will not be enforceable by attachment or seizure of government assets[,]" the court "retains ample authority to enforce nonmonetary orders and judgments." 140 Cong. Rec. H10752-01, at H10766, 1994 WL 545773 (Oct. 4, 1994).

At this juncture, the ultimate question is whether the Debtor is entitled to the TRO that it seeks. The answer turns on the same four factors that govern a motion for a preliminary injunction. *See* Animal Welfare Inst. v. Martin, 665 F. Supp. 2d 19, 22 (D. Me. 2009). Those four factors are:

> [1] the probability of the movant's success on the merits, [2] the prospect of irreparable harm absent the injunction, [3] the balance of the relevant equities (focusing on the hardship to the movant if an injunction does not issue as contrasted with the hardship to the nonmovant if it does), and [4] the effect of the court's action on the public interest.

Rosario-Urdaz v. Rivera-Hernandez, 350 F.3d 219, 221 (1st Cir. 2003). "As with a preliminary injunction, the party seeking relief bears the burden of demonstrating that these factors weigh in

its favor." Animal Welfare Inst., 665 F. Supp. 2d at 22 (quotation marks omitted). Trial courts tasked with balancing these factors "have wide discretion in making judgments regarding the appropriateness of [preliminary injunctive] relief." Francisco Sanchez v. Esso Standard Oil Co., 572 F.3d 1, 14 (1st Cir. 2009). Due to the preliminary nature of the relief and the undeveloped state of the record, the court's findings and conclusions on a request for a TRO do not represent an adjudication on the merits and are not binding on the parties in the later action. *See* Narragansett Indian Tribe v. Guilbert, 934 F.2d 4, 6 (1st Cir. 1991) ("[A] court's conclusions as to the merits of the issues presented on preliminary injunction are to be understood as statements of probable outcomes."); Wright & Miller, 11A Fed. Prac. & Proc. Civ. § 2951 (3d ed.) ("[A] court's findings on an application for a temporary restraining order do not represent an adjudication on the merits. Thus, they are not binding on the parties in the later action for a permanent injunction.") (footnotes omitted).

With these principles in mind, the Court FINDS and CONCLUDES as follows:

1. The Debtor is entitled to issuance of a temporary restraining order under Fed. R. Civ. P. 65 and Fed. R. Bankr. P. 7065.

2. The Debtor has shown a likelihood of success on the merits of the claim asserted in Count III of the complaint, namely that the Administrator acted in violation of 11 U.S.C. § 525(a) by refusing to permit the Debtor an opportunity to participate in the PPP solely because the Debtor is presently a debtor in a case under Title 11 (and therefore is unquestionably "involved in any bankruptcy").[2] This conclusion rests on the following concessions and preliminary determinations:

[2] Although the complaint also raises the issue of whether the Administrator exceeded the scope of her authority by issuing a rule and the official PPP application form that rendered the Debtor ineligible to

(A) The Administrator concedes that the SBA falls within the definition of "governmental unit" in the Bankruptcy Code.

(B) The Administrator also concedes that the SBA denied the Debtor the oppportunity to participate in the PPP solely because the Debtor is currently in chapter 11.

(C) There is one remaining element of section 525(a) in play. To determine whether the Debtor has shown a likelihood of success on Count III of its complaint, the Court must consider the following question: does the Administrator's categorical exclusion of the Debtor from the term "eligible recipient," 15 U.S.C. § 636(a)(36)(A)(iv), constitute the denial of, or discrimination with respect to, a "license, permit, charter, franchise, or other similar grant" for purposes of section 525(a)? There is no binding authority from the United States Supreme Court or the First Circuit Court of Appeals on this precise question. There are, however, several decisions interpreting section 525(a) in other contexts, and many of those decisions consider the language of section 525(a) in light of the stated purpose of the statute. *See, e.g.*, Stoltz v. Brattleboro Housing Auth. (In re Stoltz), 315 F.3d 80 (2d Cir. 2002) (holding that eviction of a debtor from public housing unit solely based on her failure to pay discharged, pre-petition rent constituted illegal discrimination under section 525(a)); In re The Bible Speaks, 69 B.R. 368, 374 (Bankr. D. Mass. 1987) ("Congress intended § 525(a) . . . to expand on and develop Perez so that the doctrine would extend to many forms of discrimination."); Rose v. Conn. Housing Fin. Auth. (In re Rose), 23 B.R. 662, 666-67 (Bankr. D. Conn. 1982) (construing section 525(a) in light of the fresh start policy

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apply for a PPP loan due to the Debtor's status as a debtor in a chapter 11 case, the Court need not and does not address that issue at this point.

and concluding that a state may not exempt debtors from a state-sponsored home financing program solely because of bankruptcy); *see also* 4 Collier on Bankruptcy ¶ 525.02 (16th ed.) ("[S]ection 525(a) is designed to protect persons from discriminatory treatment based solely on past financial difficulty.") (footnote omitted). While the answer is not free from all doubt, the Debtor has articulated a sufficient likelihood of success, when considered along with its showings on the balance of harms and the public interest, to warrant the issuance of a temporary restraining order. Wright & Miller, 11A Fed. Prac. & Proc. Civ. § 2951 (3d ed.) (suggesting that the plaintiff must ordinarily demonstrate "at least a reasonable probability of prevailing on the merits" but that the "necessary persuasiveness of this showing" may vary, depending on the facts of the case and the other relevant factors).

(D) There are cases holding that section 525(a) does not extend to loans or, stated differently, that a loan is not "a license, permit, charter, franchise, or other similar grant" within the meaning of section 525(a). The Administrator correctly points out that the PPP describes "covered loans" and specifies loan features, such as an interest rate and a repayment term. *See, e.g.,* 15 U.S.C. § 636(a)(36)(A)(ii), (B), (E), (F), (L). True enough, but that fixation on the details loses the forest in the trees during a conflagration. The CARES Act is a grant of aid necessitated by a public health crisis. It is one of many responses by federal, state, and local governments designed to help citizens weather an unprecedent storm. Likening a covered loan under the PPP to a garden-variety loan that is not be protected under section 525(a) may miss the point.

(E) Section 525(c), by its terms, applies to student loans and the Administrator argues that the existence of section 525(c) proves that Congress did not intend section 525(a)

to extend to loans: if section 525(a) extended to loans, why would Congress need to craft specific treatment for student loans in section 525(c)? This is a fair question, but the Supreme Court has, at times, been skeptical of this type of inferential reasoning. *See, e.g.*, Mission Prod. Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652, 1664-65 (2019). The hoary canon of *expressio unius est exclusio alterius* does not, alone, doom the Debtor's preferred construction of section 525(a). *See* Hewlett-Packard Co, Inc. v. Berg, 61 F.3d 101, 106 (1st Cir. 1995) (indicating that the canon "is an aid to construction and not an inflexible rule").

(F) The Court's charge is to consider the language of the statute, the words that Congress did, in fact, use. There is, at this early juncture in the litigation, enough of a showing that participation in the PPP could be characterized as an "other similar grant" such that the Debtor has met its burden on the likelihood of success on Count III.

(G) The Court is sympathetic to the significant challenges faced by the Administrator in the implementation of measures taken by the federal government in response to the extraordinary public health crisis and the resulting economic devastation. The SBA was under—and continues to be under—immense pressure to distribute aid without delay. Time is truly of the essence. That said, this country's laws cannot be pushed aside, even inadvertently, during times of crisis.

3. The Debtor has demonstrated a risk of immediate and irreparable harm in the absence of a temporary restraining order. This conclusion rests on the following preliminary findings:

(A) PPP funds are available on a first come, first served basis. The Debtor's application for funds under PPP was not processed and the Debtor did not receive funds prior to their exhaustion under the first tranche of PPP funding.

(B) On or about April 23, 2020, Congress enacted legislation making additional funds available for PPP.

(C) The Debtor is a critical access hospital providing services in the Calais area. The Debtor's business operations have been significantly impacted by Covid-19 due to the fact that many non-essential elective and office visits have been rescheduled or canceled. A significant percentage of the Debtor's revenue is derived from non-essential and elective procedures. In the absence of funding from PPP or another source, the Debtor may be forced to discontinue business operations by early June and may not have sufficient funds for an orderly liquidation under those circumstances. This timeline could accelerate depending on the spread of Covid-19 in Washington County.

(D) According to the application attached to the complaint, the Debtor has 224 employees who may lose their jobs if the Debtor's business operations cease.

(E) Due to the nature of the Debtor's business operations, it must continue to employ staff in order to meet its charitable mission and provide health care services.

(F) PPP funds are being exhausted quickly, in a matter of weeks (if not days). If the Debtor is not permitted to submit an application for funding under PPP in the very near term, funding may be exhausted. And, as previously mentioned, if the Debtor does not receive PPP funding, then it may be forced to close. When this relatively concrete forecast is "juxtaposed and weighed in tandem" with the Debtor's showing

of a likelihood of success on the merits, the forecast possesses sufficient substance to meet the Debtor's burden of establishing a prospect of immediate and irreparable harm if the TRO does not issue. *See* Ross-Simons of Warwick v. Baccarat, Inc., 102 F.3d 12, 19 (1st Cir. 1996) (providing guideposts to measure the "quantum of . . . harm that will suffice to justify interim injunctive relief"); *see also* Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970) (indicating that the destruction of a business is an irreparable injury that may be properly remedied by injunctive relief).

4. The risk of harm to the Debtor if a temporary restraining order is not granted outweighs the risk of any harm to the Administrator if a temporary restraining order is granted.

5. Given the nature of the Debtor's business operations and the purpose Congress had in enacting the CARES Act and establishing PPP, the public interest is served by issuing a temporary restraining order.

6. The Debtor is a debtor-in-possession and no bond is required under Rule 65.

7. Based on the foregoing, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** as follows:

(A) The motion is **GRANTED** on the terms and conditions set forth herein.

(B) A temporary restraining order is hereby issued, with notice, and directed to the Administrator and all agents, servants, employees, and any persons acting in concert with any of the foregoing (collectively, the "Restrained Parties"). The Court intends that First National Bank or any other lender participating in PPP with respect to the Debtor shall be one of the Restrained Parties upon actual notice of this order being provided to such bank. As to First National Bank, such notice may be provided by e-

mail to counsel of record for the bank in Case No. 19-10486. This order does not extend to any Restrained Party that submits, considers, or takes any other action with respect to an application under the PPP for any person or entity other than the Debtor.

(C) Until the expiration of this temporary restraining order, its scope shall be as follows:

(i) The Restrained Parties shall not deny or cause any commercial lender to deny an application of the Debtor under PPP solely on the basis that the Debtor is a debtor in bankruptcy or based on the words "or presently in bankruptcy" on the Administrator's official form of application.

(ii) The Restrained Parties shall not refuse to guaranty a loan sought by the Debtor under PPP solely on the basis that the Debtor is a debtor in bankruptcy or because of a "yes" answer in response to question 1 on the official form of PPP application promulgated by the Administrator.

(iii) The Administrator shall not authorize, guaranty, or disburse funds appropriated for loans under PPP without reserving sufficient funds or guaranty authority within the scope of the second appropriation to fund PPP to provide the Debtor with access to funds under PPP if the Debtor is eligible after implementation of the terms of this temporary restraining order and any appellate or judicial process with respect to any application filed by the Debtor. Rather, the Administrator shall ensure that she has sufficient authority within the scope of amounts appropriated for PPP as of April 30, 2020, to guaranty a loan to the Debtor in an amount the Debtor may be qualified to obtain, if the Debtor is eligible subject to the terms of

this order and after consideration of any administrative and judicial appeals and resolution of the claims in the Debtor's complaint.

(iv) The Debtor shall be authorized to submit a PPP application to a participating lender of its choosing—or a lender may consider any pending application—with the words "or presently involved in any bankruptcy" stricken from the official form of application and, if the Debtor satisfied all other conditions in question 1 to the official form, to mark the box answering question 1 "no" or, with respect to any pending application, for the participating lender to treat question 1 as if it was answered "no". The Restrained Parties shall consider the application submitted by the Debtor and fully implement all aspects of the PPP program with respect to the Debtor without any consideration of the involvement of the Debtor in bankruptcy. The application shall be considered an initial application of the submission if a subsequent application would adversely impact the Debtor's ability to qualify for a PPP loan.

(v) To the extent that any bank requires the Debtor to execute other forms, applications, or other documents for a PPP loan that include any language about whether the Debtor is involved in bankruptcy, the Debtor is authorized to strike the portion of such language about involvement in bankruptcy and the Restraining Parties shall process the forms, applications, or other documents without any consideration of the involvement of the Debtor in bankruptcy.

(vi) Nothing in this order obligates First National Bank to accept or submit a PPP application on behalf of the Debtor.

(vii) To the extent that approval of the Court is required for the Debtor to obtain a PPP loan, the Debtor shall file a motion and seek entry of an order authorizing such relief. The Debtor must file any such motion within ten days after the date of this order. Any deadline under the PPP program requiring disbursement of PPP loan proceeds is hereby extended in order to allow consideration of a motion by the Debtor seeking authority to obtain a PPP loan.

8. The Court will conduct a status conference on the Debtor's request for a preliminary injunction consistent with the terms of this order on May 5, 2020 at 9:30 a.m. At the status conference, the Administrator must be prepared to describe, in reasonable detail, the steps she has taken to comply with the terms of this order.

9. This temporary restraining order shall remain in full force and effect until expires at 5:00 p.m. (eastern) on May 14, 2020 unless either (a) terminated earlier by the Court or (b) further extended by applicable law, by order of the Court, or by written agreement of the Debtor and the Administrator.

Dated: May 1, 2020

Michael A. Fagone
United States Bankruptcy Judge
District of Maine

3. *In re Penobscot Valley Hospital* – Proposed Findings and Conclusions and Amended Findings and Conclusions and Amended Findings and Conclusions

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re: Penobscot Valley Hospital, Debtor	Chapter 11 Case No. 19-10034
Penobscot Valley Hospital, Plaintiff v. Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration, Defendant	Adv. Proc. No. 20-1005
In re: Calais Regional Hospital, Debtor	Chapter 11 Case No. 19-10486
Calais Regional Hospital, Plaintiff v. Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration, Defendant	Adv. Proc. No. 20-1006

PROPOSED FINDINGS AND CONCLUSIONS

Boiled to its essence, the plaintiffs' complaint is that they have been unfairly and illegally denied their spot in the "corporate breadline." These plaintiffs are not alone; many other chapter 11 debtors have the same view. This view is understandable and the plaintiffs here are

particularly sympathetic. But the Court's task is not to sympathize; it is to interpret the law. Although there is room for disagreement on the law, the better view is that the defendant—armed with a mandate from Congress and facing an economic crisis of unprecedented magnitude—made reasonable choices about how to allocate a large but finite amount of aid among struggling businesses. Those choices may produce seemingly harsh results, but they are not illegal.

I. Procedural History.

Penobscot Valley Hospital ("PVH") and Calais Regional Hospital ("CRH") are both debtors in possession in chapter 11 cases. PVH and CRH are not affiliated, and their chapter 11 cases are separate. About five weeks ago, PVH and CRH each started adversary proceedings against Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (the "Administrator" or the "SBA"). Those adversary proceedings, which have since been consolidated under Fed. R. Civ. P. 42, feature the same legal theories and nearly identical pleadings. For this reason, the Court will often refer to both entities collectively as "the Debtor" and employ the singular tense, differentiating between the two plaintiffs only where warranted by distinctions in the factual landscape.

By its complaint, the Debtor seeks preliminary and permanent injunctive relief, damages, declaratory relief, and a writ of mandamus. Shortly after the filing of the complaint, the Debtor sought a temporary restraining order ("TRO") that would enjoin the SBA and those acting in concert with it from: (a) denying the Debtor's application under the Paycheck Protection Program, 15 U.S.C. § 636(a)(36) (the "PPP") or refusing to guaranty a PPP loan sought by the Debtor solely due to the Debtor's present involvement in bankruptcy; and (b) authorizing, guarantying, or disbursing funds appropriated for loans under the PPP without reserving sufficient funds or guaranty authority to provide the Debtor access to PPP funds if the Debtor is

eligible notwithstanding its present involvement in bankruptcy. Following an expedited hearing on April 30, 2020, the Court granted the TRO over the SBA's objection. With the SBA's consent, a trial on the merits of the complaint was then scheduled for May 27 and the TRO was extended to May 28. The TRO was again extended with SBA's consent, this time to 5:30 p.m. on June 3, 2020.

II. Proposed Findings.

As discussed in more detail below, the Court is issuing proposed findings in these proceedings. These proposed findings are based on the evidence admitted at trial on May 27, including the parties' stipulations.

On or about March 27, 2020, Congress enacted, and the President signed, the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"). The CARES Act included stimulus funds designed to assist businesses and ensure that American workers continue to be paid despite the economic impact of Covid-19 and social distancing measures. Section 1102 of the CARES Act established the PPP under section 7(a) of the Small Business Act. A PPP loan may be forgiven—in whole or in part—under the circumstances set forth in section 1106 of the CARES Act.

A party may apply for a PPP loan by submitting an application to a federally insured, participating section 7(a) lender or any other lender approved by the SBA. The SBA has no authority to make direct loans under the PPP; instead, the SBA may guarantee PPP loans. Before providing a PPP loan number to a lender, the SBA does not analyze the PPP application to determine whether the applicant is likely to liquidate or whether a loan to the applicant would be of sound value. Under the CARES Act, eligibility determinations with respect to PPP applicants

rest with lenders, not the SBA.[1] However, the SBA has established minimal underwriting requirements for lenders that make PPP loans, including review of the Paycheck Protection Application Form, SBA Form 2483.

SBA Form 2483 provides, in relevant part, that if the applicant answers "Yes" to question 1, the loan will not be approved. Question 1 asks whether the applicant is "presently involved in any bankruptcy[.]" This question effectively excludes applicants who are "presently involved in any bankruptcy" from participating in the PPP. Eligible businesses, including hospitals that are not in bankruptcy, have obtained PPP funds.

PVH and CRH submitted their initial PPP applications on April 3, 2020. To question 1, PVH and CRH each answered "Yes." First National Bank did not accept CRH's application because CRH had answered "Yes" to question 1. As to PVH, Machias Savings Bank ("MSB"), sought guidance from the SBA about whether it should process the application in light of PVH's answer to question 1. The SBA indicated that the application should not be processed because the affirmative response to question 1 rendered PVH ineligible. After receiving this guidance, MSB did not process PVH's application.

PPP funds are processed generally on a first come, first served basis. Neither PVH nor CRH received PPP funds prior to their exhaustion under the first tranche of PPP funding. On or about April 23, 2020, Congress enacted legislation making additional funds available for PPP.

PVH has submitted a revised PPP application to MSB, consistent with the terms of the TRO, seeking a loan of approximately $1.5 million. On May 4, MSB submitted that revised application on PVH's behalf, and the loan was approved and funded (although the funds have not

[1] The parties have stipulated to certain "facts" that more closely resemble statements of law. Some of these stipulations have worked their way into this recitation of proposed findings. To the extent that the parties have stipulated to conclusions of law, those stipulations are not binding on the Court.

been disbursed to PVH). CRH has also prepared a revised PPP application consistent with the terms of the TRO seeking a loan for approximately $1.7 million but it has been unable to identify a lender that will process the application. June 30, 2020 is the current deadline for submissions of PPP applications.

PVH operates a 25-bed general medical and surgical hospital located in Lincoln, Maine, with approximately 174 employees. CRH also operates a 25-bed general medical and surgical hospital, located in Calais, Maine, with approximately 203 employees. The objective of both PVH and CRH, in their respective chapter 11 cases, is to preserve hospital operations and continuity of patient care in their service areas. To this end, both PVH and CRH have been actively engaged in efforts to reorganize and preserve their businesses since their chapter 11 petitions were filed; these are not liquidation cases.

PVH's and CRH's business operations and exit from chapter 11 have been negatively affected by economic consequences stemming from Covid-19. A significant portion of the cash receipts and revenue derived by PVH and CRH flow from outpatient procedures and office visits or medical procedures. In the wake of Covid-19, many procedures and office visits have been postponed, rescheduled, or canceled. These cancellations and deferrals have had—and are expected to continue to have—a negative impact on PVH's and CRH's cash receipts and revenue. PVH's net patient revenue is about $1.2 million less than budgeted for the period from March through mid-May of 2020. At CRH, net patient revenue is nearly $1.8 million less than budgeted for that same period. These revenue shortfalls will likely continue to increase into the future until business operations and patient volume normalize.

Although patient volume at PVH and CRH may vary for many reasons—including stay-at-home orders—PVH's and CRH's costs are generally fixed. In addition, PVH and CRH

regularly receive payments from certain payors that are made prospectively each week in fixed amounts. When patient volume is low, overpayments from these payors are more likely. As such, both PVH and CRH are likely accruing overpayment liabilities to Medicaid and Anthem, and perhaps Medicare, in amounts that are not yet known.

Since the initiation of these proceedings, PVH has received approximately $3.5 million, and CRH has received more than $3.7 million, in federal stimulus funds for rural hospitals. Use of these funds is restricted; they are to be used only to prevent, prepare for, and respond to coronavirus, or for health care expenses or lost revenue attributable to coronavirus. Although these stimulus funds have staved off the immediate risk of closure, they do not guarantee or ensure a successful future outcome for either PVH or CRH, and both hospitals will need the funds to prepare for and respond to future impacts of Covid-19. The futures of PVH and CRH are still highly uncertain and closure is still possible—although the risk is less immediate than when these proceedings were initiated—because the hospitals do not know when business operations will normalize, what their revenue will be like at that time, or whether they will have unrestricted funds that they can use to pay mounting liabilities.

Due to declining cash receipts in the aftermath of Covid-19, PVH was forced to use funds in its operating account that had been informally budgeted to satisfy overpayment liabilities from 2019 and contract cure payments. PVH will need to resolve this issue in order to successfully reorganize and avoid liquidation. CRH has experienced a period of extreme financial hardship due to Covid-19, while likely accruing overpayment liabilities that will need to be resolved in order to successfully reorganize and avoid liquidation. If PVH and CRH were able to obtain PPP funds, those funds would provide needed liquidity and would facilitate their efforts to reorganize. PPP funds would not be the sole determinant of a successful exit from chapter 11, but the funds

would enhance those prospects. Due to the forgivable nature of PPP loans, participation in the PPP would assist PVH and CRH sustain their respective business operations and exit from chapter 11.

III. Jurisdiction & Judicial Power.

Although the complaint lists four separate counts, there are only two substantive claims here: a claim under 11 U.S.C. § 525 ("section 525") and a claim under the Administrative Procedure Act (the "APA"). Beyond these two claims, the complaint identifies and requests various types of remedies. The substantive claims either arise under the Bankruptcy Code or are related to a case under the Bankruptcy Code. Gupta v. Quincy Med. Ctr., 858 F.3d 657, 663 (1st Cir. 2017) (observing that "related to" jurisdiction is "quite broad"); *see also* Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984) ("The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy*."). As such, the District Court has subject matter jurisdiction over the parties' disputes under 28 U.S.C. § 1334(b).

On the question of personal jurisdiction over the SBA generally, sovereign immunity presents little difficulty. The federal government and its agencies are immune from suit in the absence of a waiver. Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 260 (1999). However, Congress has expressly waived and abrogated sovereign immunity "as to a governmental unit . . . with respect to" section 525, 11 U.S.C. § 106(a)(1), permitting the court to "hear and determine any issue arising with respect to the application" of section 525 to a governmental unit, id. § 106(a)(2). In light of section 106, and because the SBA qualifies as a governmental unit under 11 U.S.C. § 101(27), sovereign immunity does not preclude the exercise of jurisdiction over the

SBA as to the Debtor's claim under section 525. The District Court also has personal jurisdiction over the SBA as to the Debtor's claim under the APA. *See* 5 U.S.C. § 702 (providing that, in general, a person wronged, aggrieved, or adversely affected by agency action may obtain judicial review in federal court and secure a judgment against the United States).[2]

These proceedings also raise a question about the exercise of judicial power, a question that goes beyond subject matter and personal jurisdiction. As authorized by 28 U.S.C. § 157(a), the District Court has referred these proceedings to this Court. *See* D. Me. LR 83.6(a). But the existence of a reference from the District Court does not end the analysis. By statute, this Court may hear and determine "core proceedings arising under title 11" and may enter "appropriate orders and judgments, subject to review under [28 U.S.C. § 158]." 28 U.S.C. § 157(b)(1). This Court may also "hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11." Id. § 157(c)(1). In such a proceeding (namely, a proceeding related to a case under Title 11), the Court "shall submit proposed findings of fact and conclusions of law to the district court," unless the District Court has referred the matter to this Court with the consent of all parties. Id. § 157(c)(1)-(2).

[2] The sovereign immunity questions are a bit thornier when it comes to the remedies that might be available to a plaintiff wronged by the conduct of the United States or its agencies. For example, the SBA contends that 15 U.S.C. § 634(b) renders the Court powerless to enjoin it from conduct that violates section 525. Although there is no need to reach this question or any of the other difficult questions relating to remedies, the Court does not believe that section 634(b) functions as the SBA contends. *See* Ulstein Mar., Ltd. v. United States, 833 F.2d 1052, 1057 (1st Cir. 1987) ("The no-injunction language [of section 634(b)] protects the agency from interference with its internal workings by judicial orders attaching agency funds, etc., but does not provide blanket immunity from every type of injunction."). The Court is similarly unpersuaded by the SBA's contention that money damages are not available for a violation of section 525. There is little reason to believe that Congress intended to create such a toothless tiger. Why should any governmental unit be licensed to engage in illegal bankruptcy discrimination, with the only remedies being declaratory or injunctive relief? That crabbed view has two apparent flaws: it ignores the text of 11 U.S.C. § 105(a) and it would stymie the fresh start policy of bankruptcy. Moreover, courts have not construed other sections of the Bankruptcy Code in a similarly effete manner. *See, e.g.,* Bessette v. Avco Fin. Servs., Inc., 230 F.3d 439, 445 (1st Cir. 2000) ("[I]t is clear . . . that a bankruptcy court is authorized to invoke § 105 to enforce the discharge injunction imposed by § 524 and order damages . . . if the merits so require.").

A proceeding to determine whether a governmental unit has violated section 525 arises under the Bankruptcy Code and fits within the statutory definition of "core proceedings." *See* 28 U.S.C. § 157(b)(2). However, the Constitution imposes limits on the exercise of judicial power and those limits cannot be altered by statute. *See generally* Stern v. Marshall, 564 U.S. 462 (2011) (concluding that bankruptcy court had statutory authority to enter judgment on a common law tort claim but lacked constitutional authority to do so). As a general matter, whether the Constitution presents an impediment to this Court's exercise of judicial power with respect to certain proceedings is an exceedingly complex question with no clear answer. With respect to the Debtor's section 525 claim, the Court need not grapple with the question for one simple reason: the SBA has knowingly and voluntarily consented to the entry of judgment on the Debtor's claim under section 525. *See* Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665 (2015) (holding that Article III is not violated when the parties knowingly and voluntarily consent to the bankruptcy court's adjudication of claims for which the parties are constitutionally entitled to an Article III adjudication).

That said, the Debtor's complaint ventures far beyond the confines of the Bankruptcy Code, asserting a claim under the APA. In that sense, this proceeding is not one arising in or arising under the Bankruptcy Code, but rather is one related to a case under the Bankruptcy Code. It is not a core proceeding and the SBA has not provided consent beyond that relating to section 525. As a result, the Court is constrained to issue proposed findings of fact and conclusions of law. *See* 28 U.S.C. § 157(c).[3]

[3] Although one of the Debtor's claims is core and the SBA has consented to entry of judgments and orders on that claim, the Court is nevertheless making proposed findings and conclusions with respect to the complaint in its entirety. Any attempt to issue proposed findings and conclusions on one aspect of the complaint, along with a final judgment subject to appeal under 28 U.S.C. § 158 on other aspects, would create unnecessary procedural complexity.

IV. Proposed Conclusions.

a. Administrative Procedure Act.

The Debtor seeks a declaratory judgment that: (i) the CARES Act does not prohibit, and in fact requires, the SBA to consider its PPP application on the same terms as other entities that are not presently debtors in bankruptcy; and (ii) the Administrator exceeded her statutory authority in promulgating a rule and an application form that exclude those who are presently debtors in bankruptcy from the pool of applicants eligible for PPP loans. Although the pleading does not invoke any particular statute, the request for a determination that the Administrator exceeded her authority falls within the umbrella of the APA, which provides for judicial review of whether an agency's action is contrary to law in either procedure or substance. *See* Union of Concerned Scientists v. Wheeler, 954 F.3d 11, 19 (1st Cir. 2020) (citing 5 U.S.C. § 706(2)).

Specifically, the APA provides that a reviewing court shall interpret statutory provisions and "set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law [or] . . . in excess of statutory . . . authority[.]" 5 U.S.C. § 706(2)(A) & (C). In Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984), the Supreme Court articulated the following two-part framework for a court called upon to review an agency's interpretation of a statute:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the 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.
>
> 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. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Id. at 842-44 (footnotes omitted) (quotation marks omitted). When a court detects a clear and unambiguous answer from Congress, the court should not proceed to the second part of the analytical framework. *See* Pereira v. Sessions, 138 S. Ct. 2105, 2113 (2018).

However, if Congress' intentions are unclear, the Court proceeds to the second step of the analysis, characterized by some amount of deference to the agency's interpretations. *See* Chevron, 467 U.S. at 844. "The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position[.]" United States v. Mead Corp., 533 U.S. 218, 228 (2001) (footnotes omitted). "The approach has produced a spectrum of judicial responses, from great respect at one end, to near indifference at the other[.]" Id. (citations omitted). In the second step of the analysis, if an administrative interpretation "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, [the court] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." Chevron, 467 U.S. at 845 (quotation marks omitted).

With this framework in place, the questions raised by the Debtor's APA claim come into sharper relief. First, did Congress directly address whether debtors in bankruptcy are eligible to participate in the PPP? Stated differently, did Congress explicitly or implicitly leave a gap for

the SBA to fill in determining whether debtors in bankruptcy are eligible? If there is a gap in the statute, does the SBA's exclusion of debtors in bankruptcy from the PPP reflect a "reasonable accommodation of conflicting policies" committed to the SBA's care? If yes, is this an accommodation that Congress would have sanctioned? To answer these questions, consideration of the text of the CARES Act and the powers and duties expressly conferred on the Administrator with respect to the PPP is necessary.

i. The CARES Act.

The CARES Act was enacted in late March 2020 in response to a global pandemic that had, at that time, begun tightening its grip on almost every aspect of American life. The CARES Act contains six titles, but the parties' dispute finds its footing in Title I, the Keeping American Workers Paid and Employed Act. One way that Congress sought to keep American workers paid and employed is the PPP, a program designed to help small businesses meet the challenges caused by the various responses, both governmental and individual, to the pandemic.[4] The PPP is, in a manner of speaking, a lifeline for small business in this country.

At its core, the PPP provides that:

> Except 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). The term "covered loan" is a critical term that permeates the statute. An "eligible recipient" is "an individual or entity that is eligible to receive a covered loan[.]" Id. § 636(a)(36)(A)(iv). In a section titled "Increased eligibility for certain small businesses and organizations," the PPP expands the universe of eligible recipients beyond "small business

[4] The PPP has been codified at 15 U.S.C. § 636(a)(36). Other parts of the CARES Act have also been codified. *See, e.g.,* 15 U.S.C. § 9005. In these proposed conclusions, the Court cites the codification of the CARES Act rather than the public law.

concerns" in at least two respects. Id. § 636(a)(36)(D)(i)-(ii). In pertinent part, subparagraph (D) explains that "[d]uring the covered period. . . any business concern . . . shall be eligible to receive a covered loan" if it employs no more than the greater of 500 employees or, "if applicable, the size standard in number of employees established by the Administration for the industry" in which the business operates. Id. § 636(a)(36)(D)(i).

Subparagraph (F), entitled "Allowable uses of covered loans[,]" begins by identifying, in general, the allowable uses of the proceeds of a covered loan. Id. § 636(a)(36)(F)(i). It continues with an express delegation of authority from the SBA to lenders: "For purposes of making covered loans . . ., a lender approved to make loans under [section 636(a)] shall be deemed to have been delegated authority by the Administrator to make and approve covered loans, subject to [section 636(a)(36)]." Id. § 636(a)(36)(F)(ii)(I). When evaluating the eligibility of a borrower for a covered loan, lenders must consider whether the borrower was in operation on February 15, 2020 and had employees for whom the borrower paid salaries or paid independent contractors. Id. § 636(a)(36)(F)(ii)(II). This consideration is logically tied to the eligibility criteria in section 636(a)(36)(D)(i).

By enacting the CARES Act, Congress granted the Department of the Treasury authority to include in the PPP lenders that do not already participate in other SBA lending programs. 15 U.S.C. § 9008(b). The CARES Act further provides that the Secretary of the Treasury "may issue regulations and guidance as necessary . . . to": "(A) allow additional lenders to originate loans under this section; and (B) establish terms and conditions for loans under this section, including terms and conditions concerning compensation, underwriting standards, interest rates, and maturity." 15 U.S.C. § 9008(d)(1). Such terms and conditions are, "to the maximum extent practicable," to be "consistent with the terms and conditions required" by, among other things,

15 U.S.C. § 636(a)(36)(D), the eligibility provision discussed above. With guidance from the Secretary, the Administrator is tasked with administering the program established by 15 U.S.C. § 9008, a statute that refers specifically to the PPP. Id. § 9008(h). The Administrator is also given authority to issue regulations to carry out Title I of the CARES Act without regard to the notice requirements that might otherwise apply. 15 U.S.C. § 9012.

The CARES Act nestled the PPP into 15 U.S.C. § 636(a), which contains the terms generally applicable to lending under section 7(a) of the Small Business Act. Certain provisions of section 636(a) were expressly modified as to PPP loans, including the SBA's "participation" (i.e., the extent of the SBA's guarantee). *Compare* 15 U.S.C. § 636(a)(2)(A) (providing for SBA participation of 75 percent on a loan in excess of $150,000 and 85 percent on a loan less than or equal to $150,000), *with* id. § 636(a)(2)(F) (providing for SBA participation in PPP loans of 100 percent). Other parts of section 636(a) were left unaltered as to PPP loans; subparagraph (B) of the PPP provides that except as otherwise provided in paragraph (36), "the Administrator may guarantee covered loans under the same terms, conditions, and processes as a loan made under this subsection." Id. § 636(a)(36)(B). Paragraph (36) did not "provide otherwise" or expressly modify section 636(a)(6), which requires (subject to certain qualifications not relevant here), that all loans made under subsection (a) "shall be of such sound value or so secured as to reasonably assure repayment[.]" Id. § 636(a)(6).

ii. The SBA's PPP Eligibility Rules.

As described above, the CARES Act itself established certain eligibility parameters for participation in the PPP. 15 U.S.C. § 636(a)(36)(D). The Administrator, through regulations, added to those parameters, explaining that an applicant would be ineligible if:

> i. You are engaged in any activity that is illegal under Federal, state, or local law;
> ii. You are a household employer . . .;

> iii. An owner of 20 percent or more of the equity of the applicant is incarcerated, on probation, on parole; presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction; or has been convicted of a felony within the last five years; or
> iv. You, or any business owned or controlled by you or any of your owners, has ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is currently delinquent or has defaulted within the last seven years and caused a loss to the government.

See Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811 § III(2)(b) (April 15, 2020) (to be codified at 13 C.F.R. pt. 120). The Administrator also altered, as to PPP applicants, some of its preexisting eligibility rules for participation in SBA loan programs which are codified at 13 C.F.R. 120.110. For example, the SBA waived a rule that would otherwise prohibit a business owned by a director or shareholder of a PPP lender from applying for a PPP loan through that lender based on a recognition that, "unlike other SBA loan programs, the financial terms for PPP Loans are uniform for all borrowers, and the standard underwriting process does not apply because no creditworthiness assessment is required for PPP Loans." Business Loan Program Temporary Changes; Paycheck Protection Program—Additional Eligibility Criteria and Requirements for Certain Pledges of Loans, 85 Fed. Reg. 21747 § III(2)(a) (April 20, 2020) (to be codified at 13 C.F.R. pt. 120). Instead of the standard underwriting process, the SBA implemented a "streamlin[ed]" process to "provide relief to America's small businesses expeditiously." *See* 85 Fed. Reg. 20811 § III(1)

The rule specifically challenged by the Debtor here provides as follows:

> 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 nonrepayment 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.

Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Promissory Notes, Authorizations, Affiliation, and Eligibility, 85 Fed. Reg. 23450 § III(4) (April 28, 2020) (to be codified at 13 C.F.R. pts. 120-121).

iii. Legality of the Bankruptcy Exclusion Under the APA.

The Debtor contends that Congress, by statutory fiat, eliminated the SBA's discretion in administering the PPP. Specifically, the Debtor posits that the eligibility provisions of 15 U.S.C. § 636(a)(36)(D) override any discretion inherent in the word "may" as featured in 15 U.S.C. § 636(a)(36)(B), and preclude any action by the Administrator that shrinks the pool of eligible applicants specified in the statute. There is support for the Debtor's perspective. *See, e.g.,* DV Diamond Club of Flint, LLC v. U.S. Small Bus. Admin., --- F. Supp. 3d ---, 2020 WL 2315880, at *10 (E.D. Mich. May 11, 2020) (discussing section 636(a)(36)(D) and concluding that "the text of the PPP makes clear that every business concern meeting the statutory criteria is eligible for a PPP loan during the covered period"). Although this interpretive theory has some appeal, it puts too much emphasis on certain words in isolation ("shall" and "may") while ignoring the critical concept of "eligibility." In common parlance, the word "eligible" carries a connotation of choice. *See* Webster's II New University Riverside Dictionary 425 (Anne H. Soukhanov & Kaethe Ellis eds., 1984). The Court does not believe that Congress would have infused the PPP

with concept of "eligibility" if the intention was for the SBA to have no ability to choose which individuals and businesses would benefit from loan guarantees. Congress did not explicitly say whether debtors in bankruptcy are categorically excluded from the PPP. Congress did exclude debtors from another form of economic aid described in the CARES Act. *See* 15 U.S.C. § 9042(c)(3)(D)(i)(V). This exclusion does not tip the scales one way or the other when it comes to the PPP. *See* United States v. Granderson, 511 U.S. 39, 63 (1994) (Kennedy, J., concurring) (explaining that presumption that Congress acts intentionally when it includes particular language in one part of a statute but omits it in another "loses some of its force when the sections in question are dissimilar and scattered at distant points of a lengthy and complex enactment"). It does, however, suggest that Congress intended the SBA to fill a statutory gap and determine whether debtors in bankruptcy would be eligible for the PPP. As a result, in evaluating the APA claim, the Court proceeds to the second step of the Chevron framework.

The SBA defends the bankruptcy exclusion as a proper exercise of its rulemaking function. In the SBA's view, Congress defined the universe of "eligible recipients" but left the SBA free to choose among those recipients when utilizing the guaranty authority appropriated for the PPP. That act of choosing, says the SBA, is a prototypical exercise of discretion that should not be set aside by the Court based on its own policy judgments. The Court agrees.

The SBA's bankruptcy exclusion was a reasonable effort to accommodate the conflicting policies committed to the SBA's care, and one that Congress might reasonably have sanctioned. Many approaches could have been taken when determining whether and under what circumstances a debtor in bankruptcy might be approved for a PPP loan. The SBA could have determined that any debtor could participate in the PPP if authorized by the bankruptcy court. The SBA could have excluded chapter 7 debtors, but not debtors in other chapters; or some

chapter 11 debtors, but not others. None of these approaches alter the reality that the SBA had very little time to implement this program and that standard underwriting would have been impractical. Under the circumstances, in light of Congress' intent to see the PPP funds distributed quickly, the SBA relaxed its underwriting standards. The SBA did not, however, eliminate all underwriting; viewed together, the questions on SBA Form 2483 represent at least a minimal effort to learn something about whether a covered loan will be repaid if not forgiven.

Despite the Debtor's assertions and notwithstanding some of the preliminary determinations made in the TRO, the PPP is a loan program; it is not merely a grant of aid. Certain features of PPP loans make them highly desirable from a borrower's perspective—most notably the prospect of debt forgiveness. And there are many other features that distinguish PPP loans from section 7(a) loans.[5] But, a distribution of PPP funds initially assumes the form of a loan. Congress knows how to distribute aid without strings attached and, in fact, did so recently. *See, e.g.,* 26 U.S.C. § 6428(a) (amending the IRC to provide so-called "recovery rebates" as tax credits for certain individuals in the wake of Covid-19). With the PPP, however, Congress elected to establish a loan program, albeit one that does not look like any other loan program available from the government or the capital markets. These loans may function as a grant of aid during a crisis, but they are still—at least at their inception—loans.

Given the nature of the PPP, the reasonableness of the SBA's underwriting efforts, however truncated—or, to use the SBA's term, "streamlined"—becomes clear. Until a debt

[5] For example, compare 15 U.S.C. § 636(a)(18), addressing guarantee fees for section 7(a) loans, and 15 U.S.C. § 636(a)(36)(H), waiving the guarantee fees. There are other differences as well, including interest rate, loan term, prepayment penalties and deferment of principal payments. These distinctions in the financial terms are likely what Congress had in mind when, in 28 U.S.C. § 636(a)(36)(B), it wrote "Except as otherwise provided in [28 U.S.C. § 636(a)(36)] . . . ." To this extent, this Court parts ways with DV Diamond Club of Flint, LLC v. U.S. Small Bus. Admin., --- F. Supp. 3d ---, 2020 WL 2315880, (E.D. Mich. May 11, 2020).

evidenced by a PPP note is forgiven in accordance with the law, the holder of the note and a guarantor are rightfully concerned about the maker's ability to satisfy the debt. This is true whether or not the note bears a low, fixed rate of interest, and it is even more true where, as here, there is no collateral for the debt and no personal guarantee supporting the obligation. *See* 15 U.S.C. § 636(a)(36)(J), (L). Perhaps a person's status as a debtor presently involved in bankruptcy is a crude measure of creditworthiness, but it is still a measure.[6]

The Debtor may counter all of this by observing that Congress expressly delegated eligibility consideration to lenders*, see* 15 U.S.C. § 636(a)(36)(F)(ii), and that lenders, not the SBA, are imbued with the discretion to make covered loans. Wrapping it all together, the Debtor might say that Congress expanded the universe of eligible recipients and then instructed lenders, not the SBA, to make decisions about how to choose among those recipients. The difficulty with that line of attack is that it only looks at the loan, and not the guaranty which, as noted above, is a full guaranty of an unsecured loan without any supporting obligation and with minimal underwriting on the front end. The PPP was constructed on the strength of the public fisc, and it would be counterintuitive to assume that the lenders—who one can assume are taking very little risk—were given all of the discretion that Congress contemplated when it said that the SBA "may" guarantee a covered loan.

[6] Characterizing the PPP as a loan program is reconcilable with the SBA rule that states that "no creditworthiness assessment is required" when that particular language is taken in context. *See* 85 Fed. Reg. 21747 § III(2)(a). The rule permits the director or shareholder of a PPP lender to obtain a PPP loan from that lender for an unrelated business concern in which that director or shareholder is involved, despite a regulation that would prohibit such a transaction as to other section 7(a) loans. Id. The rule reflects the reality that the underwriting process is so streamlined that a PPP lender has little ability to play favorites or to relax standards when it comes to an application submitted by a director or shareholder of the lender. In any event, the "no creditworthiness assessment" language is too slender a reed to support the full weight of the Debtor's argument when the entire program is considered.

b. Section 525.

The Debtor, like many others, believes that the SBA's bankruptcy exclusion conflicts with the Bankruptcy Code's prohibition on discrimination. Invoking due process concepts and anti-discrimination laws for protected classes of persons, the Debtor sees a clear case of "ad hoc, unwarranted" discrimination prohibited by section 11 U.S.C. § 525(a). Before examining the language of the statute, there is one overriding point that bears initial emphasis: the federal government may discriminate against bankruptcy debtors, as long as the discrimination does not run afoul of 11 U.S.C. § 525(a) or (c). Bankruptcy debtors simply do not enjoy the same level of protection from discrimination as constitutionally protected classes of persons. With that in mind, the Court turns to the place where the analysis must begin, the text of the statute.

In relevant part, section 525(a) provides:

> [A] governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

11 U.S.C. § 525(a). Because the SBA is a governmental unit, 11 U.S.C. § 101(27), the Debtor is a person, 11 U.S.C. § 101(41), and the Debtor's status as debtor in a case under Title 11 was the proximate cause of its exclusion from the PPP, *see* F.C.C. v. NextWave Personal Communications Inc., 537 U.S. 293, 301 (2003), the only question is whether this case involves a "license, permit, charter, franchise, or other similar grant" within the meaning of section

525(a). The question is formulated with relative ease, but finding the answer is more challenging.

i. License, Permit, Charter, or Franchise.

The words "license," "permit," "charter," and "franchise" are not defined in the Bankruptcy Code, leaving the Court to search elsewhere for their meanings. While some of these terms have different meanings in the commercial context, section 525(a) is only concerned with action by governmental units. Accordingly, the critical terms must be evaluated in light of their meanings when used in the governmental context. A "license" is a "revocable permission to commit some act that would otherwise be unlawful" or an "agreement . . . that it will be lawful for the licensee to . . . do some act that would otherwise be illegal, such as hunting game." Black's Law Dictionary 931 (7th ed. 1999). A "permit" is a "certificate evidencing permission" or "a license." Id. at 1160. A "charter" is an "instrument by which a governmental entity . . . grants rights, liberties, or powers to its citizens." Id. at 228. And finally, the term "franchise" is defined as "[t]he right conferred by the government to engage in a specific business or to exercise corporate powers." Id. at 668. Each of the enumerated items is a type of grant from a governmental actor that involves some permission for the holder of the grant to act in a particular way. *See* Watts v. Pa. Hous. Fin. Co., 876 F.2d 1090, 1093 (3d Cir. 1989); *see also* Toth v. Mich. State Hous. Dev. Auth., 136 F.3d 477, 480 (6th Cir. 1998) (quoting Watts). For example, a driver's license is a permission to operate a motor vehicle on public roads. That a "permit" necessarily involves a permission is axiomatic. The terms "charter" and "franchise" have less obvious connections to permissions, but the concept is there nevertheless.

The "permission" view of section 525(a) is sensible: the government should not be able to erect barriers to the realization of a debtor's fresh start solely because the debtor has availed

itself of the right to a financial fresh start under federal law. There would be little sense in any contrary view. Withholding permission for a debtor to operate a motor vehicle solely because the debtor received a discharge would seriously undermine the debtor's ability to earn a living. *See* Perez v. Campbell, 402 U.S. 637 (1971) (invalidating, under the Supremacy Clause, an Arizona law allowing the state to withhold a driver's license from a person who received a discharge solely because that person did not pay a discharged debt). But withholding a permission to engage in activity that is essential to the enjoyment of the benefits of a fresh start a la Perez is different from declining to provide assistance in the form of a loan on favorable terms (or even a grant of aid) that might be useful to obtaining a fresh start.

The parties do not cite controlling authority applying section 525(a) to a loan. That is understandable because, in general, a party cannot be forced to make a loan to a debtor. *See* 11 U.S.C. § 365(c)(2). Although section 365(c)(2) is not directly applicable here because there is no prepetition contract to make a loan, the policy behind section 365(c)(2) supports an interpretation of section 525(a) that does not extend to loans. As one court recently put it, the point may be attenuated, but it is nevertheless a valid consideration. *See* Transcript of Hearing, Cosi, Inc. v. U.S. Small Bus. Admin. (In re Cosi, Inc.), Adv. Proc. 20-50591 (Bankr. D. Del. April 30, 2020), Dkt. No. 17.

Perhaps recognizing that section 525(a) is not sufficiently elastic to be stretched to cover a loan, the Debtor argues that the PPP does not involve the provision of a loan.[7] For the reasons explained above, the Court is unpersuaded: the PPP creates a loan program. The existence of favorable terms and a unique feature (namely, forgiveness under specified circumstances) does

[7] The Debtor has consistently urged the Court to afford the Debtor the right to participate in the PPP. The request is couched in terms of a "right" and, less explicitly, a "permission" to participate. Fair enough, but it is apparent that the Debtor's ultimate goal is the money.

not change the character of what the Debtor wants to obtain: a loan that might be forgiven by the lender. The Debtor makes much of the SBA's concession that it does consider whether an applicant is likely to liquidate before providing a loan number for an application. That does not, in the Court's view, establish that the PPP is a "grant program" instead of a "loan program." Instead, the SBA has recognized that, in these circumstances, there was insufficient time for traditional underwriting processes to be utilized. The funds had to be deployed quickly, both because of the immediate needs of the recipients and their employees and because of the statutory deadlines.

But even if the Court were to conclude that the PPP establishes a grant program, the benefits of this particular program would not constitute a license or a franchise.[8] There is no suggestion that the PPP would authorize the Debtor to undertake a particular act—an essential feature of a license—and the PPP would not confer a special privilege on the Debtor to engage in a specific business or exercise corporate power—an essential feature of a franchise.[9]

ii. Other Similar Grant.

The phrase "other similar grant" remains as the last arrow in the Debtor's section 525 quiver. This arrow comes closer to the target, but, like the others, sails wide. "Although the term 'grant' is not defined in the statute, the use of the word 'similar' limits the universe of 'grants' to which § 525(a) applies, ensuring that only grants bearing a family resemblance to

[8] The Debtor does not appear to contend that the PPP qualifies as a permit or a charter.

[9] Some decisions take a broader view of the meaning of the term "franchise." For example, in Exquisito Services Inc. v. United States (In re Exquisito Services, Inc.), 823 F.2d 151 (5th Cir. 1987), the court concluded that the Air Force had violated section 525(a) by declining to exercise an option contract with a company to provide services solely because that company had filed for bankruptcy. In so doing, the court reasoned that the contract was "essentially a franchise" because it fell under the umbrella of the SBA's section 8(a) program, and the SBA would assist the company during the life of the contract. Id. at 154. Because the court did explain how any governmental program that assists people amounts to a franchise, its decision carries limited persuasive force.

licenses, permits, charters, and franchises enjoy the anti-discrimination protections of the Bankruptcy Code." Ayes v. U.S. Dep't of Veterans Affairs, 473 F.3d 104, 108 (4th Cir. 2006); *see also* Goldrich v. N.Y. Higher Educ. Servs. Corp. (In re Goldrich), 771 F.2d 28, 31 (2d Cir. 1985) (noting that "Congress rejected a flat prohibition on any form of discrimination" and inferring that "Congress chose its words carefully"). The question then becomes: how strongly must an item not specifically enumerated in the statute resemble the items enumerated in order to fall within the anti-discrimination ambit?

Other courts have struggled to define the scope of section 525 based on its text. *See* Stoltz v. Brattleboro Hous. Auth. (In re Stoltz), 315 F.3d 80, 88 (2d Cir. 2002) ("Despite more than twenty years of judicial consideration, . . . the scope of Section 525(a)'s protection in the context of public housing is still unsettled."); Saunders v. Reeher (In re Saunders), 105 B.R. 781, 787 (Bankr. E.D. Pa. 1989) (observing that "there has been understandable difficulty in defining the exact scope of this subsection given its language and legislative history"). Some courts conclude that the common thread connecting licenses, permits, charters, and franchises is that all are "governmental authorizations that typically permit an individual to pursue some occupation or endeavor aimed at economic betterment." Ayes, 473 F.3d at 108. Other courts observe that these enumerated items are all unrelated to credit, Goldrich, 771 F.2d at 30, and do not give rise to mutual obligations between the governmental unit and the individual, United States v. Cleasby (In re Cleasby), 139 B.R. 897, 900 (W.D. Wis. 1992). Still others emphasize that licenses, permits, charters, franchises, and other similar grants are items "unobtainable from the private

sector and essential to a debtor's fresh start." In re Soltz, 315 F.3d at 90; *see also* In re Saunders, 105 B.R. at 787.[10]

The varied interpretations of section 525(a), combined with the elasticity inherent in the word "similar," might lead to the conclusion that section 525(a) is ambiguous. In that case, resort to the legislative history, as a means of ascertaining the meaning of the words that Congress used, would be appropriate. The House and Senate reports contain the following explanation:

> [Section 525] is an additional debtor protection. It codifies the result of Perez v. Campbell, 402 U.S. 637 (1971), which held that a state would frustrate the congressional policy of a fresh start for a debtor if it were permitted to refuse to renew a drivers license because a tort judgment resulting from an automobile accident had been unpaid as a result of a discharge in bankruptcy.
>
> Notwithstanding any other laws, section 525 prohibits a governmental unit from denying, revoking, suspending, or refusing to renew a license, permit, charter, franchise, or other similar grant to, from conditioning such a grant to, from discrimination with respect to such a grant against, deny[ing] employment to, terminat[ing] the employment of, or discriminat[ing] with respect to employment against, a person that is or has been a debtor or that is or has been associated with a debtor. The prohibition extends only to discrimination or other action based solely on the basis of the bankruptcy, on the basis of insolvency before or during bankruptcy prior to a determination of discharge, or on the basis of nonpayment of a debt discharged in the bankruptcy case (the Perez situation). It does not prohibit consideration of other factors, such as future financial responsibility or ability, and does not prohibit imposition of requirements such as net capital rules, if applied nondiscriminatorily.
>
> In addition, the section is not exhaustive. The enumeration of various forms of discrimination against former bankrupts is not intended to permit other forms of discrimination. The courts have been developing the Perez rule. This section 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

[10] The Saunders court characterized section 525(a) as covering certain "property interests not obtainable through the private sector." 105 B.R. 781, 787 (Bankr. E.D. Pa. 1989). This Court is skeptical of the notion that the items enumerated in section 525(a) amount to "property interests" in all circumstances. The Saunders court also concluded that, even if section 525(a) had been violated, no award of money damages was authorized. Id. at 788. In these two respects, Saunders is not convincing.

> 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.
>
> The effect of the section, and of further interpretations of the Perez rule, is to strengthen the anti-reaffirmation policy found in section 524(b). Discrimination based solely on nonpayment could encourage reaffirmations, contrary to the expressed policy.
>
> The section is not so broad as a comparable section proposed by the bankruptcy commission . . . which would have extended the prohibition to any discrimination, even by private parties. Nevertheless, it is not limiting either, as noted. The courts will continue to mark the contours of the anti-discrimination provision in pursuit of sound bankruptcy policy.

H.R. Rep. 95-595, at 366-67 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6322-23; S. Rep. 95-989, at 81 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5867. The House report also contains further explanation of the genesis of section 525:

> The bill [that became section 525(a)] codifies [an] important debtor protection, first enunciated by the Supreme Court in 1971 in the case of Perez v. Campbell. In that case, Arizona refused to renew a drivers license because the driver had been in an automobile accident, had been sued as a result, and lost. The driver was uninsured. He filed bankruptcy and the tort judgment was discharged. Arizona had a general policy forbidding a drivers license to any motorist that failed to pay a tort judgment arising out of an automobile accident. The Supreme Court held that if such policy were applied to include nonpayment by reason of a discharge in bankruptcy, the policy would run afoul of the federal bankruptcy policy of ensuring the debtor in a bankruptcy case a fresh start. The court ordered the license issued.
>
> Similar discrimination has occurred in other areas as well. Municipalities have occasionally dismissed employees such as foremen or policemen because of a bankruptcy. Nonpayment of a debt to a credit union has occasionally resulted in loss of a job. Various state and federal laws automatically deny certain licenses to an individual solely on the basis of a bankruptcy.
>
> These practices are seriously detrimental to a debtor's fresh start, and are contrary to bankruptcy policy. The courts have followed the Perez doctrine in some of these instances, and have restored bankruptcy to positions from which they were excluded because of the bankruptcy. The doctrine is a developing doctrine, and its precise ultimate contours are not yet clear. More case law will undoubtedly develop the extent of the discrimination that is contrary to bankruptcy policy.

> Nevertheless, the bill [that became section 525(a)] codifies one important aspect of the protection against discriminatory treatment . . . prohibit[ing] action by a governmental agency, that is based solely on the basis of a filing under . . . the Bankruptcy Code. The prohibition does not extend so far as to prohibit examination of the factors surrounding the bankruptcy, the imposition of financial responsibility rules if they are not imposed only on former bankrupts, or the examination of prospective financial condition or managerial ability. The purpose of the section is to prevent an automatic reaction against an individual for availing himself of the protection of the bankruptcy laws. Most bankruptcies are caused by circumstances beyond the debtor's control. To penalize a debtor by discriminatory treatment as a result is unfair and undoes the beneficial effects of the bankruptcy laws. However, in those cases where the causes of a bankruptcy are intimately connected with the license, grant, or employment in question, an examination into the circumstances surrounding the bankruptcy will permit governmental units to pursue appropriate regulatory policies and take appropriate action without running afoul of bankruptcy policy.

H.R. Rep. 95-595, at 165 (footnotes omitted).

To the extent that the text of section 525(a) provides some wiggle room, and to the extent that the legislative history encourages courts to continue to develop the Perez rule, the PPP nevertheless fails to qualify as an item protected by the anti-discrimination provision. The exclusion of persons involved in bankruptcy from the PPP does not conflict with the fresh start or otherwise frustrate the operation of the Bankruptcy Code. *See generally* Perez, 402 U.S. at 649-51 (analyzing whether a state statute was in conflict with the Bankruptcy Code's fresh start policy or otherwise frustrated the operation of the Code). The examples of prohibited discrimination that might fall within the expanded ambit of section 525(a) identified in the legislative history relate to restrictions on a debtor's affiliations or activities that would render it very difficult if not impossible for a debtor to pursue his or her chosen livelihood. In these proceedings, the exclusion of the Debtor from the PPP is not similar to denying a debtor a license to operate in his chosen field and thereby denying the debtor the opportunity to pursue economic betterment. There is no question that the Debtor is experiencing serious financial hardship in the current circumstances and some of that may be attributable to the Debtor's decision to follow

governmental recommendations designed to protect the public health. Despite its severity, that financial stress was not caused by the SBA's decision to exclude the Debtor from the PPP. It may be harder for the Debtor to confirm a plan of reorganization without the PPP funds, but that difficulty itself does not render the Administrator's decision to exclude debtors from the PPP a violation of section 525. *See* Jasper v. Bowdoinham Fed. Credit Union (In re Jasper), 325 B.R 50, 54 (Bankr. D. Me. 2005) (holding that denial of "check cashing privileges, ATM transactions, online banking, minimum account balances and the like" did not violate section 525(a) even though the debtors would likely pay more for these services in the commercial marketplace).

The PPP is not a grant that is similar to a license, permit, charter, or franchise. The PPP is not a permission granted by the government to allow persons to engage in economic activity; it is a government-guaranteed program of credit extension on generous terms with forgiveness features intended to aid small businesses and incentivize them to retain employees during an unprecedented economic downturn. Whether this program is properly characterized as a loan or a grant, it is ultimately a form of "financial assistance [that] does not constitute a 'similar grant' within the scope of § 525." *See* In re Cleasby, 139 B.R. at 900.

iii. The Broader View of Section 525.

Armed with both textual argument and policy-based arguments, the Debtor has advanced its view that SBA's bankruptcy exclusion violates section 525. Despite the appeal of that theory, the caselaw that adopts a broader view of section 525 is either distinguishable or unpersuasive. For example, Rose v. Connecticut Housing Authority (In re Rose), 23 B.R. 662 (Bankr. D. Conn. 1982) contains a cogent discussion of section 525 and the Congressional purpose animating that section, as well as a survey of cases in this subject. However, Rose does not offer a persuasive

explanation of how mortgage financing fits within the actual text of the statute adopted by Congress. Hillcrest Foods, Inc. v. Briggs (In re Hillcrest Foods, Inc.), 10 B.R. 579 (Bankr. D. Me. 1981) is similarly unhelpful to the Debtor. Hillcrest concluded preliminarily, and without discussion, that a debtor's ability to self-insure for worker's compensation fell within the protection of section 525(a). Id. at 579-80. There was, in Hillcrest, a "permission" (namely, permission to self-insure) that is not present with a loan program.

Stinson v. BB & T Investment Services, Inc. (In re Stinson), 285 B.R. 239 (Bankr. W.D. Va. 2002), relied on by the Debtor, is consistent with the interpretive approach employed here. In Stinson, the court held that section 525(b) does not extend to a private employer's refusal to hire a person solely because that person had been a debtor or received a discharge. Id. at 250. That conclusion was based on the words used in section 525(a)—which extends to a denial of employment by a governmental unit—in comparison to the words used in section 525(b)—which does not expressly extend to a denial of employment by a private employer. *See* id. at 247-48. Stinson is a useful illustration of a court sticking to the words of the statute, even though the purpose of the statute might have been promoted by the debtor's preferred interpretation of section 525(b). *See* id. at 247.

The Debtor fares better with its citation to In re The Bible Speaks, 69 B.R. 368 (Bankr. D. Mass. 1987), where the court concluded that a school's ability, under a federal statute, to offer unaccredited courses and to have students receive tuition subsidies was analogous to a license or franchise and constituted an "other similar grant." The problem, however, with The Bible Speaks and other similar cases is that they stretch the key terms in the statute too far. Congress did not impose a flat prohibition on bankruptcy discrimination by governmental units (although

doing so would have been entirely consistent with sound bankruptcy policy).[11] The very words on the page indicate a limitation. In its supplemental memorandum in support of its motion for a TRO, the Debtor protests that "the government cannot bar a debtor from applying for a government program solely because of the person's status as a bankruptcy debtor." But that is not what section 525(a) says. It does not bar discrimination with respect to all "government programs," but instead uses more limited terms.

A final note about the caselaw cited by the Court in the TRO: although the Court cited Stoltz, that decision is not binding. Further, even if the Court were to find Stoltz persuasive and follow it here, the PPP would not qualify as an "other similar grant" under the reasoning employed by the Second Circuit. In Stoltz, the court concluded that public housing leases are items protected by section 525(a) because: (a) a lease is a type of grant and (b) public housing leases are similar to the items enumerated in the statute because they are items conferred only by the government and are essential to a debtor's fresh start. 315 F.3d at 89-90. By contrast, a PPP loan is not a grant and even if it were, the Court cannot conclude on this record that it is essential to the Debtor's fresh start; it might be helpful but there has been no showing that it is necessary. In fact, the dissenting opinion in Stoltz contains what this Court believes is the better view of section 525, both in terms of a textual analysis and in terms of making sense of section 525 in light of the other parts of the Bankruptcy Code. *See generally* Stoltz, 315 F.3d at 95-97.

[11] In fact, when the Commission on the Bankruptcy Law of the United States published its recommendations to Congress in 1973, it proposed the enactment of a law providing that "[a] person shall not be subjected to 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." H. R. Doc. No. 93-137, pt. 2, at 143-44 (1973). A reform bill drafted by the National Conference of Bankruptcy Judges was nearly identical. In response to a hue and cry about the breadth of the proposals, Congress altered the language, ultimately settling on the text of section 525(a) that is currently in effect.

V. Conclusion.

Based on these proposed findings and conclusions, judgment should enter in favor of the SBA and against the Debtor on all counts of the Debtor's complaint.

Date: June 3, 2020

Michael A. Fagone
United States Bankruptcy Judge
District of Maine

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re: Penobscot Valley Hospital, Debtor	Chapter 11 Case No. 19-10034
Penobscot Valley Hospital, Plaintiff v. Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration, Defendant	Adv. Proc. No. 20-1005
In re: Calais Regional Hospital, Debtor	Chapter 11 Case No. 19-10486
Calais Regional Hospital, Plaintiff v. Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration, Defendant	Adv. Proc. No. 20-1006

ADDITIONAL PROPOSED FINDINGS AND CONCLUSIONS

All litigation under the Administrative Procedures Act implicates separation of powers questions, and these lawsuits provide no exception. The power to implement statutes is delegated by Congress to agencies, not to courts, because agencies have several comparative

advantages in making policy judgments. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2413 (2019). Unlike courts, agencies are politically accountable: "they are subject to the supervision of the President, who in turn answers to the public." Id. Congress delegates legislative authority explicitly in some circumstances and implicitly in others. United States v. Mead Corp., 533 U.S. 218, 229 (2001). Implicit delegation may occur, as it has here, where it is "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it . . . fills a space in the enacted law[.]" Id.

These proceedings concern a rule adopted by the Small Business Administration ("SBA") excluding debtors in bankruptcy from participating in the Paycheck Protection Program (the "PPP"). The plaintiffs—Penobscot Valley Hospital and Calais Regional Hospital (the "Hospitals")—have consistently asked this Court to cast aside the SBA's rule and declare them eligible to participate in the PPP. The arguments advanced in support of this remedy have evolved over time. What began as a challenge to the SBA's authority to implement the bankruptcy exclusion, coupled with a claim of unlawful discrimination under 11 U.S.C. § 525, has morphed into an argument that the SBA ran afoul of the procedures outlined in the Administrative Procedures Act ("APA"). Although the Hospitals make detailed arguments under the rubric of the APA on recommittal, their fundamental grievance is what it always has been: they challenge the wisdom of the bankruptcy exclusion and ask the Court to substitute their policy preference for the SBA's. But it is not for the Judiciary to second-guess a reasonable rule promulgated by an agency in the exercise of the authority delegated by Congress. As such, the Hospitals' challenge must fail. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) ("When a challenge to an agency construction of a statutory provision,

fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.").

I. PROCEDURAL BACKGROUND

These proceedings began on April 27, 2020. Due to the time-sensitive nature of the relief sought by the Hospitals, the Court conducted an expedited trial on May 27 and issued proposed findings and conclusions one week later. Following an objection from the Hospitals under Fed. R. Bankr. P. 9033(b), proceedings commenced in the District Court. With its response to that objection, the SBA filed a declaration that had not been offered in evidence during the trial. The District Court adopted and accepted, in part, this Court's proposed findings and conclusions. The proceedings were then recommitted to this Court for consideration of certain questions, including the significance of the declaration filed by the SBA.

After recommittal, the Hospitals were granted the opportunity to conduct limited discovery. Based on representations from the Hospitals about the nature and extent of discovery necessary, the Court allowed a discovery period of approximately six weeks. The parties were instructed to contact the Court upon completion of discovery to schedule a further hearing. After several months, the Court convened a status conference and learned that the parties were mired in a discovery dispute. The Court then issued an order resolving that dispute and entertained oral arguments from the parties.

The District Court recommitted a particular aspect of these proceedings to this Court for further consideration—namely, the proposed conclusion that the bankruptcy exclusion is within the bounds of a reasonable interpretation of the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), Pub. L. No. 116-136, 134 Stat. 281 (2020). Specifically, this Court is tasked with: (i) resolving the "possible discrepancy" [Dkt. No. 78, p. 6] between the declaration

filed with the District Court (the "Maine Miller Declaration") and another declaration filed in similar litigation in Vermont (the "Vermont Miller Declaration"); (ii) determining whether the bankruptcy exclusion is a reasonable construction of the CARES Act under the second step of the analysis articulated in Chevron; and (iii) determining whether the bankruptcy exclusion is "arbitrary and capricious" under the standard established in Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

II. PROPOSED FINDINGS AND CONCLUSIONS

To the extent that the District Court adopted and accepted the proposed findings and conclusions issued previously, those findings and conclusions are fully incorporated here. Despite that incorporation, certain information contained in the initial findings and conclusions may be reproduced here for the ease of the reader. Before completing the tasks assigned on recommittal, an orientation is in order, starting with the authority conferred upon the SBA in relation to loans under Section 7(a) of the Small Business Act, canvassing the pertinent provisions of the PPP, tracking through the promulgation of the bankruptcy exclusion, and concluding with a review of the two Miller declarations.[1]

A. The Small Business Administration and Section 7(a) Loans Generally

Because Congress tasked the SBA with administering the PPP under a loan program that was in place long before the passage of the CARES Act, "understanding the SBA's functions and that pre-existing loan program helps put the issues in context." USF Fed. Credit Union v. Gateway Radiology Consultants, P.A. (In re Gateway Radiology Consultants, P.A.), ---

[1] On recommittal, the Hospitals asked this Court to make additional proposed findings, a number of which straddle or even cross the (sometimes but not always blurry) line separating factual findings from legal conclusions. To the extent that the factual record and the law permit, the Court has made the findings and conclusions requested, and incorporated them below. To the extent that the requested findings and conclusions do not appear below, they lack merit as a matter of law or lack support in the record, as applicable, and the Court therefore declines to make them.

F.3d ---, 2020 WL 7579338, at *2 (11th Cir. Dec. 22, 2020). When it passed the Small Business Act of 1953 (codified as amended at 15 U.S.C. §§ 631-657), Congress declared that "the Government should aid, counsel, assist, and protect insofar as is possible the interests of small-business concerns in order to preserve free competitive enterprise . . . and to maintain and strengthen the overall economy of the Nation." 15 U.S.C. § 631(a). To carry out these policies, Congress created the SBA, an agency that would serve "under the general direction and supervision of the President[,]" 15 U.S.C. § 633(a), and vested management of the SBA in a single Administrator, to be "appointed from civilian life by the President, by and with the advice and consent of the Senate," id. § 633(b)(1). "The Administration was given extraordinarily broad powers to accomplish [its] important objectives, including that of lending money to small businesses whenever they could not get necessary loans on reasonable terms from private lenders." SBA v. McClellan, 364 U.S. 446, 447 (1960) (footnote omitted).

Section 7(a) of the Small Business Act empowers the SBA to make loans to small businesses directly or indirectly—through loan guarantees—"to the extent and in such amounts as provided . . . in appropriation Acts[.]" 15 U.S.C. § 636(a). When it comes to these loans, commonly known as Section 7(a) loans, the Administrator has expansive rulemaking authority. The Administrator is generally empowered to "make such rules and regulations as [she] deems necessary to carry out the authority vested in [her,]" 15 U.S.C. § 634(b)(6), and to "take any and all actions . . . when [she] determines such actions are necessary or desirable in making . . . or otherwise dealing with or realizing on loans[,] id. § 634(b)(7). The Administrator also serves on the Loan Policy Board of the SBA, along with the Secretary of Treasury and the Secretary of Commerce, and in that capacity establishes:

> general policies (particularly with reference to the public interest involved in the granting and denial of applications for financial assistance by the Administration

> and with reference to the coordination of the functions of the Administration with other activities and policies of the Government), which shall govern the granting and denial of applications for financial assistance by the Administration.

15 U.S.C. § 633(d).

In the exercise of its authority to lend under Section 7(a) and to make rules and policies for such lending, the SBA is constrained and guided by the terms of the statute. Among those terms is the requirement that Section 7(a) loans "shall be of such sound value or so secured as reasonably to assure repayment[.]" 15 U.S.C. § 636(a)(6). To ensure that a loan will be "so sound as to reasonably assure repayment[,]" the SBA's lending criteria involve consideration of nine factors, including the applicant's credit history. 13 C.F.R. § 120.150. For Section 7(a) loans, the SBA also considers an applicant's bankruptcy history; applicants are asked to disclose prior bankruptcy filings on Form 1919, the loan application form.

B. The Paycheck Protection Program

The CARES Act became law on March 27, 2020, creating the PPP and nestling it within the existing Section 7(a) framework. *See* Pub. L. No. 116-136, § 1102(a), 134 Stat. 281, 286. As its name suggests, the PPP was designed to keep American workers on payrolls despite the economic impacts of COVID-19. To achieve this objective, the PPP authorized small business loans that would qualify for forgiveness if used to fund specific expenses, including payroll costs, during a defined period. *See* Pub. L. No. 116-136, § 1106(b), 134 Stat. 281, 298.

For PPP loans, the CARES Act amended Section 7(a) of the Small Business Act, 15 U.S.C. § 636(a), in a number of ways, but left other aspects of Section 7(a) in place. Most provisions relating to the PPP were located in a new paragraph at the end of 15 U.S.C. § 636(a). *See* Pub. L. No. 116-136, § 1102(a)(2), 134 Stat. 281, 286. Except as otherwise set forth in that new paragraph—number (36)—Congress provided that "the Administrator may guarantee [PPP]

loans under the same terms, conditions, and processes as a loan made under this subsection"—i.e., subsection (a) of 15 U.S.C. § 636. *See* Pub. L. No. 116-136, § 1102(a)(2), 134. Stat. 281, 287 (codified at 15 U.S.C. § 636(a)(36)(B)). By enacting 15 U.S.C. § 636(a)(36), Congress deviated from some of the terms applicable to other loans made under Section 7(a). *See, e.g.,* 15 U.S.C. § 636(a)(36)(D), (J). But Congress did not suspend for PPP loans the "sound value" requirement generally applicable to Section 7(a) loans under 15 U.S.C. § 636(a)(6).

Although PPP loans were designed to incentivize borrower behavior—i.e., use of the loans to fund payroll and other specified expenses—Congress also contemplated that the loans might not be so used, and might not be forgiven. Either way, the SBA would have some part to play. To the extent that a PPP borrower qualifies for loan forgiveness, the SBA is on the hook to the lender for the amount forgiven, plus accrued interest. *See* 15 U.S.C. § 9005(c)(3). Any portion of a PPP loan not forgiven must be repaid, *see* 15 U.S.C. § 636(a)(36)(K)(ii) (establishing, for unforgiven PPP loans, a minimum maturity of five years and a maximum maturity of ten years from the date of an application for forgiveness), and if the borrower does not pay the lender, the SBA remains on the hook because the SBA guarantees 100% of loans issued under the PPP, *see* id. § 636(a)(2)(F) (providing that the SBA is to "participate in"—or guarantee—100% of PPP loans); id. § 636(a)(36)(K)(i) (indicating that unforgiven PPP loan balances "shall continue to be guaranteed by the Administration").

Congress appropriated a very large, but not unlimited, amount of money for the PPP: $349 billion. *See* Pub. L. No. 116-136, § 1107(a)(1), 134 Stat. 281, 301. The legislature communicated a sense that these funds be disbursed quickly. The statute contained time constraints relating to the loans themselves: only "covered loans" would be eligible for forgiveness, and covered loans could only be obtained during the "covered period" ending on

June 30, 2020. *See* Pub. L. 116-136, § 1102(a)(2), 134 Stat. 281, 286; Pub. L. 116-136, § 1106, 134 Stat. 281, 298.[2] Congress also granted the SBA emergency rulemaking authority, providing: "Not later than 15 days after March 27, 2020, the Administrator shall issue regulations to carry out [Title I of the CARES Act] and the amendments made [thereby] without regard to the notice requirements under [5 U.S.C. § 553(b)]." 15 U.S.C. § 9012.

PPP funds are generally processed on a first come, first served basis, and the funds were exhausted quickly. On April 24, 2020, Congress appropriated an additional $310 billion for PPP loan guarantees. *See* Paycheck Protection and Healthcare Enhancement Act, Pub. L. No. 116-139, § 101(a), 134 Stat. 620 (2020).

C. The Bankruptcy Exclusion

In the meantime, the Administrator used the emergency rulemaking authority conferred by Congress. On April 2, 2020, less than one week after the CARES Act was passed, the Administrator posted an interim final rule regarding the PPP (the "First IFR") to the SBA's website. The First IFR explains that in order to apply, an applicant must submit SBA Form 2483, the PPP Application Form, to a lender. Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,811, 20,814 (Apr. 15, 2020) (to be codified at 13 C.F.R. pt. 120). Among the limited PPP underwriting requirements, the First IFR includes lender review of the borrower certifications contained in Form 2483. Id. at 20,815. The Administrator also posted Form 2483 to the SBA's website on April 2, 2020. Form 2483 states that "if questions (1) or (2) . . . are answered 'Yes' the loan will not be approved." [Dkt. No. 49,

[2] The "covered period" during which a "covered loan" could be obtained was subsequently extended to December 31, 2020. *See* Paycheck Protection Program Flexibility Act of 2020, Pub. L. 116-142, § 3(a), 134 Stat. 641, 641 (codified at 15 U.S.C. § 636(a)(36)(A)(iii)).

¶ 17.] Question one asks whether the applicant is "presently involved in any bankruptcy[,]" excluding such applicants from participating in the PPP. Id.

The agency action excluding debtors from the PPP occurred with the promulgation of the First IFR and Form 2483, neither of which contain an explanation specifically addressing the bankruptcy exclusion. In a prefatory section, the First IFR observes that the "intent of the Act is that SBA provide relief to America's small businesses expeditiously[.]" 85 Fed. Reg. 20,811, 20,812. That prefatory section goes on to provide that:

> For . . . loans made under the PPP, SBA will not require the lenders to comply with section 120.150 "What are SBA's lending criteria?." SBA will allow lenders to rely on certifications of the borrower in order to determine eligibility of the borrower . . . . Lenders must comply with the applicable lender obligations set forth in this interim final rule, but will be held harmless for borrowers' failure to comply with program criteria; remedies for borrower violations or fraud are separately addressed in this interim final rule. The program requirements of the PPP identified in this rule temporarily supersede any conflicting Loan Program Requirement (as defined in 13 C.F.R. 120.10).

85 Fed. Reg. 20,811, 20,812. Among the lending criteria and loan program requirements suspended as to PPP loans, but applicable to other Section 7(a) loans, is the multi-factored analysis identified in 13 C.F.R. § 120.150, including a consideration of the applicant's credit history, and an evaluation of any prior bankruptcy filings revealed on Form 1919. In place of these considerations, the SBA imposed more streamlined requirements: lender review of the borrower certifications on Form 2483, and disqualification of certain applicants, including those involved in an ongoing bankruptcy.

On April 24, 2020, the Administrator posted a fourth interim final rule (the "Fourth IFR")

with respect to the PPP on its website.[3] The Fourth IFR, which has since been published in the Federal Register, "supplements the previously posted interim final rules with additional guidance." Requirements—Promissory Notes, Authorizations, Affiliation, and Eligibility, 85 Fed. Reg. 23,450, 23,450 (Apr. 28, 2020) (to be codified at 13 C.F.R. pt. 120 & 121). The rule provides the following guidance pertinent to the bankruptcy exclusion:

> **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.

Id. at 23,451.

D. The Miller Declarations

By May and June 2020, litigation was underway in this Court and in courts across the country concerning the legality of the bankruptcy exclusion. In some of the cases, the

[3] The Administrator also promulgated second and third interim final rules, neither of which address the bankruptcy exclusion. *See* Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,817 (Apr. 15, 2020) (to be codified at 13 C.F.R. pt. 121); Additional Eligibility Criteria and Requirements for Certain Pledges of Loans, 85 Fed. Reg. 21,747 (Apr. 20, 2020) (to be codified at 13 C.F.R. pt. 120).

Administrator offered declarations of its Deputy Associate Administrator for Capital Access, John A. Miller. *See* [Dkt. No. 90, Ex. 1 & 2]. In the Maine Miller Declaration—dated June 5, 2020—Mr. Miller explains that the CARES Act was enacted on March 27, 2020 "to provide emergency assistance" to "businesses affected by the COVID-19 emergency." [Dkt. No. 90, Ex. 1, ¶ 3.] He states that participating lenders began accepting PPP loan applications on April 3, 2020, one week after the CARES Act was passed. Id. ¶ 22. Mr. Miller also states that:

> SBA determined that 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, provided good cause for SBA to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act. Specifically, small businesses needed to be informed on how to apply for a loan and the terms of the loan under section 1102 of the Act as soon as possible because under the CARES Act as enacted the last day to apply for and receive a loan was June 30, 2020. The Interim Final Rules were issue[d] to allow immediate [implementation] of this program.

Id. ¶ 5. When discussing the bankruptcy exclusion specifically, Mr. Miller states:

> The reason for including the bankruptcy exclusion in Form 2483 was that SBA in consultation with Treasury determined that in order to meet the challenges of rescuing the economy from the effects of the Covid-19 virus pandemic, loan assistance authorized by the [CARES] Act had to be provided as expeditiously as possible with as little as possible underwriting. Since a company in bankruptcy required an inquiry into the state of the proceeding and possibly a court order for DIP financing, as well [as] the possible resolution of a host of other issues and the prospect of incurring fees by the lender in monitoring the bankruptcy proceeding, it was determined that the wording of Form 2483 would be expeditious and less likely to slow the administration of the program and less likely to require the expenditure of additional time, effort and other resources. The purpose of a PPP loan is to help small businesses pay their employees and maintain operations to allow them to restart quickly over the next few months. *SBA decided that this purpose would not be served by including all bankruptcies.* Certain creditors, including administrative creditors, could assert claims to the PPP loan funds that would interfere with its authorized uses and the requirements for PPP loan forgiveness. SBA, in consultation with the Department of Treasury, determined there should be one streamlined rule that applies to all debtors in bankruptcy to avoid the need for case by case reviews.

Id. ¶ 17 (emphasis added). Finally, Mr. Miller explains that other than the statute itself, the PPP application form, and the First and Fourth IFRs, there "is no Administrative Record . . . because this was an Interim Final Rule, prepared in order to deliver this much needed assistance to small businesses as expeditiously as possible." Id. ¶ 23.

The Vermont Miller Declaration—dated May 14, 2020—contains some of the same statements as the Maine Miller Declaration. But in the Vermont Miller Declaration, Mr. Miller offers the following explanation for the bankruptcy exclusion:

> The purpose of a PPP loan is to help small businesses pay their employees and maintain operations to allow them to restart quickly over the next few months. *This purpose would not be served in a chapter 11 liquidation or in a chapter 7 case.* Certain creditors, including administrative creditors, could assert claims to the PPP loan funds that would interfere with its authorized uses and the requirements for PPP loan forgiveness. SBA, in consultation with the Department of Treasury, determined there should be one streamlined rule that applies to all debtors in bankruptcy to avoid the need for case by case reviews.

[Dkt. No. 90, Ex. 2, ¶ 21 (emphasis added).]

With these individual pieces of the puzzle laid on the table, the focus can shift to the larger picture: an assessment of how the bankruptcy exclusion holds up under the second step of the Chevron analysis and the arbitrary and capricious framework articulated in State Farm. Before adjusting to that wider lens, however, the significance of the Miller declarations looms in the foreground.

E. The Significance of the Miller Declarations vis-à-vis the Administrative Record

The Hospitals contend that the Miller declarations are post hoc rationalizations that should be ignored. In the Hospitals' view, this is warranted because the Miller declarations were not generated at the same time as the bankruptcy exclusion or offered at trial, and the reasons they advance in support of the bankruptcy exclusion do not qualify as contemporaneous explanations. The Hospitals also contend that the reasoning in the Vermont Miller Declaration

differs from the reasoning in the Maine Miller Declaration, and that the evolution in the explanations offered over time renders them incredible.

When "reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record." Dep't of Commerce v. New York, 139 S. Ct. 2551, 2573 (2019). Like many rules, the administrative record rule admits certain exceptions. For example, "[a] reviewing court may accept evidence outside the administrative record where there is a strong showing of bad faith or improper behavior by agency decisionmakers, or where there is a failure to explain administrative action [so] as to frustrate effective judicial review." Murphy v. Comm'r of Internal Revenue, 469 F.3d 27, 31 (1st Cir. 2006) (citations omitted) (quotation marks omitted). "The administrative record may be supplemented, if necessary, by affidavits, depositions, or other proof of an explanatory nature." Sierra Club v. Marsh, 976 F.2d 763, 772 (1st Cir. 1992) (quotation marks omitted). "The new material, however, should be explanatory of the decisionmakers' action at the time it occurred. No new rationalizations for the agency's decision should be included, and if included should be disregarded." Id. at 772-73 (citations omitted).

Here, there has been no showing of bad faith or improper behavior on the part of the SBA. However, given the exigencies of the Administrator's rulemaking efforts in relation to the PPP, the supplementary explanation contained in the Fourth IFR is appropriately included in the administrative record. In the extraordinary circumstances surrounding the passage of the CARES Act, and the congressional directive that the Administrator get the PPP off the ground immediately to provide economic relief to struggling businesses and their employees, the lack of a perfectly contemporaneous explanation is far from troubling. There is no suggestion that the explanation offered in the Fourth IFR is simply a "convenient litigating position" and the time-

lag between the promulgation of the bankruptcy exclusion and the Fourth IFR did not force the Hospitals or the Court to chase a moving target. *Cf.* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1909 (2020) ("Permitting agencies to invoke belated justifications . . . can upset the orderly functioning of the process of review, forcing both litigants and courts to chase a moving target." (quotation marks omitted)).

The District Court determined that the Maine Miller Declaration "elaborates on and helps to explain the Administrator's earlier stated reason for adopting the bankruptcy exclusion." [Dkt. No. 78, p. 5.] Specifically, the District Court observed:

> [T]he reason provided by the Administrator for enacting the bankruptcy exclusion rule was the need to establish a streamlined, expedited loan process reliant on certifications by applicants, and her determination 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." Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. at 23,451. The [Maine] Miller Declaration is consistent with this view, explaining that "[c]ertain creditors, including administrative creditors, could assert claims to the PPP loan funds that would interfere with its authorized uses and the requirements for PPP loan forgiveness." ECF No. 1-14 at 44.

[Dkt. No. 78, p. 5] (footnote omitted). Because the explanation offered in the Maine Miller Declaration is consistent with that included in the Fourth IFR, the Maine Miller Declaration appropriately supplements the administrative record.[4]

Although the Maine Miller Declaration was not offered at trial, considerations of fairness do not warrant exclusion here, where the Hospitals were granted a full opportunity to craft a litigation response to the declaration on recommittal. Before trial, the primary thrust of the Hospitals' contentions under the APA concerned the Administrator's authority to adopt the

[4] Even if the Maine Miller Declaration were excluded from consideration, the proposed disposition would be unaffected. This Court would still conclude, on a record consisting solely of Form 2483 and the First and Fourth IFRs, that the bankruptcy exclusion is a reasonable construction of the statute and is neither arbitrary nor capricious.

bankruptcy exclusion. *See* [Dkt. No. 1]. The closest the Hospitals came to developing a State Farm style argument was in their pretrial memorandum where they asserted that the record was "sufficient to determine that the Administrator has acted in an arbitrary and capricious manner, in violation of 5 U.S.C. § 706(2)(A)." [Dkt. No. 43, ¶ 18.] They also urged the Court to use "all of the tools necessary to address the concerns of the Administrator" (as expressed in the Fourth IFR) and argued that the record would not show that the Administrator "engaged in a thoughtful, deliberative process" with respect to the bankruptcy exclusion or in "any review whatsoever of the financial health or viability of any company seeking PPP funds." Id. In the proposed findings and conclusions issued in June 2020, the Court attempted to address the arguments developed by the parties. Since then, the Administrator has supplemented the administrative record with the Maine Miller Declaration, and the Hospitals, in response to that declaration, have made new, detailed arguments under the State Farm rubric.

Among other things, this Court is tasked with resolving the "possible discrepancy" between the Maine Miller Declaration and the Vermont Miller Declaration. [Dkt. No. 78, p. 6.] When discussing the bankruptcy exclusion in the Maine Miller Declaration, Mr. Miller states: "The purpose of a PPP loan is to help small businesses pay their employees and maintain operations to allow them to restart quickly over the next few months. SBA decided that this purpose would not be served by including all bankruptcies." [Dkt. No. 90, Ex. 1, ¶ 17.] In the Vermont Miller Declaration, executed several weeks prior to the Maine Miller Declaration, Mr. Miller states: "The purpose of a PPP loan is to help small businesses pay their employees and maintain operations to allow them to restart quickly over the next few months. This purpose would not be served in a chapter 11 liquidation or in a chapter 7 case." [Dkt. No. 90, Ex. 2, ¶ 21.] After these statements, both declarations state: "Certain creditors, including administrative

creditors, could assert claims to the PPP loan funds that would interfere with its authorized uses and the requirements for PPP loan forgiveness. SBA, in consultation with the Department of Treasury, determined there should be one streamlined rule that applies to all debtors in bankruptcy to avoid the need for case by case reviews." [Dkt. No. 90, Ex. 1, ¶ 17 & Ex. 2, ¶ 21.]

A discrepancy may be a "difference" or an "inconsistency." *See* Webster's New World College Dictionary 392 (3d ed.). There is no inconsistency between the Miller declarations; they are not identical, but they are not in conflict either. Saying that the purpose of the PPP would not be served in a chapter 11 liquidation or a chapter 7 case (as Mr. Miller states in the Vermont Miller Declaration) does not imply or suggest that the purpose of the PPP would be served in other types of bankruptcy cases. That is the inference upon which the Hospitals' inconsistency theory rests. The statement in the Vermont Miller Declaration—that the purpose of the PPP would not be served in chapter 7 or a liquidating chapter 11—is merely a subset of the broader statement in the Maine Miller Declaration—that the purpose of the PPP would not be served by including all bankruptcies. The difference between these two statements does not cause the Court to view the Miller declarations with any degree of skepticism. A person might say on a Monday: "I am gluten sensitive. I have difficulty with marble rye, so I avoid that type of bread." Several days later, that person might say: "I am gluten sensitive. I have difficulty with bread, and therefore avoid all bread." A listener, hearing the more specific first statement and then the more general second statement, would not question the person's credibility simply because the statements were not identical. In both cases, the person with the gluten sensitivity would be tying a difficult decision—the decision to avoid bread—to the sensitivity. That same sort of reasoning appears in the Miller declarations; the distinction between the two declarations is not problematic in the way the Hospitals suggest.

F. The Analysis Under the Second Step of Chevron and State Farm

The District Court previously adopted this Court's proposed conclusion under the first step of Chevron—namely, that Congress did not explicitly say whether debtors in bankruptcy were eligible to participate in the PPP, delegating rulemaking authority on that issue to the SBA. In the second step of the Chevron analysis, the court considers whether the challenged agency decision "is based on a permissible construction of the statute." Chevron, 467 U.S. at 843 (footnote omitted).

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Id. at 843-44 (footnotes omitted).[5]

As the District Court stated, although the inquiry under the second step of Chevron may overlap somewhat with the question of whether the agency decision was arbitrary or capricious under the APA, the overlap is incomplete. [Dkt. No. 78, p. 6 (citing River St. Donuts, LLC v. Napolitano, 558 F.3d 111, 117 (1st Cir. 2009)).] At oral argument, the Hospitals signaled agreement with the District Court's view, stressing certain aspects of the APA analysis, but

[5] The Hospitals did not ask the Court to apply the less deferential framework supplied by Skidmore v. Swift & Co., 323 U.S. 134 (1944). Had such a request been made, it would have been denied. "The Chevron analysis applies because Congress delegated authority to the SBA to make rules carrying the force of law and the SBA exercised that authority in issuing the [bankruptcy exclusion]." USF Fed. Credit Union v. Gateway Radiology Consultants, P.A. (In re Gateway Radiology Consultants, P.A.), --- F.3d ---, 2020 WL 7579338, at *8 n.8 (11th Cir. Dec. 22, 2020) (citing United States v. Mead Corp., 533 U.S. 218, 229-30 (2001)).

indicating that their arguments under Chevron and the APA were basically one and the same. For this reason, the discussion centers on the standard set forth in the text of the APA:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of [Title 5] or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706.

The standard prescribed by section 706(2)(E) cropped up at oral argument when the Hospitals argued that the SBA is saddled with the burden of showing that the bankruptcy exclusion is supported by "substantial evidence." For this proposition, the Hospitals cited State Farm and Allentown Mack Sales and Serv., Inc. v. Nat'l Labor Relations Bd., 522 U.S. 359 (1998). These decisions are not on point. In Allentown Mack, the agency decision was governed by a statute separate from the APA indicating that the agency's findings of fact, if supported by substantial evidence, would be conclusive. *See* id. at 377 (referencing 29 U.S.C. § 160(e)). The agency decision also involved on-the-record factfinding, governed by 5 U.S.C. § 706(2)(E). Similarly, in State Farm, the substantial evidence standard applied where "Congress required a record of the rulemaking proceedings to be compiled and submitted to a reviewing

court, 15 U.S.C. § 1394, and intended that agency findings under the [applicable statute] would be supported by substantial evidence on the record considered as a whole." State Farm, 463 U.S. at 43-44 (referencing the applicable legislative history). The bankruptcy exclusion, by contrast, was not adopted pursuant to a statute requiring the SBA to conform to the substantial evidence standard, and the rulemaking process did not involve on-the-record factfinding or a hearing under 5 U.S.C. §§ 556 or 557. *Cf.* 5 U.S.C. § 706(2)(E).

The Hospitals have also invoked section 706(2)(A), asserting that the SBA acted in an "arbitrary and capricious" manner in adopting the bankruptcy exclusion.[6] In 1983, the Supreme Court provided the following explication of this standard:

> The scope of review under the arbitrary and capricious standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. In reviewing that explanation, [the court] must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies: [The court] may not supply a reasoned basis for the agency's action that the agency itself has not given. [The court] will, however, uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.

State Farm, 463 U.S. at 43 (citations omitted) (quotation marks omitted).

How does the bankruptcy exclusion hold up when this standard is applied? In the First IFR, the Administrator stressed that the CARES Act had been passed to provide "emergency

[6] Countless courts, litigants, and commentators have referred to the "arbitrary and capricious" standard. This Court will follow suit, even though a natural reading of the APA instructs the court to set aside agency action that is either arbitrary or capricious. *See* 5 U.S.C. § 706(2)(A) ("arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

assistance" to businesses and determined that the legislature had intended "that SBA provide relief to America's small businesses expeditiously." 85 Fed. Reg. 20,811, 20,811. To provide that expeditious relief, the SBA streamlined its lending criteria and created an application process that would allow lenders to underwrite PPP loans by relying on borrower certifications on Form 2483, including the certification regarding bankruptcy status. Later, in the Fourth IFR, the Administrator again emphasized the streamlined process that permitted lenders to "rely on an applicant's representation concerning the applicant's . . . involvement in a bankruptcy proceeding." 85 Fed. Reg. 23,450, 23,451. The Administrator also supplemented this need-for-speed rationale with two other considerations: First, the Administrator stated that, after consulting with the Secretary of the Treasury, she had 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." Id. Second, the Administrator observed that "the Bankruptcy Code does not require any person to make a loan or a financial commitment to a debtor in bankruptcy." Id.

As previously noted, the Maine Miller Declaration is consistent with the Fourth IFR. In that declaration, Mr. Miller reiterated that debtors were categorically excluded from the PPP in order to streamline and expedite the underwriting and lending process:

> Since a company in bankruptcy required an inquiry into the state of the proceeding and possibly a court order for DIP financing, as well as the possible resolution of a host of other issues and the prospect of the incurring of fees by the lender in monitoring the bankruptcy proceeding, it was determined that the wording of Form 2483 would be expeditious and less likely to slow the administration of the program and less likely to require the expenditure of additional time, effort and other resources.

[Dkt. No. 90, Ex. 1, ¶ 17.] Mr. Miller also elaborated on the Administrator's concerns about the risk of "unauthorized" use of the funds or non-repayment of unforgiven loans if debtors in

bankruptcy were to participate in the PPP, explaining that "[c]ertain creditors, including administrative creditors, could assert claims to the PPP loan funds that would interfere with its authorized uses and the requirements for PPP loan forgiveness." Id. Finally, Mr. Miller stated that purpose of the PPP—helping small businesses pay employees and maintain operations—would not be served by including all bankruptcies in the program, and that the Administrator had decided to apply a bright-line rule "to avoid the need for case by case reviews." Id.

The Fourth IFR and the Maine Miller Declaration reflect that the bankruptcy exclusion was the product of reasoned decision making. When deciding whether to make PPP loans available to debtors, the Administrator appropriately looked to the CARES Act as the source of the relevant factors. *See* Brewer v. Madigan, 945 F.2d 449, 457 (1st Cir. 1991) ("The enabling statute . . . is the principal source of relevant factors to be considered by the agency in promulgating regulations."); *see also* Judulang v. Holder, 565 U.S. 42, 55 (2011) (stating, in an APA challenge to an action by the Board of Immigration Appeals, that the BIA, tasked with considering "relevant factors," was required to consider "the purposes of the immigration laws or the appropriate operation of the immigration system"). These factors are identified in the administrative record, as supplemented with the Maine Miller Declaration. The record also contains an explanation that provides a rational connection between the factors the Administrator considered and the decision to exclude all debtors in bankruptcy from the PPP.

The CARES Act and the circumstances surrounding its enactment were truly extraordinary, and Congress clearly communicated the need for speedy action, granting the Administrator only fifteen days to issue regulations, dispensing with the notice-and-comment procedures that would otherwise apply to those regulations, and imposing a cut-off date for PPP applications of June 30, 2020. The Administrator did not err in concluding that the legislature

had tasked the SBA with administering the PPP expeditiously. To implement this directive, the SBA decided to streamline the lending and underwriting process, allowing lenders to rely on borrower certifications. The SBA further simplified the process by adopting a bright-line rule rendering debtors in bankruptcy ineligible, obviating the need for a lender or the SBA to review the circumstances of individual debtors and to monitor ongoing bankruptcy cases. The bankruptcy exclusion was based, in part, on the need for speedy loan processing communicated by Congress.

The Hospitals resist this conclusion, asserting that there is nothing in the administrative record—no data, facts, or studies—that explains how the process of making or guaranteeing PPP loans would be bogged down by permitting debtors to participate. In their view, the SBA should have, within the fifteen-day rulemaking window, solicited input or sought an expert opinion about how cumbersome it would have been to include debtors in bankruptcy in the PPP. The Hospitals assert that the administrative record should stand on its own, without any assistance from common sense or generalized conclusions about lending in bankruptcy. The Court disagrees. Because Congress dispensed with the notice-and-comment procedures prescribed by 5 U.S.C. § 553 and required the Administrator to promulgate rules within fifteen days, the Court does not fault the SBA for failing to seek expert opinions or to conduct hearings. These are the sorts of activities normally undertaken during the notice-and-comment process. *See* 5 U.S.C. § 553(c). And, contrary to the Hospitals' beliefs, common sense can appropriately play a role in agency rulemaking. *See, e.g.,* ABC Aerolineas, S.A. de C.V. v. U.S. Dep't of Transp., 747 F. App'x 856, 870 (D.C. Cir. 2018); Van Hollen v. Fed. Election Comm'n, 811 F.3d 486, 497 (D.C. Cir. 2016). This is especially true here, where that commonsense insight—that lending may be more complex and risky in the bankruptcy context—is bolstered by the Administrator's apparent

awareness of the content of the United States Bankruptcy Code, specifically 11 U.S.C. § 364 (concerning the terms under which the trustee, or a debtor with powers of a trustee, may obtain postpetition credit) and 11 U.S.C. § 365(c)(2) (prohibiting the trustee from assuming a contract to make a loan to or for the benefit of the debtor).

The SBA also tethered the bankruptcy exclusion to a determination that there was an "unacceptably high risk" that a debtor in bankruptcy might use PPP funds for "unauthorized purposes" or fail to repay an unforgiven loan. 85 Fed. Reg. 23,450, 23,451. The Maine Miller Declaration provides further insight, explaining that the SBA perceived a risk that creditors in a bankruptcy case, including administrative creditors, could assert claims to PPP funds, interfering with the intended uses of those funds. [Dkt. No. 90, Ex. 1, ¶ 17.] Mr. Miller also stated that the purpose of the PPP was "to help small businesses pay their employees and maintain operations" and that the SBA "decided that this purpose would not be served by including all bankruptcies." Id. These statements each relate to the purpose of the PPP generally, and the intended uses of PPP funds, more specifically. *See* 15 U.S.C. § 9005(b) (detailing the uses of PPP loan proceeds that render the loan forgivable, in whole or in part). This line of reasoning also hinges on certain generalizations about lending to debtors in bankruptcy.

The CARES Act requires all PPP applicants to certify that they are experiencing some degree of financial distress related to the uncertainty created by COVID-19. *See* 15 U.S.C. § 636(a)(36)(G)(i)(I) (requiring PPP applicants to certify "that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient"). This degree of financial distress is a PPP baseline. But, when it came to debtors in bankruptcy, the SBA perceived an additional risk that PPP loan funds might not be used for their intended purposes—e.g., to cover payroll—and might instead be gobbled up by administrative

creditors. The SBA apparently perceived that debtors, as a group, were more likely than non-debtors to be suffering from financial distress unrelated to COVID-19 and teetering on the verge of ceasing operations. This is a fair, commonsense generalization.

The Hospitals counter this generalization with specificity, asserting that they are, in fact, attempting to reorganize. That is all very well, but the SBA simply did not have the luxury of considering the particulars of individual bankruptcy cases. And many reorganizations do fail despite the debtors' best efforts. The Bankruptcy Code provides a mechanism by which a chapter 11 reorganization may be converted to a liquidation, *see* 11 U.S.C. § 1112, in which any unencumbered assets would be distributed in accordance with the waterfall contained in 11 U.S.C. § 726. Any PPP funds remaining with the estate upon conversion might not be used to fund payroll or other operating expenses that would render the loan forgivable, but instead could be paid to the trustee, professionals employed by the trustee, or a host of other chapter 7 administrative expenses. Although a PPP loan might qualify for priority if obtained pursuant to an order under 11 U.S.C. § 364(b) or (c), the loan would only be repaid in a liquidation to the extent that any funds remaining with the estate were (i) unencumbered and (ii) not subject to a claim of higher priority. Even if a PPP loan obtained administrative expense status during the chapter 11 case, if the case later converted to a chapter 7 case, the administrative expenses of the chapter 7 case would take priority over the administrative expenses of the chapter 11 case. *See* 11 U.S.C. §§ 507(a)(2), 726(b). The reality is that the Hospitals pose a false dichotomy: lending to debtors who are reorganizing in chapter 11 is relatively safe and simple (and therefore those debtors should not have been excluded from the PPP) whereas lending to chapter 7 debtors and debtors liquidating in chapter 11 cases would not promote the purposes of the PPP (and therefore the SBA could have properly excluded only those debtors). The Court does not perceive that the

distinction is quite so stark.[7] If PPP funds were not used for their intended purposes and were instead used to cover the expenses of a liquidation, the PPP loan would not be forgiven, and the SBA would be liable on its guarantee of the unforgiven loan balance in the event of non-payment. The Bankruptcy Code gives rise to the prospect that a reorganization may, at any time, become a liquidation, and liquidation would not further the purposes of the PPP.[8] The SBA did not err in determining that there was a risk that PPP loan proceeds might be diverted to purposes not intended by the CARES Act in a bankruptcy case, and that the loan, if not forgiven, might not be repaid. The SBA did not act arbitrarily or capriciously in deciding that debtors should be excluded from the program due to that risk.

The Hospitals resist this conclusion too, asserting that the SBA relied on factors that Congress did not intend the agency to consider. The Hospitals aver that Congress removed all underwriting criteria for the PPP, pointing to the part of the statute requiring a PPP applicant to certify that the loan is necessary to sustain continued operations. *See* 15 U.S.C. § 636(a)(36)(G)(i)(I). The Hospitals further assert that Congress did not intend the SBA to

[7] This conclusion is bolstered, to a limited extent, by the recent amendments to the PPP included in the Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020). In that legislation, Congress amended 11 U.S.C. § 364 by adding a new subsection (g). Pub. L. No. 116-620, § 320, 134 Stat. 1182, 2015. Under that subsection, a bankruptcy court may authorize a trustee or a debtor in possession in three types of cases to obtain a loan under 15 U.S.C. § 636(a)(36), with such a loan to be treated as a debt to the extent the loan is not forgiven, with priority equal to a claim of the kind specified in 11 U.S.C. § 364(c)(1). Pub. L. No. 116-620, § 320, 134 Stat. 1182, 2015. Notably, however, this amendment is only to take effect if and when the Administrator submits to the Director of the Executive Office for the United States Trustee a determination that any such debtor would be eligible for a loan under section 636(a)(36). Pub. L. No. 116-620, § 320, 134 Stat. 1182, 2016. This discretion now expressly conferred on the Administrator does not extend to chapter 11 debtors generally; it applies only to subchapter V cases (which are a subset of chapter 11 cases), chapter 12 cases, and chapter 13 cases.

[8] Although the Hospitals' chapter 11 cases could not be converted to chapter 7 without their consent, *see* 11 U.S.C. § 1112(c), the risk of reorganizational failure is not entirely obviated by their nonprofit status. Even a chapter 11 case commenced by a nonprofit remains subject to dismissal under 11 U.S.C. § 1112(b). The point is, not all chapter 11 reorganizations are successful.

consider an applicant's ability to repay an unforgiven PPP loan, pointing to the section of the statute that eliminated the requirements of collateral and a personal guarantee. *See* 15 U.S.C. § 636(a)(36)(J). In the Court's view, the Hospitals read too much into these specific provisions and too little into the other provisions of the PPP. Congress did not suspend for PPP loans the sound value requirement generally applicable to Section 7(a) loans, and it authorized the SBA to guarantee PPP loans on the same terms and conditions as other Section 7(a) loans, except as otherwise provided in 15 U.S.C. § 636(a)(36). *See* id. § 636(a)(36)(B). Yes, there are indications that the loans were to be used for forgivable purposes, but there were also statutory provisions for unforgiven loan balances. The SBA dutifully complied with the parts of the statute cited by the Hospitals, while continuing to impose a minimal, streamlined underwriting standard—a targeted effort to ensure that the loans would either be forgiven or repaid. In doing so, the SBA did not rely on factors which Congress did not intend the agency to consider.

The SBA asserts that the bankruptcy exclusion was justified as an effort to fulfill the statutory sound value requirement. The Hospitals urge the Court to disregard this assertion for two reasons. First, they point out that the Administrator stipulated that the SBA does not analyze PPP applications to determine whether a loan to a particular applicant would be of sound value. Second, the Hospitals note that the sound value requirement does not expressly surface as part of the rationale offered in the Fourth IFR or the Maine Miller Declaration. The stipulation raised by the Hospitals does not have the significance they ascribe to it. Instead, the stipulation simply underscores that the SBA decided to streamline PPP loan processing. As for the Hospitals' timeliness complaints, the Court cannot disregard the fact that sound value is a component of the statutory PPP calculus. Stated differently, the sound value requirement is hard-wired in the statute such that it cannot be brushed aside. When evaluating whether the SBA acted arbitrarily

and capriciously by adopting the bankruptcy exclusion, the Court is tasked with considering whether the SBA relied on factors that Congress did not intend the agency to consider. The SBA's sound value argument properly arises in this context, in response to the Hospitals' contention that Congress eliminated all underwriting requirements and did not intend the SBA to consider how PPP loan funds would be used or whether the loans would be repaid.

The Hospitals' next argument fares no better. They say that the SBA failed to consider the protections that the Bankruptcy Code might have offered to accommodate the SBA's concerns about extending PPP loans to debtors. In the Hospitals' view, these bankruptcy protections include: (a) the requirement that the debtor provide notice to interested parties prior to a hearing under 11 U.S.C. § 364; (b) a chapter 11 debtor's obligation to file monthly operating reports on the docket, thereby providing transparency about the use of PPP funds; (c) the bankruptcy court's ability to order the debtor to segregate PPP funds from other funds; (d) the court's ability to hold a debtor in contempt for unauthorized uses of PPP funds; and (e) the SBA's ability to secure a priority claim under 11 U.S.C. § 507. Perhaps these protections might have ameliorated some of the SBA's concerns about PPP lending in the bankruptcy setting. It is possible that some other rational choice might have been made in light of the SBA's concerns. But an agency is not generally required to "consider all policy alternatives in reaching a decision." State Farm, 463 U.S. at 51. The Court's task is not to second-guess, but rather to determine whether the bankruptcy exclusion was supported by adequate reasoning. *See* Chevron, 467 U.S. at 843 n.11 ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."). The SBA did not act arbitrarily or capriciously by failing to consider the ways in which a PPP loan to

a debtor could have been structured. There was nothing in the CARES Act requiring the agency to consider these aspects of the Bankruptcy Code. And, for the reasons already discussed, the SBA was pursuing a streamlined process. Invoking these bankruptcy protections would have been far from streamlined, requiring involvement on the part of the SBA or the lender in thousands of individual bankruptcy cases.

Finally, the Hospitals insist that there may be some (or even many) cases where a PPP recipient outside of bankruptcy is less creditworthy than a debtor in a bankruptcy case. They make sweeping arguments about the how the statute should operate based on the Hospitals' own circumstances, as if all debtors attempting to reorganize under chapter 11 have similar circumstances. That is simply not the case. Yes, one could find a recipient of a PPP loan outside of bankruptcy that is less creditworthy than the Hospitals. That does not mean that the SBA acted arbitrarily or capriciously when it acted quickly based on a commonsense generalization about lending to debtors in cases under Title 11. The Hospitals identify the problem with generalizations: they are not universally true. Some PPP borrowers outside of bankruptcy likely posed greater credit risks than some debtors in bankruptcy. But because of the pressure to promulgate a rule that would result in expeditious lending, and because of the permissibility of discriminating against debtors in lending under 11 U.S.C. § 525, a universal, one-size-fits-all rule was justified, notwithstanding the shortcomings of generalized risk assessment.

III. FINAL CONSIDERATIONS

Although the rules promulgated by executive agencies are not immune from judicial review, some amount of deference is generally warranted. But how much? Where, as here, the challenged rule does not represent a departure from prior practice and where the agency

promulgated the challenged rule under enormous pressure and statutory deadlines, the amount of deference should be at its zenith.

The Hospitals assert that the bankruptcy exclusion does not pass the State Farm test because it is not supported by any facts, data, or evidence. They read too much into State Farm without accounting for the significant distinctions between the rulemaking process that Congress prescribed in that case and the process prescribed here. In State Farm, the regulation at issue was a rule requiring manufacturers to install passive restraints in vehicles to protect vehicle occupants in the event of a collision. 463 U.S. at 34. The regulation, adopted after lengthy proceedings, required vehicle manufacturers to install either of two passive restraint devices: airbags or automatic seatbelts. Id. at 34-37. After the regulation was adopted, the agency determined that seatbelts would not accomplish the anticipated safety benefits because many individuals would detach them. Id. at 38. Based on this determination, and while continuing to acknowledge the effectiveness of airbags, the agency entirely rescinded the passive restraint requirement without considering an amendment to the regulation that would have required vehicle manufacturers to install airbags. *See* id. at 46-48. Under the circumstances, the Supreme Court deemed the rescission arbitrary and capricious, concluding that the mandatory passive restraint rule could not be abandoned without any consideration of an airbag-only requirement given the agency's determination that airbags remained cost-beneficial, life-saving technology. Id. at 48.

Although State Farm articulates the applicable test, its holding is largely inapposite. In State Farm, the agency action at issue was the rescission of a preexisting rule. The statute governing the agency specifically required it to compile a record of its rulemaking proceedings, and the applicable legislative history manifested congressional intent that the agency's findings be supported by "substantial evidence." The bankruptcy exclusion, by contrast, appeared in the

promulgation of a new rule and the statute authorizing the rule manifested the legislature's intent that the SBA dispense with ordinary rulemaking processes and act with alacrity.

The SBA did not engage in factfinding in any typical sense. No hearings were convened, and no studies were conducted. No statements from the public or subject matter experts were solicited or considered. One can easily imagine the outcry that would have ensued if, following the adoption of the CARES Act, the SBA had conducted studies or gathered statements before promulgating the PPP application form. Under the circumstances, the Court is not troubled that the SBA did not marshal the type of information one might ordinarily classify as "evidence" before adopting the bankruptcy exclusion.

The Hospitals do not contest the need for the SBA to have acted quickly. They do nitpick the manner in which the SBA reached its decision. But their real quarrel relates to the SBA's decision on the merits, which they view as unfair and discriminatory. As for discrimination, the Court has already determined that 11 U.S.C. § 525 does not protect the Hospitals from the sort of discrimination that occurred here. In other words, from a bankruptcy perspective, the exclusion of debtors from the PPP was a lawful choice. That conclusion—that section 525 is not applicable here—bears, to a certain extent, on the fairness of the SBA's decision. Other aspects of Title 11 also bear on the fairness of the bankruptcy exclusion. As the SBA observed, lending to debtors (in any type of bankruptcy case) is purely voluntary: no debtor can force a lender to make a postpetition loan. That reality reflects the nuances of lending to debtors in bankruptcy.

The viability of the bankruptcy exclusion under the APA has been extensively litigated in bankruptcy and district courts across the country. Some courts have upheld the exclusion; others have struck it down. In this Court's view, the bankruptcy exclusion was a reasonable choice that cannot be fairly depicted as arbitrary or capricious. The decisions that reach the contrary

conclusion suffer from a fatal flaw; they ultimately substitute a judicial determination for that of the SBA. That is precisely what the Hospitals are asking the Court to do here; the ask is revealed by the nature of the remedy requested. For the alleged violation of the APA, the Hospitals do not seek the ordinary remedy of remand to the agency for further investigation or new rulemaking. Instead, they ask the Court to compel the SBA to pay to the Hospitals the full amount of the PPP loans they were denied.

Although this Court would likely have crafted a different rule if asked to write on a blank slate, that is not the task at hand. Because the SBA engaged in reasoned decision making and the bankruptcy exclusion is a permissible construction of the enabling legislation, the Court must defer to that decision.

Date: January 12, 2021

Michael A. Fagone
United States Bankruptcy Judge
District of Maine

4. PPP – Loan Forgiveness FAQs

As of August 11, 2020

PAYCHECK PROTECTION PROGRAM
Frequently Asked Questions (FAQs) on PPP Loan Forgiveness

The Small Business Administration (SBA), in consultation with the Department of the Treasury, is providing this guidance to address borrower and lender questions concerning forgiveness of Paycheck Protection Program (PPP) loans, as provided for under section 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), as amended by the Paycheck Protection Program Flexibility Act (Flexibility Act).

Borrowers and lenders may rely on the guidance provided in this document as SBA's interpretation, in consultation with the Department of the Treasury, of the CARES Act, the Flexibility Act, and the Paycheck Protection Program Interim Final Rules ("PPP Interim Final Rules") (link).

General Loan Forgiveness FAQs

1. **Question:** Which loan forgiveness application should sole proprietors, independent contractors, or self-employed individuals with no employees complete?

   Answer: Sole proprietors, independent contractors, and self-employed individuals who had no employees at the time of the PPP loan application and did not include any employee salaries in the computation of average monthly payroll in the Borrower Application Form automatically qualify to use the Loan Forgiveness Application Form 3508EZ or lender equivalent and should complete that application.

2. **Question:** Can PPP lenders use scanned copies of documents, E-signatures, or E-consents for loan forgiveness applications and loan forgiveness documentation?

   Answer: Yes. All PPP lenders may accept scanned copies of signed loan forgiveness applications and documents containing the information and certifications required by SBA Form 3508, 3508EZ, or lender equivalent. Lenders may accept any form of E-consent or E-signature that complies with the requirements of the Electronic Signatures in Global and National Commerce Act (P.L. 106-229).

   If electronic signatures are not feasible, then when obtaining a wet ink signature without in-person contact, lenders should take appropriate steps to ensure the proper party has executed the document.

   This guidance does not supersede signature requirements imposed by other applicable law, including by the lender's primary federal regulator.

3. **Question:** If a borrower submits a timely loan forgiveness application, does the borrower have to make any payments on its loan prior to SBA remitting the forgiveness amount, if any?

   Answer: As long as a borrower submits its loan forgiveness application within ten months of the completion of the Covered Period (as defined below), the borrower is not

required to make any payments until the forgiveness amount is remitted to the lender by SBA. If the loan is fully forgiven, the borrower is not responsible for any payments. If only a portion of the loan is forgiven, or if the forgiveness application is denied, any remaining balance due on the loan must be repaid by the borrower on or before the maturity date of the loan. Interest accrues during the time between the disbursement of the loan and SBA remittance of the forgiveness amount. The borrower is responsible for paying the accrued interest on any amount of the loan that is not forgiven. The lender is responsible for notifying the borrower of remittance by SBA of the loan forgiveness amount (or that SBA determined that no amount of the loan is eligible for forgiveness) and the date on which the borrower's first payment is due, if applicable.

Loan Forgiveness Payroll Costs FAQs

1. **Question:** Are payroll costs that were incurred during the Covered Period[1] or the Alternative Payroll Covered Period[2] but paid after the Covered Period or the Alternative Payroll Covered Period eligible for loan forgiveness?

   Answer: Yes, if the payroll costs are paid on or before the next regular payroll date after the Covered Period or Alternative Payroll Covered Period.

   Example: A borrower received its loan before June 5, 2020 and elects to use a 24-week Covered Period. The borrower's Covered Period runs from Monday, April 20 through Sunday, October 4. The borrower has a biweekly payroll cycle, with a pay period ending on Sunday, October 4. However, the borrower will not make the corresponding payroll payment until the next regular payroll date of Friday, October 9. Under these circumstances, the borrower incurred payroll costs during the Covered Period and may seek loan forgiveness for the payroll costs paid on October 9 because the cost was incurred during the Covered Period and payment was made on the first regular payroll date after the Covered Period.

2. **Question:** Are payroll costs that were incurred before the Covered Period but paid during the Covered Period eligible for loan forgiveness?

   Answer: Yes.

[1] The Covered Period is either (1) the 24-week (168-day) period beginning on the PPP loan disbursement date, or (2) if the borrower received its PPP loan before June 5, 2020, the borrower may elect to use an eight-week (56-day) Covered Period. For example, if the borrower is using a 24-week Covered Period and received its PPP loan proceeds on Monday, April 20, the first day of the Covered Period is April 20 and the last day of the Covered Period is Sunday, October 4. In no event may the Covered Period extend beyond December 31, 2020.

[2] Borrowers with a biweekly (or more frequent) payroll schedule may elect to calculate eligible payroll costs using the 24-week (168-day) period (or for loans received before June 5, 2020 at the election of the borrower, the eight-week (56-day) period) that begins on the first day of their first pay period following their PPP loan disbursement date (i.e., the "Alternative Covered Period"). For example, if the borrower is using a 24-week Alternative Payroll Covered Period and received its PPP loan proceeds on Monday, April 20, and the first day of its first pay period following its PPP loan disbursement is Sunday, April 26, the first day of the Alternative Payroll Covered Period is April 26 and the last day of the Alternative Payroll Covered Period is Saturday, October 10. In no event may the Alternative Payroll Covered Period extend beyond December 31, 2020.

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Example: A borrower received its loan before June 5, 2020 and elects to use a 24-week Covered Period. The borrower's Covered Period runs from Monday, April 20 through Sunday, October 4. The borrower has a biweekly payroll cycle, with a payroll cycle ending on Saturday, April 18. The borrower will not make the corresponding payroll payment until Friday, April 24. While these payroll costs were not incurred during the Covered Period, they were paid during the Covered Period and are therefore eligible for loan forgiveness.

3. **Question:** Are borrowers required to calculate payroll costs for partial pay periods?

   Answer: If the borrower uses a biweekly or more frequent (e.g., weekly) payroll cycle, the borrower may elect to calculate eligible payroll costs using the eight-week (for borrowers that received their loans before June 5, 2020 and elect this Covered Period length) or 24-week period that begins on the first day of the first payroll cycle following the PPP Loan Disbursement Date (referred to as the Alternative Payroll Covered Period). However, if a borrower pays twice a month or less frequently, it will need to calculate payroll costs for partial pay periods. The Covered Period or Alternative Covered Period for any borrower will end no later than December 31, 2020.

   Example: A borrower uses a biweekly payroll cycle. The borrower's 24-week Covered Period begins on Monday, June 1 and ends on Sunday, November 15. The first day of the borrower's first payroll cycle that starts in the Covered Period is June 7. The borrower may elect an Alternative Payroll Covered Period that starts on June 7 and ends on November 21 (167 days later). Payroll costs incurred (i.e., the pay was earned on that day) during this Alternative Payroll Covered Period are eligible for loan forgiveness if the last payment is made on or before the first regular payroll date after November 21.

4. **Question:** For purposes of calculating cash compensation, should borrowers use the gross amount before deductions for taxes, employee benefits payments, and similar payments, or the net amount paid to employees?

   Answer: The gross amount should be used when calculating cash compensation.

5. **Question:** Are only salaries or wages covered by loan forgiveness, or can a borrower pay lost tips, lost commissions, bonuses, or other forms of incentive pay and have such costs qualify for loan forgiveness?

   Answer: Payroll costs include all forms of cash compensation paid to employees, including tips, commissions, bonuses, and hazard pay. Note that forgivable cash compensation per employee is limited to $100,000 on an annualized basis.

6. **Question:** What expenses for group health care benefits will be considered payroll costs that are eligible for loan forgiveness?

   Answer: Employer expenses for employee group health care benefits that are paid or incurred by the borrower during the Covered Period or the Alternative Payroll Covered Period are payroll costs eligible for loan forgiveness. However, payroll costs do not

include expenses for group health care benefits paid by employees (or beneficiaries of the plan) either pre-tax or after tax, such as the employee share of their health care premium. Forgiveness is not provided for expenses for group health benefits accelerated from periods outside the Covered Period or Alternative Payroll Covered Period.

If a borrower has an insured group health plan, insurance premiums paid or incurred during the Covered Period or Alternative Payroll Covered Period qualify as "payroll costs," as long as the premiums are paid during the applicable period or by the next premium due date after the end of the applicable period. As noted, only the portion of the premiums paid by the borrower for coverage during the applicable Covered Period or Alternative Payroll Covered Period is included, not any portion paid by employees or beneficiaries or any portion paid for coverage for periods outside the applicable period. Loan Forgiveness Payroll Costs FAQ 8 outlines the rules that apply to owner health insurance.

7. **Question:** What contributions for retirement benefits will be considered payroll costs that are eligible for loan forgiveness?

   Answer: Generally, employer contributions for employee retirement benefits that are paid or incurred by the borrower during the Covered Period or Alternative Payroll Covered Period qualify as "payroll costs" eligible for loan forgiveness. The employer contributions for retirement benefits included in the loan forgiveness amount as payroll costs cannot include any retirement contributions deducted from employees' pay or otherwise paid by employees. Forgiveness is not provided for employer contributions for retirement benefits accelerated from periods outside the Covered Period or Alternative Covered Period. Loan Forgiveness Payroll Costs FAQ 8 outlines the treatment of retirement benefits for owners, which are different from this general approach.

8. **Question:** How is the amount of owner compensation that is eligible for loan forgiveness determined?

   Answer: The amount of compensation of owners who work at their business that is eligible for forgiveness depends on the business type and whether the borrower is using an eight-week or 24-week Covered Period. In addition to the specific caps described below, the amount of loan forgiveness requested for owner-employees and self-employed individuals' payroll compensation is capped at $20,833 per individual in total across all businesses in which he or she has an ownership stake. For borrowers that received a PPP loan before June 5, 2020 and elect to use an eight-week Covered Period, this cap is $15,385. If their total compensation across businesses that receive a PPP loan exceeds the cap, owners can choose how to allocate the capped amount across different businesses. The examples below are for a borrower using a 24-week Covered Period.

   C Corporations: The employee cash compensation of a C-corporation owner-employee, defined as an owner who is also an employee (including where the owner is the only employee), is eligible for loan forgiveness up to the amount of 2.5/12 of his or her 2019 employee cash compensation, with cash compensation defined as it is for all other

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employees. Borrowers are also eligible for loan forgiveness for payments for employer state and local taxes paid by the borrowers and assessed on their compensation, for the amount paid by the borrower for employer contributions for their employee health insurance, and for employer retirement contributions to their employee retirement plans capped at the amount of 2.5/12 of the 2019 employer retirement contribution. Payments other than for cash compensation should be included on lines 6-8 of PPP Schedule A of the loan forgiveness application (SBA Form 3508 or lender equivalent), for borrowers using that form, and do not count toward the $20,833 cap per individual.

S Corporations: The employee cash compensation of an S-corporation owner-employee, defined as an owner who is also an employee, is eligible for loan forgiveness up to the amount of 2.5/12 of their 2019 employee cash compensation, with cash compensation defined as it is for all other employees. Borrowers are also eligible for loan forgiveness for payments for employer state and local taxes paid by the borrowers and assessed on their compensation, and for employer retirement contributions to their employee retirement plans capped at the amount of 2.5/12 of their 2019 employer retirement contribution. Employer contributions for health insurance are not eligible for additional forgiveness for S-corporation employees with at least a 2% stake in the business, including for employees who are family members of an at least 2% owner under the family attribution rules of 26 U.S.C. 318, because those contributions are included in cash compensation. The eligible non-cash compensation payments should be included on lines 7 and 8 of PPP Schedule A of the Loan Forgiveness Application (SBA Form 3508), for borrowers using that form, and do not count toward the $20,833 cap per individual.

Self-employed Schedule C (or Schedule F) filers: The compensation of self-employed Schedule C (or Schedule F) individuals, including sole proprietors, self-employed individuals, and independent contractors, that is eligible for loan forgiveness is limited to 2.5/12 of 2019 net profit as reported on IRS Form 1040 Schedule C line 31 (or 2.5/12 of 2019 net farm profit, as reported on IRS Form 1040 Schedule F line 34) (or for new businesses, the estimated 2020 Schedule C (or Schedule F) referenced in question 10 of "Paycheck Protection Program: How to Calculate Maximum Loan Amounts – By Business Type"[3]). Separate payments for health insurance, retirement, or state or local taxes are not eligible for additional loan forgiveness; health insurance and retirement expenses are paid out of their net self-employment income. If the borrower did not submit its 2019 IRS Form 1040 Schedule C (or F) to the Lender when the borrower initially applied for the loan, it must be included with the borrower's forgiveness application.

General Partners: The compensation of general partners that is eligible for loan forgiveness is limited to 2.5/12 of their 2019 net earnings from self-employment that is subject to self-employment tax, which is computed from 2019 IRS Form 1065 Schedule K-1 box 14a (reduced by box 12 section 179 expense deduction, unreimbursed partnership expenses deducted on their IRS Form 1040 Schedule SE, and depletion

[3] https://www.sba.gov/sites/default/files/2020-06/How-to-Calculate-Loan-Amounts-508_1.pdf.

claimed on oil and gas properties) multiplied by 0.9235.[4] Compensation is only eligible for loan forgiveness if the payments to partners are made during the Covered Period or Alternative Payroll Covered Period. Separate payments for health insurance, retirement, or state or local taxes are not eligible for additional loan forgiveness. If the partnership did not submit its 2019 IRS Form 1065 K-1s when initially applying for the loan, it must be included with the partnership's forgiveness application.

LLC owners: LLC owners must follow the instructions that apply to how their business was organized for tax filing purposes for tax year 2019, or if a new business, the expected tax filing situation for 2020.

Loan Forgiveness Nonpayroll Costs FAQs

1. **Question:** Are nonpayroll costs incurred prior to the Covered Period, but paid during the Covered Period, eligible for loan forgiveness?

   Answer: Yes, eligible business mortgage interest costs, eligible business rent or lease costs, and eligible business utility costs incurred prior to the Covered Period and paid during the Covered Period are eligible for loan forgiveness.

   Example: A borrower's 24-week Covered Period runs from April 20 through October 4. On May 4, the borrower receives its electricity bill for April. The borrower pays its April electricity bill on May 8. Although a portion of the electricity costs were incurred before the Covered Period, these electricity costs are eligible for loan forgiveness because they were paid during the Covered Period.

2. **Question:** Are nonpayroll costs incurred during the Covered Period, but paid after the Covered Period, eligible for loan forgiveness?

   Answer: Nonpayroll costs are eligible for loan forgiveness if they were incurred during the Covered Period and paid on or before the next regular billing date, even if the billing date is after the Covered Period.

   Example: A borrower's 24-week Covered Period runs from April 20 through October 4. On October 6, the borrower receives its electricity bill for September. The borrower pays its September electricity bill on October 16. These electricity costs are eligible for loan forgiveness because they were incurred during the Covered Period and paid on or before the next regular billing date (November 6).

3. **Question:** If a borrower elects to use the Alternative Payroll Covered Period for payroll costs, does the Alternative Payroll Covered Period apply to nonpayroll costs?

[4] This treatment follows the computation of self-employment tax from IRS Form 1040 Schedule SE Section A line 4 and removes the "employer" share of self-employment tax, consistent with how payroll costs for employees in the partnership are determined.

As of August 11, 2020

Answer: No. The Alternative Payroll Covered Period applies only to payroll costs, not to nonpayroll costs. The Covered Period always starts on the date the lender makes a disbursement of the PPP loan. Nonpayroll costs must be paid or incurred during the Covered Period to be eligible for loan forgiveness. For payroll costs only, the borrower may elect to use the Alternative Payroll Covered Period to align with its biweekly or more frequent payroll schedule.

4. **Question:** Is interest on unsecured credit eligible for loan forgiveness?

   Answer: No. Payments of interest on business mortgages on real or personal property (such as an auto loan) are eligible for loan forgiveness. Interest on unsecured credit is not eligible for loan forgiveness because the loan is not secured by real or personal property. Although interest on unsecured credit incurred before February 15, 2020 is a permissible use of PPP loan proceeds, this expense is not eligible for forgiveness.

5. **Question:** Are payments made on recently renewed leases or interest payments on refinanced mortgage loans eligible for loan forgiveness if the original lease or mortgage existed prior to February 15, 2020?

   Answer: Yes. If a lease that existed prior to February 15, 2020 expires on or after February 15, 2020 and is renewed, the lease payments made pursuant to the renewed lease during the Covered Period are eligible for loan forgiveness. Similarly, if a mortgage loan on real or personal property that existed prior to February 15, 2020 is refinanced on or after February 15, 2020, the interest payments on the refinanced mortgage loan during the Covered Period are eligible for loan forgiveness.

   Example: A borrower entered into a five-year lease for its retail space in March 2015. The lease was renewed in March 2020. For purposes of determining forgiveness of the borrower's PPP loan, the March 2020 renewed lease is deemed to be an extension of the original lease, which was in force before February 15, 2020. As a result, the lease payments made under the renewed lease during the Covered Period are eligible for loan forgiveness.

6. **Question:** Covered utility payments, which are eligible for forgiveness, include a "payment for a service for the distribution of . . . transportation" under the CARES Act. What expenses does this category include?

   Answer: A service for the distribution of transportation refers to transportation utility fees assessed by state and local governments. Payment of these fees by the borrower is eligible for loan forgiveness.[5]

7. **Question:** Are electricity supply charges eligible for loan forgiveness if they are charged separately from electricity distribution charges?

[5] For more information on transportation utility fees, see https://www.fhwa.dot.gov/ipd/value_capture/defined/transportation_utility_fees.aspx.

As of August 11, 2020

Answer: Yes. The entire electricity bill payment is eligible for loan forgiveness (even if charges are invoiced separately), including supply charges, distribution charges, and other charges such as gross receipts taxes.

Loan Forgiveness Reductions FAQs

1. **Question:** Will a borrower be subject to a reduction to its forgiveness amount due to a reduction in FTE employees during the Covered Period if the borrower offered to rehire one or more laid off employees but the employees declined?

   Answer: In calculating its loan forgiveness amount, a borrower may exclude any reduction in FTE employees if the borrower is able to document in good faith the following: (1) an inability to rehire individuals who were employees of the borrower on February 15, 2020 and (2) an inability to hire similarly qualified individuals for unfilled positions on or before December 31, 2020. Borrowers are required to inform the applicable state unemployment insurance office of any employee's rejected rehire offer within 30 days of the employee's rejection of the offer. The documents that borrowers should maintain to show compliance with this exemption include the written offer to rehire an individual, a written record of the offer's rejection, and a written record of efforts to hire a similarly qualified individual.

2. **Question:** If a seasonal employer elects to use a 12-week period between May 1, 2019 and September 15, 2019 to calculate its maximum PPP loan amount, what period in 2019 should be used as the reference period for calculating any reductions in the loan forgiveness amount?

   Answer: A seasonal employer that elects to use a 12-week period between May 1, 2019 and September 15, 2019 to calculate its maximum PPP loan amount must use the same 12-week period as the reference period for calculation of any reduction in the amount of loan forgiveness.

3. **Question:** When calculating the FTE Reduction Exceptions in Table 1 of the PPP Schedule A Worksheet on the Loan Forgiveness Application (SBA Form 3508 or lender equivalent), do borrowers include employees who made more than $100,000 in 2019 (those listed in Table 2 of the PPP Schedule A Worksheet)?

   Answer: Yes. The FTE Reduction Exceptions apply to all employees, not just those who would be listed in Table 1 of the Loan Forgiveness Application (SBA Form 3508 or lender equivalent). Borrowers should therefore include employees who made more than $100,000 in the FTE Reduction Exception line in Table 1 of the PPP Schedule A Worksheet.

4. **Question:** How do borrowers calculate the reduction in their loan forgiveness amount arising from reductions in employee salary or hourly wage?

As of August 11, 2020

Answer: Certain pay reductions during the Covered Period or the Alternative Payroll Covered Period may reduce the amount of loan forgiveness a borrower will receive. If the salary or hourly wage of a covered employee[6] is reduced by more than 25% during the Covered Period or the Alternative Payroll Covered Period, the portion in excess of 25% reduces the eligible forgiveness amount unless the borrower satisfies the Salary/Hourly Wage Reduction Safe Harbor (as described in the Loan Forgiveness Application (SBA Form 3508 or lender equivalent)). The examples below assume that each employee is a "covered employee."

Example 1: A borrower received its PPP loan before June 5, 2020 and elected to use an eight-week covered period. Its full-time salaried employee's pay was reduced during the Covered Period from $52,000 per year to $36,400 per year on April 23, 2020 and not restored by December 31, 2020. The employee continued to work on a full-time basis with a full-time equivalency (FTE) of 1.0. The borrower should refer to the "Salary/Hourly Wage Reduction" section under the "Instructions for PPP Schedule A Worksheet" in the PPP Loan Forgiveness Application Instructions. In Step 1, the borrower enters the figures in 1.a, 1.b, and 1.c, and because annual salary was reduced by more than 25%, the borrower proceeds to Step 2. Under Step 2, because the salary reduction was not remedied by December 31, 2020, the Salary/Hourly Wage Reduction Safe Harbor is not met, and the borrower is required to proceed to Step 3. Under Step 3.a., $39,000 (75% of $52,000) is the minimum salary that must be maintained to avoid a penalty. Salary was reduced to $36,400, and the excess reduction of $2,600 is entered in Step 3.b. Because this employee is salaried, in Step 3.e., the borrower would multiply the excess reduction of $2,600 by 8 (if it had instead selected a 24-week Covered Period, it would multiply by 24) and divide by 52 to arrive at a loan forgiveness reduction amount of $400. The borrower would enter on the PPP Schedule A Worksheet, Table 1, $400 as the salary/hourly wage reduction in the column above box 3 for that employee.

Example 2: A borrower received its PPP loan before June 5, 2020 and elected to use a 24-week Covered Period. An hourly employee's hourly wage was reduced from $20 per hour to $15 per hour during the Covered Period. The employee worked 10 hours per week between January 1, 2020 and March 31, 2020. The borrower should refer to the "Salary/Hourly Wage Reduction" section under the "Instructions for PPP Schedule A Worksheet" in the PPP Loan Forgiveness Application Instructions. Because the employee's hourly wage was reduced by exactly 25% (from $20 per hour to $15 per hour), the wage reduction does not reduce the eligible forgiveness amount. The amount on line 1.c would be 0.75 or more, so the borrower would enter $0 in the Salary/Hourly Wage Reduction column for that employee on the PPP Schedule A Worksheet, Table 1.

If the same employee's hourly wage had been reduced to $14 per hour, the reduction would be more than 25%, and the borrower would proceed to Step 2. If that reduction

[6] A "covered employee" is an individual who: (1) was employed by the borrower at any point during the Covered Period or Alternative Payroll Covered Period and whose principal place of residence is in the United States; and (2) received compensation from the borrower at an annualized rate less than or equal to $100,000 for all pay periods in 2019 or was not employed by the borrower at any point in 2019.

were not remedied as of December 31, 2020, the borrower would proceed to Step 3. This reduction in hourly wage in excess of 25% is $1 per hour. In Step 3, the borrower would multiply $1 per hour by 10 hours per week to determine the weekly salary reduction. The borrower would then multiply the weekly salary reduction by 24 (because the borrower is using a 24-week Covered Period). The borrower would enter $240 in the Salary/Hourly Wage Reduction column for that employee on the PPP Schedule A Worksheet, Table 1. If the borrower applies for forgiveness before the end of the 24-week Covered Period, it must account for the salary reduction (the excess reduction over 25%, or $240) for the full 24-week Covered Period.

Example 3: An employee earned a wage of $20 per hour between January 1, 2020 and March 31, 2020 and worked 40 hours per week. During the Covered Period, the employee's wage was not changed, but his or her hours were reduced to 25 hours per week. In this case, the salary/hourly wage reduction for that employee is zero, because the hourly wage was unchanged. As a result, the borrower would enter $0 in the Salary/Hourly Wage Reduction column for that employee on the PPP Schedule A Worksheet, Table 1. The employee's reduction in hours would be taken into account in the borrower's calculation of its FTE during the Covered Period, which is calculated separately and may result in a reduction of the borrower's loan forgiveness amount.

5. **Question:** For purposes of calculating the loan forgiveness reduction required for salary/hourly wage reductions in excess of 25% for certain employees, are all forms of compensation included or only salaries and wages?

   Answer: For purposes of calculating reductions in the loan forgiveness amount, the borrower should only take into account decreases in salaries or wages.

Economic Injury Disaster Loan (EIDL) FAQs

1. **Question:** SBA will deduct the amount of any Economic Injury Disaster Loan (EIDL) advance received by a PPP borrower from the forgiveness amount remitted to the lender. How will a lender know the amount of the EIDL advance that will be automatically deducted by SBA?

   Answer: If a borrower received an EIDL advance, SBA is required to reduce the borrower's loan forgiveness amount by the amount of the EIDL advance. SBA will deduct the amount of the EIDL advance from the forgiveness amount remitted by SBA to the lender. The lender will be able to confirm the amount of the EIDL advance that will be automatically deducted by SBA from the forgiveness payment by reviewing the borrower's EIDL advance information in the PPP Forgiveness Platform.

2. **Question:** How should a lender handle any remaining balance due on a PPP loan after SBA remits the forgiveness amount to the lender?

   Answer: If a PPP loan is not forgiven in full (including if there has been a reduction in the forgiveness amount for an EIDL advance), any remaining balance due on the PPP

loan must be repaid by the borrower. The lender is responsible for notifying the borrower of the loan forgiveness amount remitted by SBA and the date on which the borrower's first loan payment is due. The lender must continue to service the loan. The borrower must repay the remaining loan balance by the maturity date of the PPP loan (either two or five years). If a borrower is determined to have been ineligible for a PPP loan for any reason, SBA may seek repayment of the outstanding PPP loan balance or pursue other available remedies.

3. **Question:** What should a lender do if a borrower received an EIDL advance in excess of the amount of its PPP loan?

   Answer: A borrower that received an EIDL advance in excess of the amount of its PPP loan will not receive any forgiveness on the PPP loan, because the amount of an EIDL advance is deducted from the PPP loan forgiveness amount. The lender is responsible for notifying the borrower of the date on which the borrower's first loan payment is due. The lender must continue to service the loan. The borrower must repay the remaining loan balance by the maturity date of the PPP loan (either two or five years). If a borrower is determined to have been ineligible for a PPP loan for any reason, SBA may seek repayment of the outstanding PPP loan balance or pursue other available remedies.[7]

[7] All questions and answers published August 4, 2020 unless specified otherwise. EIDL FAQs 1 – 3 published August 11, 2020.

5. 13 CRF Part 120 – Loan Forgiveness Requirements and Loan Review Procedures as Amended (2.21)

Rules and Regulations

Federal Register
Vol. 86, No. 23
Friday, February 5, 2021

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1026

[Docket No. CFPB–2020–0028]

RIN 3170–AA98

Qualified Mortgage Definition Under the Truth in Lending Act (Regulation Z): Seasoned QM Loan Definition; Correction

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule; correction.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) recently published ''Qualified Mortgage Definition Under the Truth in Lending Act (Regulation Z): Seasoned QM Loan Definition,'' which appeared in the **Federal Register** on December 29, 2020. This document corrects a scrivener's error in an amendatory instruction in that document.

DATES: Effective March 1, 2021.

FOR FURTHER INFORMATION CONTACT: Amanda Quester, Senior Counsel, Office of Regulations, at (202) 435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov*.

SUPPLEMENTARY INFORMATION: In FR Doc. 2020–27571 appearing on page 86402 in the **Federal Register** of Tuesday, December 29, 2020, the following correction is made:

§ 1026.43 [Corrected]

■ On page 86452, in the second column, in amendment 2, the instruction ''Amend § 1026.43 by revising paragraphs (e)(1) and (e)(2) introductory text and adding paragraph (e)(7) to read as follows: '' is corrected to read: ''Amend § 1026.43 by revising the headings for paragraphs (e) and (e)(1) and paragraphs (e)(1)(i) and (e)(2) introductory text and adding paragraph (e)(7) to read as follows:''.

Dated: January 15, 2021.

Grace Feola,

Federal Register Liaison, Bureau of Consumer Financial Protection.

[FR Doc. 2021–01387 Filed 2–4–21; 8:45 am]

BILLING CODE 4810–AM–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

[Docket Number SBA–2021–0006]

RIN 3245–AH65

DEPARTMENT OF THE TREASURY

RIN 1505–AC75

Business Loan Program Temporary Changes; Paycheck Protection Program—Loan Forgiveness Requirements and Loan Review Procedures as Amended by Economic Aid Act

AGENCY: U.S. Small Business Administration; Department of the Treasury.

ACTION: Interim final rule.

SUMMARY: This interim final rule implements changes related to the forgiveness and review of loans made under the Paycheck Protection Program (PPP), which was originally established under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID–19). On December 27, 2020, the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (Economic Aid Act) was enacted, extending the authority to make PPP loans through March 31, 2021, revising certain PPP requirements, and permitting second draw PPP loans. This interim final rule consolidates prior rules related to forgiveness and reviews of PPP loans and incorporates changes made by the Economic Aid Act, including with respect to forgiveness of second draw PPP loans.

DATES:

Effective date: Unless otherwise specified in the Economic Aid Act, the provisions of this interim final rule are effective February 3, 2021.

Applicability date: This interim final rule applies to Paycheck Protection Programs loans for which a loan forgiveness payment had not been remitted by SBA as of December 27, 2020. Parts IV.6.c., IV.7 and V of this interim final rule, Paycheck Protection Program SBA Loan Review Procedures and Related Borrower and Lender Responsibilities, apply to all Paycheck Protection Program loans.

Comment date: Comments must be received on or before March 8, 2021.

ADDRESSES: You may submit comments, identified by number SBA–2021–0006 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.* All other comments must be submitted through the Federal eRulemaking Portal described above. 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 continue to experience economic hardship as a direct result of the Federal, State, and local public health measures that continue to be taken to minimize the public's exposure to the virus. In addition, based on the advice of public health officials, other voluntary measures continue to be observed, resulting in a 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) (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 CARES 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 CARES Act temporarily permitted SBA to guarantee 100 percent of 7(a) loans under a new program titled the ''Paycheck Protection Program,'' pursuant to section 7(a)(36) of the Small Business Act (15 U.S.C. 636(a)(36)). Section 1106 of the CARES Act provided for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program (PPP). On April 24, 2020, the President signed the Paycheck Protection Program and Health Care Enhancement Act (Pub. L. 116–139), which provided additional funding and authority for the Paycheck Protection Program.

On June 5, 2020, the President signed the Paycheck Protection Program Flexibility Act of 2020 (Flexibility Act) (Pub. L. 116–142), which changed provisions of the PPP relating to the maturity of PPP loans, the deferral of PPP loan payments, and the forgiveness of PPP loans. On July 4, 2020, Public Law 116–147 extended the authority for SBA to guarantee PPP loans to August 8, 2020.

On December 27, 2020, the President signed the Economic Aid to Hard-Hit Small Businesses, Nonprofits and Venues Act (Economic Aid Act) (Pub. L. 116–260), which reauthorizes lending under the PPP through March 31, 2021, and among other things, modifies the PPP, including provisions relating to forgiveness of PPP loans. The Economic Aid Act added a new temporary section 7(a)(37) to the Small Business Act, which authorizes SBA to guarantee additional PPP loans to eligible borrowers under generally the same terms and conditions available under section 7(a)(36) of the Small Business Act through March 31, 2021. The Economic Aid Act also redesignates section 1106 of the CARES Act as section 7A and transfers that section to the Small Business Act, to appear after section 7 of the Small Business Act.[1]

As described below, this interim final rule (1) provides borrowers and lenders with guidance on requirements governing forgiveness of PPP loans, and (2) informs borrowers and lenders of SBA's process for reviewing loan applications and loan forgiveness applications. SBA is incorporating and restating the prior interim final rules relating to loan forgiveness and loan reviews and making revisions to conform these prior interim final rules to the amendments made by the Economic Aid Act, including for PPP loans made under section 7(a)(37) of the Small Business Act. The prior interim final rules relating to loan forgiveness and loan reviews that are incorporated in this interim final rule are: The first interim final rule on loan forgiveness (85 FR 33004) (June 1, 2020); the first interim final rule on SBA loan review procedures and related borrower and lender responsibilities (85 FR 33010) (June 1, 2020); the interim final rule incorporating Flexibility Act Amendments (85 FR 38304) (June 26, 2020); the interim final rule on Treatment of Owners and Forgiveness of Certain Nonpayroll Costs (85 FR 52881) (August 27, 2020); and the interim final rule on Additional Revisions to Loan Forgiveness and Loan Review Procedures Interim Final Rules (85 FR 66214) (October 19, 2020). The rule also incorporates the forgiveness portions of the interim final rules regarding individuals with self-employment income (85 FR 21747 (April 20, 2020) and 85 FR 36997 (June 19, 2020)) and fishing boat owners (85 FR 39066) (June 30, 2020).

This rule should be interpreted consistently with the sets of Frequently Asked Questions (FAQs) regarding the PPP that are posted on SBA's and the Department of the Treasury's (Treasury) websites, the consolidated interim final rule implementing updates to the Paycheck Protection Program (86 FR 3692 (January 14, 2021)) and the interim final rule on second draw PPP loans (86 FR 3712 (January 14, 2021)); however, the Economic Aid Act overrides any conflicting guidance in the FAQs, and SBA will be revising the FAQs to fully conform to the Economic Aid Act as quickly as feasible.

Most of this document restates existing regulatory provisions to provide PPP lenders and new and existing PPP borrowers a single regulation to consult on loan forgiveness and loan review requirements and processes. To enhance the readability of this document, SBA has not reproduced the policy and legal justifications for existing regulatory provisions restated here, except to the extent that those justifications may be helpful to the borrower or lender. However, those justifications from the original interim final rules are adopted here.

Six provisions of this interim final rule are an exercise of rulemaking authority by Treasury either jointly with SBA or by Treasury alone: (1) The additional reference period option provided for seasonal employers, (2) the *de minimis* exemption provided with respect to certain offers of rehire, (3) the *de minimis* exemption from the full-time equivalent employee reduction penalty when an employee is, for example, fired for cause, (4) the *de minimis* exemption from the full-time equivalent employee reduction penalty when the borrower eliminates reductions by December 31, 2020 or, for a PPP loan made after December 27, 2020, the last day of the loan's covered period, (5) the *de minimis* exemption from the full-time equivalent (FTE) employee reduction penalty for certain PPP loans of $50,000 or less, and (6) the *de minimis* exemption from the employee salary and wages reduction penalty for certain PPP loans of $50,000 or less. Otherwise, all provisions in this rule are an exercise of rulemaking authority by SBA alone.

II. Comments and Immediate Effective Date

This interim final rule is being issued without advance notice and public comment because section 303 of the Economic Aid Act authorizes SBA to issue regulations to implement the Economic Aid Act without regard to notice requirements. In addition, this rule is being issued to allow for immediate implementation of this program. The intent of both the CARES Act and the Economic Aid Act is that SBA provides relief to America's small businesses expeditiously. The Economic Aid Act provided that several of the changes relating to loan forgiveness are effective as if included in the CARES Act and apply to any loan made pursuant to section 7(a)(36) of the Small Business Act before, on, or after December 27, 2020, including forgiveness of such a loan. Accordingly, loans that were made in 2020 but for which SBA has not yet remitted forgiveness to the lender will be forgiven based on changes made in the Economic Aid Act, as implemented in this interim final rule. Given the urgent need to provide borrowers that are eligible for loan forgiveness with timely relief, the Administrator in consultation with the Secretary has determined that it is impractical and not in the public interest to provide a 30-day delayed effective date. An immediate effective date will allow SBA to continue remitting forgiveness payments to

[1] Because section 1106 of the CARES Act is now codified as section 7A of the Small Business Act, any reference to section 1106 of the CARES Act in the rules that are being restated herein will refer to section 7A.

lenders without disruption and in accordance with the amendments made by the Economic Aid Act. This good cause justification also supports waiver of the 60-day delayed effective date for major rules under the Congressional Review Act at 5 U.S.C. 808(2). 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.

These comments must be submitted on or before March 8, 2021. SBA will consider these comments and the need for making any revisions as a result of these comments.

III. Paycheck Protection Program—Loan Forgiveness and Loan Review Procedures as Amended by Economic Aid Act

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 may qualify for loan forgiveness.

Under the CARES Act, as amended by the Economic Aid Act, SBA is authorized to guarantee loans under the PPP, a new temporary 7(a) program, through March 31, 2021. PPP loans made under section 7(a)(36) of the Small Business Act may be referred to as ''First Draw PPP Loans,'' and PPP loans made under section 7(a)(37) of the Small Business Act may be referred to as ''Second Draw PPP Loans.'' (Any reference to ''PPP loans'' or ''PPP loan'' herein refers to both First Draw PPP Loans and Second Draw PPP Loans.) The intent of the CARES Act and the Economic Aid Act is that SBA provide relief to America's small businesses expeditiously, which is expressed in the CARES Act by giving all lenders delegated authority and streamlining the requirements of the regular 7(a) loan program. This intent is also expressed in the Economic Aid Act through the statutory deadlines requiring that the Administrator issue certain guidance and regulations within 10 days of enactment.[2]

The Small Business Act authorizes the Administrator to conduct investigations to determine whether a recipient or participant in any assistance under a 7(a) program, including the PPP, is ineligible for a loan, or has violated section 7(a), or any rule, regulation or order issued thereunder.[3] Additionally, under section 7(a), the Administrator is empowered to make loans in cooperation with lenders through agreements to participate on a deferred (guaranteed) basis.[4] Further, the Administrator may make such rules and regulations as deemed necessary and take any and all actions determined to be necessary or desirable with respect to 7(a) loans.[5] Pursuant to these provisions of the Small Business Act, SBA has issued regulations establishing the standards by which it will investigate whether a loan met program requirements and the circumstances under which SBA will be released from liability on a guarantee for such a loan.[6] Additionally, section 7A(l)(1)(E) of the Small Business Act expressly provides that SBA may review and audit PPP loans of $150,000 or less and access any records the borrower is required to retain.

In light of the structure of the PPP program established by the CARES Act and the PPP Interim Final Rules, in which loans and loan forgiveness are provided based on the borrower's certifications and documentation provided by the borrower, the Administrator, in consultation with the Secretary of the Treasury (Secretary), previously determined that it was appropriate to adopt additional procedures and criteria through which SBA will review whether an action by the borrower has resulted in its receipt of a PPP loan that did not meet program requirements.[7] SBA's review of borrower certifications and representations regarding the borrower's eligibility for a PPP loan and loan forgiveness, and the borrower's use of PPP loan proceeds, is essential to ensure that PPP loans are directed to the entities Congress intended, and that PPP loan proceeds are used for the purposes Congress required, including the CARES Act's and the Economic Aid Act's central purposes of keeping workers paid and employed.

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[2] See, *e.g.,* section 303 of the Economic Aid Act; section 7(a)(37)(M) of the Small Business Act.

[3] 15 U.S.C. 634(b)(11).

[4] 15 U.S.C. 636(a).

[5] 15 U.S.C. 634(b)(6) and (b)(7).

[6] 13 CFR 120.524.

[7] This interim final rule is an exercise of SBA's rulemaking authority under 15 U.S.C. 634(b), 15 U.S.C. 633(d), and 5 U.S.C. App., Reorg. Plan No. 4 of 1965, 11(b), 13(a) (abolishing Loan Policy Board and transferring functions to the Administrator); sections 1106(k) (now section 7A(k) of the Small Business Act) and 1114 of the CARES Act, and section 307 of the Economic Aid Act.

IV. Paycheck Protection Program Loan Forgiveness Requirements

1. General

a. What amounts are eligible for forgiveness? [8]

Section 7A(b) of the Small Business Act provides that, subject to several important limitations, borrowers shall be eligible for forgiveness of their PPP loan in an amount equal to the sum of the following costs incurred and payments made during the covered period (as described in section IV.3. below).

(1) Payroll costs.[9] Payroll costs consist of compensation to employees (whose principal place of residence is the United States) in the form of salary, wages, commissions, or similar compensation; cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips); payment for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal; payment for the provision of employee benefits consisting of group health care or group life, disability, vision, or dental insurance, including insurance premiums, and retirement; payment of state and local taxes assessed on compensation of employees; and for an independent contractor or sole proprietor, wages, commissions, income, or net earnings from self-employment, or similar compensation. Payroll costs that are qualified wages taken into account in determining the Employer Retention Credit are not eligible for loan forgiveness.[10]

(2) Interest payments on any business mortgage obligation on real or personal property that was incurred before February 15, 2020 (but not any prepayment or payment of principal).

(3) Payments on business rent obligations on real or personal property under a lease agreement in force before February 15, 2020.

(4) Business utility payments for the distribution of electricity, gas, water, transportation, telephone, or internet access for which service began before February 15, 2020.

(5) Covered operations expenditures. A covered operations expenditure is a payment for any business software or cloud computing service that facilitates business operations, product or service delivery, the processing, payment, or tracking of payroll expenses, human resources, sales and billing functions, or accounting or tracking of supplies, inventory, records and expenses.[11]

(6) Covered property damage costs. A covered property damage cost is a cost related to property damage and vandalism or looting due to public disturbances that occurred during 2020 that was not covered by insurance or other compensation.[12]

(7) Covered supplier costs. A covered supplier cost means an expenditure made by a borrower to a supplier of goods for the supply of goods that—(A) are essential to the operations of the borrower at the time at which the expenditure is made; and (B) is made pursuant to a contract, order, or purchase order—(i) in effect at any time before the covered period with respect to the applicable covered loan; or (ii) with respect to perishable goods, in effect before or at any time during the covered period with respect to the applicable covered loan.[13]

(8) Covered worker protection expenditures. A covered worker protection expenditure:

(A) Means an operating or a capital expenditure to facilitate the adaptation of the business activities of an entity to comply with requirements established or guidance issued by the Department of Health and Human Services, the Centers for Disease Control, or the Occupational Safety and Health Administration, or any equivalent requirements established or guidance issued by a State or local government related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID–19, during the period beginning on March 1, 2020 and ending the date on which the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 *et seq.*) with respect to the Coronavirus Disease 2019 (COVID–19) expires;

(B) may include—

[8] This subsection was originally published at 85 FR 33004, section III.1. (June 1, 2020) and has been modified to conform to section 304 of the Economic Aid Act.

[9] ''Payroll costs'' has the same meaning as in subsections III.B.4.g. and h. of the consolidated interim final rule implementing updates to the Paycheck Protection Program. 86 FR 3692, 3702 (Jan. 14, 2021).

[10] Section 7(a)(37)(J)(iii) of the Small Business Act provides these amounts are not eligible for forgiveness for Second Draw PPP Loans. This provision similarly provides that these amounts are not eligible for forgiveness for First Draw PPP Loans in order to provide consistent treatment and to prevent a borrower from receiving forgiveness for amounts for which the borrower will also receive a tax credit.

[11] This eligible nonpayroll cost was added by section 304 of the Economic Aid Act.

[12] This eligible nonpayroll cost was added by section 304 of the Economic Aid Act.

[13] This eligible nonpayroll cost was added by section 304 of the Economic Aid Act.

(i) the purchase, maintenance, or renovation of assets that create or expand—

(I) a drive-through window facility;

(II) an indoor, outdoor, or combined air or air pressure ventilation or filtration system;

(III) a physical barrier such as a sneeze guard;

(IV) an expansion of additional indoor, outdoor, or combined business space;

(V) an onsite or offsite health screening capability; or

(VI) other assets relating to the compliance with the requirements or guidance described in subsection (A), as determined by the Administrator in consultation with the Secretary of Health and Human Services and the Secretary of Labor; and

(ii) the purchase of—

(I) covered materials described in § 328.103(a) of title 44, Code of Federal Regulations, or any successor regulation;

(II) particulate filtering facepiece respirators approved by the National Institute for Occupational Safety and Health, including those approved only for emergency use authorization; or

(III) other kinds of personal protective equipment, as determined by the Administrator in consultation with the Secretary of Health and Human Services and the Secretary of Labor; and

(C) does not include residential real property or intangible property.[14]

This interim final rule uses the term ''nonpayroll costs'' to refer to the payments described in (2)–(8) above. Eligible nonpayroll costs cannot exceed 40 percent of the loan forgiveness amount.[15] A borrower may receive forgiveness for the nonpayroll costs described in (5), (6), (7) and (8) only if SBA had not yet remitted a forgiveness payment on the borrower's loan to the borrower's PPP lender as of December 27, 2020 (the date of the Economic Aid Act's enactment).

b. For borrowers that are individuals with self-employment income who file a Form 1040, Schedule C or F, what amounts are eligible for forgiveness?[16]

The amount of loan forgiveness can be up to the full principal amount of the loan plus accrued interest. The actual amount of loan forgiveness will depend, in part, on the total amount spent during the covered period (as described in section IV.3 below)[17] on:

i. Payroll costs including salary, wages, and tips, up to $100,000 of annualized pay per employee, as prorated for the period during which the payments are made or the obligation to make the payments is incurred (maximum per individual is $100,000 prorated for the covered period, *e.g.,* for an 8-week covered period a maximum of $15,385 and for a 24-week covered period a maximum of $46,154),[18] as well as covered benefits for employees (but not owners), including health care expenses, retirement contributions, and state taxes imposed on employee payroll paid by the employer (such as unemployment insurance premiums), but excluding any qualified wages taken into account in determining the Employer Retention Credit;

ii. owner compensation replacement, calculated based on 2019 or 2020[19] net profit[20] as described in subsection 3.c. below; forgiveness of such amounts is limited to either (a) the prorated portion of 2019 or 2020 net profit for a covered period up to 2.5 months, or (b) 2.5 months' worth (2.5/12) of 2019 or 2020 net profit (up to $20,833) for a covered period greater than 2.5 months,[21] excluding any qualified sick leave equivalent amount for which a credit is claimed under section 7002 of the Families First Coronavirus Response Act (FFCRA) (Pub. L. 116–127) or qualified family leave equivalent amount for which a credit is claimed under section 7004 of FFCRA;

iii. payments of interest on mortgage obligations on real or personal property incurred before February 15, 2020, to the extent they are deductible on Form 1040 Schedule C or F (business mortgage payments);

iv. rent payments on lease agreements in force before February 15, 2020, to the extent they are deductible on Form 1040 Schedule C or F (business rent payments);

v. utility payments under service agreements dated before February 15, 2020 to the extent they are deductible on Form 1040 Schedule C or F (business utility payments);

vi. any covered operations expenditures to the extent they are deductible on Form 1040 Schedule C or F;[22]

vii. any covered property damage costs to the extent they are deductible on Form 1040 Schedule C or F;[23]

viii. Any covered supplier costs to the extent they are deductible on Form 1040 Schedule C or F;[24] and

ix. any covered worker protection expenditures to the extent they are deductible on Form 1040 Schedule C or F.[25]

A borrower may receive forgiveness for the new nonpayroll costs described in vi., vii., viii., and ix. only if SBA had not yet remitted a forgiveness payment on the borrower's loan to the borrower's PPP lender as of December 27, 2020.

2. Loan Forgiveness Process

a. What is the general process to obtain loan forgiveness?[26]

To receive loan forgiveness on either a First Draw PPP Loan or a Second Draw PPP Loan, a borrower must complete and submit the Loan Forgiveness Application[27] to its lender (or to the lender servicing its loan). For Second Draw PPP Loans in excess of $150,000, the borrower must submit its loan forgiveness application for the First Draw PPP Loan before or simultaneously with the loan forgiveness application for the Second Draw PPP Loan, even if the calculated amount of forgiveness on the First Draw PPP Loan is zero.[28]

[14] This eligible nonpayroll cost was added by section 304 of the Economic Aid Act.

[15] *See* section 7A(d)(8) of the Small Business Act.

[16] This subsection was originally published at 85 FR 21747, subsection III.1.f. (Apr. 20, 2020) and has been modified to conform to subsequent rules or guidance and sections 306, 313, and 344 of the Economic Aid Act.

[17] The Economic Aid Act amended the definition of the forgiveness covered period.

[18] Due to the amended definition of forgiveness covered period in the Economic Aid Act, this calculated amount has changed.

[19] For First Draw PPP loans made in 2020, borrowers use 2019. For First Draw PPP loans made in 2021 and Second Draw PPP Loans, borrowers use the year (2019 or 2020) that was used to calculate the borrower's loan amount.

[20] For self-employed borrowers that file Form 1040, Schedule F and have no employees, gross income may be used instead of net profit throughout this calculation. For self-employed borrowers that file Schedule F and have employees, the difference between gross income and employee payroll costs may be used instead of net profit throughout this calculation. *See* section 313 of the Economic Aid Act.

[21] Section 306 of the Economic Aid Act allows the borrower to select a covered period between 8 weeks and 24 weeks.

[22] This eligible nonpayroll cost was added by section 304 of the Economic Aid Act.

[23] This eligible nonpayroll cost was added by section 304 of the Economic Aid Act.

[24] This eligible nonpayroll cost was added by section 304 of the Economic Aid Act.

[25] This eligible nonpayroll cost was added by section 304 of the Economic Aid Act.

[26] This subsection was originally published at 85 FR 33004, section III.2. (June 1, 2020) and was amended by 85 FR 38304, subsection III.2.a. (June 26, 2020) and 85 FR 66214, subsections III.2.a. and b. (Oct. 19, 2020) and has been modified to conform to section 307 of the Economic Aid Act.

[27] SBA Form 3508, 3508EZ, 3508S, as applicable, or lender equivalent. Loan Forgiveness Application forms were amended to conform to the Economic Aid Act, including section 307, which requires a simplified forgiveness application for loans of not more than $150,000. The Simplified Forgiveness Application is SBA Form 3508S (as amended).

[28] This requirement is necessary to provide information relevant to the borrower's eligibility for the Second Draw PPP Loan and loan forgiveness. A borrower is eligible for a Second Draw PPP Loan

Continued

As a general matter, the lender will review the application and make a decision regarding loan forgiveness. The lender has 60 days from receipt of a complete application to issue a decision to SBA. If the lender determines that the borrower is entitled to forgiveness of some or all of the amount applied for under the statute and applicable regulations, the lender must request payment from SBA at the time the lender issues its decision to SBA. SBA will, subject to any SBA review of the borrower's loan(s) or loan application(s), remit the appropriate forgiveness amount to the lender, plus any interest accrued through the date of payment, not later than 90 days after the lender issues its decision to SBA. The EIDL Advance Amount received by the borrower will not reduce the amount of forgiveness to which the borrower is entitled and will not be deducted from the forgiveness payment amount that SBA remits to the Lender.[29] If SBA determines in the course of its review that the borrower was ineligible for the PPP loan under the statute, the SBA rules or guidance available at the time of the borrower's loan application, or the terms of the borrower's PPP loan application (for example, because the borrower lacked an adequate basis for the certifications that it made in its PPP loan application), the loan will not be eligible for loan forgiveness. The lender must notify the borrower of the forgiveness amount. If only a portion of the loan is forgiven, or if the forgiveness request is denied, any remaining balance due on the loan must be repaid by the borrower on or before the maturity date of the loan. The lender must notify the borrower of remittance by SBA of (i) the loan forgiveness amount (or that SBA determined that no amount of the loan is eligible for forgiveness), and (ii) the date on which the borrower's first payment is due, if applicable. If SBA determines that the full amount of the loan is eligible for forgiveness and remits the full amount of the loan to the lender, the lender must mark the PPP loan note as ''paid in full'' and report the status of the loan as ''paid in full'' on the next monthly 1502 report filed by the lender.[30]

The general loan forgiveness process described above applies only to loan forgiveness applications that are not reviewed by SBA prior to the lender's decision on the forgiveness application. Part V of this interim final rule describes SBA's procedures for reviewing PPP loan applications and loan forgiveness applications.

b. When must a borrower apply for loan forgiveness or start making payments on a loan? [31]

A borrower may submit a loan forgiveness application any time on or before the maturity date of the loan if the borrower has used all of the loan proceeds for which the borrower is requesting forgiveness, except that a borrower applying for forgiveness of a Second Draw PPP Loan that is more than $150,000 must submit the loan forgiveness application for its First Draw PPP Loan before or simultaneously with the loan forgiveness application for its Second Draw PPP Loan.[32] If the borrower does not apply for loan forgiveness within 10 months after the last day of the maximum covered period of 24 weeks,[33] or if SBA determines that the loan is not eligible for forgiveness (in whole or in part), the PPP loan is no longer deferred and the borrower must begin paying principal and interest. If this occurs, the lender must notify the borrower of the date the first payment is due. The lender must report that the loan is no longer deferred to SBA on the next monthly SBA Form 1502 report filed by the lender.

3. Payroll Costs Eligible for Loan Forgiveness

a. When must payroll costs be incurred and/or paid to be eligible for forgiveness? [34]

In general, payroll costs paid or incurred during the covered period are eligible for forgiveness. For purposes of loan forgiveness, the covered period is the period beginning on the date the lender disburses the PPP loan and ending on a date selected by the borrower that occurs during the period (i) beginning on the date that is 8 weeks after the date of disbursement, and (ii) ending on the date that is 24 weeks after the date of disbursement.[35] The covered periods for a First Draw PPP Loan and a Second Draw PPP Loan cannot overlap; the borrower must use all proceeds of the First Draw PPP Loan for eligible expenses before disbursement of the Second Draw PPP Loan.

Payroll costs are considered paid on the day that paychecks are distributed or the borrower originates an ACH credit transaction. Payroll costs incurred during the borrower's last pay period of the covered period are eligible for forgiveness if paid on or before the next regular payroll date; otherwise, payroll costs must be paid during the covered period to be eligible for forgiveness. Payroll costs generally are incurred on the day the employee's pay is earned (*i.e.,* on the day the employee worked). For employees who are not performing work but are still on the borrower's payroll, payroll costs are incurred based on the schedule established by the borrower (typically, each day that the employee would have performed work).

b. Are salary, wages, or commission payments to furloughed employees; bonuses; or hazard pay during the covered period eligible for loan forgiveness? [36]

Yes. The CARES Act defines the term ''payroll costs'' broadly to include compensation in the form of salary, wages, commissions, or similar compensation. If a borrower pays furloughed employees their salary,

if they have used, or will use, the full amount of its First Draw PPP Loan (including the amount of any increase on such First Draw PPP Loan) on authorized uses on or before the expected date on which the Second Draw PPP Loan will be disbursed. *See* interim final rule on Second Draw PPP Loans. 86 FR 3712, 3717 (Jan. 14, 2021). This requirement does not apply to Second Draw PPP Loans of $150,000 or less that use the simplified forgiveness application (SBA Form 3508S).

[29] Section 333 of the Economic Aid Act repealed the CARES Act provision requiring SBA to deduct EIDL Advance Amounts received by borrowers from the forgiveness payment amounts remitted by SBA to the lender. Any EIDL Advance Amounts previously deducted from a borrower's forgiveness amount will be remitted to the lender, together with interest through the remittance date.

[30] Although the note is marked ''Paid in Full,'' the forgiven amount is considered canceled indebtedness under section 7A(c)(1) of the Small Business Act.

[31] This subsection was originally published at 85 FR 38304, section III.1.c. (June 26, 2020) and has been modified to conform to sections 306 and 307 of the Economic Aid Act.

[32] Because section 306 of the Economic Aid Act allows the borrower to select a covered period between 8 weeks and 24 weeks, there is no longer a need to allow a borrower to apply for forgiveness ''before the end of the covered period'' and that text has been deleted.

[33] The Economic Aid Act is silent on what covered period applies for a borrower who does not apply for forgiveness, so SBA will apply the longest available covered period to such borrowers.

[34] This subsection was originally published at 85 FR 33004, subsection III.3.a. (June 1, 2020) and amended by 85 FR 38304, subsection III.1.d. (June 26, 2020) and has been modified to conform to section 306 of the Economic Aid Act and for readability.

[35] Amended to conform to the section 306 of Economic Aid Act change to definition of covered period. The option to elect an alternative covered period has been removed because the Economic Aid Act provided borrowers flexibility to choose the end of their covered period.

[36] This subsection was originally published at 85 FR 33004, subsection III.3.b. (June 1, 2020) and has been modified to conform to section 344 of the Economic Aid Act.

wages, or commissions during the covered period, those payments are eligible for forgiveness as long as they do not exceed an annual salary of $100,000, as prorated for the period during which the payments are made or the obligation to make the payments is incurred. The Administrator, in consultation with the Secretary, has also determined that, if an employee's total compensation does not exceed $100,000 on an annualized basis, as prorated for the period during which the payments are made or the obligation to make the payments is incurred, the employee's hazard pay and bonuses are eligible for loan forgiveness because they constitute a supplement to salary or wages, and are thus a similar form of compensation.

c. Are there caps on the amount of loan forgiveness available for owner-employees and self-employed individuals' own payroll compensation? [37]

Yes. Forgiveness is capped at 2.5 months' worth (2.5/12) of an owner-employee or self-employed individual's 2019 or 2020 [38] compensation (up to a maximum $20,833 per individual in total across all businesses). The individual's total compensation may not exceed $100,000 on an annualized basis, as prorated for the period during which the payments are made or the obligation to make the payments is incurred. For example, for borrowers that elect to use an eight-week covered period, the amount of loan forgiveness requested for owner-employees and self-employed individuals' payroll compensation is capped at eight weeks' worth (8/52) of 2019 or 2020 compensation (*i.e.,* approximately 15.38 percent of 2019 or 2020 compensation) or $15,385 per individual, whichever is less, in total across all businesses. For borrowers that elect to use a ten-week covered period, the cap is ten weeks' worth (10/52) of 2019 or 2020 compensation (approximately 19.23 percent) or $19,231 per individual, whichever is less, in total across all businesses. For a covered period longer than 2.5 months, the amount of loan forgiveness requested for owner-employees and self-employed individuals' payroll compensation is capped at 2.5 months' worth (2.5/12) of 2019 or 2020 compensation (up to $20,833) in total across all businesses.

In particular, C-corporation owner-employees are capped by the prorated amount of their 2019 or 2020 [39] employee cash compensation and employer retirement and health, life, disability, vision and dental insurance contributions made on their behalf. S-corporation owner-employees are capped by the prorated amount of their 2019 or 2020 [40] employee cash compensation and employer retirement contributions made on their behalf. However, employer health, life, disability, vision and dental insurance contributions made on their behalf cannot be separately added; those payments are already included in their employee cash compensation. Schedule C or F filers are capped by the prorated amount of their owner compensation replacement, calculated based on 2019 or 2020 net profit.[41] General partners are capped by the prorated amount of their 2019 or 2020 net earnings from self-employment (reduced by claimed section 179 expense deduction, unreimbursed partnership expenses, and depletion from oil and gas properties) multiplied by 0.9235. For self-employed individuals, including Schedule C or F filers and general partners, retirement and health, life, disability, vision or dental insurance contributions are included in their net self-employment income and therefore cannot be separately added to their payroll calculation. LLC members are subject to the rules based on their LLC's tax filing status in the reference year used to determine their loan amount.

d. Are any individuals with an ownership stake in a PPP borrower exempt from application of the PPP owner-employee compensation rule when determining the amount of their compensation that is eligible for loan forgiveness? [42]

Yes, owner-employees with less than a 5 percent ownership stake in a C- or S-corporation are not subject to the owner-employee compensation rule in subsection IV.3.c. above.

e. May a fishing boat owner include as payroll costs in its application for loan forgiveness any compensation paid to a crewmember who received his or her own PPP loan and is seeking forgiveness for amounts of compensation the crewmember received for performing services described in Section 3121(b)(20) of the Internal Revenue Code with respect to that owner's fishing boat? [43]

No. If a fishing boat crewmember obtains his or her own PPP loan during the fishing boat owner's covered period and seeks forgiveness of that loan based in part on compensation from a particular fishing boat owner, the fishing boat owner cannot also obtain PPP loan forgiveness based on compensation paid to that same crewmember. This restriction applies only if the crewmember is performing services described in section 3121(b)(20) of the Internal Revenue Code for the particular fishing boat owner. The fishing boat owner is responsible for determining whether any of its crewmembers received their own PPP loans during the fishing boat owner's loan forgiveness covered period.

4. Nonpayroll Costs Eligible for Loan Forgiveness

a. When must nonpayroll costs be incurred and/or paid to be eligible for forgiveness? [44]

A nonpayroll cost is eligible for forgiveness if it was:

i. Paid during the covered period; or

ii. incurred during the covered period and paid on or before the next regular billing date, even if the billing date is after the covered period.

Example: A borrower that received a loan before June 5, 2020 uses a 24-week covered period that begins on June 1 and ends on November 15. The borrower pays its electricity bills for June through October during the covered period and pays its November electricity bill on December 10, which is the next regular billing date. The borrower may seek loan forgiveness for its June through October electricity bills, because they were paid during the covered period. In addition, the borrower may seek loan forgiveness for the portion of its November electricity bill through November 15 (the end of the covered period), because it was

[37] This subsection was originally published at 85 FR 33004, subsection III.3.c. (June 1, 2020) and amended by 85 FR 38304, subsection III.1.d (June 26, 2020) and has been modified to conform to sections 308 and 344 of the Economic Aid Act and for readability.

[38] For First Draw PPP loans made in 2020, borrowers use 2019. For First Draw PPP loans made in 2021 and Second Draw PPP loans, borrowers use the year (2019 or 2020) that was used to calculate the borrower's loan amount.

[39] Use whichever year was used to calculate the borrower's loan amount.

[40] Use whichever year was used to calculate the borrower's loan amount.

[41] For self-employed borrowers that file Form 1040, Schedule F and have no employees, gross income may be used instead of net profit. For self-employed borrowers that file Schedule F and have employees, the difference between gross income and employee payroll costs may be used instead of net profit. *See* section 313 of the Economic Aid Act.

[42] This subsection was originally published at 85 FR 52881, section III.1. (Aug. 27, 2020) and has been modified for readability.

[43] This subsection was originally published at 85 FR 39066, subsection III.2. (June 30, 2020) and has been modified for consistency with the Economic Aid Act.

[44] This subsection was originally published at 85 FR 33004, subsection III.4.a. (June 1, 2020) and amended by 85 FR 38304, subsection III.1.e (June 26, 2020) and has been modified for readability.

incurred during the covered period and paid on the next regular billing date.

b. Are advance payments of interest on mortgage obligations eligible for loan forgiveness? [45]

No. Advance payments of interest on a covered mortgage obligation are not eligible for loan forgiveness because the CARES Act's loan forgiveness provisions regarding mortgage obligations specifically exclude ''prepayments.'' Principal on mortgage obligations is not eligible for forgiveness under any circumstances.

c. Are amounts attributable to the business operation of a tenant or sub-tenant of the PPP borrower or, in the context of home-based businesses, household expenses, eligible for forgiveness? [46]

No, the amount of loan forgiveness requested for nonpayroll costs may not include any amount attributable to the business operation of a tenant or sub-tenant of the PPP borrower or, for home-based businesses, household expenses. The examples below illustrate this rule.

Example 1: A borrower rents an office building for $10,000 per month and sub-leases out a portion of the space to other businesses for $2,500 per month. Only $7,500 per month is eligible for loan forgiveness.

Example 2: A borrower has a mortgage on an office building it operates out of, and it leases out a portion of the space to other businesses. The portion of mortgage interest that is eligible for loan forgiveness is limited to the percent share of the fair market value of the space that is not leased out to other businesses. As an illustration, if the leased space represents 25% of the fair market value of the office building, then the borrower may only claim forgiveness on 75% of the mortgage interest.

Example 3: A borrower shares a rented space with another business. When determining the amount that is eligible for loan forgiveness, the borrower must prorate rent and utility payments in the same manner as on the borrower's 2019 tax filings, or if a new business, the borrower's expected 2020 tax filings.

Example 4: A borrower works out of his or her home. When determining the amount of nonpayroll costs that are eligible for loan forgiveness, the borrower may include only the share of covered expenses that were deductible on the borrower's 2019 tax filings, or if a new business, the borrower's expected 2020 tax filings.

d. Are rent payments to a related party eligible for loan forgiveness? [47]

Yes, as long as (1) the amount of loan forgiveness requested for rent or lease payments to a related party is no more than the amount of mortgage interest owed on the property during the covered period that is attributable to the space being rented by the business, and (2) the lease and the mortgage were entered into prior to February 15, 2020.[48] Any ownership in common between the business and the property owner is a related party for these purposes. The borrower must provide its lender with mortgage interest documentation to substantiate these payments. While rent or lease payments to a related party may be eligible for forgiveness, mortgage interest payments to a related party are not eligible for forgiveness.

5. Reductions to Loan Forgiveness Amount

Section 7A of the Small Business Act specifically requires certain reductions in a borrower's loan forgiveness amount based on reductions in full-time equivalent employees or in employee salary and wages. It includes an important statutory exemption for borrowers that have eliminated the reduction on or before December 31, 2020 (or, for a PPP loan made on or after December 27, 2020, not later than the last day of the loan's covered period).[49] Section 7A(d)(7) of the Small Business Act also allows exemptions from reductions in loan forgiveness amounts based on employee availability and business activity. In addition, SBA and Treasury have adopted regulatory exemptions to the reduction rules for borrowers that (1) have offered to restore employee hours at the same salary or wages, even if the employees have not accepted, (2) fired an employee for cause or have an employee that voluntarily resigns or voluntarily requests a schedule reduction, (3) eliminate reductions by December 31, 2020 or, for a PPP loan made after December 27, 2020, the last day of the loan's covered period, or (4) have a PPP loan of $50,000 or less. The instructions to the loan forgiveness applications and the guidance below explain how the statutory forgiveness reduction formulas work.

a. Will a borrower's loan forgiveness amount be reduced if the borrower reduced the hours of an employee, then offered to restore the reduction in hours, but the employee declined the offer? [50]

No. In calculating the loan forgiveness amount, a borrower may exclude any reduction in full-time equivalent employee headcount that is attributable to an individual employee if:

i. The borrower made a good faith, written offer to restore the reduced hours of such employee;

ii. the offer was for the same salary or wages and same number of hours as earned by such employee in the last pay period prior to the reduction in hours;

iii. the offer was rejected by such employee; and

iv. the borrower has maintained records documenting the offer and its rejection.

b. What effect does a reduction in a borrower's number of full-time equivalent (FTE) employees have on the loan forgiveness amount? [51]

In general, a reduction in FTE employees during the covered period reduces the loan forgiveness amount by the same percentage as the percentage reduction in FTE employees. For both First Draw PPP Loans and Second Draw PPP Loans, the borrower must first select a reference period: (i) February 15, 2019 through June 30, 2019; (ii) January 1, 2020 through February 29, 2020; or (iii) in the case of a seasonal employer,[52] either of the two preceding methods or a consecutive 12-week period between February 15, 2019 and February 15, 2020.[53] If the average number of FTE employees during the covered period is less than during the

[45] This subsection was originally published at 85 FR 33004, subsection III.4.b. (June 1, 2020).

[46] This subsection was originally published at 85 FR 52881, subsection III.2.a. (Aug. 27, 2020).

[47] This subsection was originally published at 85 FR 52881, subsection III.2.b. (Aug. 27, 2020) and has been modified for readability.

[48] In this context, the related party itself would not also be eligible to request forgiveness for this amount.

[49] This subsection was originally published at 85 FR 33004, subsection III.5. (June 1, 2020) and amended by 85 FR 38304, subsection III.1.f. (June 26, 2020), and has been modified to conform to subsequent rules or guidance and section 311 of the Economic Aid Act.

[50] This subsection was originally published at 85 FR 33004, subsection III.5.a. (June 1, 2020) and amended by 85 FR 38304, section III.5. (June 26, 2020) and has been modified for readability.

[51] This subsection was originally published at 85 FR 33004, subsection III.5.b. (June 1, 2020) and amended by 85 FR 38304, section III.1.f. (June 26, 2020) and has been modified to conform to sections 306, 311 and 336 of the Economic Aid Act and for readability.

[52] The term ''seasonal employer'' is defined in section 7(a)(36)(A)(xiii) of the Small Business Act.

[53] This decision to permit seasonal employers to use, as a reference period, any consecutive 12-week period between February 15, 2019 and February 15, 2020 is an exercise of the Secretary's rulemaking authority under section 1109 of the CARES Act. This reference period is consistent with section 336 of the Economic Aid Act, which amends the calculation of the maximum loan amount for seasonal employers.

reference period, the total eligible expenses available for forgiveness is reduced proportionally by the percentage reduction in FTE employees. For example, if a borrower had 10.0 FTE employees during the reference period and this declined to 8.0 FTE employees during the covered period, the percentage of FTE employees declined by 20 percent and thus only 80 percent of otherwise eligible expenses are available for forgiveness.

Borrowers are exempted from the loan forgiveness reduction arising from a proportional reduction in FTE employees during the covered period if the borrower is able to document in good faith the following: (1) An inability to rehire individuals who were employees of the borrower on February 15, 2020; and (2) an inability to hire similarly qualified individuals for unfilled positions on or before December 31, 2020 (or, for a PPP loan made on or after December 27, 2020, not later than the last day of the loan's covered period).[54] Borrowers are required to inform the applicable state unemployment insurance office of any employee's rejected rehire offer within 30 days of the employee's rejection of the offer. The documents that borrowers should maintain to show compliance with this exemption include, but are not limited to, the written offer to rehire an individual, a written record of the offer's rejection, and a written record of efforts to hire a similarly qualified individual.

Borrowers are also exempted from the loan forgiveness reduction arising from a reduction in the number of FTE employees during the covered period if the borrower is able to document in good faith an inability to return to the same level of business activity as the borrower was operating at before February 15, 2020, due to compliance with requirements established or guidance issued between March 1, 2020 and December 31, 2020 (or, for a PPP loan made on or after December 27, 2020, not later than the last day of the loan's covered period) [55] by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention (CDC), or the Occupational Safety and Health Administration related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID–19 (COVID Requirements or Guidance). Specifically, borrowers that can certify that they have documented in good faith that their reduction in business activity during the covered period stems directly or indirectly from compliance with such COVID Requirements or Guidance are exempt from any reduction in their forgiveness amount stemming from a reduction in FTE employees during the covered period. Such documentation must include copies of applicable COVID Requirements or Guidance for each business location and relevant borrower financial records.

Example: A PPP borrower is in the business of selling beauty products both online and at its physical store. During the covered period, the local government where the borrower's store is located orders all non-essential businesses, including the borrower's business, to shut down their stores, based in part on COVID–19 guidance issued by the CDC in March 2020. Because the borrower's business activity during the covered period was reduced compared to its activity before February 15, 2020 due to compliance with COVID Requirements or Guidance, the borrower satisfies the exemption and will not have its forgiveness amount reduced because of a reduction in FTEs during the covered period, if the borrower in good faith maintains records regarding the reduction in business activity and the local government's shutdown orders that reference a COVID Requirement or Guidance as described above.

c. What does ''full-time equivalent employee'' mean? [56]

Full-time equivalent employee means an employee who works 40 hours or more, on average, each week. The hours of employees who work less than 40 hours are calculated as proportions of a single full-time equivalent employee and aggregated, as explained further below in subsection IV.5.d.

d. How should a borrower calculate its number of FTE employees? [57]

Borrowers seeking forgiveness must document their average number of FTE employees during the covered period and their selected reference period. If applicable, a borrower must perform this calculation for both its First Draw PPP Loan and Second Draw PPP Loan. For purposes of this calculation, borrowers must divide the average number of hours paid for each employee per week by 40, capping this quotient at 1.0. For example, an employee who was paid 48 hours per week during the covered period would be considered to be an FTE employee of 1.0.

For employees who were paid for less than 40 hours per week, borrowers may choose to calculate the full-time equivalency in one of two ways. First, the borrower may calculate the average number of hours a part-time employee was paid per week during the covered period. For example, if an employee was paid for 30 hours per week on average during the covered period, the employee could be considered to be an FTE employee of 0.75. Similarly, if an employee was paid for ten hours per week on average during the covered period, the employee could be considered to be an FTE employee of 0.25. Second, for administrative convenience, borrowers may elect to use a full-time equivalency of 0.5 for each part-time employee. The Administrator recognizes that not all borrowers maintain hours-worked data, and has decided to afford such borrowers this flexibility in calculating the full-time equivalency of their part-time employees.

Borrowers may select only one of these two methods, and must apply that method consistently to all of their part-time employees for the covered period and the selected reference period. In either case, the borrower shall provide the aggregate total of FTE employees for both the selected reference period and the covered period by adding together all of the employee-level FTE employee calculations. The borrower must then divide the average FTE employees during the covered period by the average FTE employees during the selected reference period, resulting in the reduction quotient.

e. What effect does a borrower's reduction in employees' salary or wages have on the loan forgiveness amount? [58]

Under section 7A(d)(3) of the Small Business Act, a reduction in an employee's salary or wages in excess of 25 percent will generally result in a reduction in the loan forgiveness amount, unless an exception applies. Specifically, for each new employee in 2020 and 2021, as well as each existing employee who was not paid more than the annualized equivalent of $100,000

[54] This text was originally published at 85 FR 38304, subsection III.1.f. (June 26, 2020) and has been modified to conform to section 311 of the Economic Aid Act.

[55] This text was originally published at 85 FR 38304, subsection III.1.f. (June 26, 2020) and has been modified to conform to section 311 the Economic Aid Act.

[56] This subsection was originally published at 85 FR 33004, subsection III.5.c. (June 1, 2020) and has been modified for readability.

[57] This subsection was originally published at 85 FR 33004, subsection III.5.d. (June 1, 2020) and has been modified to conform to section 311 of the Economic Aid Act and for readability.

[58] This subsection was originally published at 85 FR 33004, subsection III.5.e. (June 1, 2020) and has been modified to conform to section 306 of the Economic Aid Act and for readability.

in any pay period in 2019, the borrower must reduce the total forgiveness amount by the total dollar amount of the salary or wage reductions that are in excess of 25 percent of base salary or wages of the employee during the most recent full quarter during which the employee was employed before the covered period (the reference period), subject to exceptions for borrowers who restore reduced wages or salaries (see g. below). This reduction calculation is performed on a per employee basis, not in the aggregate. Additionally, this reduction is performed based on the covered period and reference period applicable to the First Draw Loan or Second Draw Loan.

Example: A borrower is using a 24-week covered period. This borrower reduced a full-time employee's weekly salary from $1,000 per week during the reference period to $700 per week during the covered period. The employee continued to work on a full-time basis during the covered period, with an FTE of 1.0. In this case, the first $250 (25 percent of $1,000) is exempted from the loan forgiveness reduction. The borrower seeking forgiveness would list $1,200 as the salary/hourly wage reduction for that employee (the extra $50 weekly reduction multiplied by 24 weeks).[59]

Example: A borrower has elected to use an eight-week covered period. This borrower reduced a full-time employee's weekly salary from $1,000 per week during the reference period to $700 per week during the covered period. The employee continued to work on a full-time basis during the covered period, with an FTE of 1.0. In this case, the first $250 (25 percent of $1,000) is exempted from the loan forgiveness reduction. The borrower seeking forgiveness would list $400 as the salary/hourly wage reduction for that employee (the extra $50 weekly reduction multiplied by eight weeks).

f. How should borrowers seeking loan forgiveness account for the reduction based on a reduction in the number of employees (section 7A(d)(2)) relative to the reduction relating to salary and wages (section 7A(d)(3))? [60]

To ensure that borrowers are not doubly penalized, the salary/wage reduction applies only to the portion of the decline in employee salary and wages that is *not* attributable to the FTE reduction.

Example: An hourly wage employee had been working 40 hours per week during the borrower selected reference period (FTE employee of 1.0) and the borrower reduced the employee's hours to 20 hours per week during the covered period (FTE employee of 0.5). There was no change to the employee's hourly wage during the covered period. Because the hourly wage did not change, the reduction in the employee's total wages is entirely attributable to the FTE employee reduction and the borrower is not required to conduct a salary/wage reduction calculation for that employee.

g. If a borrower restores reductions made to employee salaries and wages or FTE employees, can the borrower avoid a reduction in its loan forgiveness amount? [61]

Yes. Section 7A(d)(5) of the Small Business Act provides that if certain employee salaries and wages were reduced between February 15, 2020 and April 26, 2020 (the safe harbor period) but the borrower eliminates those reductions by December 31, 2020 (or, for a PPP loan made on or after December 27, 2020, by the last day of the loan's covered period), the borrower is exempt from any reduction in loan forgiveness amount that would otherwise be required due to reductions in salaries and wages under section 7A(d)(3) of the Small Business Act. Similarly, if a borrower eliminates any reductions in FTE employees occurring during the safe harbor period by December 31, 2020 (or, for a PPP loan made on or after December 27, 2020, by last day of the loan's covered period), the borrower is exempt from any reduction in loan forgiveness amount that would otherwise be required due to reductions in FTE employees.[62]

This provision implements section 7A(d)(5) of the Small Business Act, which gives borrowers an opportunity to cure reductions in FTEs, salary/wage reductions in excess of 25 percent, or both, using the applicable methodology set forth in section 7A(d)(5). The Small Business Act provides that the reduction in FTEs or the reduction in salary/hourly wages must be eliminated not later than December 31, 2020 (or, for a PPP loan made on or after December 27, 2020, not later than the last day of the loan's covered period). This does not change or affect the requirement that at least 60 percent of the loan forgiveness amount must be attributable to payroll costs.

h. Will a borrower's loan forgiveness amount be reduced if an employee is fired for cause, voluntarily resigns, or voluntarily requests a schedule reduction? [63]

No. When an employee of the borrower is fired for cause, voluntarily resigns, or voluntarily requests a reduced schedule during the covered period (FTE reduction event), the borrower may count such employee at the same full-time equivalency level before the FTE reduction event when calculating the section 7A(d)(2) FTE employee reduction penalty. Borrowers that avail themselves of this *de minimis* exemption shall maintain records demonstrating that each such employee was fired for cause, voluntarily resigned, or voluntarily requested a schedule reduction. The borrower shall provide such documentation upon request.

i. Is a borrower with a loan of $50,000 or less exempt from any reductions to the loan forgiveness amount? [64]

Yes. A borrower with a loan of $50,000 or less, other than any borrower

[59] This subsection previously provided that a borrower must account for the salary reduction for the full 24-week covered period if the borrower applies for forgiveness before the end of the covered period. 85 FR 38304, 38308 (June 26, 2020). This text has been removed because section 306 of the Economic Aid Act allows the borrower to select a covered period between 8 and 24 weeks and there is no need to apply for forgiveness before the end of the covered period.

[60] This subsection was originally published at 85 FR 33004, subsection III.5.e. (June 1, 2020) and has been modified for readability.

[61] This subsection was originally published at 85 FR 33004, subsection III.5.g. (June 1, 2020) and has been modified to conform to section 311 of the Economic Aid Act.

[62] In light of the flexibility the Small Business Act provides to borrowers with respect to their selection of the reference time period for any potential reduction in loan forgiveness, and the statutory authority for SBA and the Treasury to grant *de minimis* exemptions from this requirement, if the borrower meets the requirements for the FTE reduction safe harbor, it will not be subject to any loan forgiveness reduction based on a reduction in FTE employees.

[63] This subsection was originally published at 85 FR 33004, subsection III.5.h. (June 1, 2020) and has been modified to conform to section 304 of the Economic Aid Act and for readability.

[64] This subsection was originally published at 85 FR 66214, subsection III.1.b. (Oct. 19, 2020) and has been modified to conform to sections 304 and 307 the Economic Aid Act and for readability. As described further below in subsection 6.a and 6.b, borrowers with loans up to $150,000 may use SBA Form 3508S. However, only borrowers with loans of $50,000 or less, other than any borrower that together with its affiliates received First Draw Loans totaling $2 million or more or Second Draw Loans totaling $2 million or more, are exempt from any reductions to the loan forgiveness amount. Accordingly, the exemptions in this subsection are

that together with its affiliates received First Draw PPP Loans totaling $2 million or more or Second Draw PPP Loans totaling $2 million or more, is exempt from any reductions in the borrower's loan forgiveness amount based on reductions in FTE employees (section 7A(d)(2) of the Small Business Act) or reductions in employee salary or wages (section 7A(d)(3) of the Small Business Act) that would otherwise apply. As such, subsections IV.5.a. through IV.5.h. above do not apply to qualifying borrowers with loans of $50,000 or less.

6. Documentation Requirements

a. What must borrowers submit for forgiveness of their PPP loans? [65]

The loan forgiveness application form details the documentation requirements; specifically, documentation each borrower must submit with its Loan Forgiveness Application (SBA Form 3508, 3508EZ, 3508S as applicable, or lender equivalent), documentation each borrower is required to maintain and make available upon request, and documentation each borrower may voluntarily submit with its loan forgiveness application. An eligible borrower that received a loan of $150,000 or less should use the SBA Form 3508S and shall not, at the time of its application for loan forgiveness, be required to submit any application or documentation in addition to the certification and information required by section 7A(*l*)(1)(A) of the Small Business Act. However, an eligible borrower that received a Second Draw loan of $150,000 or less and is using the SBA Form 3508S must, before or at the time of its application for loan forgiveness, submit documentation sufficient to establish that the borrower experienced a reduction in revenue as provided in subsection (g)(2)(v) of the interim final rule on Second Draw PPP Loans, unless the borrower already provided such documentation at the time of its application for the Second Draw PPP Loan.[66] Such documentation may include relevant tax forms, including annual tax forms, or, if relevant tax forms are not available, a copy of the applicant's quarterly income statements or bank statements.

For Second Draw PPP Loans, all borrowers must certify on their loan forgiveness application that the borrower used all First Draw PPP Loan amounts on eligible expense prior to disbursement of the Second Draw PPP Loan. For Second Draw PPP Loans in excess of $150,000, the borrower must submit its loan forgiveness application for the First Draw PPP Loan before or simultaneously with the loan forgiveness application for the Second Draw PPP Loan, even if the calculated forgiveness amount for the First Draw PPP Loan is zero.

b. What documentation are borrowers who are individuals with self-employment income who file a Form 1040, Schedule C or F required to submit to their lender with their request for loan forgiveness? [67]

For borrowers that received loans of $150,000 or less that use the SBA Form 3508S, the borrower must submit the certification and information required by section 7A(*l*)(1)(A) of the Small Business Act and, for a Second Draw PPP Loan, revenue reduction documentation if such documentation was not provided at the time of application.[68] All other borrowers must submit the certification required by section 7A(e)(3) of the Small Business Act, and (if the borrower has employees) Form 941 and state quarterly business and individual employee wage reporting and unemployment insurance tax forms or equivalent payroll processor records that best correspond to the covered period (with evidence of any retirement and group health, life, disability, vision, and dental insurance contributions). Whether or not the borrower has employees, the borrower must submit evidence of business rent, business mortgage interest payments on real or personal property, business utility payments, or payments for a covered operations expenditure, covered property damage cost, covered supplier cost, or covered worker protection expenditure during the covered period if the borrower used loan proceeds for those purposes. This documentation may include cancelled checks, payment receipts, transcripts of accounts, purchase orders, orders, invoices, or other documents verifying payments on nonpayroll costs.

For all loans, the 2019 or 2020 Form 1040 Schedule C or F that the borrower provided at the time of the PPP loan application must be used to determine the amount of net profit allocated to the owner for the covered period.[69]

c. What additional documentation must a borrower submit when the President of the United States, Vice President of the United States, the head of an Executive department, or a Member of Congress, or the spouse of any of the preceding, directly or indirectly holds a controlling interest in the borrower? [70]

For any First Draw PPP loan made before December 27, 2020, if the President of the United States, Vice President of the United States, the head of an Executive department, or a Member of Congress, or the spouse of any such person as determined under applicable common law, directly or indirectly held a controlling interest in the borrower on the date of the loan application, the borrower is required to make certain disclosures following submission of the borrower's application for loan forgiveness.

For purposes of this section, the term ''controlling interest'' means owning, controlling, or holding not less than 20 percent, by vote or value, of the outstanding amount of any class of equity interest in a borrower. For purposes of making this determination, the securities owned, controlled or held by the individual and spouse shall be aggregated. The term ''equity interest'' means (1) a share in a borrower, without regard to whether the share is transferable or classified as stock or anything similar, (2) a capital or profit interest in a limited liability company or partnership, or (3) a warrant or right, other than a right to convert, to purchase, sell, or subscribe to a share of interest described in (1) or (2), respectively. The term ''Executive department'' has the meaning given the term in section 101 of title 5, United States Code. The term ''Member of Congress'' means a Member of the Senate or House of Representatives, a Delegate to the House of

limited to qualifying borrowers with loans of $50,000 or less. A borrower with a loan greater than $50,000 and up to $150,000 must comply with the requirements under the Paycheck Protection Program, including calculating any reduction in forgiveness amounts based on reductions in FTEs or employee salary or wages.

[65] This subsection was originally published at 85 FR 33004, section III.6. (June 1, 2020) and amended at 85 FR 38304, subsection III.1.g. (June 26, 2020) and has been modified to conform to sections 304 and 307 of the Economic Aid Act and for readability.

[66] *See* interim final rule on Second Draw PPP Loans. 86 FR 3712, 3721 (Jan. 14, 2021). Subsection (g)(2)(v) of the interim final rule on Second Draw PPP Loans implements section 7(a)(37)(J)(v) of the Small Business Act.

[67] This subsection was originally published at 85 FR 21747, subsection III.1.g. (Apr. 20, 2020) and has been modified to conform to sections 304, 307, 308, and 313 of the Economic Aid Act and for readability.

[68] *See* subsection (g)(2)(v) of the interim final rule on Second Draw PPP Loans. 86 FR 3712, 3721 (Jan. 14, 2021).

[69] For self-employed borrowers that file Form 1040, Schedule F and have no employees, gross income may be used instead of net profit. For self-employed borrowers that file Schedule F and have employees, the difference between gross income and employee payroll costs may be used instead of net profit.

[70] This subsection has been added to conform to section 322 of the Economic Aid Act.

Representatives, and the Resident Commissioner from Puerto Rico.

If the borrower submitted a loan forgiveness application to its PPP lender before December 27, 2020, then the principal executive officer, or individual performing a similar function, of the borrower shall submit to its PPP lender an SBA Form 3508D disclosing the controlling interest(s) not later than January 26, 2021. If the PPP lender has already submitted a forgiveness decision to SBA, the lender shall promptly transmit the SBA Form 3508D to SBA. Otherwise, the PPP lender shall transmit the SBA Form 3508D to SBA at the time the lender issues its forgiveness decision to SBA. If the borrower submits a loan forgiveness application to its PPP lender on or after December 27, 2020, then the principal executive officer, or individual performing a similar function, of the borrower shall submit to its PPP lender an SBA Form 3508D disclosing the controlling interest(s) not later than 30 days after submitting the application. The PPP lender shall transmit the SBA Form 3508D to SBA with the PPP lender's forgiveness decision. Alternatively, the PPP lender may transmit the completed Form 3508D to SBA when received.

An entity is prohibited from receiving a PPP loan after December 27, 2020 if a controlling interest is held directly or indirectly by the President of the United States, Vice President of the United States, the head of an Executive department, or a Member of Congress, or the spouse of any of the preceding.[71]

7. Lender Hold Harmless[72]

Under what circumstances may a lender rely on a certification or documentation submitted by an eligible PPP borrower that received a PPP loan?

A lender may rely on any certification or documentation submitted by a PPP applicant or an eligible PPP borrower that received a PPP loan that—(a) is submitted pursuant to all applicable statutory requirements, regulations, and guidance related to a PPP loan, including sections 7(a)(36), 7(a)(37), and 7A of the Small Business Act; and (b) attests that the PPP applicant or eligible PPP borrower, as applicable, has accurately provided the certification or documentation to the lender in accordance with the statutory requirements, regulations, and guidance described in (a). With respect to a lender that relies on a borrower certification or documentation meeting the requirements of this subsection, an enforcement action may not be taken against the lender related to the PPP loan, and the lender shall not be subject to any penalties relating to loan origination or forgiveness of the PPP loan, if:

(i) The lender acts in good faith relating to loan origination or forgiveness of the PPP loan based on that reliance; and

(ii) all other relevant Federal, State, local, and other statutory and regulatory requirements applicable to the lender are satisfied with respect to the PPP loan.[73]

V. Paycheck Protection Program SBA Loan Review Procedures and Related Borrower and Lender Responsibilities

1. SBA Reviews of Individual PPP Loans

a. Will SBA review individual PPP loans?[74]

Yes. SBA may review any PPP loan, as the Administrator deems appropriate, as described below.

b. What borrower representations and statements will SBA review?[75]

The Administrator is authorized to review the following:

Borrower Eligibility: The Administrator may review whether a borrower is eligible for the PPP loan based on the provisions of the CARES Act, the Economic Aid Act, the rules and guidance available at the time of the borrower's PPP loan application, and the terms of the borrower's loan application. See FAQ 17 (posted April 6, 2020).[76] These include, but are not limited to, SBA's regulations under 13 CFR 120.110 (as modified and clarified by the PPP Interim Final Rules) and 13 CFR 121.301(f) and the information, certifications, and representations on the Borrower Application Form (SBA Form 2483, 2483–SD, or lender's equivalent form) and the Loan Forgiveness Application Form (SBA Form 3508, 3508EZ, 3508S, or lender's equivalent form). With respect to a Second Draw PPP Loan, this may include a review of whether the borrower experienced the 25 percent revenue reduction required under the Economic Aid Act.

Loan Amounts and Use of Proceeds: The Administrator may review whether a borrower calculated the loan amount correctly and used loan proceeds for the allowable uses specified in the CARES Act and the Economic Aid Act.

Loan Forgiveness Amounts: The Administrator may review whether a borrower is entitled to loan forgiveness in the amount claimed on the borrower's Loan Forgiveness Application (SBA Form 3508, 3508EZ, 3508S, or lender's equivalent form).

c. When will SBA undertake a loan review?[77]

For a PPP loan of any size, SBA may undertake a review at any time in SBA's discretion. For example, SBA may review a loan if the loan documentation submitted to SBA by the lender or any other information indicates that the borrower may be ineligible for a PPP loan, or may be ineligible to receive the loan amount or loan forgiveness amount claimed by the borrower.[78] Additionally, section 7A(l)(1)(E) of the Small Business Act expressly provides that SBA may review and audit PPP loans of $150,000 or less and access any records the borrower is required to retain. SBA may, in its discretion, review a borrower's First Draw PPP Loan and Second Draw PPP Loan at the same time or at different times. For loans of more than $150,000, as noted on the loan forgiveness application forms, the borrower must retain PPP documentation in its files for six years after the date the loan is forgiven or repaid in full. For loans of $150,000 and under, the borrower must retain records relevant to the form that prove compliance with the requirements of section 7(a)(36) or 7(a)(37), as applicable, of the Small Business Act—for employment records, for the 4-year period following submission of the loan forgiveness application, and for other records, for the 3-year period following submission of the loan forgiveness application. All borrowers must permit authorized representatives of SBA, including representatives of its Office of Inspector General, to access such files upon request. Additionally, all borrowers must provide documentation

[71] *See* subsection III.B.2.a. of the consolidated interim final rule implementing updates to the Paycheck Protection Program, 86 FR 3692, 3698 (Jan. 14, 2021); subsection III.e.6. of the interim final rule for Second Draw PPP loans, 86 FR 3712, 3719 (Jan. 14, 2021).

[72] This section has been added to conform to section 305 of the Economic Aid Act.

[73] This provision is effective as if included in the CARES Act and shall apply to any loan made pursuant to section 7(a)(36) or 7(a)(37) of the Small Business Act before, on, or after the date of enactment of the Economic Aid Act, including forgiveness of such a loan.

[74] This subsection was originally published at 85 FR 33010, subsection III.1.a. (June 1, 2020).

[75] This subsection was originally published at 85 FR 33010, subsection III.1.b. (June 1, 2020) and amended by 85 FR 38304, subsection III.2.a. (June 26, 2020) and 85 FR 66214, subsection III.2.a. (Oct. 19, 2020) and has been modified to conform to section 311 of the Economic Aid Act.

[76] *https://www.sba.gov/document/support—faq-lenders-borrowers.*

[77] This subsection was originally published at 85 FR 33010, subsection III.1.c. (June 1, 2020) and has been modified to conform to sections 307 and 311 of the Economic Aid Act.

[78] 13 CFR 120.524(c).

independently to a lender to satisfy relevant Federal, State, local or other statutory or regulatory requirements or in connection with an SBA loan review.

Lenders must comply with applicable SBA requirements for records retention, which for Federally regulated lenders means compliance with the requirements of their federal financial institution regulator and for SBA supervised lenders (as defined in 13 CFR 120.10 and including PPP lenders with authority under SBA Form 3507) means compliance with 13 CFR 120.461.

d. Will I have the opportunity to respond to SBA's questions in a review? [79]

Yes. If loan documentation submitted to SBA by the lender or any other information indicates that the borrower may be ineligible for a PPP loan or may be ineligible to receive the loan amount or loan forgiveness amount claimed by the borrower, SBA will require the lender to contact the borrower in writing to request additional information. SBA may also request information directly from the borrower. The lender will provide any additional information provided to it by the borrower to SBA. SBA will consider all information provided by the borrower in response to such an inquiry.

Failure to respond to SBA's inquiry may result in a determination that the borrower was ineligible for a PPP loan or ineligible to receive the loan amount or loan forgiveness amount claimed by the borrower.

e. If SBA determines that a borrower is ineligible for a PPP loan, can the loan be forgiven? [80]

No. If SBA determines that a borrower is ineligible for the PPP loan, SBA will direct the lender to deny the loan forgiveness application. An SBA determination that a borrower is ineligible for a First Draw PPP Loan may also result in an SBA determination that the borrower is ineligible for any Second Draw PPP Loan, and SBA may direct the lender to deny any loan forgiveness application submitted for the Second Draw PPP Loan. Further, if SBA determines that the borrower is ineligible for the loan amount or loan forgiveness amount claimed by the borrower, SBA will direct the lender to deny the loan forgiveness application in whole or in part, as appropriate. SBA may also seek repayment of the outstanding PPP loan balance or pursue other available remedies.

Section 7A(b) of the Small Business Act provides for forgiveness of a PPP loan only if the borrower is an ''eligible recipient.'' The Administrator has determined that to be an eligible recipient that is entitled to forgiveness under section 7A(b), the borrower must be an ''eligible recipient'' under section 7(a)(36) and section 7(a)(37) of the Small Business Act and rules and guidance available at the time of the borrower's loan application. This requirement promotes the public interest, aligns SBA's functions with other governmental policies, and appropriately carries out the PPP provisions of the CARES Act and the Economic Aid Act, including by preventing evasion of the requirements for PPP loan eligibility and ensuring program integrity with respect to this emergency financial assistance program. It is also consistent with the CARES Act's nonrecourse provision, 15 U.S.C. 636(a)(36)(F)(v), which limits SBA's recourse against individual shareholders, members, or partners of a PPP borrower for nonpayment of a PPP loan only if the borrower is an eligible recipient of the loan.

f. May a borrower appeal SBA's determination that the borrower is ineligible for a PPP loan or ineligible for the loan amount or the loan forgiveness amount claimed by the borrower? [81]

Yes. SBA has issued a separate interim final rule addressing this process.[82]

2. The Loan Forgiveness Process for Lenders

a. What should a lender review? [83]

When a borrower submits SBA Form 3508 or lender's equivalent form, the lender shall:

i. Confirm receipt of the borrower certifications contained in the SBA Form 3508 or lender's equivalent form.

ii. Confirm receipt of the documentation the borrower must submit to aid in verifying payroll and nonpayroll costs, as specified in the instructions to the SBA Form 3508 or lender's equivalent form.

iii. Confirm the borrower's calculations on the borrower's SBA Form 3508 or lender's equivalent form, including the dollar amount of the (A) Cash Compensation, Non-Cash Compensation, and Compensation to Owners claimed on Lines 1, 4, 6, 7, 8, and 9 on PPP Schedule A and (B) Business Mortgage Interest Payments, Business Rent or Lease Payments, Business Utility Payments, Covered Operations Expenditures, Covered Property Damage Costs, Covered Supplier Costs, and Covered Worker Protection Expenditures claimed on Lines 2 through 8 on the PPP Loan Forgiveness Calculation Form, by reviewing the documentation submitted with the SBA Form 3508 or lender's equivalent form.

iv. Confirm that the borrower made the calculation on Line 14 of the SBA Form 3508 or lender's equivalent form correctly, by dividing the borrower's Eligible Payroll Costs claimed on Line 1 by 0.60.

When the borrower submits SBA Form 3508EZ or lender's equivalent form, the lender shall:

i. Confirm receipt of the borrower certifications contained in the SBA Form 3508EZ or lender's equivalent form.

ii. Confirm receipt of the documentation the borrower must submit to aid in verifying payroll and nonpayroll costs, as specified in the instructions to the SBA Form 3508EZ or lender's equivalent form.

iii. Confirm the borrower's calculations on the borrower's SBA Form 3508EZ or lender's equivalent form, including the dollar amount of the Payroll Costs, Business Mortgage Interest Payments, Business Rent or Lease Payments, Business Utility Payments, Covered Operations Expenditures, Covered Property Damage Costs, Covered Supplier Costs, and Covered Worker Protection Expenditures claimed on Lines 1 through 8 of the SBA Form 3508EZ or lender's equivalent form, by reviewing the documentation submitted with the SBA Form 3508EZ or lender's equivalent form.

iv. Confirm that the borrower made the calculation on Line 11 of the SBA Form 3508EZ or lender's equivalent form correctly, by dividing the borrower's Eligible Payroll Costs claimed on Line 1 by 0.60.

Providing an accurate calculation of the loan forgiveness amount is the responsibility of the borrower, and the borrower attests to the accuracy of its reported information and calculations on the Loan Forgiveness Application Form. Lenders are expected to perform

[79] This subsection was originally published at 85 FR 33010, subsection III.1.d. (June 1, 2020).

[80] This subsection was originally published at 85 FR 33010, subsection III.1.e. (June 1, 2020) and has been modified for readability.

[81] This subsection was originally published at 85 FR 33010, subsection III.1.f. (June 1, 2020) and has been modified to reflect the issuance of the interim final rule on appeals of SBA loan review decisions under the Paycheck Protection Program. 85 FR 52883 (Aug. 27, 2020).

[82] *See* 85 FR 52883 (Aug. 27, 2020).

[83] This subsection was originally published at 85 FR 33010, subsection III.2.a. (June 1, 2020) and amended by 85 FR 38304, subsection III.2.b. (June 26, 2020) and 85 FR 66214, subsection III.2.b. (Oct. 19, 2020) and has been modified to conform to sections 307 and 311 of the Economic Aid Act.

a good-faith review, in a reasonable time, of the borrower's calculations and supporting documents concerning amounts eligible for loan forgiveness. For example, minimal review of calculations based on a payroll report by a recognized third-party payroll processor would be reasonable. By contrast, if payroll costs are not documented with such recognized sources, more extensive review of calculations and data would be appropriate. The borrower shall not receive forgiveness without submitting all required documentation to the lender.

As the First Interim Final Rule [84] and section IV.7 above indicate, lenders may rely on borrower representations. If the lender identifies errors in the borrower's calculation or material lack of substantiation in the borrower's supporting documents, the lender should work with the borrower to remedy the issue. As stated in paragraph III.3.c of the First Interim Final Rule, the lender does not need to independently verify the borrower's reported information if the borrower submits documentation supporting its request for loan forgiveness and attests that it accurately verified the payments for eligible costs.

When a borrower submits SBA Form 3508S or lender's equivalent form, the lender shall:

i. Confirm receipt of the borrower certifications contained in the SBA Form 3508S or lender's equivalent form.

ii. In the case of a Second Draw PPP Loan for which the borrower did not provide documentation of revenue reduction with its application and the lender did not conduct a review of the documentation at the time of application, confirm the dollar amount and percentage of the borrower's revenue reduction by performing a good faith review, in a reasonable time, of the borrower's calculations and supporting documents concerning the borrower's revenue reduction.[85]

If the lender identifies errors in the borrower's calculation or material lack of substantiation in the borrower's supporting documents regarding revenue reduction, the lender should work with the borrower to remedy the issue. Providing an accurate calculation of the loan forgiveness amount is the responsibility of the borrower, and the borrower attests to the accuracy of its reported information and calculations on the Loan Forgiveness Application. The borrower shall not receive forgiveness without submitting all required documentation to the lender.

As the First Interim Final Rule [86] and section IV.7 above indicate, lenders may rely on borrower representations. As stated in paragraph III.3.c of the First Interim Final Rule, the lender does not need to independently verify the borrower's reported information if the borrower submits documentation supporting its request for loan forgiveness (if required) and attests that it accurately verified the payments for eligible costs.

b. What is the timeline for the lender's decision on a loan forgiveness application? [87]

The lender must issue a decision to SBA on a loan forgiveness application not later than 60 days after receipt of a complete loan forgiveness application from the borrower. That decision may take the form of an approval (in whole or in part); denial; or (if directed by SBA) a denial without prejudice due to a pending SBA review of the loan for which forgiveness is sought. In the case of a denial without prejudice, the borrower may subsequently request that the lender reconsider its application for loan forgiveness, unless SBA has determined that the borrower is ineligible for a PPP loan. The Administrator has determined that this process appropriately balances the need for efficient processing of loan forgiveness applications with considerations of program integrity, including affording SBA the opportunity to ensure that borrower representations and certifications (including concerning eligibility for a PPP loan) were accurate.

When the lender issues its decision to SBA approving the application (in whole or in part), it must include the following:

i. For applications submitted using the SBA Form 3508 or lender's equivalent form:

(1) The PPP Loan Forgiveness Calculation Form;

(2) PPP Schedule A;

(3) the (optional) PPP Borrower Demographic Information Form (if submitted to the lender); and

(4) the SBA Form 3508D, if applicable.

ii. For applications submitted using the SBA Form 3508EZ, 3508S, or lender's equivalent form:

(1) The SBA Form 3508EZ, 3508S, or lender's equivalent form;

(2) the (optional) Borrower Demographic Information Form (if submitted to the lender); and

(3) the SBA Form 3508D, if applicable.

The lender must confirm that the information provided by the lender to SBA accurately reflects lender's records for the loan, that the lender has made its decision in accordance with the requirements set forth in subsection V.2.a., and for a Second Draw PPP Loan of $150,000 or less, if applicable, the lender has reviewed the revenue reduction documentation provided by the borrower and confirmed the dollar amount and percentage of the borrower's revenue reduction. If the lender determines that the borrower is entitled to forgiveness of some or all of the amount applied for under the statute and applicable regulations, the lender must request payment from SBA at the time the lender issues its decision to SBA. SBA will, subject to any SBA review of the borrower's loan(s) or loan application(s), remit the appropriate forgiveness amount to the lender, plus any interest accrued through the date of payment, not later than 90 days after the lender issues its decision to SBA. The EIDL Advance Amount received by the borrower will not reduce the amount of forgiveness to which the borrower is entitled and will not be deducted from the forgiveness payment amount that SBA remits to the Lender.[88] The lender is responsible for notifying the borrower of remittance by SBA of the loan forgiveness amount (or that SBA determined that no amount of the loan is eligible for forgiveness) and the date on which the borrower's first payment is due, if applicable.

When the lender issues its decision to SBA determining that the borrower is not entitled to forgiveness in any amount, the lender must provide SBA with the reason for its denial, together with the following:

i. For applications submitted using the SBA Form 3508 or lender's equivalent form:

(1) The PPP Loan Forgiveness Calculation Form;

(2) PPP Schedule A;

[84] 85 FR 20811, 20815–20816 (Apr. 15, 2020).

[85] *See* subsection (h)(2)(i)(D) of the interim final rule on Second Draw PPP Loans. 86 FR 3712, 3721 (Jan. 14, 2021).

[86] 85 FR 20811, 20815–20816 (Apr. 15, 2020).

[87] This subsection was originally published at 85 FR 33010, subsection III.2.b. (June 1, 2020) and amended by 85 FR 38304, subsection III.2.b. (June 26, 2020) and 85 FR 66214, subsection III.2.b. (Oct. 19, 2020) and has been modified to conform to sections 311, 322, and 333 of the Economic Aid Act and for readability.

[88] Section 333 of the Economic Aid Act repealed the CARES Act provision requiring SBA to deduct EIDL Advance Amounts received by borrowers from the forgiveness payment amounts remitted by SBA to the lender. Any EIDL Advance Amounts previously deducted from a borrower's forgiveness amount will be remitted to the lender, together with interest to the remittance date.

(3) the (optional) PPP Borrower Demographic Information Form (if submitted to the lender); and
(4) the SBA Form 3508D, if applicable.
ii. For applications submitted using the SBA Form 3508EZ, 3508S, or lender's equivalent form:
(1) The SBA Form 3508EZ, 3508S, or lender's equivalent form;
(2) the (optional) Borrower Demographic Information Form (if submitted to the lender); and
(3) the SBA Form 3508D, if applicable.

The lender must confirm that the information provided by the lender to SBA accurately reflects lender's records for the loan, and that the lender has made its decision in accordance with the requirements set forth in subsection V.2.a., and for a Second Draw PPP Loan of $150,000 or less, if applicable, the lender has reviewed the revenue reduction documentation provided by the borrower and confirmed the dollar amount and percentage of the borrower's revenue reduction. The lender must also notify the borrower in writing that the lender has issued a decision to SBA denying the loan forgiveness application and provide SBA with a copy of the notice.[89] The notice to the borrower must include the reasons that the lender concluded that the borrower is not entitled to loan forgiveness in any amount and inform the borrower that the borrower has 30 calendar days from receipt of the notification to seek, through the lender, SBA review of the lender's decision.[90] SBA reserves the right to review the lender's decision in its sole discretion. Within 30 days of notice from the lender, a borrower may notify the lender that it is requesting that SBA review the lender's decision in accordance with subsection V.2.c. below. Within 5 days of receipt, the lender must notify SBA of the borrower's request for review. SBA will notify the lender if SBA decides to review the lender's decision or if SBA declines a request for review. If the borrower does not timely request SBA review or SBA declines the request for review, the lender is responsible for notifying the borrower of the date on which the borrower's first payment is due. If SBA accepts a borrower's request for review, SBA will notify the borrower and the lender of the results of the review. If SBA denies forgiveness in whole or in part, the lender is responsible for notifying the borrower of the date on which the borrower's first payment is due.

c. What should a lender do if it receives notice that SBA is reviewing a loan? [91]

SBA may begin a review of any PPP loan of any size at any time in SBA's discretion. SBA may, in its discretion, review the borrower's First Draw PPP Loan and Second Draw PPP Loan at the same time or at different times. If SBA undertakes such a review, SBA will notify the lender in writing and the lender must notify the borrower in writing within five business days of receipt.

Within five business days of receipt of such notice, the lender shall transmit to SBA electronic copies of the following:
i. The Borrower Application Form (SBA Form 2483, 2483–SD, or lender's equivalent form) and all supporting documentation provided by the borrower, including revenue reduction documentation provided by the borrower on a Second Draw PPP Loan.
ii. The Loan Forgiveness Application (SBA Form 3508, 3508EZ, 3508S, or lender's equivalent form), and all supporting documentation provided by the borrower (if the lender has received such application), including revenue reduction documentation provided by the borrower on a Second Draw PPP Loan of $150,000 or less if not provided at the time of loan application. If the lender receives the borrower's loan forgiveness application after it receives notice that SBA has commenced a loan review, the lender shall transmit electronic copies of the application and all supporting documentation provided by the borrower to SBA within five business days of receipt.

The lender must also request that the borrower provide the lender with the applicable documentation that the instructions to the Loan Forgiveness Application Form (SBA Form 3508, 3508EZ, 3508S, or lender's equivalent) instruct the borrower to maintain but not submit (documentation listed under ''Documents that Each Borrower Must Maintain but is Not Required to Submit'').

For Second Draw PPP Loans of $150,000 or less where a loan forgiveness application has not been submitted by the borrower, the lender must also request that the borrower provide the lender with revenue reduction documentation, if not previously provided to the lender.

The lender must submit documents received from the borrower to SBA within five business days of receipt from the borrower.
iii. A signed and certified transcript of account.
iv. A copy of the executed note evidencing the PPP loan.
v. Any memorandum or other analysis that the lender prepared in making its decision on the borrower's loan forgiveness application, if applicable.
vi. Any other documents related to the loan requested by SBA.

If SBA has notified the lender that SBA has commenced a loan review, the lender should issue a forgiveness decision to SBA not later than 60 days after receipt of the complete loan forgiveness application from the borrower, unless otherwise directed by SBA.

d. What should a lender do if a borrower submits documentation of eligible costs that exceed a borrower's PPP Loan Amount? [92]

The amount of loan forgiveness that a borrower may receive cannot exceed the principal amount of the PPP loan. Whether a borrower submits SBA Form 3508, 3508EZ, 3508S, or lender's equivalent form, a lender should confirm receipt of the documentation the borrower is required to submit to aid in verifying payroll and nonpayroll costs, and, if applicable (for SBA Form 3508, 3508EZ, or lender's equivalent form), confirm the borrower's calculations on the borrower's Loan Forgiveness Application, up to the amount required to reach the requested Forgiveness Amount. Supporting documentation regarding a borrower's payroll and nonpayroll costs is not required to be submitted to the lender with the SBA Form 3508S.

3. Lender Fees [93]

Are lender processing fees subject to clawback if a lender has not fulfilled its obligations under PPP regulations?

A lender is required to repay the processing fee to SBA if a lender is found guilty of an act of fraud in connection with the PPP loan. In such

[89] This change has been made so that SBA can determine whether the borrower requested review within the appropriate time frame.

[90] This text has been added to clarify the information that will be provided to borrowers regarding the lender's forgiveness decision.

[91] This subsection was originally published at 85 FR 33010, subsection III.2.c. (June 1, 2020) and amended by 85 FR 38304, subsection III.2.b. (June 26, 2020) and 85 FR 66214, subsection III.2.b. (Oct. 19, 2020) and has been modified to conform to section 311 of the Economic Aid Act and updates to SBA loan review procedures.

[92] This subsection was originally published at 85 FR 66214, subsection III.2.c. (Oct. 19, 2020) and has been modified to conform to section 307 of the Economic Aid Act.

[93] This section was originally published at 85 FR 33010, subsection III.3. (June 1, 2020) and has been modified to conform to section 340 of the Economic Aid Act. Section 340 of the Economic Aid Act provides that a lender may not be required to repay a processing fee unless the lender is found guilty of an act of fraud in connection with the PPP loan.

case, the loan is not eligible for a guaranty.[94]

VI. 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 Congressional Review Act, the Administrative Procedure Act, 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. 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.

This rule is necessary to implement the Economic Aid Act in order to provide economic relief to small businesses nationwide adversely impacted under the COVID–19 Emergency Declaration. We anticipate that this rule will result in substantial benefits to small businesses, their employees, and the communities they serve. However, we lack data to estimate the effects of this rule.

The Administrator of the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) has determined that this is a major rule for purposes of Subtitle E of the Small Business Regulatory Enforcement and Fairness Act of 1996 (also known as the Congressional Review Act or CRA) (5 U.S.C. 804(2) *et seq.*). Under the CRA, a major rule takes effect 60 days after the rule is published in the **Federal Register**. 5 U.S.C. 801(a)(3).

Notwithstanding this requirement, the CRA allows agencies to dispense with the requirements of section 801 when the agency for good cause finds that such procedure would be impracticable, unnecessary, or contrary to the public interest and the rule shall take effect at such time as the agency promulgating the rule determines. 5 U.S.C. 808(2). Pursuant to § 808(2), SBA for good cause finds that a 60-day delay to provide public notice is impracticable and contrary to the public interest. Likewise, for the same reasons, SBA for good cause finds that there are grounds to waive the 30-day effective date delay under the Administrative Procedure Act. 5 U.S.C. 553(d)(3).

As discussed elsewhere in this interim final rule, the Economic Aid Act provided that several of the changes relating to loan forgiveness are effective as if included in the CARES Act and apply to any loan made pursuant to section 7(a)(36) of the Small Business Act before, on, or after December 27, 2020, including forgiveness of such a loan. Accordingly, loans that were made in 2020 but that have not yet received forgiveness will be forgiven based on changes made in the Economic Aid Act, as implemented in this interim final rule. Given the urgent need to provide borrowers that are eligible for loan forgiveness with timely relief, the Administrator in consultation with the Secretary has determined that it is impractical and not in the public interest to provide a delayed effective date. An immediate effective date will allow SBA to continue remitting forgiveness payments to lenders without disruption and in accordance with the amendments made by the Economic Aid Act.

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 effect but does have some retroactive effect consistent with specific applicability provisions of the Economic Aid Act.

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 require revisions to existing recordkeeping or reporting requirements of the Paycheck Protection Program (PPP) information collection (OMB Control Number 3245–0407) as a result of amendments made to the PPP by the Economic Aid Act and implemented in this interim final rule. The revisions will affect the PPP Loan Forgiveness Application Form 3508, PPP Loan Forgiveness Application Form 3508EZ, and PPP Loan Forgiveness Application Form 3508S.

Further, to address the conflict of interest provisions in section 322 of the Economic Aid Act, SBA has developed a new form, Paycheck Protection Program—Borrower's Disclosure of Certain Controlling Interests Form 3508D, which is required for certain borrowers who have disclosure requirements under the Economic Aid Act.

SBA Form 3508S was amended to conform to section 307 of the Economic Aid Act, which requires a simplified forgiveness application for loans of not more than $150,000. SBA Forms 3508, 3508EZ and 3508S were also amended to address the new Second Draw PPP Loan program under section 311 of the Economic Aid Act, include the additional expenses that are eligible for forgiveness under section 304 of the Economic Aid Act, address the changes to the covered period definition in section 306 of the Economic Aid Act, and implement the EIDL advance deduction repeal in section 333 of the Economic Aid Act. SBA Form 3508D will be used by borrowers where a covered individual, as defined in section 322 of the Economic Aid Act, holds a controlling interest in the borrower.

SBA has requested Office of Management and Budget (OMB) emergency approval of the revisions to the information collection to enable borrowers to begin submitting loan forgiveness applications with the Economic Aid Act changes as quickly as possible and to enable borrowers with disclosure requirements to meet the statutory deadline for disclosure.

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 Administrative Procedure Act 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.

Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a

[94] *See* 13 CFR 120.524.

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. Since this rule is exempt from notice and comment, SBA is not required to conduct a regulatory flexibility analysis.

Authority: 15 U.S.C. 636(a)(36); Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116–136, section 1114 and Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (Pub. L. 116–260), section 303.

Tami Perriello,

Acting Administrator, Small Business Administration.

Andy P. Baukol,

Principal Deputy Assistant Secretary for International Monetary Policy (performing the delegable duties of the Deputy Secretary), Department of the Treasury.

[FR Doc. 2021–02314 Filed 2–3–21; 11:15 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–1177; Project Identifier MCAI–2020–01336–R; Amendment 39–21403; AD 2021–02–20]

RIN 2120–AA64

Airworthiness Directives; Hélicoptères Guimbal Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Hélicoptères Guimbal Model Cabri G2 helicopters. This AD was prompted by a report of a crack in a rotating scissor fitting. This AD requires an initial and repetitive inspections of certain rotating and non-rotating scissor fittings, and depending on the results, replacing the affected assembly. This AD also prohibits installing certain main rotor hubs (MRHs) and swashplate guides unless the initial inspection has been accomplished. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD becomes effective February 22, 2021.

The Director of the Federal Register approved the incorporation by reference of certain documents listed in this AD as of February 22, 2021.

The FAA must receive comments on this AD by March 22, 2021.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this final rule, contact Hélicoptères Guimbal, Basile Ginel, 1070, rue du Lieutenant Parayre, Aérodrome d'Aix-en-Provence, 13290 Les Milles, France; telephone 33–04–42–39–10–88; email *basile.ginel@guimbal.com;* web *https://www.guimbal.com.* You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110. It is also available at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1177.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1177; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the European Union Aviation Safety Agency (EASA) AD, any comments received, and other information. The street address for Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Fred Guerin, Aerospace Engineer, General Aviation & Rotorcraft Section, International Validation Branch, FAA, 2200 South 216th St. Des Moines, WA 98198; telephone (206) 231–3500; email *fred.guerin@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD No. 2020–0199, dated September 21, 2020, and corrected September 24, 2020 (EASA AD 2020–0199), to correct an unsafe condition for Hélicoptères Guimbal (HG) Model Cabri G2 helicopters. EASA advises of a report of a crack in a rotating scissor fitting discovered during maintenance. According to EASA, the suspected root cause of the crack was corrosion under residual stress. This condition, if not addressed, could result in failure of the rotating or non-rotating scissor fitting on either the MRH or the swashplate guide, and subsequent loss of control of the helicopter.

Accordingly, EASA AD 2020–0199 requires an initial and repetitive inspections of the rotating and non-rotating scissor fittings part number (P/N) G12–00–200 installed on the MRH or swashplate guide, respectively. If a crack is detected, the EASA AD requires replacing the affected MRH or swashplate guide with a serviceable part. The EASA AD prohibits installing certain MRHs and swashplate guides unless the initial inspection has been accomplished. The EASA AD also requires reporting certain information to HG.

FAA's Determination

These helicopters have been approved by EASA and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the European Union, EASA has notified the FAA about the unsafe condition described in its AD. The FAA is proposing this AD after evaluating all known relevant information and determining that the unsafe condition described previously is likely to exist or develop on other helicopters of the same type design.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Guimbal Service Bulletin SB 20–011, Revision C, and SB 20–012, Revision B, each dated October 5, 2020 (SB 20–011 Rev C and SB 20–012 Rev B). SB 20–012 Rev B specifies removing the bolts connecting the two scissor fittings P/N G12–00–200 and accomplishing a one-time detailed inspection for a crack in certain areas. SB 20–012 Rev B also specifies reassembling the two scissor fittings using correct bolt torque limits, installing new cotter pins, and reporting any findings to HG customer service. SB 20–011 Rev C specifies procedures for a recurring inspection after accomplishment of SB 20–012 Rev B of the same areas of the scissor fittings for a crack as SB 20–012 Rev B, except without removing the bolts which connect the two scissor fittings. SB 20–

6. PPP Loan Forgiveness Application Form 3508S-508

Paycheck Protection Program
PPP Loan Forgiveness Application Form 3508S

OMB Control No. 3245-0407
Expiration date: 10/31/2020

A BORROWER MAY USE THIS FORM ONLY IF THE BORROWER RECEIVED A PPP LOAN OF $50,000 OR LESS.
A Borrower that, together with its affiliates, received PPP loans totaling $2 million or greater cannot use this form.

Business Legal Name ("Borrower")	DBA or Tradename, if applicable	
Business Address	**Business TIN (EIN, SSN)**	**Business Phone**
		( ) -
	Primary Contact	**E-mail Address**

SBA PPP Loan Number: _____ **Lender PPP Loan Number:** _____

PPP Loan Amount: _____ **PPP Loan Disbursement Date:** _____

Employees at Time of Loan Application: _____ **Employees at Time of Forgiveness Application:** _____

EIDL Advance Amount: _____ **EIDL Application Number:** _____

Forgiveness Amount: _____

By Signing Below, You Make the Following Representations and Certifications on Behalf of the Borrower:

The Authorized Representative of the Borrower certifies to all of the below by **initialing** next to each one.

_____ The dollar amount for which forgiveness is requested does not exceed the principal amount of the PPP loan and:
- was used to pay costs that are eligible for forgiveness (payroll costs to retain employees; business mortgage interest payments; business rent or lease payments; or business utility payments);
- includes payroll costs equal to at least 60% of the forgiveness amount;
- if a 24-week Covered Period applies, does not exceed 2.5 months' worth of 2019 compensation for any owner-employee or self-employed individual/general partner, capped at $20,833 per individual; and
- if the Borrower has elected an 8-week Covered Period, does not exceed 8 weeks' worth of 2019 compensation for any owner-employee or self-employed individual/general partner, capped at $15,385 per individual.

_____ I understand that if the funds were knowingly used for unauthorized purposes, the federal government may pursue recovery of loan amounts and/or civil or criminal fraud charges.

_____ The Borrower has accurately verified the payments for the eligible payroll and nonpayroll costs for which the Borrower is requesting forgiveness, and has accurately calculated the forgiveness amount requested.

_____ I have submitted to the Lender the required documentation verifying payroll costs, the existence of obligations and service (as applicable) prior to February 15, 2020, and eligible business mortgage interest payments, business rent or lease payments, and business utility payments.

_____ The information provided in this application and the information provided in all supporting documents and forms is true and correct in all material respects. I understand that knowingly making a false statement to obtain forgiveness of an SBA-guaranteed loan is punishable under the law, including 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to $250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than $5,000; and, if submitted to a Federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than $1,000,000.

_____ The tax documents I have submitted to the Lender are consistent with those the Borrower has submitted/will submit to the IRS and/or state tax or workforce agency. I also understand, acknowledge, and agree that the Lender can share the tax information with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of ensuring compliance with PPP requirements and all SBA reviews.

_____ I understand, acknowledge, and agree that SBA may request additional information for the purposes of evaluating the Borrower's eligibility for the PPP loan and for loan forgiveness, and that the Borrower's failure to provide information requested by SBA may result in a determination that the Borrower was ineligible for the PPP loan or a denial of the Borrower's loan forgiveness application.

The Borrower's eligibility for loan forgiveness will be evaluated in accordance with the PPP regulations and guidance issued by SBA through the date of this application. SBA may direct a lender to disapprove the Borrower's loan forgiveness application if SBA determines that the Borrower was ineligible for the PPP loan.

_____ _____
Signature of Authorized Representative of Borrower Date

_____ _____
Print Name Title

SBA Form 3508S (10/20)

Paycheck Protection Program
PPP Loan Forgiveness Application Form 3508S

PPP Borrower Demographic Information Form (Optional)

Instructions

1. **Purpose**. Veteran/gender/race/ethnicity data is collected for program reporting purposes only.
2. **Description**. This form requests information about each of the Borrower's Principals. Add additional sheets if necessary.
3. **Definition of Principal**. The term "Principal" means:
   - For a self-employed individual, independent contractor, or a sole proprietor, the self-employed individual, independent contractor, or sole proprietor.
   - For a partnership, all general partners and all limited partners owning 20% or more of the equity of the Borrower, or any partner that is involved in the management of the Borrower's business.
   - For a corporation, all owners of 20% or more of the Borrower, and each officer and director.
   - For a limited liability company, all members owning 20% or more of the Borrower, and each officer and director.
   - Any individual hired by the Borrower to manage the day-to-day operations of the Borrower ("key employee").
   - Any trustor (if the Borrower is owned by a trust).
   - For a nonprofit organization, the officers and directors of the Borrower.
4. **Principal Name**. Insert the full name of the Principal.
5. **Position**. Identify the Principal's position; for example, self-employed individual; independent contractor; sole proprietor; general partner; owner; officer; director; member; or key employee.

Principal Name		Position
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	

Disclosure is voluntary and will have no bearing on the loan forgiveness decision

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 time for completing this application, including gathering data needed, is 15 minutes. Comments about this time or the information requested should be sent to 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, Washington DC 20503. **PLEASE DO NOT SEND FORMS TO THESE ADDRESSES.**

7. EZ Form PPP Forgiveness Application 3508EZ (Revised 06.16.2020) Fillable-508

Paycheck Protection Program
PPP Loan Forgiveness Application Form 3508EZ

OMB Control No. 3245-0407
Expiration date: 10/31/2020

Business Legal Name ("Borrower")	DBA or Tradename, if applicable	
Business Address	**Business TIN (EIN, SSN)**	**Business Phone**
		( ) -
	Primary Contact	**E-mail Address**

SBA PPP Loan Number: _____ **Lender PPP Loan Number:** _____

PPP Loan Amount: _____ **PPP Loan Disbursement Date:** _____

Employees at Time of Loan Application: _____ **Employees at Time of Forgiveness Application:** _____

EIDL Advance Amount: _____ **EIDL Application Number:** _____

Payroll Schedule: The frequency with which payroll is paid to employees is:

☐ **Weekly** ☐ **Biweekly** (every other week) ☐ **Twice a month** ☐ **Monthly** ☐ **Other** _____

Covered Period: _____ to _____

Alternative Payroll Covered Period, if applicable: _____ to _____

If Borrower (together with affiliates, if applicable) received PPP loans in excess of $2 million, check here: ☐

Forgiveness Amount Calculation:

Payroll and Nonpayroll Costs

Line 1. Payroll Costs: _____

Line 2. Business Mortgage Interest Payments: _____

Line 3. Business Rent or Lease Payments: _____

Line 4. Business Utility Payments: _____

Potential Forgiveness Amounts

Line 5. Add the amounts on lines 1, 2, 3, and 4: _____

Line 6. PPP Loan Amount: _____

Line 7. Payroll Cost 60% Requirement (divide Line 1 by 0.60): _____

Forgiveness Amount

Line 8. Forgiveness Amount (enter the smallest of Lines 5, 6, and 7): _____

Paycheck Protection Program
PPP Loan Forgiveness Application Form 3508EZ

By Signing Below, You Make the Following Representations and Certifications on Behalf of the Borrower:
The Authorized Representative of the Borrower certifies to all of the below by **initialing** next to each one.

_____ The dollar amount for which forgiveness is requested:
- was used to pay costs that are eligible for forgiveness (payroll costs to retain employees; business mortgage interest payments; business rent or lease payments; or business utility payments);
- includes payroll costs equal to at least 60% of the forgiveness amount;
- if a 24-week Covered Period applies, does not exceed 2.5 months' worth of 2019 compensation for any owner-employee or self-employed individual/general partner, capped at $20,833 per individual; and
- if the Borrower has elected an 8-week Covered Period, does not exceed 8 weeks' worth of 2019 compensation for any owner-employee or self-employed individual/general partner, capped at $15,385 per individual.

_____ I understand that if the funds were knowingly used for unauthorized purposes, the federal government may pursue recovery of loan amounts and/or civil or criminal fraud charges.

_____ The Borrower did not reduce salaries or hourly wages by more than 25 percent for any employee during the Covered Period or Alternative Payroll Covered Period compared to the period between January 1, 2020 and March 31, 2020. For purposes of this certification, the term "employee" includes only those employees that did not receive, during any single period during 2019, wages or salary at an annualized rate of pay in an amount more than $100,000.

_____ The Borrower has accurately verified the payments for the eligible payroll and nonpayroll costs for which the Borrower is requesting forgiveness.

_____ I have submitted to the Lender the required documentation verifying payroll costs, the existence of obligations and service (as applicable) prior to February 15, 2020, and eligible business mortgage interest payments, business rent or lease payments, and business utility payments.

_____ The information provided in this application and the information provided in all supporting documents and forms is true and correct in all material respects. I understand that knowingly making a false statement to obtain forgiveness of an SBA-guaranteed loan is punishable under the law, including 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to $250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than $5,000; and, if submitted to a Federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than $1,000,000.

_____ The tax documents I have submitted to the Lender are consistent with those the Borrower has submitted/will submit to the IRS and/or state tax or workforce agency. I also understand, acknowledge, and agree that the Lender can share the tax information with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of ensuring compliance with PPP requirements and all SBA reviews.

_____ I understand, acknowledge, and agree that SBA may request additional information for the purposes of evaluating the Borrower's eligibility for the PPP loan and for loan forgiveness, and that the Borrower's failure to provide information requested by SBA may result in a determination that the Borrower was ineligible for the PPP loan or a denial of the Borrower's loan forgiveness application.

In addition, the Authorized Representative of the Borrower must certify by **initialing at least ONE** of the following two items:

_____ The Borrower did not reduce the number of employees or the average paid hours of employees between January 1, 2020 and the end of the Covered Period (other than any reductions that arose from an inability to rehire individuals who were employees on February 15, 2020, if the Borrower was unable to hire similarly qualified employees for unfilled positions on or before December 31, 2020, and reductions in an employee's hours that a borrower offered to restore and were refused).

_____ The Borrower was unable to operate between February 15, 2020, and the end of the Covered Period at the same level of business activity as before February 15, 2020 due to compliance with requirements established or guidance issued between March 1, 2020 and December 31, 2020, by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration, related to the maintenance of standards of sanitation, social distancing, or any other work or customer safety requirement related to COVID-19.

The Borrower's eligibility for loan forgiveness will be evaluated in accordance with the PPP regulations and guidance issued by SBA through the date of this application. SBA may direct a lender to disapprove the Borrower's loan forgiveness application if SBA determines that the Borrower was ineligible for the PPP loan.

_____ _____
Signature of Authorized Representative of Borrower | Date

_____ _____
Print Name | Title

Paycheck Protection Program
PPP Loan Forgiveness Application Form 3508EZ

PPP Borrower Demographic Information Form (Optional)

Instructions

1. **Purpose**. Veteran/gender/race/ethnicity data is collected for program reporting purposes only.
2. **Description**. This form requests information about each of the Borrower's Principals. Add additional sheets if necessary.
3. **Definition of Principal**. The term "Principal" means:
   - For a self-employed individual, independent contractor, or a sole proprietor, the self-employed individual, independent contractor, or sole proprietor.
   - For a partnership, all general partners and all limited partners owning 20% or more of the equity of the Borrower, or any partner that is involved in the management of the Borrower's business.
   - For a corporation, all owners of 20% or more of the Borrower, and each officer and director.
   - For a limited liability company, all members owning 20% or more of the Borrower, and each officer and director.
   - Any individual hired by the Borrower to manage the day-to-day operations of the Borrower ("key employee").
   - Any trustor (if the Borrower is owned by a trust).
   - For a nonprofit organization, the officers and directors of the Borrower.
4. **Principal Name**. Insert the full name of the Principal.
5. **Position**. Identify the Principal's position; for example, self-employed individual; independent contractor; sole proprietor; general partner; owner; officer; director; member; or key employee.

Principal Name		Position
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	

Disclosure is voluntary and will have no bearing on the loan forgiveness decision

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 time for completing this application, including gathering data needed, is 20 minutes. Comments about this time or the information requested should be sent to 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, Washington DC 20503. **PLEASE DO NOT SEND FORMS TO THESE ADDRESSES.**

8. SBA EZ Form PPP Loan Forgiveness Application Form EZ Instructions (Revised 06.16.2020)-508

Paycheck Protection Program
PPP Loan Forgiveness Application Form 3508EZ

OMB Control No. 3245-0407
Expiration Date: 10/31/2020

PPP LOAN FORGIVENESS APPLICATION FORM 3508EZ INSTRUCTIONS FOR BORROWERS

Checklist for Using SBA Form 3508EZ

You (the Borrower) can apply for forgiveness of your Paycheck Protection Program (PPP) loan using this SBA Form 3508EZ if you can check at least one of the three boxes below. Do not submit this Checklist with your SBA Form 3508EZ.

☐ The Borrower is a self-employed individual, independent contractor, or sole proprietor who had no employees at the time of the PPP loan application and did not include any employee salaries in the computation of average monthly payroll in the Borrower Application Form (SBA Form 2483).

☐ The Borrower did not reduce annual salary or hourly wages of any employee by more than 25 percent during the Covered Period or the Alternative Payroll Covered Period (as defined below) compared to the period between January 1, 2020 and March 31, 2020 (for purposes of this statement, "employees" means only those employees that did not receive, during any single period during 2019, wages or salary at an annualized rate of pay in an amount more than $100,000);

AND

The Borrower did not reduce the number of employees or the average paid hours of employees between January 1, 2020 and the end of the Covered Period. (Ignore reductions that arose from an inability to rehire individuals who were employees on February 15, 2020 if the Borrower was unable to hire similarly qualified employees for unfilled positions on or before December 31, 2020. Also ignore reductions in an employee's hours that the Borrower offered to restore and the employee refused. See 85 FR 33004, 33007 (June 1, 2020) for more details.

☐ The Borrower did not reduce annual salary or hourly wages of any employee by more than 25 percent during the Covered Period or the Alternative Payroll Covered Period (as defined below) compared to the period between January 1, 2020 and March 31, 2020 (for purposes of this statement, "employees" means only those employees that did not receive, during any single period during 2019, wages or salary at an annualized rate of pay in an amount more than $100,000);

AND

The Borrower was unable to operate during the Covered Period at the same level of business activity as before February 15, 2020, due to compliance with requirements established or guidance issued between March 1, 2020 and December 31, 2020 by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration, related to the maintenance of standards of sanitation, social distancing, or any other work or customer safety requirement related to COVID-19.

If you can check at least one of the three boxes above, complete this SBA Form 3508EZ in accordance with the instructions below, and **submit it to your Lender** (or the Lender that is servicing your loan). Borrowers may also complete this application electronically through their Lender. If you are unable to check one of the boxes above, you cannot use SBA Form 3508EZ and instead you must apply for forgiveness of your PPP loan using SBA Form 3508.

Instructions for PPP Loan Forgiveness Calculation Form 3508EZ

Business Legal Name ("Borrower")/DBA or Tradename (if applicable)/Business TIN (EIN, SSN): Enter the same information as on your Borrower Application Form (SBA Form 2483 or lender's equivalent).

Business Address/Business Phone/Primary Contact/E-mail Address: Enter the same information as on your Borrower Application Form, unless there has been a change in address or contact information.

SBA PPP Loan Number: Enter the loan number assigned by SBA at the time of loan approval. Request this number from the Lender if necessary.

Lender PPP Loan Number: Enter the loan number assigned to the PPP loan by the Lender.

PPP Loan Amount: Enter the disbursed principal amount of the PPP loan (the total loan amount you received from the Lender).

Employees at Time of Loan Application: Enter the total number of employees at the time of the PPP Loan Application.

Employees at Time of Forgiveness Application: Enter the total number of employees at the time the Borrower is applying for loan forgiveness.

PPP Loan Disbursement Date: Enter the date that you received the PPP loan proceeds from the Lender. If loan proceeds were received on more than one date, enter the first date on which you received PPP loan proceeds.

Paycheck Protection Program
PPP Loan Forgiveness Application Form 3508EZ

EIDL Advance Amount: If the Borrower received an Economic Injury Disaster Loan (EIDL) advance, enter the amount.

EIDL Application Number: If the Borrower applied for an EIDL, enter the Borrower's EIDL Application Number.

Payroll Schedule: Select the box that corresponds to your payroll schedule.

Covered Period: The Covered Period is either: (1) the 24-week (168-day) period beginning on the PPP Loan Disbursement Date, or (2) if the Borrower received its PPP loan before June 5, 2020, the Borrower may elect to use an eight-week (56-day) Covered Period. For example, if the Borrower is using a 24-week Covered Period and received its PPP loan proceeds on Monday, April 20, the first day of the Covered Period is April 20 and the last day of the Covered Period is Sunday, October 4. In no event may the Covered Period extend beyond December 31, 2020.

Alternative Payroll Covered Period: For administrative convenience, Borrowers with a biweekly (or more frequent) payroll schedule may elect to calculate eligible payroll costs using the 24-week (168-day) period or for loans received before June 5, 2020 at the election of the borrower, the eight-week (56-day) period that begins on the first day of their first pay period following their PPP Loan Disbursement Date. For example, if the Borrower is using a 24-week Alternative Payroll Covered Period and received its PPP loan proceeds on Monday, April 20, and the first day of its first pay period following its PPP loan disbursement is Sunday, April 26, the first day of the Alternative Payroll Covered Period is April 26 and the last day of the Alternative Payroll Covered Period is Saturday, October 10. Borrowers that elect to use the Alternative Payroll Covered Period must apply the Alternative Payroll Covered Period wherever there is a reference in this application to "the Covered Period or the Alternative Payroll Covered Period." However, Borrowers must apply the Covered Period (not the Alternative Payroll Covered Period) wherever there is a reference in this application to "the Covered Period" only. In no event may the Alternative Payroll Covered Period extend beyond December 31, 2020.

If Borrower Received PPP Loans in Excess of $2 Million: Check the box if the Borrower, together with its affiliates (to the extent required under SBA's interim final rule on affiliates (85 FR 20817 (April 15, 2020)) and not waived under 15 U.S.C. 636(a)(36)(D)(iv)), received PPP loans with an original principal amount in excess of $2 million.

Forgiveness Amount Calculation (see Summary of Costs Eligible for Forgiveness below):

Line 1: Enter total eligible payroll costs incurred or paid during the Covered Period or the Alternative Payroll Covered Period. To calculate these costs, sum the following:

Cash Compensation: The sum of gross salary, gross wages, gross tips, gross commissions, paid leave (vacation, family, medical or sick leave, not including leave covered by the Families First Coronavirus Response Act), and allowances for dismissal or separation paid or incurred during the Covered Period or the Alternative Payroll Covered Period. For each individual employee, the total amount of cash compensation eligible for forgiveness may not exceed an annual salary of $100,000, as prorated for the Covered Period. For an 8-week Covered Period, that total is $15,385. For a 24-week Covered Period, that total is $46,154 for purposes of this 3508EZ. You can only include compensation of employees who were employed by the Borrower at any point during the Covered Period or Alternative Payroll Covered Period and whose principal place of residence is in the United States.

Employee Benefits: The total amount paid by the Borrower for:

1. Employer contributions for employee health insurance, including employer contributions to a self-insured, employer-sponsored group health plan, but excluding any pre-tax or after-tax contributions by employees. Do not add employer health insurance contributions made on behalf of a self-employed individual, general partners, or owner-employees of an S-corporation, because such payments are already included in their compensation.
2. Employer contributions to employee retirement plans, excluding any pre-tax or after-tax contributions by employees. Do not add employer retirement contributions made on behalf of a self-employed individual or general partners, because such payments are already included in their compensation, and contributions on behalf of owner-employees are capped at 2.5 months' worth of the 2019 contribution amount.
3. Employer state and local taxes paid by the borrower and assessed on employee compensation (e.g., state unemployment insurance tax), excluding any taxes withheld from employee earnings.

Owner Compensation: Enter any amounts paid to owners (owner-employees, a self-employed individual, or general partners). For a 24-week Covered Period, this amount is capped at $20,833 (the 2.5-month equivalent of $100,000 per year) for each individual or the 2.5-month equivalent of their applicable compensation in 2019, whichever is lower. For an 8-week Covered Period, this amount is capped at 8/52 of 2019 compensation (up to $15,385).

Line 2: Enter the amount of business mortgage interest payments paid or incurred during the Covered Period for any business mortgage obligation on real or personal property incurred before February 15, 2020. Do not include prepayments.

Paycheck Protection Program
PPP Loan Forgiveness Application Form 3508EZ

Line 3: Enter the amount of business rent or lease payments paid or incurred for real or personal property during the Covered Period, pursuant to lease agreements in force before February 15, 2020.

Line 4: Enter the amount of business utility payments paid or incurred during the Covered Period, for business utilities for which service began before February 15, 2020.

NOTE: For lines 2-4, you are not required to report payments that you do not want to include in the forgiveness amount.

Line 5: Add lines 1 through 4, enter the total.

Line 6: Enter the PPP Loan Amount.

Line 7: Divide the amount on line 1 by 0.60, and enter the amount. This determines whether at least 60% of the potential forgiveness amount was used for payroll costs.

Line 8: Enter the smallest of lines 5, 6, or 7. Note: If applicable, SBA will deduct EIDL Advance Amounts from the forgiveness amount remitted to the Lender.

Summary of Costs Eligible for Forgiveness:

Borrowers are eligible for loan forgiveness for the following costs:

1. **Eligible payroll costs.** Borrowers are generally eligible for forgiveness for the payroll costs paid and payroll costs incurred during the 24-week (168-day) or 8-week (56-day) Covered Period (or Alternative Payroll Covered Period) ("payroll costs"). Payroll costs are considered paid on the day that paychecks are distributed or the Borrower originates an ACH credit transaction. Payroll costs are considered incurred on the day that the employee's pay is earned. Payroll costs incurred but not paid during the Borrower's last pay period of the Covered Period (or Alternative Payroll Covered Period) are eligible for forgiveness if paid on or before the next regular payroll date. Otherwise, payroll costs must be paid during the Covered Period (or Alternative Payroll Covered Period). For each individual employee, the total amount of cash compensation eligible for forgiveness may not exceed an annual salary of $100,000, as prorated for the Covered Period. Count payroll costs that were both paid and incurred only once. For information on what qualifies as payroll costs, see Interim Final Rule on Paycheck Protection Program posted on April 2, 2020 (85 FR 20811), as amended by the Revisions to First Interim Final Rule, posted on June 11, 2020). Include only payroll costs for employees whose principal place of residence is in the United States.

2. **Eligible nonpayroll costs.** Nonpayroll costs eligible for forgiveness consist of:
   (a) covered mortgage obligations: payments of mortgage interest (not including any prepayment or payment of principal) on any business mortgage obligation on real or personal property incurred before February 15, 2020 ("business mortgage interest payments");
   (b) covered rent obligations: business rent or lease payments pursuant to lease agreements for real or personal property in force before February 15, 2020 ("business rent or lease payments"); and
   (c) covered utility payments: business payments for a service for the distribution of electricity, gas, water, telephone, transportation, or internet access for which service began before February 15, 2020 ("business utility payments").

   An eligible nonpayroll cost must be paid during the Covered Period or incurred during the Covered Period and paid on or before the next regular billing date, even if the billing date is after the Covered Period. Eligible nonpayroll costs cannot exceed 40% of the total forgiveness amount. Count nonpayroll costs that were both paid and incurred only once.

Paycheck Protection Program
PPP Loan Forgiveness Application Form 3508EZ

Documents that Each Borrower Must Submit with its PPP Loan Forgiveness Application Form 3508EZ

PPP Loan Forgiveness Calculation Form 3508EZ

Payroll: Documentation verifying the eligible cash compensation and non-cash benefit payments from the Covered Period or the Alternative Payroll Covered Period consisting of each of the following:

a. Bank account statements or third-party payroll service provider reports documenting the amount of cash compensation paid to employees.
b. Tax forms (or equivalent third-party payroll service provider reports) for the periods that overlap with the Covered Period or the Alternative Payroll Covered Period:
    i. Payroll tax filings reported, or that will be reported, to the IRS (typically, Form 941); and
    ii. State quarterly business and individual employee wage reporting and unemployment insurance tax filings reported, or that will be reported, to the relevant state.
c. Payment receipts, cancelled checks, or account statements documenting the amount of any employer contributions to employee health insurance and retirement plans that the Borrower included in the forgiveness amount.
d. If you checked only the second box on the checklist on page 1 of these instructions, the average number of full-time equivalent employees on payroll employed by the Borrower on January 1, 2020 and at the end of the Covered Period.

Nonpayroll: Documentation verifying existence of the obligations/services prior to February 15, 2020 and eligible payments from the Covered Period.

a. Business mortgage interest payments: Copy of lender amortization schedule and receipts or cancelled checks verifying eligible payments from the Covered Period; or lender account statements from February 2020 and the months of the Covered Period through one month after the end of the Covered Period verifying interest amounts and eligible payments.
b. Business rent or lease payments: Copy of current lease agreement and receipts or cancelled checks verifying eligible payments from the Covered Period; or lessor account statements from February 2020 and from the Covered Period through one month after the end of the Covered Period verifying eligible payments.
c. Business utility payments: Copy of invoices from February 2020 and those paid during the Covered Period and receipts, cancelled checks, or account statements verifying those eligible payments

Documents that Each Borrower Must Maintain but is Not Required to Submit

Documentation supporting the certification that annual salaries or hourly wages were not reduced by more than 25 percent during the Covered Period or the Alternative Payroll Covered Period relative to the period between January 1, 2020 and March 31, 2020. This documentation must include payroll records that separately list each employee and show the amounts paid to each employee during the period between January 1, 2020 and March 31, 2020, and the amounts paid to each employee during the Covered Period or Alternative Payroll Covered Period.

Documentation regarding any employee job offers and refusals, refusals to accept restoration of reductions in hours, firings for cause, voluntary resignations, written requests by any employee for reductions in work schedule, and any inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020.

Documentation supporting the certification, if applicable, that the Borrower did not reduce the number of employees or the average paid hours of employees between January 1, 2020 and the end of the Covered Period (other than any reductions that arose from an inability to rehire individuals who were employees on February 15, 2020, if the Borrower was unable to hire similarly qualified employees for unfilled positions on or before December 31, 2020). This documentation must include payroll records that separately list each employee and show the amounts paid to each employee between January 1, 2020 and the end of the Covered Period.

Documentation supporting the certification, if applicable, that the Borrower was unable to operate between February 15, 2020 and the end of the Covered Period at the same level of business activity as before February 15, 2020 due to compliance with requirements established or guidance issued between March 1, 2020 and December 31, 2020 by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration, related to the maintenance of standards of sanitation, social distancing, or any other work or customer safety requirement related to COVID-19. This documentation must include copies of the applicable requirements for each borrower location and relevant borrower financial records.

All records relating to the Borrower's PPP loan, including documentation submitted with its PPP loan application, documentation supporting the Borrower's certifications as to the necessity of the loan request and its eligibility for a PPP loan, documentation necessary to support the Borrower's loan forgiveness application, and documentation demonstrating the Borrower's material compliance with PPP requirements. The Borrower must retain all such documentation in its files for six years after the date the loan is forgiven or repaid in full, and permit authorized representatives of SBA, including representatives of its Office of Inspector General, to access such files upon request.

9. SBA PPP Loan Forgiveness Application Form 3508S Instructions-508

Paycheck Protection Program
PPP Loan Forgiveness Application Form 3508S

OMB Control No. 3245-0407
Expiration Date: 10/31/2020

PPP LOAN FORGIVENESS APPLICATION FORM 3508S INSTRUCTIONS FOR BORROWERS

You (the Borrower) can apply for forgiveness of your Paycheck Protection Program (PPP) loan using this SBA Form 3508S only if the total PPP loan amount you received from your Lender was $50,000 or less. However, a borrower that, together with its affiliates (see 85 FR 20817 (April 15, 2020) regarding application of SBA's affiliation rules and the exemption of otherwise qualified faith-based organizations from SBA's affiliation rules), received PPP loans totaling $2 million or more cannot use this form. If you are not eligible to use this form, you must apply for forgiveness of your PPP loan using SBA Form 3508 or 3508EZ (or lender's equivalent form).

SBA Form 3508S requires fewer calculations and less documentation for eligible borrowers. Borrowers that use SBA Form 3508S are exempt from reductions in loan forgiveness amounts based on reductions in full-time equivalent (FTE) employees or in salaries or wages. SBA Form 3508S also does not require borrowers to show the calculations used to determine their loan forgiveness amount. However, SBA may request information and documents to review those calculations as part of its loan review process.

Complete this SBA Form 3508S in accordance with the instructions below, and **submit it to your Lender** (or the Lender that is servicing your loan). Borrowers may also complete this application electronically through their Lender.

Instructions for PPP Loan Forgiveness Application Form 3508S

Business Legal Name ("Borrower")/DBA or Tradename (if applicable)/Business TIN (EIN, SSN): Enter the same information as on your Borrower Application Form (SBA Form 2483 or lender's equivalent).

Business Address/Business Phone/Primary Contact/E-mail Address: Enter the same information as on your Borrower Application Form, unless there has been a change in address or contact information.

SBA PPP Loan Number: Enter the loan number assigned by SBA at the time of loan approval. Request this number from the Lender if necessary.

Lender PPP Loan Number: Enter the loan number assigned to the PPP loan by the Lender.

PPP Loan Amount: Enter the disbursed principal amount of the PPP loan (the total loan amount you received from the Lender).

Employees at Time of Loan Application: Enter the total number of employees at the time of the PPP Loan Application.

Employees at Time of Forgiveness Application: Enter the total number of employees at the time the Borrower is applying for loan forgiveness.

PPP Loan Disbursement Date: Enter the date that you received the PPP loan proceeds from the Lender. If loan proceeds were received on more than one date, enter the first date on which you received PPP loan proceeds.

EIDL Advance Amount: If the Borrower received an Economic Injury Disaster Loan (EIDL) advance, enter the amount.

EIDL Application Number: If the Borrower applied for an EIDL, enter the Borrower's EIDL Application Number.

Forgiveness Amount: Enter the total amount of your payroll and nonpayroll costs eligible for forgiveness. The amount entered cannot exceed the principal amount of the PPP loan. Use the following instructions to determine your forgiveness amount.

1. **Eligible payroll costs.** Borrowers are generally eligible for forgiveness for the payroll costs paid and payroll costs incurred during the 24-week (168-day) or 8-week (56-day) Covered Period or Alternative Payroll Covered Period ("payroll costs").

   Covered Period: The Covered Period is either: (1) the 24-week (168-day) period beginning on the PPP Loan Disbursement Date, or (2) if the Borrower received its PPP loan before June 5, 2020, the Borrower may elect to use an eight-week (56-day) Covered Period. For example, if the Borrower is using a 24-week Covered Period and received its PPP loan proceeds on Monday, April 20, the first day of the Covered Period is April 20 and the last day of the Covered Period is Sunday, October 4. In no event may the Covered Period extend beyond December 31, 2020.

   Alternative Payroll Covered Period: For administrative convenience, Borrowers with a biweekly (or more frequent) payroll schedule may elect to calculate eligible payroll costs using the 24-week (168-day) period or for loans received before June 5, 2020 at the election of the borrower, the eight-week (56-day) period that begins on the first day of their first pay period following their PPP Loan Disbursement Date. For example, if the Borrower is using a 24-week Alternative Payroll Covered Period and received its PPP loan proceeds on Monday, April 20, and the first day of its first pay period following its PPP loan disbursement is Sunday, April 26, the first day of the Alternative Payroll Covered Period is April 26 and the last day of the Alternative Payroll Covered Period is Saturday, October 10. Borrowers that elect to use the Alternative Payroll Covered Period must apply the Alternative Payroll Covered Period wherever there is a reference in this application to "the Covered Period or the Alternative Payroll Covered Period." However, Borrowers must apply the Covered Period

(not the Alternative Payroll Covered Period) wherever there is a reference in this application to "the Covered Period" only. In no event may the Alternative Payroll Covered Period extend beyond December 31, 2020.

To calculate eligible payroll costs incurred or paid during the Covered Period or the Alternative Payroll Covered Period, sum Cash Compensation, Employee Benefits, and Owner Compensation, as follows:

Cash Compensation: The sum of gross salary, gross wages, gross tips, gross commissions, paid leave (vacation, family, medical or sick leave, not including leave covered by the Families First Coronavirus Response Act), and allowances for dismissal or separation paid or incurred during the Covered Period or the Alternative Payroll Covered Period. For each individual employee, the total amount of cash compensation eligible for forgiveness may not exceed an annual salary of $100,000, as prorated for the Covered Period. For an 8-week Covered Period, that total is $15,385. For a 24-week Covered Period, that total is $46,154 for purposes of this 3508S. You can only include compensation of employees who were employed by the Borrower at any point during the Covered Period or Alternative Payroll Covered Period and whose principal place of residence is in the United States.

Employee Benefits: The total amount paid by the Borrower for:

1. Employer contributions for employee health insurance, including employer contributions to a self-insured, employer-sponsored group health plan, but excluding any pre-tax or after-tax contributions by employees. Do not add employer health insurance contributions made on behalf of a self-employed individual, general partners, or owner-employees of an S-corporation, because such payments are already included in their compensation.
2. Employer contributions to employee retirement plans, excluding any pre-tax or after-tax contributions by employees. Do not add employer retirement contributions made on behalf of a self-employed individual or general partners, because such payments are already included in their compensation, and contributions on behalf of owner-employees are capped at 2.5 months' worth of the 2019 contribution amount.
3. Employer state and local taxes paid by the borrower and assessed on employee compensation (e.g., state unemployment insurance tax), excluding any taxes withheld from employee earnings.

Owner Compensation: Include any amounts paid to owners (owner-employees, a self-employed individual, or general partners). For a 24-week Covered Period, this amount is capped at $20,833 (the 2.5-month equivalent of $100,000 per year) for each individual or the 2.5-month equivalent of their applicable compensation in 2019, whichever is lower. For an 8-week Covered Period, this amount is capped at 8/52 of 2019 compensation (up to $15,385).

Payroll costs are considered paid on the day that paychecks are distributed or the Borrower originates an ACH credit transaction. Payroll costs are considered incurred on the day that the employee's pay is earned. Payroll costs incurred but not paid during the Borrower's last pay period of the Covered Period (or Alternative Payroll Covered Period) are eligible for forgiveness if paid on or before the next regular payroll date. Otherwise, payroll costs must be paid during the Covered Period (or Alternative Payroll Covered Period). For each individual employee, the total amount of cash compensation eligible for forgiveness may not exceed an annual salary of $100,000, as prorated for the Covered Period. Count payroll costs that were both paid and incurred only once. For information on what qualifies as payroll costs, see Interim Final Rule on Paycheck Protection Program posted on April 2, 2020 (85 FR 20811), as amended by the Revisions to First Interim Final Rule, posted on June 11, 2020 (85 FR 36308)). Include only payroll costs for employees whose principal place of residence is in the United States.

2. **Eligible nonpayroll costs.** Nonpayroll costs eligible for forgiveness consist of:
   (a) covered mortgage obligations: payments of mortgage interest (not including any prepayment or payment of principal) on any business mortgage obligation on real or personal property incurred before February 15, 2020 ("business mortgage interest payments");
   (b) covered rent obligations: business rent or lease payments pursuant to lease agreements for real or personal property in force before February 15, 2020 ("business rent or lease payments"); and
   (c) covered utility payments: business payments for a service for the distribution of electricity, gas, water, telephone, transportation, or internet access for which service began before February 15, 2020 ("business utility payments").

An eligible nonpayroll cost must be paid during the Covered Period or incurred during the Covered Period and paid on or before the next regular billing date, even if the billing date is after the Covered Period. Eligible nonpayroll costs cannot exceed 40% of the total forgiveness amount. Count nonpayroll costs that were both paid and incurred only once.

Paycheck Protection Program
PPP Loan Forgiveness Application Form 3508S

Documents that Each Borrower Must Submit with its PPP Loan Forgiveness Application Form 3508S

PPP Loan Forgiveness Application Form 3508S

Payroll: Documentation verifying the eligible cash compensation and non-cash benefit payments from the Covered Period or the Alternative Payroll Covered Period consisting of each of the following:

a. Bank account statements or third-party payroll service provider reports documenting the amount of cash compensation paid to employees.
b. Tax forms (or equivalent third-party payroll service provider reports) for the periods that overlap with the Covered Period or the Alternative Payroll Covered Period:
    i. Payroll tax filings reported, or that will be reported, to the IRS (typically, Form 941); and
    ii. State quarterly business and individual employee wage reporting and unemployment insurance tax filings reported, or that will be reported, to the relevant state.
c. Payment receipts, cancelled checks, or account statements documenting the amount of any employer contributions to employee health insurance and retirement plans that the Borrower included in the forgiveness amount.

Nonpayroll: Documentation verifying existence of the obligations/services prior to February 15, 2020 and eligible payments from the Covered Period.

a. Business mortgage interest payments: Copy of lender amortization schedule and receipts or cancelled checks verifying eligible payments from the Covered Period; or lender account statements from February 2020 and the months of the Covered Period through one month after the end of the Covered Period verifying interest amounts and eligible payments.
b. Business rent or lease payments: Copy of current lease agreement and receipts or cancelled checks verifying eligible payments from the Covered Period; or lessor account statements from February 2020 and from the Covered Period through one month after the end of the Covered Period verifying eligible payments.
c. Business utility payments: Copy of invoices from February 2020 and those paid during the Covered Period and receipts, cancelled checks, or account statements verifying those eligible payments

Documents that Each Borrower Must Maintain but is Not Required to Submit

All records relating to the Borrower's PPP loan, including documentation submitted with its PPP loan application, documentation supporting the Borrower's certifications as to its eligibility for a PPP loan, documentation necessary to support the Borrower's loan forgiveness application, and documentation demonstrating the Borrower's material compliance with PPP requirements. The Borrower must retain all such documentation in its files for six years after the date the loan is forgiven or repaid in full, and permit authorized representatives of SBA, including representatives of its Office of Inspector General, to access such files upon request.

10. SBA Procedural Notice on PPP Loans and Changes of Ownership – Oct. 2, 2020

SBA Procedural Notice

TO: All SBA Employees and Paycheck Protection Program Lenders

CONTROL NO.: 5000-20057

SUBJECT: Paycheck Protection Program Loans and Changes of Ownership

EFFECTIVE: October 2, 2020

The purpose of this Notice is to provide information concerning the required procedures for changes of ownership of an entity that has received Paycheck Protection Program (PPP) funds (a "PPP borrower").

For purposes of the PPP, a "change of ownership" will be considered to have occurred when (1) at least 20 percent of the common stock or other ownership interest of a PPP borrower (including a publicly traded entity) is sold or otherwise transferred, whether in one or more transactions,[1] including to an affiliate or an existing owner of the entity, (2) the PPP borrower sells or otherwise transfers at least 50 percent of its assets (measured by fair market value), whether in one or more transactions, or (3) a PPP borrower is merged with or into another entity.

Regardless of any change of ownership, the PPP borrower remains responsible for (1) performance of all obligations under the PPP loan, (2) the certifications made in connection with the PPP loan application, including the certification of economic necessity, and (3) compliance with all other applicable PPP requirements. Additionally, the PPP borrower remains responsible for obtaining, preparing, and retaining all required PPP forms and supporting documentation and providing those forms and supporting documentation to the PPP lender or lender servicing the PPP loan (referred to as the "PPP Lender" in this Notice) or to SBA upon request.[2] SBA reserves

[1] For purposes of determining a change of ownership, all sales and other transfers occurring since the date of approval of the PPP loan must be aggregated to determine whether the relevant threshold has been met. For publicly traded borrowers, only sales or other transfers that result in one person or entity holding or owning at least 20% of the common stock or other ownership interest of the borrower must be aggregated.

[2] If the buyer or the seller (or both) has an outstanding PPP loan, and the change of ownership transaction is financed in whole or in part with a 7(a) loan, all SBA Loan Program Requirements, as defined in 13 CFR 120.10, must be met. In addition, if an escrow account is required under the procedures set forth in this Notice, the 7(a) loan that finances the change of ownership cannot be used to finance the escrow account.

SBA Form 1353.3 (4-93) MS Word Edition; previous editions obsolete

Must be accompanied by SBA Form 58

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all rights and remedies available under the law in the event of fraud, false statements, and/or unauthorized uses of PPP loan proceeds.

Prior to the closing of any change of ownership transaction, the PPP borrower must notify the PPP Lender in writing of the contemplated transaction and provide the PPP Lender with a copy of the proposed agreements or other documents that would effectuate the proposed transaction.

There are different procedures depending on the circumstances of the change of ownership, as set forth below. In all cases, the PPP Lender is required to continue submitting the monthly 1502 reports until the PPP loan is fully satisfied.

1. **The PPP Note is fully satisfied**. There are no restrictions on a change of ownership if, prior to closing the sale or transfer, the PPP borrower has:

    a. Repaid the PPP Note in full; or

    b. Completed the loan forgiveness process in accordance with the PPP requirements and:

        i. SBA has remitted funds to the PPP Lender in full satisfaction of the PPP Note; or

        ii. The PPP borrower has repaid any remaining balance on the PPP loan.

2. **The PPP Note is not fully satisfied**. If the PPP Note is not fully satisfied prior to closing the sale or transfer, the following applies:

    a. ***Cases in which SBA prior approval is not required***. If the following conditions are met for (i) a change of ownership structured as a sale or other transfer of common stock or other ownership interest or as a merger; or (ii) a change of ownership structured as an asset sale, the PPP Lender may approve the change of ownership and SBA's prior approval is not required:

        i. **Change of ownership is structured as a sale or other transfer of common stock or other ownership interest or as a merger**. An individual or entity may sell or otherwise transfer common stock or other ownership interest in a PPP borrower without the prior approval of SBA only if:

            a) The sale or other transfer is of 50% or less of the common stock or other ownership interest of the PPP borrower[3]; or

            b) The PPP borrower completes a forgiveness application reflecting its use of all of the PPP loan proceeds and submits it, together with any required supporting documentation, to the PPP Lender, and an interest-bearing

[3] In determining whether a sale or other transfer exceeds this 50% threshold, all sales and other transfers occurring since the date of approval of the PPP loan must be aggregated.

escrow account controlled by the PPP Lender is established with funds equal to the outstanding balance of the PPP loan. After the forgiveness process (including any appeal of SBA's decision) is completed, the escrow funds must be disbursed first to repay any remaining PPP loan balance plus interest.

In any of the circumstances described in a) or b) above, the procedures described in paragraph #2.c. below must also be followed.

ii. **Change of ownership is structured as an asset sale**. A PPP borrower may sell 50 percent or more of its assets (measured by fair market value) without the prior approval of SBA only if the PPP borrower completes a forgiveness application reflecting its use of all of the PPP loan proceeds and submits it, together with any required supporting documentation, to the PPP Lender, and an interest-bearing escrow account controlled by the PPP Lender is established with funds equal to the outstanding balance of the PPP loan. After the forgiveness process (including any appeal of SBA's decision) is completed, the escrow funds must be disbursed first to repay any remaining PPP loan balance plus interest. The PPP Lender must notify the appropriate SBA Loan Servicing Center of the location of, and the amount of funds in, the escrow account within 5 business days of completion of the transaction.[4]

b. ***Cases in which SBA prior approval is required***. If a change of ownership of a PPP borrower does not meet the conditions in paragraph #2.a. above, prior SBA approval of the change of ownership is required and the PPP Lender may not unilaterally approve the change of ownership.

To obtain SBA's prior approval of requests for changes of ownership, the PPP Lender must submit the request to the appropriate SBA Loan Servicing Center. The request must include:

i. the reason that the PPP borrower cannot fully satisfy the PPP Note as described in paragraph #1 above or escrow funds as described in paragraph #2.a above;

ii. the details of the requested transaction;

iii. a copy of the executed PPP Note;

iv. any letter of intent and the purchase or sale agreement setting forth the responsibilities of the PPP borrower, seller (if different from the PPP borrower), and buyer;

[4] To find the appropriate SBA Loan Servicing Center, see https://www.sba.gov/document/sop-50-57-7a-loan-servicing-and-liquidation, Chapter 2.

v. disclosure of whether the buyer has an existing PPP loan and, if so, the SBA loan number; and

vi. a list of all owners of 20 percent or more of the purchasing entity.

If deemed appropriate, SBA may require additional risk mitigation measures as a condition of its approval of the transaction.

SBA approval of any change of ownership involving the sale of 50 percent or more of the assets (measured by fair market value) of a PPP borrower will be conditioned on the purchasing entity assuming all of the PPP borrower's obligations under the PPP loan, including responsibility for compliance with the PPP loan terms. In such cases, the purchase or sale agreement must include appropriate language regarding the assumption of the PPP borrower's obligations under the PPP loan by the purchasing person or entity, or a separate assumption agreement must be submitted to SBA.

SBA will review and provide a determination within 60 calendar days of receipt of a complete request.

c. ***For all sales or other transfers of common stock or other ownership interest or mergers, whether or not the sale requires SBA's prior approval***. In the event of a sale or other transfer of common stock or other ownership interest in the PPP borrower, or a merger of the PPP borrower with or into another entity, the PPP borrower (and, in the event of a merger of the PPP borrower into another entity, the successor to the PPP borrower) will remain subject to all obligations under the PPP loan. In addition, if the new owner(s) use PPP funds for unauthorized purposes, SBA will have recourse against the owner(s) for the unauthorized use.

If any of the new owners or the successor arising from such a transaction has a separate PPP loan, then, following consummation of the transaction: (1) in the case of a purchase or other transfer of common stock or other ownership interest, the PPP borrower and the new owner(s) are responsible for segregating and delineating PPP funds and expenses and providing documentation to demonstrate compliance with PPP requirements by each PPP borrower, and (2) in the case of a merger, the successor is responsible for segregating and delineating PPP funds and expenses and providing documentation to demonstrate compliance with PPP requirements with respect to both PPP loans.

The PPP Lender must notify the appropriate SBA Loan Servicing Center, within 5 business days of completion of the transaction, of the:

i. identity of the new owner(s) of the common stock or other ownership interest;

ii. new owner(s)' ownership percentage(s);

iii. tax identification number(s) for any owner(s) holding 20 percent or more of the equity in the business; and

iv. location of, and the amount of funds in, the escrow account under the control of the PPP Lender, if an escrow account is required.

PPP Loans Pledged in Paycheck Protection Program Liquidity Facility (PPPLF)

If a PPP loan of a PPP borrower associated with a change of ownership transaction was pledged by the PPP lender to secure a loan under the Federal Reserve's PPPLF, the lender is reminded to comply with any notification or other requirements of the PPPLF.

Questions:

Questions concerning this Notice may be directed to the Lender Relations Specialist in the local SBA Field Office, which can be found at https://www.sba.gov/tools/local-assistance/districtoffices.

Dianna L. Seaborn
Director
Office of Financial Assistance

11. SBA Publishes PPP 30 Regulations and PPP Second Draw Loan Regulations - Jan 11, 2021

SBA PUBLISHES PPP 3.0 REGULATIONS AND PPP SECOND DRAW LOAN REGULATIONS

Date: 11 January 2021

U.S. Corporate Alert

By: Rick Giovannelli, Randy J. Clark

On Wednesday, 6 January 2021, the U.S. Small Business Administration (SBA) released new guidance on the existing Paycheck Protection Program (PPP) under Sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act and on the SBA's new "Paycheck Protection Program Second Draw Loans" (the Second Draw PPP) created by Section 311 of the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (the EAA).

The SBA's guidance came via two interim final rules (IFRs)—one that helpfully restates and consolidates many of the prior interim rules on the PPP (the Consolidated IFR) and a second addressing the Second Draw PPP (the Second Draw PPP IFR and, together with the Consolidated IFR, the New IFRs). Both IFRs very closely track the precise language of the EAA, with far fewer departures than in the spring 2020 PPP IFRs. This alert will highlight some of the key new terms and instances where the IFRs may depart from, or perhaps clarify, ambiguities from the EAA.

In addition, SBA announced that in order to promote access to capital for smaller lenders and their customers, SBA will initially accept applications only from community financial institutions forfirst draw PPP loans starting on Monday, 11 January 2021 and from those same lenders forSecond Draw PPP loans starting on Wednesday, 13 January 2021.

THE SECOND DRAW PPP IFR

Helpfully, Second Draw PPP loans are generally subject to the same terms as the original PPP loans. That includes: (1) the 100 percent SBA guarantee; (2) no collateral requirement; (3) no personal guarantee requirement; (4) a non-compounding and non-adjustable interest rate of one percent, a five-year maturity; (5) similar borrower eligibility and certification requirements; and (6) similar processing requirements for lenders administering the Second Draw PPP. As a result, the Second Draw PPP IFR generally addresses only those terms where a Second Draw PPP loan is different from a first draw PPP loan. Thus, except where noted in the Second Draw PPP IFR, the Consolidated IFR applies to both PPP and Second Draw PPP loans.

Eligible Borrowers

Under the EAA and as provided in the Second Draw PPP IFR, an eligible borrower must have less than 300 employees and have experienced a revenue decline, the latter of which is discussed in more detail below.

Further, an eligible borrower must have already received a first draw PPP loan and must have used the full amount of its PPP loan for permitted purposes prior to the disbursement of the Second Draw PPP loan. The EAA required that the loan had been or "will be used" without specifying the time period for such use. The Second

Draw PPP IFR interprets that to mean that borrowers can apply for a Second Draw PPP loan before they have fully used the PPP loan, but cannot receive the disbursement of the Second Draw PPP loan until they have fully used the original PPP proceeds.

In addition to the borrowers generally excluded from getting PPP loans, there are further categories of borrowers excluded from the Second Draw PPP. Pursuant to the Second Draw PPP IFR, those are borrowers:

- That have permanently closed;
- That are public companies;
- That have Chinese affiliates, a Chinese national on the board or certain other ties to China, or
- That are primarily engaged in political or lobbying activities, or required to register as a foreign agent.

However, as discussed in more detail below, there is some ambiguity as to whether a subsidiary of a public company, in addition to the public parent itself, is ineligible under the Second Draw PPP.

The Second Draw PPP may not be immediately available for some PPP borrowers that are "unresolved borrowers." A borrower whose first PPP loan is being reviewed by the SBA will not be eligible to receive a second draw loan until the issues regarding the first PPP loan are resolved. This same limitation is applied to borrowers where "information in SBA's possession indicates that the [PPP] borrower may have been ineligible" for its PPP loan in whole or in part. In such cases, the SBA will notify the lender that the applicant is an "unresolved borrower."

The SBA has committed to resolving unresolved borrower issues "expeditiously" and the introduction to the Second Draw PPP IFR says that the SBA will "set aside" funds for unresolved borrowers in the event they are ultimately approved. It is not clear what this means, but it may mean that unresolved borrowers would not lose their place in line if the Second Draw PPP appropriation would otherwise have been fully used prior to a positive resolution of the review of the unresolved borrower.

Revenue Decline

In addition, a Second Draw PPP borrower must demonstrate a revenue decline of 25 percent in any quarter of 2020 over the corresponding quarter OR submit tax returns showing a 25 percent decline in Fiscal Year (FY) 2020 revenue over FY 2019. For this purpose, "Revenue" is defined to mean "gross receipts" in accordance with the existing SBA regulations.[1]

Second Draw PPP borrowers of loans under US$150 thousand need not demonstrate such decline at the time of application, but ultimately must demonstrate it later in order to obtain forgiveness.

The Second Draw PPP IFR includes further rules on the calculation of gross receipts for borrowers who have engaged in an acquisition or disposition during 2019 or 2020, in an attempt to create an apples-to-apples revenue comparison. Under those rules,

- Entities acquired during 2020 are treated as if they were owned by the buyer during the "entire period of measurement" (i.e., all relevant quarters of 2019–20);[2] and
- Receipts from entities sold during 2019 OR 2020 are excluded for the "entire period of measurement."

The treatment of entities acquired applies to equity acquisitions unless the entity purchased was a "segregable division," in which case the gross receipts of the division are NOT included for periods prior to the acquisition. This, however, does not appear to exclude revenues acquired in 2020 via an asset acquisition, unless perhaps the borrower acquired the assets into a newly-formed acquisition sub or affiliate. This may unfortunately exclude some impacted borrowers who would otherwise be eligible.

Borrowers who sold a "segregable division" during 2020 must "continue to include the receipts of the division that was sold."

Second Draw PPP Loan Amounts

Generally, the principal amount of a Second Draw PPP loan is limited to the lesser of US$2 million or 2.5 multiplied by the average monthly payroll costs for most borrowers or 3.5 multiplied by the monthly payroll costs for borrowers who used North American Industry Classification System (NAICS) 72 on their most recent federal tax return.[3]

Borrowers can calculate their loan amounts based on payroll costs for calendar year 2019, calendar year 2020, or (for entities) the actual trailing 12-month (TTM) period before the application. This should benefit borrowers whose payrolls have declined during the pandemic. However, the New IFRs do not address the time period for determining employee counts for purposes of the eligibility determination and, therefore, it appears that the traditional SBA method of using the average pre-application TTM period would apply.

The US$10 million limit on PPP loans has been revised to apply only to first draw PPP loans, but the SBA's corporate group limit of US$20 million applies all PPP loans in the aggregate. A new, separate corporate group limit of US$4 million applies to Second Draw PPP loans (i.e., two times the individual loan limit). This US$4 million effectively functions as a sublimit within the US$20 million aggregate cap on loans to a corporate group. Thus, borrowers within a corporate group that has received more than US$16 million of first draw PPP loans will not be able to obtain a full US$4 million of Second Draw PPP loans.

THE CONSOLIDATED IFR

The preamble to the Consolidated IFR notes that it is not intended to substantively alter or affect PPP rules that were not amended by the EAA and, throughout the footnotes, the Consolidated IFR indicates that changes were made for "readability." We believe it is likely that the SBA will provide a similar consolidated IFR to address the forgiveness, loan review, and appeals IFRs that were published later than those spring 2020 IFRs that have been restated in the Consolidated IFR.

Eligible Borrowers

The Consolidated IFR tracks the original rules, as limited by the EAA to borrowers in operation on 15 February 2020 (subject to exception for seasonal employers) and expanded by the EAA to include:

- The following, if they have no more than 300 (note, not 500) employees:
  - Housing cooperatives,
  - Eligible 501(c)(6) organizations (excluding professional sports leagues and political campaigns and similar organization), and
  - Destination marketing organizations.

- A news organization that is majority owned or controlled by a NAICS code 511110 or 5151 business or a nonprofit or tax exempt public broadcasting or news entity with a trade or business under NAICS 511110 or 5151, that:
  - Employs no more than 500 employees (or the applicable SBA NAICS size standard) per location; and
  - Makes a good faith certification that the loan proceeds will "be used to support expenses at the component of the organization that produces or distributes locally focused or emergency information."

The list of ineligible borrowers has been expanded to include:

- Businesses receiving a shuttered venue grant;
- Any entity in which certain federal political officials hold more than 20 percent "by vote or value" of any class of equity;
- Public companies, defined as "issuers" with securities listed on a "national securities exchange"; and
- Debtors in a bankruptcy proceeding.

Notably, SBA Form 3509, the Paycheck Protection Program Loan Necessity Questionnaire, addresses the public trading of securities of the borrower or any parent company, while the New IFRs, like the EAA, address only the borrower itself. Therefore, it appears that subsidiaries of public companies may be eligible for both PPP and Second Draw PPP loans. If those loans are under US$2 million, no Form 3509 Questionnaire is required, which may make it easier for those loans to be forgiven.

The bankruptcy exclusion is consistent with the existing rules, though Section 320 of the EAA would have allowed PPP loans to bankrupt borrowers if the SBA administrator certified that they were eligible. The SBA appears to be exercising interpretive authority to decline the invitation to make such an eligibility certification.

Loan Amounts

As noted above, Borrowers can calculate their loan amounts based on payroll costs for calendar year 2019, calendar year 2020, or (for entities) the actual TTM period before the application. However, borrowers must now provide IRS Forms 941, or other tax documents, unemployment insurance reporting forms or equivalent payroll processor records with their loan applications to support the loan calculations.

The methodology for determining the loan amount for a sole proprietor (or independent contractor) or a partner in a partnership has not substantially changed from the SBA's 24 April 2020 guidance, "How To Calculate the Maximum Loan Amounts - By Business Type," except to take into account the changes in the EAA and to eliminate provisions relating to the refinancing of economic injury disaster loans. Similar to the April guidance, the New IFRs require providing a copy of the tax return for the applicable year on which the payroll costs are determined (Form 1040 Schedule C for self-employed individuals and independent contractors, Form 1040 Schedule F for farmers, or the Form 1065 plus Schedules K-1 for a partnership).

The Consolidated IFR continues to prevent a self-employed partner in a partnership from submitting a separate PPP loan application as a self-employed individual. As such, a "general active partner" that was not eligible for a PPP loan should correspondingly not be eligible for a Second Draw PPP loan. Instead, the self-employment income of such partners may be included as a payroll cost of the partnership. The New IFRs continue to apply an

adjustment to the self-employment income of partners, as reported on Schedules K-1, explained in a footnote in the Second Draw PPP IFR to remove the "employer" share of self-employment tax consistent with the determination of payroll costs of W-2 employees of the partnership.

Use of Proceeds; Covered Period; Forgiveness

The Consolidated IFR includes the EAA provisions expanding the scope of payroll costs to include group insurance benefit payments, covered operations expenditures, covered property damage costs, covered supplier costs, and covered worker protection expenditures.

Under the Consolidated IFR, borrowers can elect a forgiveness covered period of any duration from eight to 24 weeks, and the 31 December 2020 expiration date for existing PPP covered periods has been removed.

At least 60 percent of the loan proceeds must be used for payroll costs, and the forgiveness amount is capped at payroll costs during the forgiveness covered period divided by 60 percent.

Updates to Frequently Asked Questions

The SBA did not update its existing Frequently Asked Questions (FAQs) to conform to the EAA, but notes that it intends to do so "as quickly as feasible." Until then, the Consolidated IFR says that it is to be interpreted consistent with the FAQs, except that the EAA "overrides any conflicting guidance in the FAQs."

PPP DEDUCTIBILITY

A welcome change for PPP borrowers in the EAA was the explicit congressional recognition of the deductibility of expenses paid with a PPP loan. The IRS had previously outlined its positions on pre-EAA deductibility of such expenses in Notice 2020-32 and Rev. Rul. 2020-27. On 6 January 2021, in response to the changes affirmed in the EAA, the IRS published Rev. Rul. 2021-2 formally obsoleting its prior guidance.

FOOTNOTES

[1] Gross receipts, for this purpose, includes all revenue in whatever form received or accrued (in accordance with the entity's accounting method) from whatever source, including from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances. Generally, receipts are considered "total income" (or in the case of a sole proprietorship, independent contractor, or self-employed individual "gross income") plus "cost of goods sold," and excludes net capital gains or losses as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms.

Gross receipts do not include the following: taxes collected for and remitted to a taxing authority if included in gross or total income (such as sales or other taxes collected from customers and excluding taxes levied on the concern or its employees); proceeds from transactions between a concern and its domestic or foreign affiliates; and amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder, or customs broker.

All other items, such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, investment income, and employee-based costs such as payroll taxes, may not be excluded from gross receipts.

For non-profits, gross receipts has the meaning in Section 6033 of the Internal Revenue Code of 1986, as

amended, which is generally "the gross amount received by the organization during its annual accounting period from all sources without reduction for any costs or expenses including, for example, cost of goods or assets sold, cost of operations, or expenses of earning, raising, or collecting such amounts."

[2] This applies to both borrowers who were acquired and borrowers who acquired another entity.

[3] The applicable NAICS code for C-corporation borrowers is the "business activity" code reported on Schedule K, line 2 of the Form 1120, for S-corporation borrowers is the business activity code reported at Item B of the Form 1120-S, and for partnership borrowers is the business code number reported at Item C of the Form 1065.

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12. DOJ Action Against Covid-19 Fraud

THE UNITED STATES DEPARTMENT of JUSTICE
JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Friday, March 26, 2021

Justice Department Takes Action Against COVID-19 Fraud

Historic level of enforcement action during national health emergency continues

The Department of Justice announced an update today on criminal and civil enforcement efforts to combat COVID-19 related fraud, including schemes targeting the Paycheck Protection Program (PPP), Economic Injury Disaster Loan (EIDL) program and Unemployment Insurance (UI) programs.

As of today, the Department of Justice has publicly charged 474 defendants with criminal offenses based on fraud schemes connected to the COVID-19 pandemic. These cases involve attempts to obtain over $569 million from the U.S. government and unsuspecting individuals through fraud and have been brought in 56 federal districts around the country. These cases reflect a degree of reach, coordination, and expertise that is critical for enforcement efforts against COVID-19 related fraud to have a meaningful impact and is also emblematic of the Justice Department's response to criminal wrongdoing.

"The Department of Justice has led an historic enforcement initiative to detect and disrupt COVID-19 related fraud schemes," said Attorney General Merrick B. Garland. "The impact of the department's work to date sends a clear and unmistakable message to those who would exploit a national emergency to steal taxpayer-funded resources from vulnerable individuals and small businesses. We are committed to protecting the American people and the integrity of the critical lifelines provided for them by Congress, and we will continue to respond to this challenge."

"To anyone thinking of using the global pandemic as an opportunity to scam and steal from hardworking Americans, my advice is simple – don't," said Acting Assistant Attorney General Nicholas L. McQuaid of the Justice Department's Criminal Division. "No matter where you are or who you are, we will find you and prosecute you to the fullest extent of the law."

"We will not allow American citizens or the critical benefits programs that have been created to assist them to be preyed upon by those seeking to take advantage of this national emergency," said Acting Assistant Attorney General Brian M. Boynton of the Justice Department's Civil Division. "We are proud to work with our law enforcement partners to hold wrongdoers accountable and to safeguard taxpayer funds."

In March 2020, Congress passed a $2.2 trillion economic relief bill known as the Coronavirus Aid, Relief, and Economic Security (CARES) Act designed to provide emergency financial assistance to the millions of Americans who are suffering the economic effects caused by the COVID-19 pandemic. Anticipating the need to protect the integrity of these taxpayer funds and to otherwise protect Americans from fraud related to the COVID-19 pandemic, the Department of Justice immediately stood up multiple efforts dedicated to identifying, investigating, and prosecuting such fraud. Leveraging data analysis capabilities and partnerships developed through its vast experience combatting economic crime and fraud on government programs, the Justice Department's response to COVID-19 related fraud serves as a model for proactive, high-impact white-collar enforcement, and demonstrates our agility in responding to new and emerging threats. This rapid and nationwide response enabled the Justice Department to quickly ensure accountability

for wrongdoing amid a national crisis and sent a forceful message of deterrence during an ongoing crisis. The multifaceted and multi-district approach to enforcement during this national health emergency continues and is expected to yield numerous additional criminal and civil enforcement actions in the coming months.

On criminal matters, the Justice Department's efforts to combat COVID-19 related fraud schemes have proceeded on numerous fronts, including:

- **Paycheck Protection Program (PPP) fraud:** Prominent among the department's efforts have been cases brought by the Criminal Division's Fraud Section involving at least 120 defendants charged with PPP fraud. The cases involve a range of conduct, from individual business owners who have inflated their payroll expenses to obtain larger loans than they otherwise would have qualified for, to serial fraudsters who revived dormant corporations and purchased shell companies with no actual operations to apply for multiple loans falsely stating they had significant payroll, to organized criminal networks submitting identical loan applications and supporting documents under the names of different companies. Most charged defendants have misappropriated loan proceeds for prohibited purposes, such as the purchase of houses, cars, jewelry, and other luxury items. In one case, *U.S. v. Dinesh Sah*, in the Northern District of Texas, the defendant applied for 15 different PPP loans to eight different lenders, using 11 different companies, seeking a total of $24.8 million. The defendant obtained approximately $17.3 million and used the proceeds to purchase multiple homes, jewelry, and luxury vehicles. In another case, *U.S. v. Richard Ayvazyan, et al.*, in the Central District of California, eight defendants applied for 142 PPP and EIDL loans seeking over $21 million using stolen and fictitious identities and sham companies, and laundered the proceeds through a web of bank accounts to purchase real estate, securities, and jewelry.
- **Economic Injury Disaster Loans (EIDL) fraud:** The department has also focused on fraud against the EIDL program, which was designed to provide loans to small businesses, agricultural and non-profit entities. Fraudsters have targeted the program by applying for EIDL advances and loans on behalf of ineligible newly-created, shell, or non-existent businesses, and diverting the funds for illegal purposes. The department has responded, primarily through the efforts of the U.S. Attorney's Office for the District of Colorado and their partners at the U.S. Secret Service, acting swiftly to seize loan proceeds from fraudulent applications, with $580 million seized to date and seizures ongoing. The EIDL Fraud Task Force in Colorado, comprised of personnel from five federal law enforcement agencies and federal prosecutors, is investigating a broad swath of allegedly fraudulently loans and their applicants. It is working to identify individual wrongdoers and networks of fraudsters appropriate for prosecution.
- **Unemployment Insurance (UI) fraud:** Due to the COVID-19 pandemic, more than $860 billion in federal funds has been appropriated for UI benefits through September 2021. Early investigation and analysis indicate that international organized criminal groups have targeted these funds by using stolen identities to file for UI benefits. Domestic fraudsters, ranging from identity thieves to prison inmates, have also committed UI fraud. In response, the department established the National Unemployment Insurance Fraud Task Force, a prosecutor-led multi-agency task force with representatives from more than eight different federal law enforcement agencies. Additionally, the department is hiring Assistant U.S. Attorneys in multiple U.S. Attorney's Offices whose focus will be UI fraud prosecutions. Since the start of the pandemic, over 140 defendants have been charged and arrested for federal offenses related to UI fraud. In one case, *U.S. v. Leelynn Danielle Chytka*, in the Western District of Virginia, a defendant recently pleaded guilty for her role in a scheme that successfully stole more than $499,000 in UI benefits using the identities of individuals ineligible for UI, including a number of prisoners.

Through the department's International Computer Hacking and Intellectual Property (ICHIP) program, ICHIP advisors have provided assistance and case-based mentoring to foreign counterparts around the globe to help detect, investigate and prosecute fraud related to the pandemic. The ICHIPs have helped counterparts combat cyber-enabled crime (e.g., online fraud) and intellectual property crime, including fraudulent and mislabeled COVID-19 treatments and sales of counterfeit pharmaceuticals. ICHIPs conducted webinars for foreign prosecutors and law enforcement in Asia, Africa, Europe, and South America on how to take down fraudulent COVID-19 websites. These webinars addressed methods for finding the registrar for a particular domain and requesting a voluntary takedown as well as the U.S. legal processes necessary for obtaining a court order that would bind a U.S. registrar. This has resulted in the take down of multiple online COVID-19 scams and significant seizures of counterfeit medicines and medical supplies such as masks, gloves, hand sanitizers and other illicit goods.

The department has also brought actions to combat coronavirus-related fraud schemes targeting American consumers. With scammers around the world attempting to sell fake and unlawful cures, treatments, and personal protective equipment, the department has brought dozens of civil and criminal enforcement actions to safeguard Americans' health and economic security. The department has prosecuted or secured civil injunctions against dozens of defendants who sold products — including industrial bleach, ozone gas, vitamin supplements, and colloidal silver ointments — using false or unapproved claims about the products' abilities to prevent or treat COVID-19 infections. The department has also worked to shutter hundreds of fraudulent websites that were facilitating consumer scams, and it has taken scores of actions to disrupt financial networks supporting such scams. The department is also coordinating with numerous agency partners to prevent and deter vaccine-related fraud.

The department is also using numerous civil tools to address fraud in connection with CARES Act programs. For example, in the Eastern District of California, the department obtained the first civil settlement for fraud involving the Paycheck Protection Program, resolving civil claims under the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) and the False Claims Act (FCA) against an internet retail company and its president and chief executive officer arising from false statements to federally insured banks to influence those banks to approve, and the SBA to guarantee, a PPP loan. FIRREA allows the government to impose civil penalties for violations of enumerated federal criminal statutes, including those that affect federally-insured financial institutions. The FCA is the government's primary civil tool to redress false claims for federal funds and property involving a multitude of government operations and functions. The FCA permits private citizens with knowledge of fraud against the government to bring a lawsuit on behalf of the United States and to share in any recovery. Such whistleblower complaints have been on the rise as unscrupulous actors take advantage of vulnerabilities created by the COVID-19 pandemic and the new government programs disbursing federal relief, and whistleblower cases will continue to be an essential source of new leads to help root out the misuse and abuse of taxpayer funds.

Indictments and other criminal charges referenced above are merely allegations, and all defendants are presumed innocent until proven guilty beyond a reasonable doubt in a court of law.

The unprecedented pace and tempo of these efforts is made possible only through the diligent work of a wide range of Justice Department partners, including the Criminal Division's Fraud Section and Money Laundering and Asset Recovery Section, the Civil Division's Commercial Litigation Branch (Fraud Section) and Consumer Protection Branch, U.S. Attorneys' Offices throughout the country, and law enforcement partners from the FBI, Department of Labor Office of Inspector General, U.S. Secret Service, IRS-Criminal Investigation, Defense Criminal Investigative Service, Homeland Security Investigations, U.S. Postal Inspection Service, the Offices of Inspectors General from the Small Business Administration, Department of Homeland Security, Social Security Administration, Federal Deposit Insurance Corporation, Department of Health and Human Services, Department of Veterans Affairs, Federal Housing Finance Agency and Federal Reserve Board, Food and Drug Administration's Office of Criminal Investigations, Treasury Inspector General for Tax Administration, Financial Crimes Enforcement Network, Special Inspector General for Pandemic Relief, Pandemic Response Accountability Committee, OCDETF Fusion Center and OCDETF's International Organized Crime Intelligence and Operations Center.

To learn more about the department's COVID response, visit: https://www.justice.gov/coronavirus. For further information on the Criminal Division's enforcement efforts on PPP fraud, including court documents from significant cases, visit the following website: https://www.justice.gov/criminal-fraud/ppp-fraud. For further information on the Civil Division's enforcement efforts, visit the following website: https://www.justice.gov/civil.

To report a COVID-19-related fraud scheme or suspicious activity, contact the National Center for Disaster Fraud (NCDF) by calling the NCDF Hotline at 1-866-720-5721 or via the NCDF Web Complaint Form at: https://www.justice.gov/disaster-fraud/ncdf-disaster-complaint-form.

Topic(s):
Coronavirus

Component(s):
Civil Division
Criminal Division

Office of the Attorney General

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21-272

Updated March 26, 2021

13. PPP Loan Enforcement: SBA Ramping up Audits, June 10, 2021

CARES Act SBA Audits & Government Enforcement Defense Team update

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April 27, 2021

Welcome to the First Issue:

- In response to anticipated SBA Audits and DOJ investigations of Paycheck Protection Program (PPP) loans and other CARES Act loans and grants, we have created a CARES Act SBA Audit & Government Enforcement Defense Team which has spent the last several months researching every DOJ prosecution of recipients of CARES Acts funds, including PPP loans, and has created an Excel spreadsheet to track them, with links to Indictments and other key pleadings. The Team has also read and analyzed over 1,000 pages of law, including the 380-page CARES Act and the statutes that have amended it, all SBA Interim Final Rules, all SBA "Frequently Asked Questions" and other guidance, and has researched the three entities created by the CARES Act: the Special Inspector General for Pandemic Recovery (SIGPR), the Pandemic Response Advisory Committee (PRAC), and the Congressional Oversight Commission (COC).
- Our Team will work with corporate attorneys and their clients to provide advice on preparing for SBA Audits and DOJ fraud investigations, and representation of clients in those audits and investigations. The Team will also work with other white collar and government investigation attorneys at Dentons who are best suited geographically to assist clients with CARES Act-related audits and investigations.
- This is the first issue of our "Update," which is intended to provide periodic summaries of recent CARES Act-related SBA Audits, DOJ prosecutions, and other developments concerning government enforcement agencies.

Executive Summary

- The SBA has announced that it intends to audit every borrower of PPP loans of US$2 million or more, and it may audit "any" borrower at "any time" regardless of the amount of the loan. Audits may occur even after loans are forgiven.
- SBA audits will focus on whether documentation supports borrower certifications that loans were "necessary" to support the ongoing operation of the business, whether businesses were qualified for loans, whether borrowers were entitled to the amount of loans for which they applied, whether loan proceeds were used for only "authorized" purposes, and numerous other factors. The SBA has made clear it believes there was widespread fraud in the PPP loan program and that it intends to refer to law enforcement suspected fraud discovered during audits.
- The Department of Justice has already filed 155 criminal prosecutions of borrowers of PPP loans and has pledged to aggressively investigate and prosecute fraud in PPP loans and other CARES Act programs.
- The Special Inspector General for Pandemic Recovery (SIGPR), created by the CARES Act, has set up both an Office of Audits and an Office of Investigations, staffed with experienced analysts, investigators and attorneys. SIGPR analysts are mining massive financial databases searching for evidence of fraud by recipients of CARES

Act funds and have already referred 69 cases to other law enforcement agencies for fraud investigations.

- Our CARES Act SBA Audits & Government Enforcement Defense Team was created, in large part, to assist clients prepare for and respond to SBA Audits and other government investigations. This Update and future issues of it are intended to alert clients and corporate lawyers advising them to the risks clients face in SBA Audits and other government investigations and steps they may take to help mitigate those risks.

The CARES Act & PPP Loans

- The Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), PL 116-136, March 27, 2020, 134 Stat 281, 15 U.S.C. § 9001, created the Paycheck Protection Program (PPP) and appropriated US$349 billion to fund it. Subsequent legislation increased the appropriation to US$806 billion.
  - Congress has amended the CARES Act multiple times since its enactment, including the following statutes:
  - Paycheck Protection Program & Health Care Enhancement Act, Pub. L. 116-139, April 24, 2020;
  - Paycheck Protection Program Flexibility Act of 2020 (Flexibility Act), Pub. L. 116-142, June 5, 2020;
  - Pub. L. 116-147, July 4, 2020 (extending the authority for the SBA to guarantee PPP loans to August 8, 2020);
  - Economic Aid to Hard-Hit Small Businesses, Nonprofits and Venues Act (Economic Aid Act), Pub. L. 116-260, Dec. 27, 2020; and
  - American Rescue Plan Act of 2021 (American Rescue Plan Act), Pub. L. 117-2, March 11, 2021.

Small Business Administration (SBA)

- The SBA published its first Interim Final Rule relating to implementation of the CARES Act and PPP loans on April 2, 2020. It has since published an additional 29 Interim Final Rules, the last of which was published on March 22, 2021.
- The SBA has also published 67 Frequently Asked Questions ("FAQs"), the last of which was published on April 6, 2021.
- As of April 18, 2021, the SBA has approved 9,876,741 PPP loans totaling US$762,405,455,019 which were processed by 5,475 lenders.
- The SBA has forgiven 2.7 million PPP loans representing a total of US$227.6 billion.
- The SBA has announced that it will audit all borrowers of PPP loans in the amount of US$2 million or more. With some exceptions, borrowers are required to maintain all documentation of eligibility, calculation of loan amount, uses of PPP loan proceeds and related documents for 6 years. However, the SBA has made clear that it may audit borrowers "at any time." Loan forgiveness does not protect borrowers from SBA audits (or DOJ investigations).
- The SBA has yet to publish guidance on how it will audit borrowers to determine if borrowers were eligible for PPP loans. Several factors create uncertainty and borrower concern:
- The CARES Act required borrowers to certify "that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient."
- In its FAQ #31, the SBA added its own interpretation of this statutory requirement:
- "Borrowers must make this certification in good faith, taking into account their current business activity and their

ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business. For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification." (Emphasis added)

- On December 31, 2020, the SBA issued its Loan Necessity Questionnaire for borrowers who received PPP loans of US$2 million or more and stated that the purpose of the questionnaire was "to facilitate the collection of supplemental information that will be used by SBA loan reviewers to evaluate the good-faith certification that you made on your PPP Borrower Application (SBA Form 2483 or Lender's equivalent form) that economic uncertainty made the loan request necessary." Significantly, the Questionnaire required borrowers to disclose information that previously appeared to be irrelevant to whether a PPP loan was "necessary." Among the new factors included in the Questionnaire are:
- The borrower's gross revenue in the second quarter of 2020 and 2019;
- Whether the borrower began any new capital improvement projects after March 13, 2020 that were not due to COVID-19;
- Whether the borrower paid any dividends or other capital distributions to its owners between March 13, 2020 and the end of the loan forgiveness covered period of the PPP loan;
- Whether the borrower paid any outstanding debt between March 13, 2020, and the end of the loan forgiveness covered period; and
- Whether any of the borrower's employees were compensated in an amount that exceeded US$250,000.
- The Loan Necessity Questionnaire required a certification that the borrower understands that knowingly making a false statement to obtain a guaranteed loan or forgiveness of an SBA-guaranteed loan is punishable by several identified criminal statutes.

- The SBA has announced that it may take into account a borrower's circumstances and actions both before and after the borrower's certification of loan necessity in determining whether the certification was made in good faith.
- The SBA has also announced that if it believes a borrower may have committed fraud in obtaining a PPP loan or loan forgiveness, or has made a false certification, it will refer the borrower to the Department of Justice for a criminal fraud investigation.

Preparing for an SBA Audit

- Borrowers of PPP loans should act now to prepare for an SBA Audit, particularly if the borrower received a PPP loan of US$2 million or more. As noted above, even if a PPP loan has been forgiven, the SBA may still conduct an audit of the loan, and has announced that it will do so for all loans of US$2 million or more. To prepare for such audits, borrowers should:
- Gather all documents that will be needed in the event of an audit, including:
- Materials which support the borrower's certification "that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient;"
- Documents that support the borrower's calculation of the number of employees it had at the time its PPP loan application was submitted, taking into account the "Affiliation Rules;"

- Documents that support the borrower's calculation of payroll costs;
- Documents that support the borrower's determination of the maximum loan amount for which it was eligible; and
- Accounting and other records verifying that the PPP loan proceeds were only utilized for "allowable uses," and that at least 60% of the proceeds were used for payroll costs.

- If borrowers have not previously documented the basis upon which they made their loan necessity determination or other decisions relating to their PPP loans and loan forgiveness, they should re-create those determinations now. Borrowers should be cautious, however, not to back-date any memoranda created now to memorialize prior decisions. Any back-dating or creation of documentation that appears to have been made prior to submission of the loan application or application for loan forgiveness could be considered obstruction of justice, which is a federal criminal offense.

Department of Justice Prosecutions

- The Department of Justice has made CARES Act and PPP loan fraud a top priority and has directed that each U.S. Attorney's Office throughout the country create a CARES Act Prosecutor.
- "On March 16, 2020, the Attorney General issued a memorandum directing every U.S. Attorney's Office 'to prioritize the detection, investigation, and prosecution of all criminal conduct related to the current pandemic.' Within days, each of the 94 U.S. Attorneys' Offices identified and appointed one prosecutor to serve as the office's Coronavirus Coordinator to ensure that those cases were given the highest priority." (Source: DOJ Press Release)
- In a Joint Statement by Associate Deputy Attorney General William Hughes and the U.S. Attorney for the District of New Jersey, the DOJ's position was outlined: "To be clear, the Department will not tolerate any bad actors who seek to treat the pandemic as an opportunity to defraud their fellow citizens or the government."
- In a speech on Feb. 17, 2021 to the Federal Bar Association Qui Tam Conference, Acting Assistant Attorney General Brian M. Boynton said: "It is clear to me and my colleagues in the Civil Division – and I am sure to all of you – that the False Claims Act will play a significant role in the coming years as the government grapples with the consequences of this pandemic."

- The DOJ has already filed 155 individual prosecutions of PPP loan fraud in 46 federal judicial districts. Our Team has created an Excel spreadsheet that tracks each case, with links to Indictments and other key pleadings, and we update the spreadsheet every week. Here is a summary of the prosecutions that have been filed thus far:
- 164 individual defendants have been charged in the 155 cases.
- The average PPP loan amount – or alleged "loss" for Sentencing Guidelines purposes – is US$3.3 million.
- 23 of the cases filed involve a PPP loan amount of US$2 million or more.
- The smallest alleged financial loss is only US$9,400.
- The largest alleged loss is US$24,800,000.
- Prosecutions have charged defendants with violating 15 different federal criminal statutes. The most frequently cited statutes are the wire fraud statute, 18 U.S.C. 1343 (69 cases); the bank fraud statute, 18 U.S.C. 1344 (61 cases); the loan application fraud statute, 18 U.S.C. 1014 (49 cases; the money laundering statute, 18 U.S.C. 1957 (40 cases); and the attempts and conspiracy statute, 18 U.S.C. 1349 (37 cases).

- The most recent prosecution was filed on April 13, 2021 in the Central District of California, alleging that a

California company applied for and received a PPP loan of US$7.25 million and then misappropriated hundreds of thousands of dollars of PPP loan proceeds on luxury cars and a US$6,000 computer. The defendant is also charged with attempting to transfer US$150,000 of the loan proceeds to Mauritania.

- The Select Subcommittee on the Coronavirus Crisis, U.S. Congress, issued a Report on March 25, 2021, in which it estimated that there has been "nearly US$84 billion in potential fraud" of CARES Act loans and grants.
- There are new DOJ criminal investigations and prosecutions every month, and often every week. Prosecutions of fraud following the Troubled Asset Relief Program (TARP) – which was established in response to the 2008 Great Recession -- lasted over 10 years and resulted in hundreds of corporate executives being convicted and sentenced to prison. The economic bailout initiated by the CARES Act is several times larger than the TARP program. Given the number of prosecutions thus far and the estimates of the total amount of fraud, companies should expect a significant increase in the number of criminal investigations and prosecutions over the next several months as grand juries are reconvened, and FBI and other law enforcement agents and federal prosecutors return to work after receiving COVID-19 vaccinations. Many investigations had been put on hold because agents could not conduct field investigations, execute search warrants, and make arrests. As those agents return to work, expect a significant increase in fraud investigations and prosecutions. Likewise, with grand jury activities resuming, prosecutors are likely to begin issuing subpoenas aimed at obtaining evidence of suspected fraud.
- Congress expedited the PPP loan program to get federal monies to small businesses as quickly as possible to avert economic hardship and keep workers employed. As part of the emergency relief effort, the CARES Act suspended the requirement that lenders investigate borrower applications. Rather, banks were authorized to rely on borrower certifications and were granted immunity if errors occurred. Similarly, businesses rushed to apply for PPP loan funds as they faced eminent layoffs and possible closure of their businesses if they did not immediately obtain emergency relief.
- Although the government's expeditious rollout of the CARES Act programs is laudable, and the rush to apply for those funds by businesses is understandable, when everyone acts with haste, mistakes invariably occur. And, to make matters worse, there was widespread confusion as to eligibility for PPP loans, how to calculate a company's number of employees, application of the Affiliation Rules, determination of the loan amount, and myriad other issues. Now, with the benefit of 20:20 hindsight, federal prosecutors must determine whether those were honest mistakes, or fraud. How a company handles an SBA Audit or DOJ investigation could have a tremendous impact on whether the company and its corporate executives are prosecuted.

Special Inspector General for Pandemic Recovery

- The Special Inspector General for Pandemic Recovery ("SIGPR") was established by the CARES Act, 15 U.S.C. § 9053. The SIGPR has the duty to conduct, supervise, and coordinate audits and investigations of the making, purchase, management, and sale of loans, loan guarantees, and other investments by the Secretary of the Treasury under any program established by the Secretary under Division A of the CARES Act – which includes PPP loans – as well as the management by the Secretary of any program established under Division A of the CARES Act. Congress appropriated US$25 million to the SIGPR to fund its activities.
- The SIGPR, Brian D. Miller, was appointed by the President and confirmed by the Senate on June 2, 2020. Mr. Miller is an experienced career federal prosecutor and attorney, having served as Senior Associate White House Counsel, Inspector General of the U.S. General Services Administration (GSA), Senior Counsel to the Deputy Attorney General, Assistant U.S. Attorney for the Eastern District of Virginia, Counsel to the United States Attorney, and Special Counsel on Health Care Fraud for the Deputy Attorney General.
- The Office of Audits, a division of the SIGPR, has authority to audit loans, loan guarantees and other investments made by the Treasury under Division A of the CARES Act.

- The Office of Investigations, another division of the SIGPR, has authority to conduct both civil False Claims Act and criminal fraud investigations relating to loans, grants and loan guarantees under Division A of the CARES Act. Agents of the SIGPR have law enforcement powers, including the authority to carry firearms, execute search warrants, and make arrests.
- The SIGPR has established a team of analysts, auditors and investigators who conduct electronic analysis of a large number of government and financial databases for evidence of fraud. The office has entered into agreements with other agencies, including FinCEN, the Federal Trade Commission (FTC), and numerous U.S. Attorney's offices that provide SIGPR staff with access to a large volume of confidential files and databases.
- The SIGPR has already referred 69 cases of suspected fraud under the CARES Act to other law enforcement agencies for further investigation and potential prosecution.
- The U.S. Attorney's Office for the District of South Dakota obtained an indictment on April 6, 2021, against James Bunker for allegedly defrauding or attempting to defraud banks in connection with his efforts to obtain loans under the Paycheck Protection Program and the Main Street Lending Program, both of which were funded by the CARES Act. The U.S. Attorney's press release of the indictment credits the SIGPR, FBI and IRS for their assistance in investigating this case.

Our SBA Audits & Government Enforcement Team

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CARES Act SBA Audits & Government Enforcement Defense Team Update

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May 26, 2021

Welcome to the Second Issue:

- In response to anticipated SBA Audits and DOJ investigations of Paycheck Protection Program ("PPP") loans and other CARES Act loans and grants, we created a CARES Act SBA Audit & Government Enforcement Defense Team which spent several months researching every DOJ prosecution of recipients of CARES Acts funds, including PPP loans. We track those prosecutions along with new ones in an Excel spreadsheet, with links to Indictments and other key pleadings, and update it daily. The Team has also read and analyzed over 1,000 pages of law, including the 380-page CARES Act and the statutes that have amended it, all SBA Interim Final Rules, all SBA "Frequently Asked Questions" and other guidance, and has researched the three entities created by the CARES Act: the Special Inspector General for Pandemic Recovery (SIGPR), the Pandemic Response Advisory Committee (PRAC), and the Congressional Oversight Commission (COC). We monitor each of those on a daily basis as well.

- Our Team is working with corporate attorneys throughout Dentons to represent clients in SBA audits, and to provide advice on preparing for those audits and DOJ fraud investigations. The Team will also work with other white collar and government investigation attorneys at Dentons who are best suited geographically to assist clients with CARES Act-related audits and investigations.

- This is the second issue of our "Update," which is intended to provide periodic summaries of recent CARES Act-related SBA Audits, DOJ prosecutions, and other developments concerning government enforcement agencies. If you missed the First Issue, please contact us and we will email it to you.

SBA Audits Have Begun

- The Small Business Administration ("SBA") has begun audits. In the past two weeks, we have represented clients in New York and Texas in responding to SBA "reviews" of their PPP loans. The SBA has told us that their "reviews" are, in fact, "audits." The SBA has recently repeated its previous announcement that it will audit every borrower of PPP loans of $2 million or more, and it may audit "any" borrower at "any time" regardless of the amount of the loan. The SBA told our Team that PPP loans of less than $2 million will be "spot checked" and if the SBA needs information they will contact the lender, and the lender will contact the borrower to let them know the loan is under review.

- SBA "reviews" a/k/a "audits" are requiring that Borrowers upload a massive amount of documents within a 15-day deadline, with no extensions available. The SBA is requiring Borrowers to upload documents to their banks, which will then upload them to an SBA portal. Required documents include the Borrower's PPP Loan Application, PPP

Loan Forgiveness Application, and the SBA Loan Necessity Questionnaire, along with "all supporting documents." In addition, when Borrowers applied for loan forgiveness, the SBA required that Borrowers preserve for six years all documents relating to their PPP loan, although they were not required at the time they sought loan forgiveness to produce them to the SBA. Now the SBA "reviews" require that all of those documents be uploaded as well.

- We recommend that, when Borrowers respond to the SBA audits, they provide the SBA with a memorandum explaining their good faith basis for their certifications of loan necessity, their determinations of eligibility, the number of their employees under the Affiliation Rules, their calculation of loan amount, any other eligibility issues, and how they spent the proceeds of the PPP loans. The memorandum should reference exhibits to support each and every issue that the SBA may audit and review.

- Borrowers must "make the record" in their submissions to the SBA in response to a review/audit. Under the Administrative Procedures Act which governs appeals of SBA decisions, the "record" for appeal is whatever was in the SBA file at the time of its determination. Thus, in the event of an adverse SBA decision, the Borrower must rely on the SBA file in an appeal. There is no guarantee that the SBA will contact the Borrower again if the SBA has questions or concludes that the documents submitted are not sufficient to support eligibility, loan necessity, the amount of the loan, or that the proceeds were only spent for "authorized" purposes under Section 1102 of the CARES Act. Borrowers should therefore submit every document, and provide every explanation, needed both to convince the SBA to conclude the Borrower was eligible for the loan and is entitled to loan forgiveness, and to support an appeal if one becomes necessary.

- A central issue in most, if not all, SBA reviews/audits is whether the PPP loan was "necessary to support the ongoing operation of the business." The CARES Act requires borrowers to certify, inter alia, "that the uncertainty of current economic conditions makes necessary the loan request to support theongoing operations of the eligible recipient." The SBA announced in April 2020 an additional requirement Previously, there was no requirement that borrowers consider other sources of liquidity. The SBA will review whether a Borrower had other sources of liquidity, including private equity firms, venture capital firms, or hedge funds (See "Liquidity Assessment," Question #10, SBA Form 3509 "Loan Necessity Questionnaire"). The SBA will also examine a Borrower's cash or cash equivalents at the time of its PPP loan application, its ability to borrow from banks or other financial institutions, and its capital.

- The SBA has also announced that if it believes a borrower may have committed fraud in obtaining a PPP loan or loan forgiveness, or has made a false certification, it will refer the borrower to the Department of Justice for a criminal fraud investigation.

Preparing for an SBA Audit

- Borrowers of PPP loans should act now to prepare for an SBA Audit, particularly if the borrower received a PPP loan of $2 million or more. It is proving difficult for our clients to gather all required documents, and for us to prepare a comprehensive memorandum explaining the Borrower's decisions on loan necessity and forgiveness, within the 15-day deadline the SBA is imposing in its audits. Borrowers should act now, before a "review" or audit occurs and when they have no such deadline, to get prepared for them. To prepare for such audits, borrowers should:

  - Gather all documents that will be needed in the event of an audit, including:
    - Materials which support the borrower's certification "that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient;"

- Documents that support the borrower's calculation of the number of employees it had at the time its PPP loan application was submitted, taking into account the "Affiliation Rules;"

- Documents that support the borrower's calculation of payroll costs;

- Documents that support the borrower's determination of the maximum loan amount for which it was eligible; and

- Accounting and other records verifying that the PPP loan proceeds were only utilized for "allowable uses," and that at least 60% of the proceeds were used for payroll costs.

- If borrowers have not previously documented the basis upon which they made their loan necessity determination or other decisions relating to their PPP loans and loan forgiveness, they should re-create those determinations now. Borrowers should be cautious, however, not to back-date any memoranda created now to memorialize prior decisions. Any back-dating or creation of documentation that appears to have been made prior to submission of the loan application or application for loan forgiveness could be considered obstruction of justice, which is a federal criminal offense.

SBA Data Update

- As of May 24, 2021, the SBA has approved 11,618,144 PPP loans totaling $795,909,415,6979 which were processed by 5,469 lenders. The total funds appropriated by Congress for PPP loans is $806 billion, so the SBA is nearing the limit.

- The SBA has forgiven 3.3 million PPP loans representing a total of $279.4 billion

Department of Justice Prosecutions

- In a meeting with a high-ranking DOJ Fraud Section attorney on April 28, 2021, our Team was told that the DOJ Fraud Section has a "huge backlog" of PPP loan fraud cases and that as law enforcement agents and federal prosecutors return to the office from working remotely, we will see a significant increase in criminal investigations and prosecutions throughout the United States.

- We continue to monitor the DOJ for new criminal filings. Predictably, that number continues to grow. As of May 24, 2021 we have identified a total of 482 defendants charged for CARES Act or PPP fraud related cases. Of that total, there are currently 164 individuals indicted for allegations centered on PPP fraud. That number includes four new separate indictments that have been publicly unsealed this month.

- Since our last Update, the Department of Justice has continued to demonstrate that CARES Act and PPP fraud remain a focal point. That focus extends to both public pronouncements and court pleadings. One recent news release from the U.S. Secret Service touted the fact that, one year into investigating COVID-19 related fraud, the

DOJ and Secret Service have seized over $640 million in allegedly fraudulently procured funds, and have recovered over $2 billion for state unemployment insurance programs.

- In addition to tracking new criminal prosecutions, our Team continues to monitor existing ones. To date, none of these cases has proceeded to trial. In addition, since our last Update, DOJ has secured 4 new plea agreements, bringing the current total to 33 pleas filed.

- Of those 33 guilty pleas, only one PPP loan fraud defendant has been sentenced. In United States v. Hines, (U.S. District Court, Southern District of Florida), the Defendant admitted to seeking $13.5 million in loans for business expenses that were not legitimate, including payroll for employees who didn't exist. He also used the money for personal expenses, including the purchase of a Lamborghini. He was sentenced last week to prison for 78 months, followed by 3 years of supervised release.

- Prosecutions have charged defendants with violating 15 different federal criminal statutes. The most frequently cited statutes are the wire fraud statute, 18 U.S.C. 1343 (83 cases); the bank fraud statute, 18 U.S.C. 1344 (66 cases); the loan application fraud statute, 18 U.S.C. 1014 (34 cases; the money laundering statute, 18 U.S.C. 1957 (40 cases); and the attempts and conspiracy statute, 18 U.S.C. 1349 (30 cases).

Special Inspector General for Pandemic Recovery (SIGPR)

- Since publication of our first Update, a dispute has arisen over the jurisdiction of the SIGPR. Unless Congress clarifies its authority, it appears the SIGPR will not exercise any jurisdiction over the Paycheck Protection Program ("PPP"), including the SIGPR will not conduct PPP audits or investigations.

- The CARES Act created the Office of Special Inspector General for Pandemic Recovery (SIGPR) and vested it with authority to "conduct, supervise, and coordinate audits and investigations of the making, purchase, management, and sale of loans, loan guarantees, and other investments made by the Secretary of the Treasury under any program established by the Secretary under this Act . . ." CARES Act, Section 4018(c)(1). Section 1 of the CARES Act reads: "This Act may be cited as the "Coronavirus Aid, Relief, and Economic Security Act" or the "CARES Act." It would thus appear that "this Act" in Section 4018 defining the SIGPR's authority would include any program under the entire CARES Act.

- In his April 30, 2021 Quarterly Report, the SIGPR revealed that he would need to "discontinue many ongoing oversight efforts and transfer others, including criminal investigations and leads," due to a jurisdictional dispute with the Department of the Treasury and the Treasury Inspector General regarding oversight of the Coronavirus Relief Fund, Payroll Support Program, and the Paycheck Protection Program. The SIGPR has taken the position that those programs fall within the scope of the SIGPR's oversight authority, but that position has been hotly contested by the Department of the Treasury. The parties referred the matter to the Department of Justice's Office of Legal Counsel, which issued an opinion on April 28, 2021 that the "SIGPR's jurisdiction is narrowly limited to programs established under title IV, subtitle A of the CARES Act," which includes "Treasury's direct loans and the Federal Reserve's lending programs," but excludes "the Coronavirus Relief Fund, Payroll Support Program, and Paycheck Protection Program." The dispute between the SIGPR and Treasury reportedly escalated in late January of 2021, when the Treasury Department began refusing the SIGPR's requests for information, such as access to the

"Treasury's Payroll Support database." The SIGPR has urged Congress to pass legislation clarifying the SIGPR's mandate "to provide oversight of the Coronavirus Relief Fund, Payroll Support Program, and other pandemic-related programs managed by the Secretary of the Treasury."

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Faculty

Denise D. Dell-Powell is the chair of Dean Mead's Bankruptcy and Creditors' Rights Practice Group in Orlando, Fla., and has more than 25 years of experience in bankruptcy and creditors' rights, as well as distressed property, including CMBS foreclosures, workouts and bankruptcy matters. She has represented secured and unsecured creditors, debtors, chapter 11 trustees, chapter 7 trustees and unsecured creditors' committees. In addition to a focus on banking and financial institutions, her career also includes representation in the hospitality, restaurant, health care and agricultural industries. In Ms. Dell-Powell's business litigation practice, she has represented parties in federal and state court and has experience trying both jury and nonjury trials. Her litigation practice involves representing clients in a broad range of matters, including those involving real estate, mortgage foreclosure, receiverships, lender liability, commercial evictions, partnership disputes and other real estate-based litigation. Ms. Dell-Powell is a Fellow of the American College of Bankruptcy and a frequent lecturer, presenter and author on bankruptcy, restructuring and related issues. She has presented at conferences and seminars sponsored by the American Bar Association, ABI, Trigild, The Florida Bar, The Bankruptcy/UCC Section of The Florida Bar, the Florida Bankers Association, the Jacksonville Bankruptcy Bar Association, the Central Florida Bankruptcy Law Association and Lorman Education Series. Ms. Dell-Powell received her B.S. from Florida State University and her J.D. from Mercer University School of Law.

Hon. Michael A. Fagone is a U.S. Bankruptcy Judge for the District of Maine in Bangor, appointed in April 2015. He is also a member of the U.S. Bankruptcy Appellate Panel for the First Circuit, appointed in April 2016. Judge Fagone previously clerked for Associate Justices Leigh I. Saufley and Robert W. Clifford of the Maine Supreme Judicial Court. Following his clerkship, he joined Bernstein, Shur, Sawyer & Nelson in Portland, Maine, and was a member of its Business Restructuring and Insolvency Practice Group from 1998-2000, and from 2001-15, where he represented clients in bankruptcy cases and in out-of-court restructurings. While practicing law, Judge Fagone was recognized in *The Best Lawyers in America* and *Chambers USA* as one of the top bankruptcy lawyers in Maine. He is Board Certified in Business Bankruptcy Law by the American Board of Certification and served on the board of directors of the Nathan and Henry B. Cleaves Law Library, and on the board of directors of the Dyer/Library and Saco Museum. Judge Fagone currently serves on ABI's Board of Directors and volunteers with Credit Abuse Resistance Education (CARE), teaching students about the responsible use of credit and the dangers of credit abuse. He also has volunteered as a coach and an evaluator for Maine Law's teams in the Conrad B. Duberstein Moot Court Competition. Judge Fagone received his B.A. from Amherst College in 1993 and his J.D. *summa cum laude* from the University of Maine School of Law in 1997.

Margaret N. Rosenfeld is a partner with K&L Gates LLP in Raleigh, N.C., has more than 20 years of corporate and securities law experience both within the U.S. and internationally. Her practice includes public company reporting, corporate governance, public and private financings, security token and digital asset offerings, blockchain technology matters, corporate investigations (internal and government), mergers and acquisitions, and intellectual property protection and licensing. Ms. Rosenfeld is one of two female attorneys in North Carolina to be ranked within the category of Corporate/M&A law by *Chambers USA: Americas Leading Business Lawyers*, having first been

listed in 2013. She has assisted public companies, underwriters and directors with initial public offerings and secondary financings on numerous stock exchanges in the U.S. and internationally, public reporting requirements both pre- and post-Sarbanes-Oxley, corporate governance issues, and internal and external corporate investigations, including interaction with the Securities and Exchange Commission, the NYSE and Nasdaq. She also has experience assisting emerging growth companies as well as mature companies with legal, business and strategic planning, from contractual assistance such as with licensing agreements, distribution agreements, franchise agreements, employment agreements and joint-venture agreements to assistance with public and private debt and equity financing. She is particularly known for assisting companies facing transformative changes as they balance legal and business concerns. Before joining K&L Gates, Ms. Rosenfeld practiced with a full-service business firm in the Research Triangle region of North Carolina, as well as with two global law firms in London, Frankfurt and Tokyo. Since December 2013, she has served in a voluntary capacity as the Honorary German Consul for Eastern North Carolina, a joint diplomatic appointment by the U.S. State Department and the Federal Republic of Germany that involves representing the interests of German companies in North Carolina and North Carolina companies in Germany, as well as assisting U.S. and German citizens in some legal and consular issues related to Germany. Ms. Rosenfeld received her B.A. in 1992 summa cum laude and Phi Beta Kappa from Rutgers University, and her J.D. with highest honors from George Washington University Law School in 1997, where she was admitted to the Order of the Coif and was special projects editor of its law review.

Jeremy S. Williams is a partner in with Kutak Rock LLP in its Bankruptcy, Restructuring and Creditors' Rights group in Richmond, Va., where he represents both debtors and creditors in all aspects of bankruptcy, including transactional matters and litigation in federal and state courts. His practice includes creditors' rights litigation, complex loan workouts, chapter 11 reorganizations and contract disputes, as well as complex business litigation, having represented large and small businesses as well as individuals. Mr. Williams has served a co-counsel and lead counsel for debtors in numerous bankruptcies, including Alpha Media Holdings Inc., Le Tote Inc., Intelsat S.A., Pier 1 Imports Inc., Toy "R" Us Inc., Gymboree Corp., Penn Virginia Corp., Patriot Coal Corp., Movie Gallery Inc. and On-Site Sourcing Inc. He also represents landlords, vendors and financial institutions in national bankruptcy cases, including CarbonLite Holdings, Forever 21, Bertucci's, Charming Charlie, Radio Shack and Haggen Holdings. Mr. Williams represents asset-purchasers, preference defendants, secured creditors and other interested parties in numerous bankruptcy cases around the country. He also regularly serves as counsel for chapter 7 and 11 trustees. Mr. Williams received his B.A. from the University of Virginia and his J.D. from George Mason University School of Law.

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