

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

<hr/>)	
CARMEN'S CORNER STORE, <i>et al.</i> ,)	
	Plaintiffs,)	
v.)	
)	No. 1:20-cv-1736-CCB
UNITED STATES SMALL BUSINESS)	
ADMINISTRATION, <i>et al.</i> ,)	
	Defendants.)	
<hr/>)	
DEFY VENTURES, INC., , <i>et al.</i> ,)	
	Plaintiffs,)	
v.)	
)	No. 1:20-cv-1838-CCB
UNITED STATES SMALL BUSINESS)	
ADMINISTRATION, <i>et al.</i> ,)	
	Defendants.)	
<hr/>)	

**DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTIONS
FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTIONS**

Dated: June 24, 2020

JOSEPH H. HUNT
Assistant Attorney General

JAMES J. GILLIGAN
Special Litigation Counsel

DAVID M. MORRELL
Deputy Assistant Attorney General

INDRANEEL SUR
Trial Attorney

JOHN R. GRIFFITHS
Director

Federal Programs Branch,
Civil Division
United States Department of Justice
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 514-3358
E-mail: james.gilligan@usdoj.gov

ERIC WOMACK
Assistant Director

Counsel for Defendants

TABLE OF CONTENTS

INTRODUCTION..... 1

BACKGROUND5

LEGAL STANDARD.....16

ARGUMENT.....17

 I. PLANTIFFS LACK ARTICLE III STANDING17

 II. SBA IS LIKELY TO SUCCEED ON THE MERITS.....21

 A. The Challenged Requirements In The Interim Final Rule Are Consistent With
 Statutory Authority.....21

 B. The Criminal Justice Exclusion Is the Product of Reasoned Agency
 Decisionmaking and Is Not Arbitrary and Capricious.....28

 C. The Agency Has Not Unlawfully Withheld Required Action, And Interpretation Of
 The CARES Act Is Not A Ministerial Duty.....36

 III. PLAINTIFFS WILL NOT SUFFER IRREPARABLE HARM IN THE ABSENCE OF
 AN INJUNCTION37

 IV. A PRELIMINARY INJUNCTION WOULD BE CONTRARY TO THE PUBLIC
 INTEREST.....39

 V. THE INJUNCTION DEMANDED IS UNAVAILABLE.....41

 A. Section 634(b)(1) Forecloses The Injunction Demanded Against SBA.....41

 B. An Order Purporting To Extend The Deadline For PPP Loans Would Disrespect
 Limits On Spending Imposed By Congress And Thereby Violate The Separation Of
 Powers.....42

 C. An Order Requiring SBA To Award Relief To Unidentified Loan Applicants Would
 Be Impossible For The Agency To Implement.....43

CONCLUSION.....44

INTRODUCTION

What reason there once may have been to bring these cases no longer remains. The individual Plaintiffs and Plaintiff businesses in these cases sought to obtain Paycheck Protection Program (“PPP”) loans authorized by the Coronavirus Aid, Relief, and Economic Stimulus (“CARES”) Act. But they were denied eligibility under a Small Business Administration (“SBA”) rule intended to assure that PPP loans are sound, and that the proceeds are expended for the purposes authorized by Congress. That rule, however, was revised on June 24, 2020. It no longer applies to the Plaintiffs, and no longer stands as an obstacle to the PPP financial assistance they desire. Accordingly, Plaintiffs’ request for preliminary relief should be denied for the simple reason, even if none other, that Plaintiffs no longer need it.

Plaintiffs are three small business owners and their businesses, and a social welfare organization whose mission is to assist formerly incarcerated individuals achieve economic independence. They contest the validity of an SBA regulation which, at the time Plaintiffs applied for PPP loans, restricted eligibility for businesses whose owners, such as the individual Plaintiffs here, are on parole, or facing pending criminal charges. The SBA applied this rule to the PPP to provide assurance that borrowers with criminal histories are trustworthy, and creditworthy, so as to minimize risks that loans will not be repaid, and to ensure that loan proceeds intended for the benefit of small business employees are not misspent. Plaintiffs nevertheless challenge this criminal justice restriction as unauthorized by the CARES Act, and as arbitrary and capricious within the meaning of the Administrative Procedure Act (the “APA”).

On June 24, however, the SBA revised the criminal justice restriction so that, as relevant here, it applies only to persons whose terms of parole (for crimes not involving fraud, bribery, embezzlement, or false applications for financial assistance) began within a year of their application for PPP assistance, and to persons charged with felonies. The individual Plaintiffs do not fall within

the rule's terms, as modified, and so the restriction no longer bars the Plaintiff businesses from applying for PPP loans. Under the terms of the CARES Act, the APA, and the circumstances as they now stand, Plaintiffs' request for preliminary relief should be denied.

First, no Plaintiff has Article III standing. No individual Plaintiff or Plaintiff business faces continuing or future injury from the challenged criminal justice restriction as revised, because the revised restriction does not prevent them from applying for PPP loans.. That leaves only Defy Ventures, an organization that lacks Article III standing because the mere diversion of resources it purports to have suffered resulted from its own unilateral decision to advise non-parties regarding the restriction, not actions taken by SBA. Moreover, Defy Ventures fails to show that the sweeping injunction it seeks, which would significantly upset Executive Branch expectations about how the PPP loan program functions, would redress the organization's claimed injury-in-fact.

Second, Plaintiffs' contention that the criminal justice restriction exceeds the SBA's authority under the CARES Act has no likelihood of success on the merits, because it hinges on an incorrectly narrow view of the authority conferred by the CARES Act's plain text. Congress explicitly placed the PPP under the SBA's existing Section 7(a) loan program, and stated that PPP loans are to be provided "under the same terms, conditions, and processes" as other Section 7(a) loans unless otherwise specified. CARES Act, § 1102(a), 134 Stat. at 287 (codified at 15 U.S.C. § 636(a)(36)(B)). That provision authorized the SBA to adhere to its longstanding "criminal justice" ineligibility rule codified at 13 C.F.R. § 120.110(n), which, as relevant here, bars loans to "[b]usinesses with an Associate who is incarcerated, on probation, on parole, or has been indicted for a felony or a crime of moral turpitude." *Id.* ¶ 120.110(n). And Congress likewise authorized the SBA to adhere to its preexisting standards of creditworthiness at 13 C.F.R. § 120.150, under which SBA's evaluation of a borrower's creditworthiness begins with assessing the "[c]haracter, reputation and credit history of the applicant . . . , its Associates, and guarantors." *Id.* § 120.150(a). Both provisions give effect to the SBA's statutory

mandate under the Section 7(a) program, of which the PPP is a part, that all Section 7(a) loans be of “sound value.” The challenged criminal justice restriction is drawn from that mandate and those pre-existing and longstanding regulations, and tailored by SBA to the particular needs of PPP loan administration.

Plaintiffs’ contrary argument is that § 636(a)(36)(D)(i)(I), by providing that “in addition to small business concerns, any business concern . . . shall be eligible to receive a covered loan” if it meets specified size standards, makes loans available to all applicants regardless of pre-existing limitations for the Section 7(a) program. But Plaintiffs take that isolated size-focused provision out of context and incorrectly make it the driving engine of the entire PPP. The statutory text plainly supports the SBA’s adherence to its prior regulations (albeit in modified form to address current emergency conditions of the PPP). Even if the statute were unclear, the SBA’s interpretation would at the very least be a reasonable one. As one District Court in the Western District of New York has recently concluded, the Congressional relaxation of size restrictions for PPP loans in the provision on which Plaintiffs focus does not mean that Congress intended for size to be the only restriction on eligibility for the loans. *See Diocese of Rochester v. SBA*, No. 20-cv-4243, 2020 WL 3071603, at *6-7 (W.D.N.Y. June 10, 2020) (rejecting contention that “in expanding the size restrictions, Congress unambiguously provided that there could be no other eligibility criteria”).

Third, Plaintiffs’ arbitrary and capricious claims also lack merit. The SBA operates under a statutory mandate to ensure that the small business loans it guarantees with taxpayer funds are of “sound value,” and to that end it applies rules meant to ensure that borrowers, including borrowers with criminal histories, are trustworthy and creditworthy. In implementing the PPP, the SBA determined that a criminal justice restriction, similar to that applied under the agency’s general business loan program, is necessary and appropriate to avoid the risks of default that arise when small business owners face potential incarceration; the risks of fraud in a streamlined application process that relies

heavily on borrower good faith; and the risk that PPP loan proceeds, funds intended by Congress for the relief of small business employees, may be misappropriated. Plaintiffs' policy arguments to the contrary notwithstanding, that choice was the product of reasoned agency decisionmaking, and as such it meets all that is required of the agency under the arbitrary and capricious test.

Fourth, Plaintiffs have not shown that they will suffer irreparable harm in the absence of preliminary injunctive relief. Because the criminal justice restriction no longer applies to the individual Plaintiffs, the Plaintiff businesses are no longer prevented by the rule from applying for PPP loans. The SBA, moreover, is prepared to so inform Plaintiffs' lenders, so that Plaintiffs encounter no more difficulties on the rule's account. For its part, Plaintiff Defy Ventures has neither applied for nor been denied a PPP loan, and makes no showing of ongoing, concrete injury that could support preliminary relief. Plaintiffs also have not shown that the injunctive relief they seek would be in the public interest. Congress did not deem it in the public interest to require that the SBA make PPP loans available to prisoners still serving their sentences, or to felons who, though released, have yet to establish a track record as trustworthy and creditworthy borrowers. Plaintiffs offer no justification for disregarding that legislative judgment, or for programmatic intervention by the judiciary in a government initiative so large, complex, and urgent as the PPP.

Fifth, the requested injunction is overbroad and invalid. Plaintiffs have brought claims under the APA, and the ordinary remedy for a violation of the APA is a remand for further proceedings before the agency. Plaintiffs err in demanding an injunction that would not only exceed the ordinary-remand rule, but that would violate existing law in its own right. Any injunction against SBA is prohibited by 15 U.S.C. § 634(b)(1), a statute whose plain language the Fourth Circuit has repeatedly applied. Furthermore, Plaintiffs' demand to extend the duration of the PPP loan program would contradict both the CARES Act, which grants no authority to make PPP loans after June 30, 2020, and the separation of powers, which grants Congress alone the power to appropriate federal funds.

In addition, it is impossible or at least infeasible for SBA to set aside loan guarantee authority for unknown and unknowable nonparties whom Plaintiffs define as “applicants wrongfully excluded” under the challenged restriction.

BACKGROUND

The Small Business Administration and the Section 7(a) Loan Program

The declared policy of the Small Business Act, 15 U.S.C. § 631 *et seq.*, is to “aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns,” in order to preserve the system of free competitive enterprise that is “essential” to the economic well-being and security of the Nation. 15 U.S.C. § 631(a). To promote that important national objective, Congress created the Small Business Administration (“SBA”), under the management of a single Administrator, *id.* § 633(a), (b)(1), who is given “extraordinarily broad powers” under section 7(a) of the Act, 15 U.S.C. § 636(a), to provide a wide variety of technical, managerial, and financial assistance to small-business concerns. *See SBA v. McClellan*, 364 U.S. 446, 447 (1960); *see generally* 15 U.S.C. § 636(a) (describing numerous varieties of general small-business loans the Administrator is “authorized” and “empowered” to make); 13 C.F.R. § 120.1. In the performance of these authorized functions the Administrator is further empowered to “make such rules and regulations as [she] deems necessary to carry out the authority vested in [her],” and in addition to “take any and all actions ... [that] [she] determines ... are necessary or desirable in making ... loans.” 15 U.S.C. § 634(b)(6), (7). The Act also empowers the Administrator to “establish general policies” in the public interest governing the “granting and denial” of SBA financial assistance. 15 U.S.C. § 633(d).¹

¹ The Administrator’s authority under 15 U.S.C. § 633(d) was originally vested in a Loan Policy Board consisting of the Administrator and the Secretaries of the Treasury and Commerce, *see id.*, but that authority was transferred to the Administrator alone by Reorganization Plan No. 4 of 1965, *see* 5 U.S.C. App., Reorg Plan No. 4 of 1965, §§ 11(b), 13(a), under the Reorganization Act of 1949, 5 U.S.C. § 901 *et seq.*

SBA financial assistance to a small business under section 7(a) of the Act may take the form of a direct loan, an immediate participation (joint) loan with a lender, or a deferred participation (guaranteed) loan initiated by a lender but a portion of which the SBA will purchase from the lender in the event of a borrower default. 13 C.F.R. § 120.2(a); see *Valley Nat'l Bank v. Abdnor*, 918 F.2d 128, 129 (10th Cir. 1990); *California Pac. Bank v. SBA*, 557 F.2d 218, 219 (9th Cir. 1977). In practice, however, the SBA ordinarily guarantees loans made by private lenders rather than disbursing funds directly to borrowers, see *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 719 (1979), thus “reduc[ing] risk for lenders ... mak[ing] it easier for them to access capital,” and thereby “mak[ing] it easier for small business to get loans.” See <https://www.sba.gov/funding-programs/loans>. See also Decl. of John A. Miller ¶¶ 3-4 (filed herewith) (“Miller Decl.”). Accordingly, a small business seeking a Section 7(a) loan typically submits its application to an authorized SBA lender, and if the lender concludes that the applicant meets SBA program requirements, and the lender wishes to make the loan, then the lender initiates the loan, submits a guarantee application to SBA, and, upon approval of that application, funds and services the loan. Miller Decl. ¶ 4.

Ordinarily, to qualify for an SBA general business loan an applicant must be an operating business organized for profit that is located in the United States, 13 C.F.R. § 120.100(a)-(c); meet the size standards for a “small” business set forth under the statute and SBA rules (usually stated in terms of number of employees, or average annual receipts), see 15 U.S.C. § 632(a)(2); 13 C.F.R. § 120.100(d); 13 C.F.R. Part 121; and demonstrate that the desired credit is not available elsewhere on reasonable terms, 15 U.S.C. § 632(h); 13 C.F.R. §§ 120.100(e), 120.101.

In addition, the Small Business Act requires that “[a]ll loans made under [Section 7(a)] shall be of such sound value or so secured as reasonably to assure repayment.” To give effect to this mandate, SBA requires that applicants meet standards of creditworthiness set forth at 13 C.F.R. § 120.150. These requirements were adopted to provide reasonable assurance that loans are repaid, and that

taxpayer funds are not expended unnecessarily to honor SBA guarantees on defaulted loans. *See* Miller Decl. ¶ 5. First among the factors that the SBA takes into account in evaluating a borrower's creditworthiness is the "[c]haracter, reputation and credit history of the applicant . . ., its Associates, and guarantors." *Id.* § 120.150(a). An "Associate" of a small business is defined under SBA regulations to include an officer, director, or more-than-20-percent owner of the business, or a key employee, among other individuals and entities. *Id.* § 120.10(2); *see also* Miller Decl. ¶ 5.

Furthermore, pursuant to the broad powers conferred on the Administrator by the Small Business Act to make rules and regulations, establish general policies, and take other actions deemed necessary or desirable in making SBA loans to small-business concerns, 15 U.S.C. §§ 633(d), 634(b)(6), (7); *supra* at 5, the SBA over time has determined as a matter of policy and experience that SBA business loans should not be made available to certain types of businesses, such as, for example, non-profit businesses, other lenders, businesses in which the lender owns an equity interest, and businesses that have previously defaulted on federal or federally assisted loans resulting in a loss to the Government. The types of business concerns deemed ineligible for SBA section 7(a) loans (18 in all) are listed at 13 C.F.R. § 120.110, and include, as relevant here, "[b]usinesses with an Associate who is incarcerated, on probation, on parole, or has been indicted for a felony or a crime of moral turpitude." *Id.* ¶ 120.110(n).

Although the SBA first issued this rule in January 1996, *see* 61 Fed. Reg. 3226 (Jan. 31, 1996), the policy against making (or guaranteeing) loans to businesses whose owners (or other Associates) are incarcerated, on probation or parole, or indicted for felonies extends back even farther, to the 1980s. Miller Decl. ¶ 7. Both the policy and the ensuing regulation are based on the concern that small businesses frequently decline when their owners are incarcerated, and as a result these businesses have difficulty repaying their loans. *Id.* Similarly, owners or other Associates who are on parole or probation, or who face felony charges, also present risks of incarceration that could lead to an

impairment of business operations and reduced ability to repay SBA-backed loans. *Id.* SBA therefore adopted the “criminal justice” restriction codified at 13 C.F.R. § 120.110(n), to safeguard against these risks, which are closely aligned with the creditworthiness and character concerns set forth in 13 C.F.R. § 120.150(a). Miller Decl. ¶ 7.²

The Coronavirus Aid, Relief, and Economic Stimulus (CARES) Act

On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Stimulus (“CARES”) Act, Pub. L. No. 116-136, 134 Stat. 281, passed by Congress to provide an unprecedented package of emergency economic assistance and other support to help individuals, families, businesses, and health-care providers cope with the enormous economic and public health crises triggered by the worldwide coronavirus (COVID-19) pandemic. *See* SBA, Interim Final Rule, *Business Loan Program Temporary Changes; Paycheck Protection Program*, 85 Fed. Reg. 20811, 20811-12 (Apr. 15, 2020) (“First PPP Interim Final Rule”) (Exh. 2, hereto); *see also, e.g.*, 166 Cong. Rec. H1732-01, 1820-24 (Mar. 27, 2020) (statements of Reps. Neal, Davis, and Mitchell); 166 Cong. Rec. S2059-01 (Mar. 25, 2020) (statement of Sen. Schumer); 166 Cong. Rec. S1862-02 (Mar. 20, 2020) (statement of Sen. McConnell). Among the numerous measures taken by the CARES Act to address the COVID-19 crisis, of principal concern here is the Paycheck Protection Program (“PPP”), CARES

² In accordance with 13 C.F.R. §§ 120.110(n) and 120.150(a), the SBA’s Standard Operating Procedure 50 10 5(K), *Lender & Dev. Co. Loan Programs* (“SOP 50 10 5(K)”) (relevant excerpts at Miller Decl., Exh. A), instructs lenders that “every proprietor, general partner, officer, director,” or other Associate of a business “must be of good character” for the business to qualify for a Section 7(a) loan. SOP 50 10 5(K) at 109. Lenders are further instructed that SBA financial assistance is unavailable to businesses with Associates who are (a) “[i]ncarcerated, on probation, or on parole”; or (b) “[c]urrently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction.” *Id.* at 110; *see* Miller Decl. ¶ 9. If an Associate has been arrested within six months prior to the application for any criminal offense, or for any offense has ever been convicted, pleaded guilty or nolo contendere, or been placed on probation, parole, or pre-trial diversion, then a character determination for the Associate is required to determine the business’s eligibility for a Section 7(a) loan. SOP 50 10 5(K) at 110; Miller Decl. ¶¶ 9-10 & Exh. B. Depending on the circumstances, a character determination can involve an FBI fingerprint background investigation, and take several weeks to complete. *See id.* ¶¶ 11-12 & Exh. C.

Act. § 1102, enacted to extend relief to small businesses experiencing economic hardship as a result of the public-health measures being taken to minimize the public’s exposure to the COVID-19 virus. *See* First PPP Interim Final Rule, 85 Fed. Reg. at 20811.

In particular, section 1102(a)(2) of the CARES Act adds a new paragraph (36) to section 7(a) of the Small Business Act, 15 U.S.C. § 636(a)(36), which provides that “[e]xcept as otherwise provided in this paragraph, the [SBA] may guarantee [PPP] covered loans under the same terms, conditions, and processes as a loan made under this subsection,” i.e., Section 7(a). 15 U.S.C. § 636(a)(36)(B) (emphasis added). The PPP then sets forth the precise ways in which PPP covered loans differ from other section 7(a) loans. *Id.* § 636(a)(36)(D)-(R). Among these differences, the PPP authorizes the SBA to make covered loans to various non-profit organizations, independent contractors, and self-employed individuals, as well as to small business concerns, *id.* § 636(a)(36)(D)(i), (ii); relaxes size limitations to allow businesses with as many as 500 employees (or more, depending on the industry in which they operate) to receive assistance, *id.* § 636(a)(36)(D)(i)(I); and selectively waives certain of the SBA’s affiliation rules used to make small business “size” determinations, *id.* § 636(a)(36)(D)(iv); *see* 13 C.F.R. Part 121. The PPP also expressly caps the chargeable rate of interest of a covered loan at four percent (SBA has further limited the rate to one percent), *id.* § 636(a)(36)(L); First PPP Interim Final Rule, 85 Fed. Reg. at 20813; and waives the “no credit elsewhere,” personal guarantee, collateral, and guaranteed loan fee requirements imposed under Section 7(a), SBA regulations, and SBA standard operating procedures. 15 U.S.C. § 636(a)(36)(h)-(J), (L).

The maximum amount of a PPP covered loan is the lesser of \$10,000,000 or an amount calculated as a multiple of the applicant’s average total monthly “payroll costs,” to which the balance of any outstanding disaster loans under 15 U.S.C. § 636(b)(2) may be added. *Id.* § 636(a)(36)(E); § 636(a)(36)(A)(viii)(I); *see* First PPP Interim Final Rule, 85 Fed. Reg. at 20812-13. The CARES Act requires that PPP loan proceeds be used for employee compensation, mortgage interest and/or rent,

utility costs, and interest on certain other debt obligations. 15 U.S.C. § 636(a)(36)(F). Section 1106 of the CARES Act provides for forgiveness of up to the full principal amount borrowed. CARES Act § 1106(b); First PPP Interim Final Rule, 85 Fed. Reg. at 20811, 20813. The actual amount forgiven will depend on a borrower's payroll costs and payments for rent, utilities, and mortgage interest. CARES Act § 1106(b) (1)-(4), (d); First PPP Interim Final Rule, 85 Fed. Reg. at 20813. No later than 90 days after the date on which the amount of forgiveness is determined, the SBA must remit to the lender the amount forgiven plus interest. CARES Act § 1106(c)(3).

Congress initially authorized the SBA to guarantee up to \$349 billion in PPP loans “[d]uring the period beginning on February 15, 2020 and ending on June 30, 2020[.]” CARES Act § 1102(b)(1). The Paycheck Protection Program and Health Care Enhancement Act, Pub. L. No. 116-139, 134 Stat. 620, § 101(a)(1), enacted on April 24, 2020, added another \$310 billion to the program on April 24, 2020, but did not extend the program's June 30, 2020, termination. The Paycheck Protection Program Flexibility Act of 2020, Pub. L. 116-142, 134 Stat. 641, enacted on June 5, 2020, makes certain amendments to the PPP's loan-forgiveness provisions, but also does not extend the June 30, 2020 PPP deadline. *See* 166 Cong. Rec. S2690, S2691 (letter for the record by Sens. Lee, Rubio, Johnson, and Cardin, and Reps. Phillips and Roy).

To expedite implementation of the PPP, the SBA significantly streamlined the loan application process ordinarily followed under the Section 7(a) program, allowing lenders to rely on borrower certifications of eligibility with only minimal documentary verification. First PPP Interim Final Rule, 85 Fed. Reg. at 20812, 20814, 20815; *see* Miller Decl. ¶ 15. Otherwise the PPP loan application process resembles the Section 7(a) process, *supra* at 6-8. A small business seeking a PPP loan submits an application to an authorized lender, which then determines the borrower's eligibility. If the lender wishes to make the loan, it submits a guarantee application to the SBA, and then disburses the loan proceeds if the guarantee application is approved. Miller Decl. ¶ 16.

To provide for immediate assistance to small businesses adversely affected by the COVID-19 crisis, the CARES Act directed the SBA to issue regulations implementing the PPP within 15 days of its enactment, without regard to the notice-and-comment requirements of the APA. CARES Act § 1114. Because the CARES Act authorizes the SBA to guarantee PPP loans under the same terms, conditions, and processes as Section 7(a) loans (except as otherwise provided by the CARES Act), 15 U.S.C. § 636(a)(36)(B), the SBA had to determine which terms, conditions, and procedures applied under the Section 7(a) program should be applied by regulation to the PPP. *See* Miller Decl. ¶¶ 17-18.

As relevant here, the SBA determined that a restriction for businesses with owners who are incarcerated, on probation, or parole, or charged with a crime, similar to the Section 7(a) restriction under 13 C.F.R. § 120.110(n), was also appropriate under the PPP, and for similar reasons, *supra* at 6-8. When one or more owners of a small business are incarcerated, frequently the operation of the business becomes impaired and it has difficulty repaying its loans, risking default. Business owners on parole or probation or facing criminal charges present a similar risk. Miller Decl. ¶¶ 18-19. SBA similarly determined that a reasonable assurance of applicants' good character, as required under Section 7(a) regulations, also remained necessary under the PPP to safeguard against the risk of fraud in the streamlined PPP application process, and misuse of PPP loan proceeds. *Id.* ¶ 20. SBA anticipated, however, that the expected huge volume of PPP loan applications could prolong the usual time required for individual character determinations by additional weeks or months. Because delays of that length would be incompatible with the need to make PPP loan eligibility determinations as expeditiously as possible, SBA adopted a bright-line rule under which an applicant would be ineligible for a loan if a 20-percent-or-more owner were convicted of a felony in the last five years. *Id.* ¶ 21.³

³ In reaching these conclusions, the SBA recognized that concerns about creditworthiness and repayment of PPP loans are less acute where borrowers can obtain loan forgiveness under CARES Act § 1106. But PPP loans may only be forgiven to the extent that borrowers expend the loan proceeds for payroll costs, mortgage interest and/or rent, and utilities in accordance with the

In accordance with these conclusions and policy determinations, SBA's First PPP Interim Final Rule provides that a business applying for a PPP loan is ineligible if

[a]n 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[.]

85 Fed. Reg. at 20812; *see* Miller Decl. ¶ 22.⁴

Because the terms of the CARES Act and the COVID-19 crisis both compelled immediate implementation of the PPP, SBA issued the First PPP Interim Final Rule in a matter of days, and solicited public comment on all aspects of the rule following its publication, with a commitment to considering “the need for making any revisions [to the rule] as a result of [the] comments” received. 85 Fed. Reg. at 20811; *see* Miller Decl. ¶ 23. SBA received a number of comments urging it to rescind or narrow the scope of the criminal justice restriction contained in the First PPP Interim Final Rule. *Id.* ¶¶ 25-26. Commenters proposed, for example, that the disqualification for businesses with owners convicted for a felony within the last five years be limited to convictions for fraud or other crimes directly related to trustworthiness for financial assistance. *Id.* ¶ 26.

After consideration of these comments, the agency decided “that a shorter [restriction] for felonies that do not involve fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance is more consistent with Congressional intent to provide relief to small businesses and also promotes the important policies underlying the First Step Act[.]” *See Business Loan Program Temporary Changes: Paycheck Protection Program, Additional Revisions to First*

requirements of section 1106. In cases where the proceeds have not been used as section 1106 specifies, the loans cannot be forgiven, *id.*, and borrowers' ability to repay the loans remains a matter of concern. *See* Miller Decl. ¶ 19.

⁴ The day following the publication of the First PPP Interim Final Rule on the SBA's website on April 2, 2020, SBA issued a PPP Borrower Application Form, SBA Form 2483 (4/20), that included two questions regarding the criminal histories of an applicant business's owners, to implement the criminal justice restriction contained in the Rule. Miller Decl. ¶ 24 & Exh. D.

[PPP] Interim Final Rule, 85 Fed. Reg. 36717, 36718 (June 18, 2020). SBA revised the criminal justice restriction contained in the First PPP Interim Final Rule accordingly, to provide that an applicant business is ineligible if

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 involving fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance within the last five years or any other felony within the last year[.]*

See id. (emphasis added); Miller Decl. ¶ 27.⁵

After giving still further consideration to these issues, the SBA determined that two additional modifications to the criminal justice exclusion were appropriate. Miller Decl. ¶ 29. First, SBA concluded that the restriction for business owners subject to criminal charges should be limited to charges for felony offenses, to align it with the restriction for prior convictions, which is also limited to convictions for felony offenses. *See Business Loan Program Temporary Changes: Paycheck Protection Program, Additional Revisions to First [PPP] Interim Final Rule*, <https://www.sba.gov/document/policy-guidance-ppp-interim-final-rule-additional-eligibility-revisions-first-interim-final-rule>, at 5 (posted June 24, 2020) (Miller Decl. Exh. F). Second, the agency concluded that the restriction for business owners on probation or parole should be limited to individuals whose term of probation or parole commenced within the last five years for any felony involving fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance, and within the last one year for other felonies, to align with the identical time restrictions applied to prior felony convictions. *Id.* at 6.⁶

⁵ A revised SBA Borrower Application Form, SBA Form 2483 (6/20) (revised June 11, 2020), was issued concurrently to reflect this change to the criminal justice restriction. Miller Decl. ¶ 28 & Exh. E.

⁶ To implement the June 24, 2020, revisions to the criminal justice exclusion, the SBA issued a revised SBA Borrower Application Form, SBA Form 2483, with corresponding revisions to question nos. 5 and 6. Miller Decl. ¶ 30 & Exh. G.

Plaintiffs and Their Claims

Plaintiff Altimont Mark Wilks is owner and operator of two sole proprietorship Plaintiffs, Carmen's Corner Store, which serves a low-income neighborhood in Hagerstown, Maryland, and Retail4Retail, a logistics business that delivers automotive products. *See* Wilks Decl. ¶¶ 1, 3, 5 (No. 20-cv-1736, Doc. 7-1, June 17, 2020). Mr. Wilks was placed on federal supervised release and parole with the State of Maryland on June 14, 2018; he completed his federal supervision on June 14, 2020, and his State parole ends in 2021. *Id.* ¶ 11. Mr. Wilks applied for a PPP loan (on behalf of Retail4Real) from AmeriServ Bank in Hagerstown, but on April 13 AmeriServ Bank denied the loan because he answered "yes" to the application's questions (5) and (6). *Id.* ¶¶ 9-11.

Plaintiff Sekwan Merritt is a State licensed electrician who started Prop Prep Properties LLC, doing business as Lightning Electric in Baltimore. *See* Merritt Decl. ¶¶ 4-5 (No. 20-cv-1838, Doc. 1-4, June 16, 2020). Mr. Merritt served five years in prison (2012 to 2017), and is on parole until 2022, based on a 2012 plea of guilty on charges of possession and possession with intent to distribute narcotics in Circuit Court for Baltimore County. *Id.* ¶ 8. After Lightning Electric suffered COVID-related losses (*id.* ¶ 17), Mr. Merritt applied on April 15, 2020 for a PPP loan through a bank, Wells Fargo, and the application software program informed him that his "application cannot be processed at this time" after he answered yes to questions about his criminal history (*id.* ¶¶ 18-21).

Plaintiff John D. Garland is a graphic designer who owns and operates Sign Me Up Bethpage, Inc. d/b/a Fastsigns 2323 ("Fastsigns Bethpage"). *See* Garland Decl. ¶¶ 4-6 (No. 20-cv-1838, Doc. 1-8, June 16, 2020). Mr. Garland was incarcerated between 1987 and 2003. *Id.* ¶ 4. In October 2019 he was charged with a domestic violence offense, and the case was adjourned in contemplation of dismissal in December 2019, with entry of a limited order of protection against him. *Id.* ¶ 9. Also in December 2019, he was charged with petit larceny, a misdemeanor offense, and Mr. Garland pleaded not guilty. *Id.* ¶¶ 10-11. After Fastsigns Bethpage suffered COVID-related losses (*id.* ¶¶ 22-24), Mr.

Garland applied on April 10, 2020 for a PPP loan, but did not complete the application “because it would clearly be denied” given that the application states that if two questions about criminal history are answered “yes,” “the loan will not be approved” (*id.* ¶ 29).

Although the Plaintiff businesses owned by Messrs. Merritt, Garland, and Wilks each were denied PPP loans based on their criminal justice histories, under then-existing rules governing the applications, the SBA has recently amended those rules. The restriction for business owners on parole applies only to persons whose terms of parole began within the last five years for felonies involving fraud, bribery, embezzlement, or false statements in loan applications or an applications for federal financial assistance, and within one year for other felonies. *See* Miller Decl. Exh F. at 6-7. The restriction for business owners facing charges now applies only to felonies, not to misdemeanors. If the individual Plaintiffs’ businesses were therefore to apply now for PPP loans, they would not be denied based on the criminal justice restriction as it now exists. Moreover, to ensure that the individual Plaintiffs and Plaintiff businesses encounter no further difficulties on account of the criminal justice restriction, the SBA has offered to contact their lenders and advise them that the Plaintiff businesses should not be denied PPP loans on the basis of the restriction. *See* Decl. of James J. Gilligan (“Gilligan Decl.”) (filed herewith) ¶¶ 2-3 & Exhs. 1-2.

Other than the individual Plaintiffs and the businesses they operate, the sole remaining Plaintiff is Defy Ventures, Inc. (“Defy”)—a non-profit organization that alleges its “mission is to use entrepreneurship and employment as tools for currently and formerly incarcerated individuals to address the social problems of mass incarceration and recidivism” (Defy Compl. ¶ 21). Defy does not allege that it applied for or was denied a PPP loan. Defy instead claims that responding to questions about the criminal justice restriction by graduates of its entrepreneurial training programs resulted in a diversion of its resources. (*Id.* ¶¶ 119-23.)

Plaintiffs' complaints allege that the SBA's criminal history restriction in the First PPP Interim Final Rule is invalid under various theories. In particular, the Defy Ventures Complaint alleges that the criminal history restriction is (1) in excess of statutory authority and not in accordance with law under 5 U.S.C. § 706(2)(A), (C) (Count I, Defy Compl. ¶¶ 125-30); (2) arbitrary and capricious under 5 U.S.C. § 706(2)(A) (Count II, Defy Compl. ¶¶ 131-37); and (3) without observance of procedure under 5 U.S.C. § 706(2)(D) (Count III, Defy Compl. ¶¶ 138-45).

The first two counts of the Carmen's Corner Store Complaint resemble those of the Defy Ventures Complaint: Count I (Carmen's Corner Store Compl. ¶¶ 116-30) alleges a violation of § 706(2)(C), and Count II (Carmen's Corner Store Compl. ¶¶ 131-42) alleges the challenged restriction is arbitrary and capricious. The Carmen's Corner Store Complaint adds two additional theories, alleging a claim that SBA has unlawfully withheld agency action under 5 U.S.C. § 706(1) (Count III, Carmen's Corner Store Compl. ¶¶ 143-49), and a claim seeking a writ of mandamus (Count IV, Carmen's Corner Store Compl. ¶¶ 150-56).

LEGAL STANDARD

A temporary or preliminary injunction is an "extraordinary and drastic remedy" that is "never awarded as of right," *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008), and "may only be awarded upon a clear showing that the plaintiff is entitled to such relief," *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *see also DiBiase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017) ("A preliminary injunction is an extraordinary remedy" that "shall be granted only if the moving party clearly establishes entitlement to relief."). A plaintiff seeking a temporary or preliminary injunction must show that (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *Winter*, 555 U.S. at 20; *DiBiase*, 872 F.3d at 230. The last two factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009).

While a plaintiff need not establish a ‘certainty of success,’ [he] must make a clear showing that he is likely to succeed at trial.” *DiBiase*, 872 F.3d at 230 (quoting *Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013)). “Similarly, a plaintiff must demonstrate more than just a ‘possibility’ of irreparable harm” to obtain a temporary or preliminary injunction. *Id.* “Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent” with the requirement that such extraordinary relief “be awarded [only] upon a ‘clear showing’” of entitlement. *Winter*, 555 U.S. at 22. Rather, the movant must establish that irreparable harm is “*likely* in the absence of an injunction.” *Id.*

For the reasons that follow, the Plaintiffs, who no longer face denial of PPP financing because of the criminal justice restriction, have not carried these heavy burdens.

ARGUMENT

I. PLANTIFFS LACK ARTICLE III STANDING

Plaintiffs’ claims are unlikely to succeed for the threshold reason that none of the Plaintiffs has standing to seek injunctive relief against the revised criminal justice restriction.

To establish Article III standing, a plaintiff must establish (1) that he has “suffered an injury in fact . . . which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical”; (2) a sufficient “causal connection between the injury and the conduct complained of”; and (3) a “likel[i]hood” that “the injury will be redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotation marks and citations omitted). The plaintiff must “demonstrate standing separately for each form of relief sought.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (citation omitted). Furthermore, to seek injunctive relief, the plaintiff must establish a present injury or an “actual and imminent”— not “conjectural”—threat of future injury. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). To assess the Article III standing of an organizational plaintiff, the Court “must conduct

the same inquiry as in the case of an individual.” *Lane v. Holder*, 703 F.3d 668, 674 (4th Cir. 2012) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982)).

A. The Individual Plaintiffs and Plaintiff Businesses Are Not Injured by the Revised Criminal Justice Restriction.

No individual Plaintiff faces continuing or future injury from the challenged criminal justice restriction because, as revised through the amendments to the First PPP Interim Final Rule of June 24, 2020, the restriction does not bar PPP loans to the individual Plaintiffs given how long ago Plaintiffs Wilks and Merritt were placed on parole, and given that Mr. Garland faces only misdemeanor charges. Accordingly, the individual Plaintiffs and the businesses they own or operate lack Article III standing to litigate the alleged claims in the Complaints. “A case becomes moot—and therefore no longer a ‘Case’ or ‘Controversy’ for purposes of Article III—when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (internal quotation marks omitted); *see also Williams v. Griffin*, 952 F.2d 820, 823 (4th Cir. 1991) (prisoner transfer mooted Eighth Amendment claims for injunctive and declaratory relief).

B. Defy Ventures Lacks Injury-In-Fact Because The Challenged Conduct Does Not Harm Its Activities.

Defy Ventures, Inc. (“Defy”)—a non-profit organization that alleges its “mission is to use entrepreneurship and employment as tools for currently and formerly incarcerated individuals to address the social problems of mass incarceration and recidivism” (Defy Compl. ¶ 21)—has failed to sufficiently show an injury-in-fact to itself. Defy’s CEO, Andrew Glazier, describes the organization’s responses to the effects of the pandemic and the challenged PPP rules on the graduates of Defy’s programs. *See* Defy Mem. 11-12; Glazier Decl. ¶¶ 20-34. In particular, Glazier states that Defy staff spent “thirty hours minimum” (Glazier Decl. ¶ 32) on studying the pertinent PPP application forms to advise the graduates about them (*id.* ¶¶ 23-27) and on seeking alternative funding sources for the graduates (*id.* ¶¶ 28-31). The challenged rules “caused a significant diversion of [Defy’s] resources,”

Glazier asserts, because “had the SBA not excluded [Defy’s] graduates” from participation in the PPP, the organization “would have instead devoted this time and energy to our previously-planned programming and training activities.” *Id.* ¶ 32. Furthermore, Glazier asserts that the challenged PPP rules “impede[] the ability of Defy . . . to accomplish its mission” by reducing graduate access to funding and by “reinforc[ing]” the notion, which Defy opposes, “that an individual’s criminal history should . . . hold them back from economic success.” *Id.* ¶¶ 33-34.

Those assertions do not describe an injury-in-fact because they do not show that the challenged PPP rules “perceptibly impaired [the organization’s] ability to provide” services to its graduates. *See Lane*, 703 F.3d at 674 (quoting *Havens*, 455 U.S. at 379). Rather, Defy’s decisions to provide advice to its graduates about the PPP and to seek alternate funding sources for the graduates were voluntary choices about how to spend its time and money. Such a “diversion of resources,” the Fourth Circuit has held, is not an injury-in-fact to the organization because “it results not from any actions taken by [the defendant], but rather from the [organization’s] own budgetary choices.” *Lane*, 703 F.3d at 675 (internal quotation marks omitted). So holding, the Fourth Circuit has rejected the contention, akin to Defy’s, that an “organization that decides to spend its money on educating members, responding to member inquiries, or undertaking litigation in response to legislation suffers a cognizable injury,” because that would confer standing on “organizations with merely ‘abstract concern[s] with a subject that could be affected by an adjudication.’” *Id.*, 703 F.3d at 675 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976)); *cf. Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (*per curiam*) (no litigant “can be heard to complain about damage inflicted by its own hand”). Nor can Defy establish an injury-in-fact to the organization from the alleged conflict between SBA’s acts and Defy’s broad purposes of increasing access to funding for its graduates and of combatting the effects of criminal history on post-incarceration income. *See Md. Highways Contractors Ass’n, Inc. v.*

Maryland, 933 F.2d 1246, 1250-51 (4th Cir.1991) (“non-economic injury” to entity’s “organizational purpose” produced by challenged statute is insufficient to confer Article III standing).

C. All *Defy Ventures* Plaintiffs Lack Redressability Because Their Requested Injunction Seeks Impermissible Structural Relief

The *Defy* Plaintiffs also lack standing because the equitable relief they seek would not redress their alleged injuries. Because a federal court “is not the proper forum to press general complaints about the way in which government goes about its business,” the “[c]ase-or-controversy considerations . . . ‘obviously shade into those determining whether the complaint states a sound basis for equitable relief,’” so those equitable relief requirements “should therefore inform our judgment about whether [challengers] have standing.” *Allen v. Wright*, 468 U.S. 737, 760-61 (1984) (quoting *Lyons*, 461 U.S. at 112, and *O’Shea v. Littleton*, 414 U. S. 488, 499 (1974)). In particular, the “pervasive and fundamental” doctrine of separation of powers “counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek *a restructuring of the apparatus* established by the Executive Branch to fulfill its legal duties.” *Allen*, 468 U.S. at 752, 761 (emphasis added). The *Defy* Plaintiffs seek an injunction that would not confine relief to the grievance of any particular, identified loan applicant before the Court, but rather would “restructur[e]” the “apparatus established by the Executive Branch to fulfill its legal duties” under the CARES Act in implementing PPP loans—in particular, by extending the June 30, 2020, termination date that Congress specified for the PPP, and by requiring the Government to ensure the availability of funds for PPP loans beyond that Congressionally-prescribed deadline. *Defy Compl.* at 36 ¶¶ C, D (Prayer for Relief).

Because granting such relief would sweep beyond the particular dispute presented by the individuals before the Court, it would not *redress* any injury-in-fact to Plaintiffs. Instead, the *Defy* Plaintiffs’ conception of redressability defies the established principles that the Article III judicial power does not include the “amorphous general supervision of the operations of government” (*Raines*

v. Byrd, 521 U.S. 811, 829 (1997)) and does not contemplate courts serving as “virtually continuing monitors of the wisdom and soundness of Executive action” (*Laird v. Tatum*, 408 U.S. 1, 15 (1972)).

II. SBA IS LIKELY TO SUCCEED ON THE MERITS.

A. The Challenged Requirements In The Interim Final Rule Are Consistent With Statutory Authority

Even if this case still presented a justiciable Article III case or controversy, Plaintiffs still would lack a likelihood of success on the merits. Their principal claim (*Carmen’s Corner* Mem. at 14-20; *Defy* Mem. at 12-25), which challenges the SBA’s statutory authority to issue the criminal justice restriction on PPP loan applications (most recently revised on June 24, 2020) under the “deferential review” framework of *Chevron, USA, Inc. v. NRDC*, 467 U.S. 837 (1984). See *Montgomery Cty., Md. v. F.C.C.*, 811 F.3d 121, 129 (4th Cir. 2015). When applying that framework, the reviewing court “initially examine[s] the statute’s plain language; if Congress has spoken clearly on the precise question at issue, the statutory language controls. If, however, the statute is silent or ambiguous,” then the reviewing court “defer[s] to the agency’s interpretation if it is reasonable.” *Barabona v. Holder*, 691 F.3d 349, 354 (4th Cir. 2012) (internal quotation marks omitted). Here, the SBA prevails at either step: First, the text of the CARES Act fully supports the agency’s position. And, second, even if the statutory text were ambiguous, the SBA’s construction is reasonable.

1. Congress explicitly placed the PPP under the SBA’s existing Section 7(a) loan program, and stated that PPP loans are to be provided “under the same terms, conditions, and processes” as other Section 7(a) loans unless otherwise specified. CARES Act, § 1102(a), 134 Stat. at 287 (codified at 15 U.S.C. § 636(a)(36)(B)). Congress enumerated several restrictions in the CARES Act that, although applicable to ordinary Section 7(a) loans, shall not apply to Paycheck Protection Program loans. See, e.g., *id.* § 1102(a), 134 Stat. at 288 (codified at 15 U.S.C. § 636(a)(36)(D)). For example, “non-profits” are excluded from Section 7(a) loans under 13 C.F.R. § 120.110(a), but Congress expressly allowed certain non-profits to receive PPP loans, see 15 U.S.C. § 636(a)(36)(D)(i). In addition, the SBA may

not offer “financial assistance” under the Section 7(a) program “if the applicant can obtain credit elsewhere” (15 U.S.C. § 636(a)(1)(A)(i)), but Congress expressly lifted that restriction for PPP purposes (*see id.* § 636(a)(36)(I)). Congress also expressly lifted the application of affiliation rules which ordinarily apply to determine eligibility for Section 7(a) loans, *see id.* § 636(a)(36)(D)(iv); and the collateral and personal guarantee requirements on which Section 7(a) loan assistance is typically conditioned, *id.* § 636(a)(36)(J).

Congress did not, however, waive or condition SBA’s obligation under Section 7(a) to assure that “[a]ll loans made under [Section 7(a)],” of which the PPP is a part, “shall be of such sound value or so secured as reasonably to assure repayment.” 15 U.S.C. § 636(a)(6). Nor did Congress bar application of longstanding SBA rules giving effect to this statutory requirement. Congress did not bar reliance on the criminal justice restriction codified at 13 C.F.R. § 120.110(n), which, as relevant here, bars loans to “[b]usinesses with an Associate who is incarcerated, on probation, on parole, or has been indicted for a felony or a crime of moral turpitude.” *Id.* ¶ 120.110(n). And Congress likewise did not prohibit application of the SBA’s standards of creditworthiness at 13 C.F.R. § 120.150, under which SBA’s evaluation of a borrower’s creditworthiness begins with assessing the “[c]haracter, reputation and credit history of the applicant . . . , its Associates, and guarantors.” *Id.* § 120.150(a). The SBA accordingly has express statutory authority to apply those pre-existing limitations (not altered by Congress) to the PPP, consistent with the plain text of the CARES Act, in which Congress stated that, “[e]xcept as otherwise provided,” “the [SBA] Administrator *may* guarantee” PPP loans “under the *same* terms, conditions, and processes” as other Section 7(a) loans. *See* CARES Act, § 1102, 134 Stat. at 287 (codified at § 636(a)(36)(B)) (emphases added).

Given that Congress expressly lifted particular Section 7(a) limitations for PPP purposes, but did not lift the “sound value” requirement of Section 7(a), the SBA’s Section 7(a) criminal justice restriction, or its creditworthiness standards, and given also Congress’s grant of authority to SBA to

adhere to Section 7(a) “terms, conditions, and processes” except where the CARES Act itself “provided,” it follows that under the PPP the SBA retained authority to impose “criminal justice” and creditworthiness “terms, conditions, and processes” similar to those that govern Section 7(a) loans. *See Russello v. United States*, 464 U.S. 16, 23 (1983) (“[I]t is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion” of statutory provisions, particularly in the same Act) (quotation marks omitted). Thus, it was well within the rulemaking authority conferred on the SBA by section 1114 of the CARES Act to craft a tailored version of those limitations to ensure the soundness of loans issued under the PPP. Miller Decl. ¶ 5.

Plaintiffs’ contrary contention (Carmen’s Corner Mem. at 14-17; Defy Mem. 14-15) revolves around an “isolated provision[]” of the CARES Act—namely, the provision of the CARES Act, § 1102(a), 134 Stat. at 288, codified at 15 U.S.C. § 636(a)(36)(D)(i)(I)—and therefore would contravene the “duty to construe statutes, not isolated provisions.” *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995)). Plaintiffs’ arguments track *DV Diamond Club of Flint, LLC v. U.S. Small Bus. Admin.*, No. 20-cv-10899, 2020 WL 2315880, at *10-11 (E.D. Mich. May 11, 2020) (*Diamond Club*), *appeal filed*, No. 20-1437, 2020 WL 2988528 (6th Cir. May 15, 2020), but as more recently explained in *Diocese of Rochester v. SBA*, No. 20-cv-4243, 2020 WL 3071603, at *6-7 (W.D.N.Y. June 10, 2020), the *Diamond Club* rationale is wrong.

Section 636(a)(36)(D)(i) provides that “[d]uring the covered period [February 15 to June 30, 2020], in addition to small business concerns, any business concern, nonprofit organization, veterans organization, or tribal business concern . . . shall be eligible to receive a covered loan” if the business employs fewer than 500 employees, or otherwise meets alternative size standards established by the SBA for a particular industry. According to Plaintiffs, because, under § 636(a)(36)(D)(i)(I), “in addition to small business concerns, *any* business concern . . . shall be eligible to receive a covered

loan” if they meet the size standards specified in that provision, “Congress did not intend there to be any other criteria for loan guarantee eligibility” under the CARES Act. Defy Mem. 23 (quoting *Diamond Club*, 2020 WL 2315880, at *10). But as explained above, the SBA under the Small Business Act may ordinarily provide Section 7(a) loans only to “small business concerns.” *See* 15 U.S.C. 636(a) (“The [SBA] is empowered ... to make loans to any small business concern”). The term “small business concerns” is defined by reference to size restrictions. *See* 15 U.S.C. § 632(a)(1)-(2) (defining “small business concerns”); 13 C.F.R. § 121.101(a) (“SBA’s size standards define whether a business entity is small and, thus, eligible for Government programs and preferences reserved for ‘small business’ concerns.”); 13 C.F.R. Part 121 (establishing size standards). Congress sought to ease those size restrictions in the CARES Act, and thus provided in § 636(a)(36)(D)(i) that, “in addition to small business concerns, any business concern . . . shall be eligible to receive a covered loan” if the business has fewer than 500 employees, or qualifies under industry-specific rules. *See* 15 U.S.C. § 636(a)(36)(D)(i). In short, Congress in § 636(a)(36)(D)(i) explicitly lifted certain size restrictions that ordinarily constrain the SBA from lending to larger businesses, allowing such businesses to qualify for PPP loans. *See Diocese of Rochester*, 2020 WL 3071603, at *6.

But the Congressional relaxation of size restrictions for PPP loans in a provision of the CARES Act does not suggest that Congress intended for size to be the *only* restriction on eligibility for those loans. *See id.* (rejecting contention that “in expanding the size restrictions, Congress unambiguously provided that there could be no other eligibility criteria”). To the contrary, § 636(a)(36)(D)(i) is just one of several provisions that adjust requirements that ordinarily apply to determine eligibility for Section 7(a) loans, as discussed. *See, e.g., id.* § 636(a)(36)(ii) (permitting sole proprietors and independent contractors to receive PPP loans); *id.* § 636(a)(36)(I) (waiving the no “credit elsewhere” requirement); *id.* § 636(a)(36)(J) (waiving collateral and personal guarantee requirements). Those additional provisions “clearly anticipate the existence of additional eligibility

criteria” beyond the size requirement. *Diocese of Rochester*, 2020 WL 3071603, at *7. If Plaintiffs were correct, those other provisions would be superfluous because Congress would have already made clear that the SBA may not impose any eligibility requirements other than § 636(a)(36)(D)(i)’s size requirements. *See Barabona*, 691 F.3d at 355 (applying “canon against interpreting any statutory provision in a manner that would render another provision superfluous”) (quoting *Bilski v. Kappos*, 561 U.S. 593, 607-08 (2010)); *see also Diocese of Rochester*, 2020 WL 3071603, at *7. And, again, the CARES Act provides that, except for enumerated adjustments, PPP loans may be guaranteed “under the same terms, conditions, and processes as” an ordinary Section 7(a) loan. *See* 15 U.S.C. § 636(a)(36)(B).

Nor does the phrase “*any* business concern” in § 636(a)(36)(D)(i) dictate the outcome urged by Plaintiffs. *Defy* Mem. 14, 16-18; *Diamond Club*, 2020 WL 2315880, at *10-11. Plaintiffs fail to respect the Supreme Court’s admonition that “any” means “different things depending upon the setting.” *Nixon v. Mo. Mun. League*, 541 U.S. 125, 132 (2004). As set forth above, Congress used the phrase “any business concern” in § 636(a)(36)(D)(i) to modify the defined term “small business concerns,” thereby relaxing the business size restrictions that would ordinarily prohibit the SBA from lending to larger institutions. The phrase “any business concern” in that context cannot be understood to mean that the SBA must lend to *all* businesses so long as they meet the size requirement, thereby transforming size into the only relevant consideration for PPP eligibility. “[E]ven though the word ‘any’ demands a broad interpretation, we must look beyond that word itself” to its context, and Plaintiffs therefore err “in placing dispositive weight on the broad statutory reference to ‘any’” business concern “without considering the rest of the statute.” *Small v. United States*, 544 U.S. 385, 388 (2005) (quoting *United States v. Alvarez-Sanchez*, 511 U.S. 350, 357 (1994)); *cf. Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012) (meaning of “any” is “expansive” but not “transformative”).

Plaintiffs’ approach would also yield “strange and indeterminate results” characteristic of a mistakenly broad application of the term “any.” *See Nixon*, 541 U.S. at 132-33; *see also Small*, 544 U.S.

at 388-94 (term “any court” in 18 U.S.C. § 922(g)(1) was limited to domestic courts because, *inter alia*, including foreign courts would create anomalies that Congress could not have intended). Congress and the SBA have placed several restrictions on eligibility for Section 7(a) loans. For example, Congress has expressly prohibited SBA loans to businesses that are “engaged in the production or distribution of any product or service that has been determined to be obscene by a court of competent jurisdiction.” 15 U.S.C. § 633(e). The SBA has by regulation prohibited its loans to businesses primarily engaged in political and lobbying activities (*see* 13 C.F.R. § 120.200(r)), consistent with “Government-wide Federal policy that Federal funds not be used for lobbying or political activities because to do so would not be an appropriate or cost-effective use of Federal tax dollars” (51 Fed. Reg. 37,580, 37,589 (Oct. 23, 1986)). The SBA has similarly determined that its funds should not go to private clubs that restrict membership (13 C.F.R. § 120.200(i)); or “[p]yramid sale distribution plans” (13 C.F.R. § 120.200(f)). Under Plaintiffs’ approach, those and other restrictions cannot apply to PPP loans because Congress made size the only pertinent limitation. But there is no basis for concluding that Congress found it necessary or appropriate in the public interest to compel the SBA to make such dramatic departures from the Government’s longstanding policies against financial assistance to businesses falling into these categories. *See Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001) (“Congress . . . does not . . . hide elephants in mouseholes.”); *Jones v. United States*, 526 U.S. 227, 234 (1999) (“Congress is unlikely to intend radical departures from past practice without making a point of saying so.”). “The Court [should] not presume that simply by using the phrase ‘any business’ concern in one part of the CARES Act, Congress meant to implicitly eliminate the long-standing . . . requirements for Section 7(a) loans.” *Diocese of Rochester*, 2020 WL 3071603, at *7 (citing *Jones*).⁷

⁷ Contrary to Plaintiffs’ contention (Defy Mem. 14, 16-17), neither the treatment of the word “any” in *SAS Institute, Inc. v. Iancu*, 138 S. Ct. 1348 (2018), nor the treatment of the word “shall” in *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969 (2016), could justify ignoring the “strange results” that would follow from Plaintiffs’ interpretation of the CARES Act. *Nixon*, 541 U.S. at 132-

For those reasons, the Court need not go beyond *Chevron*'s first step, because the text of the CARES Act unambiguously confers discretion on the SBA to impose the criminal justice restriction in the Interim Final Rules, which is derived from the pre-existing limitations on Section 7(a) loans in 13 C.F.R. § 120.110(n) and 13 C.F.R. § 120.150.

2. In any event, even if the CARES Act were silent or ambiguous on the SBA's authority to impose the criminal justice restriction, the reasons discussed above are more than sufficient for the Court to uphold the Agency at *Chevron*'s second step—so Plaintiffs again lack success on the merits. For the reasons set forth above, the Agency's application of a variation of its longstanding criminal justice restriction and character requirements to the PPP is, at a minimum, a "permissible construction of the statute" (*Montgomery Cty.*, 811 F.3d at 130 (internal quotation marks omitted)), which the reviewing court will "uphold . . . even if it is not the interpretation [the court] would have given to the same statute" (*Kofa v. INS*, 60 F.3d 1084, 1088 (4th Cir. 1995) (*en banc*) (citing *Chevron*, 467 U.S. at 843 n.11)); *see also Diocese of Rochester*, 2020 WL 3071603, at *8-9 (upholding SBA bankruptcy exclusion for PPP loans at *Chevron* Step Two).⁸

33. *SAS Institute* involved a procedure for U.S. Patent Office review of the patentability of certain claims under the Patent Act; the Court concluded that the direction in 35 U.S.C. 318(a) to the Patent Office to decide "the patentability of *any* patent claim challenged by the petitioner" means that the Patent Office lacks discretion to decide "*every* claim the petitioner has challenged." *See* 138 S. Ct. at 1354-56. *Kingdomware* involved a statutory preference for awarding contracts based on competition restricted to veteran-owned small businesses (called the Rule of Two), 38 U.S.C. § 8127(d). That provision requires that "a contracting officer . . . shall award contracts" to veteran-owned small businesses using restricted competition whenever the Rule of Two is satisfied, "[e]xcept as provided in subsections (b) and (c)." The Government argued that it was permissible for the Veterans Administration to place orders under preexisting Federal Supply Schedule contracts without first applying the Rule of Two, but the Court held instead that "Section 8127(d)'s text unambiguously requires . . . use [of] the Rule of Two before contracting under the competitive procedures." 136 S. Ct. at 1976-77. In drawing "the usual inference" that the statute's distinction between "shall" and "may" meant that the Rule of Two was nondiscretionary, the Court noted that the Federal Circuit's contrary approach below "would produce an anomaly." *Id.* at 1978. Here, as explained, it is Plaintiffs' argument that would produce multiple anomalies that neither *SAS Institute* nor *Kingdomware* involved.

⁸ In *Diamond Club*, a divided panel of the Sixth Circuit denied the SBA a stay pending its appeal from the District Court's preliminary injunction, under a standard of review "highly deferential" to the District Court. *DV Diamond Club of Flint, LLC v. U.S. Small Bus. Admin.*, 2020 WL 2988528, at *2

Although Plaintiffs couch their contentions as addressing only *Chevron's* first step (Defy Mem. 13), insofar as they allege that certain individual legislators have set forth “criticism” of the SBA’s approach to the criminal justice restriction (Mem. 9 (citing Compl. ¶¶ 52-55), such “criticism” cannot undermine the reasonableness of the Agency’s interpretation at *Chevron's* second step. “We give ‘little weight,’” the Fourth Circuit has explained, “to such post-enactment statements by legislators.” *Mylan Pharms., Inc. v. U.S. FDA*, 454 F.3d 270, 275 (4th Cir. 2006) (quoting *Kofa*, 60 F.3d at 1089); see 2B Norman J. Singer, *Sutherland Statutory Construction* § 49.06, at 59 (5th ed. 1992) (“Little weight is given to postenactment statements by members of Congress.”). In any event, the SBA’s refinements of the criminal justice restriction over several amendments to the First PPP Interim Final Rule, as described in the Miller Declaration, has aimed to meet the concerns of commenters while preserving the soundness of PPP loans.. See, e.g., Miller Decl. ¶¶ 25-30. SBA’s willingness to refine its approach in response to these public expressions of concern certainly does not supply a basis for holding that the Agency’s solution to the practical problem presented when applicants with criminal charges or convictions seek PPP loans was an unreasonable interpretation of the CARES Act.

B. The Criminal Justice Exclusion Is the Product of Reasoned Agency Decisionmaking and Is Not Arbitrary and Capricious.

Plaintiffs next maintain that the inclusion of the criminal justice restriction in the First PPP Interim Final Rule was arbitrary and capricious within the meaning of the APA. Carmen’s Corner Mem. at 20-26; Defy Ventures Mem. at 25-29. This claim also lacks merit and is unlikely to succeed on the merits.

(6th Cir. May 15, 2020) (quoting, *inter alia*, *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000)). The panel majority remarked that “[t]he Act’s specification that ‘any business concern’ is eligible, so long as it meets the size criteria, is a reasonable interpretation.” *Id.* (emphasis added) But even if the district court’s interpretation was a reasonable one, that does not mean that the SBA’s is unreasonable, nor did the panel majority say so. Hence, the Sixth Circuit’s stay ruling cannot be taken to have rejected the SBA’s interpretation under *Chevron's* second step. See, e.g., *Montgomery Cty.*, 811 F.3d at 133 (challengers failed to meet their burden at *Chevron* Step Two of showing agency interpretation was “an unreasonable interpretation of the Spectrum Act”).

When a court reviews agency action under the arbitrary and capricious standard, “the scope of [the court’s] review is a narrow one.” *Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 282, 287 (4th Cir. 1999); *see also Appalachian Voices v. State Water Control Board*, 912 F.3d 746, 753 (4th Cir. 2019); *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 177 (2009). The agency must show that it “examined ‘the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.’” *Appalachian Voices*, 912 F.3d at 753 (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)). “Agency action is arbitrary and capricious if the agency relies on factors that Congress did not intend for it to consider, entirely ignores important aspects of the problem, explains its decision in a manner contrary to the evidence before it, or reaches a decision that is so implausible that it cannot be ascribed to a difference in view.” *Id.*

The standard of review, however, “is highly deferential, with a presumption in favor of finding the agency action valid[.]” so long as the agency “has examined the relevant data and provided an explanation of its decision that includes a rational connection between the facts found and the choice made.” *Id.*; *see also Aracoma Coal*, 556 F.3d at 192. Although a reviewing court must engage “in a searching and careful inquiry of the record” to “educate” itself about the problem confronting the agency, the evidence before it, the questions it did and did not address, and the choices open to it, *Aracoma Coal*, 556 F.3d at 192-93; *AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 733 (4th Cir. 2009), the court “is not empowered to substitute its judgment for that of the agency,” *Hughes River Watershed Conservancy*, 165 F.3d at 287; *see also Appalachian Voices*, 912 F.3d at 753; *Aracoma Coal*, 556 F.3d at 192. The court “look[s] only to see if [the agency has made] a “clear error of judgment.”” *Hughes River Watershed Conservancy*, 165 F.3d at 287 (quoting *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989)); *Aracoma Coal*, 556 F.3d at 192.

Plaintiffs are not likely to succeed in demonstrating that the SBA's decision to include a criminal justice restriction in the First PPP Interim Final Rule was arbitrary and capricious under these standards. As discussed above, the PPP is an extension of the SBA's Section 7(a) loan authority, under which the SBA is statutorily obligated to ensure that the loans it guarantees are of "sound value." 15 U.S.C. § 636(a)(6). To carry out that legislative mandate, it adopted a criminal justice restriction against Section 7(a) financial assistance for businesses with owners or Associates who are incarcerated, on probation or parole, or indicted for felonies, because of the greater credit risk those businesses represent. *Supra* at 6-8; Miller Decl. ¶¶ 6-7. It also adopted policies and procedures to ensure that owners and Associates of Section 7(a) loan applicants who have ever been convicted (or placed on parole, probation, or pretrial diversion) for a criminal offense are of good character. *Supra* at 6-8; Miller Decl. ¶ 8; *see also id.* ¶ 5.

The CARES Act, which authorizes the SBA to guarantee PPP loans under the same terms, conditions, and procedures as Section 7(a) unless the Act states otherwise, 15 U.S.C. § 636(a)(36)(B), does not direct the SBA to ignore its statutory mandate to guarantee only sound loans, or to disregard the policies and procedures it has developed over time to achieve that legislative objective. In exercise of the discretion the SBA is thus granted under the Act, SBA determined, in consultation with the Department of the Treasury, that it remained necessary to include a criminal justice restriction under the PPP, similar to the restriction under the Section 7(a) program, both to avoid the risk of default that arises when businesses' owners are incarcerated (or face a threat of incarceration), and to direct PPP loan funds to businesses that are most able to support jobs. *Supra* at 11-14; Miller Decl. ¶¶ 18-21. In reaching these conclusions, the SBA recognized that the possibility of loan forgiveness may reduce concerns about repayment and creditworthiness to some extent, but because loan forgiveness is unavailable to businesses that do not spend loan proceeds to pay their employees (or other expenses

authorized under CARES Act § 1106), the agency concluded that borrowers' ability to repay their loans remained an important concern. *Supra* at 11-12; Miller Decl. ¶ 19.

The SBA also determined that a means of assuring good character was needed when business owners seeking PPP assistance have criminal histories. *Supra* at 11-12; Miller Decl. ¶ 20. It reasoned that an assurance of good character was necessary to reduce the risk of fraud in the streamlined PPP application process, and the risk that borrowers would not expend PPP loan proceeds to meet payroll costs, as Congress intended under the CARES Act. *Supra* at 11-12; Miller Decl. ¶ 20.

Therefore, to achieve these objectives the SBA, in consultation with the Department of the Treasury, decided that inclusion of the criminal justice exclusion in the First PPP Interim Final Rule was warranted. *See* Miller Decl. ¶ 22. This was a reasonable and legitimate choice for the agency to make in furtherance of both its statutory mandate under Section 7(a) to make sound lending decisions, and its responsibility to ensure that PPP loan funds are expended for the important purposes that Congress intended. It cannot be dismissed as “a clear error in judgment,” *Hughes River Watershed Conservancy*, 165 F.3d at 287, but is instead a reasoned decision to which “[d]eference is due.” *Appalachia Voices*, 912 F.3d at 753.⁹

Plaintiffs advance no persuasive arguments to the contrary. The *Carmen's Corner* Plaintiffs principally argue that when the SBA decided to include a criminal justice restriction under the PPP it relied on factors that Congress did not intend it to consider by disregarding the only two

⁹ The *Carmen's Corner* Plaintiffs suggest that no deference is owed here to the SBA's many decades of experience and expertise as a government lender to small businesses, *contra* the Circuit authority cited above, on the stated grounds that Congress did not mean to rely on the SBA's expertise to implement the PPP, and that the SBA's decision to include a criminal justice restriction under the PPP was not based on that expertise. *Carmen's Corner* Mem. at 23. The first of these propositions is refuted by Congress's delegation of broad discretion to the SBA to make decisions regarding which features of the Section 7(a) program should be incorporated into the PPP, 15 U.S.C. § 636(a)(36)(B), and its delegation of rulemaking authority to the agency to effectuate those decisions, CARES Act § 1114. The second of those propositions is refuted by the Miller Declaration, as discussed herein.

considerations on which Congress, according to Plaintiffs, intended eligibility to be based. Carmen's Corner Mem. at 21-22. But that is no more than a restatement of the failed statutory authority argument on which the *Carmen's Corner* Plaintiffs principally rely. *Supra* at 21-29. It is no more valid when repurposed as putative support for Plaintiffs' arbitrary and capricious claim.

Nevertheless, in attempt to bolster this argument the *Carmen's Corner* Plaintiffs cite April 2020 correspondence from two Senators and 11 Representatives, prepared after the CARES Act had already been enacted, stating that the CARES Act "was not intended to exclude business owner[s] who have made mistakes, paid their debt, and turned their lives around," and that the criminal justice restriction (among others) was "not intended by Congress at all." Carmen's Corner Mem. at 22 (quoting Compl. Exhs. 9 and 8, respectively). As evidence of legislative intent, however, this correspondence is entitled to little weight, if any. *Barber v. Thomas*, 560 U.S. 474, 486 (2010) (statements by individual legislators made after a law's enactment are normally given "little weight"); *N. Car. St. Conference of NAACP v. McCrory*, 831 F.3d 204, 229 (4th Cir. 2016) (statements made by legislators after the fact of enactment "are of limited value"); *Veasey v. Abbott*, 830 F.3d 216, 234 (5th Cir. 2016) ("inappropriate" to rely on "stray statements" made after the fact by individual legislators). They furnish no basis on which to conclude that the SBA acted in disregard of Congress's intentions.¹⁰

For their part, the *Defy Ventures* Plaintiffs principally rest their arbitrary and capricious claim on the argument that the First PPP Interim Final Rule does not include an explanation of SBA's reasons for including a criminal justice restriction. *Defy Ventures* Mem. at 25, 26-27 (citing, *inter alia*, *State Farm*, 463 U.S. at 43). This argument, too, is unlikely to succeed. Ordinarily, when an agency

¹⁰ The *Carmen's Corner* Plaintiffs also argue that the criminal justice restriction does not "properly reflect[] Congress's . . . support for second chances" as shown in "a record of bipartisan criminal justice reforms dating back more than a decade." Carmen's Corner Mem. at 22 (quoting Compl. Exh. 9). The CARES Acts contains no provisions indicating that Congress intended the SBA to take such considerations into account when implementing and administering the PPP. Therefore the criminal justice restriction cannot be faulted on this basis.

takes regulatory action, it must provide a contemporaneous explanation of the basis for its decision. *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 626 (1986). In this case, however, working under a statutory mandate to issue regulations implementing the PPP within 15 days, *see* CARES Act § 1114; Miller Decl. ¶ 17, the SBA did not include an explanation for each of the numerous policy decisions reflected in the provisions of the First PPP Interim Final Rule. In circumstances such as this, where the agency's explanation for its action is not reflected in the record of its action, the agency may instead submit a declaration by a responsible official stating the grounds and rationale on which the agency relied. *See Roe v. Dep't of Defense*, 947 F.3d 207, 220 (4th Cir. 2020) (citing *Camp v. Pitts*, 411 U.S. 138, 142 (1973)); *see also Va. Agr. Growers Ass'n, Inc. v. Donovan*, 774 F.2d 89, 92 (4th Cir. 1985).

In this case, the Miller declaration provides relevant background information on the Section 7(a) program and sets forth the contemporaneous explanation of the considerations that the SBA took into account at the time it decided to include the criminal justice restriction in the First PPP Interim Final Rule. The Court is therefore permitted to consider Mr. Miller's declaration in evaluating the SBA's decision. *See Roe*, 947 F.3d at 220-21; *see also Env'tl Def. Fund, Inc. v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981). As discussed above, the Miller declaration furnishes the requisite connection between the facts before the SBA and the choice it made to include a criminal justice restriction. *Appalachian Voices*, 912 F.3d at 753.¹¹

Plaintiffs' remaining arguments in support of their arbitrary and capricious claims require only brief attention. First, Plaintiffs maintain that the SBA failed to take into account the interests of small business employees, whose economic well-being was a principal concern of Congress in passing the CARES Act. Carmen's Corner Mem. at 24; Defy Ventures Mem. at 25-26. But that is manifestly not

¹¹ Because the Miller declaration provides an explanation of the contemporaneous reasons for the SBA's decision to include a criminal justice restriction under the PPP, the declaration is not an impermissible "*post hoc* rationalization." *See Roe*, 947 F.3d at 220; *Olivares v. Transp. Sec. Admin.*, 819 F.3d 454, 463-64 (D.C. Cir. 2016).

the case. The SBA decided to include a criminal justice exclusion under the PPP in significant part to ensure that PPP loan funds are directed to healthy businesses capable of supporting jobs, and that PPP loan proceeds are used to meet small businesses' payroll costs and not diverted to unauthorized purposes. *Supra* at 11-12; Miller Decl. ¶¶ 18-22.

Plaintiffs also maintain that changes the SBA has made to the criminal justice restriction since the initial publication of the First PPP Interim Final Rule “reinforce just how arbitrarily and capriciously the agency has acted.” *Carmen's Corner Mem.* at 24-25; *Defy Ventures Mem.* at 28-29 (citing SBA's “various and changing articulations” of the restriction). This argument proves only that no good deed goes unpunished. The SBA issued the First PPP Interim Final Rule in a matter of days and without prior public comment, as the CARES Act mandated. Nevertheless, recognizing the value of public input, the agency invited comment on the Rule's provisions. *Supra* at 11-14; Miller Decl. ¶¶ 17, 23. Among the issues raised by commenters was a concern that the criminal justice exclusion denied PPP assistance to deserving individuals with criminal records who, lacking other job opportunities, started their own businesses. *See* Miller Decl. ¶ 26. These are the very interests that Plaintiffs seek to address in this litigation. *See, e.g., Defy Ventures Compl.* ¶¶ 50-56. The SBA took these comments and concerns into account and revised the criminal justice restriction (for example, in the June 12, 2020 amendment) to make it more targeted in scope, and did so as quickly as possible for the benefit of applicants. *Supra* at 12-14; Miller Decl. ¶ 27-30. This is not a record of arbitrary and capricious decisionmaking, but of responsive government acting in accordance with the goals of public participation in the administrative process that the APA is designed to promote.

Next, the *Carmen's Corner* Plaintiffs also fault the criminal justice rule because it excludes all businesses whose owners have been convicted or placed on probation or parole for felonies within certain time frames, without conducting individualized assessments of owners' character, as is done under the Section 7(a) program. *Carmen's Corner Mem.* at 23. As the Miller declaration explains,

however, the SBA concluded that a bright-line rule was required under the PPP, because lengthy character determinations on a case-by-case basis would be incompatible with the expedited PPP application process and the imperative to get PPP loans into the hands of businesses affected by the COVID-19 crisis as quickly as possible. *Supra* at 11-12; Miller Decl. ¶ 21. The decision to adopt such a reasonable, bright-line rule was one the agency was entitled to make. *See Keating v. F.E.R.C.*, 569 F.3d 427, 433 (D.C. Cir. 2009); *Health & Med. Policy Research Grp. v. F.C.C.*, 807 F.2d 1038, 1045 n. 10 (D.C. Cir. 1986); *Kamargo Corp. v. F.E.R.C.*, 852 F.2d 1392, 1398 n. 7 (D.C. Cir. 1988).

Finally, the *Carmen's Corner* Plaintiffs point to the SBA's decision to exempt faith-based organizations seeking PPP financial assistance from SBA affiliation rules that would ordinarily disqualify them from eligibility. *Carmen's Corner* Mem. at 25 (citing 85 Fed. Reg. 20817, 20819 (Apr. 15, 2020)). That exemption, the SBA concluded, was compelled by the Religious Freedom Restoration Act, 42 U.S.C. 20000bb-1 ("RFRA"), which provides that the "Government shall not substantially burden a person's exercise of religion" unless doing so is the "least restrictive means of furthering [a] compelling governmental interest." 85 Fed. Reg. at 20819. The affiliation rules, the SBA found, imposed burdens on the exercise of sincere religious beliefs held by certain faith-based organizations, without a compelling Government reason for doing so. *Id.* The *Carmen's Corner* Plaintiffs argue that likewise "no compelling interest exists to treat differently businesses owned by persons with criminal records." *Carmen's Corner* Mem. at 25. But to state the obvious, RFRA does not apply here, the APA does, and the SBA does not have to point to a "compelling" justification for the criminal justice restriction, only a reasonable one, as it has done. For this reason and those discussed above, Plaintiffs' attack on the criminal justice restriction as arbitrary and capricious is not likely to succeed.¹²

¹² Plaintiffs further err in contending (*Defy* Mem. 28 n.5) that the SBA failed to adopt the criminal justice restriction through notice-and-comment rulemaking. Plaintiffs fail to address § 1114 of the CARES Act, 134 Stat. at 312 (codified at 15 U.S.C. § 9012), which authorizes SBA to issue regulations to implement Title I of the CARES Act without regard to the notice-and-comment requirements of 5 U.S.C. § 553(b).

C. The Agency Has Not Unlawfully Withheld Required Action, And Interpretation Of The CARES Act Is Not A Ministerial Duty

Carmen’s Corner is unlikely to succeed on the merits of its claim that the criminal justice restriction violates 5 U.S.C. § 706(1). Carmen’s Corner divides that claim into an “unlawfully withheld” branch (Mem. 26 (citing *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004)) and a mandamus branch (Mem. 27-28 (citing *Mississippi v. Johnson*, 71 U.S. 475, 498 (1866)). Each branch is misconceived.

First, the “APA’s use of the term ‘agency action’ in § 706(1) limits judicial review to discrete determinations of rights and obligations” (*Vill. of Bald Head Island v. U.S. Army Corps of Engineers*, 714 F.3d 186, 195 (4th Cir. 2013) (citing *Norton*, 542 U.S. at 62-63)), but Carmen’s Corner fails to identify an SBA “action”—namely, an SBA “rule, order, license, sanction, relief, or the equivalent” (5 U.S.C. § 551(13))—that SBA has “unlawfully withheld” from Carmen’s Corner. Furthermore, “a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it [was] *required to take*” (*Bald Head Island*, 714 F.3d at 195 (quoting *Norton*, 542 U.S. at 63)), but Carmen’s Corner does not allege such a legally-compelled, discrete action. The action in question cannot be deemed the grant of a PPP loan. It is lenders, not the SBA, that decide whether they wish to make PPP loans to borrowers, and the SBA has no legal authority to compel them to do so. *See* Miller Decl. ¶ 4. Insofar as Plaintiffs’ are challenging SBA’s administration of the PPP loan program as a whole, that sort of blanket “programmatic” challenge is unavailable under the APA. *Bald Head Island*, 714 F.3d at 194 (quoting *Norton*, 542 U.S. at 64).

Second, in a similar vein, Carmen’s Corner has not identified a ministerial duty that the court could compel the SBA to carry out under the extraordinary writ of mandamus. “Mandamus” is available “only to compel the fulfillment of a duty which is ministerial, plainly and positively ascertained, and free of doubt.” *Grice v. Colvin*, 97 F. Supp. 3d 684, 705 (D. Md. 2015) (quoting *Morris*

v. Weinberger, 401 F. Supp. 1071, 1077 (D. Md. 1975)). An act is “ministerial” if “the law direct[s] [the officer] to perform an act in regard to which no discretion is committed to [her], and which, upon the facts existing, [s]he is bound to perform.” *City of Columbus v. Trump*, 2020 WL 1820074, at *22 (D. Md. April 10, 2020) (quoting *NTEU v. Nixon*, 492 F.2d 587, 602 (D.C. Cir. 1974)) (further citations omitted). That is, the duty must be “so plainly prescribed as to be free from doubt and equivalent to a positive command.” *Wilbur v. U.S. ex rel. Kadrie*, 281 U.S. 206, 218 (1930); *see also U.S. ex rel. McLennan v. Wilbur*, 283 U.S. 414, 420 (1931) (“The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable.”). Just as Carmen’s Corner fails to allege a “discrete” agency action the SBA was “required to take,” it has failed to allege a nondiscretionary act the SBA “is bound to perform,” and SBA’s administration of PPP loans plainly cannot qualify, because interpreting the CARES Act and implementing it calls for a wide variety of discretionary decisions. There is no basis here for a writ of mandamus.

III. PLAINTIFFS WILL NOT SUFFER IRREPARABLE HARM IN THE ABSENCE OF AN INJUNCTION

In addition to the fact that Plaintiffs’ claims have no likelihood of success on the merits, their requests for preliminary relief must also be denied because, on the facts as they now stand, Plaintiff will not suffer irreparable harm, or injury of any kind, if an injunction is denied. *See DiBiase*, 872 F.3d at 230 (“A plaintiff seeking a preliminary injunction must demonstrate,” *inter alia*, “that he is likely to suffer irreparable harm in the absence of an injunction.”).

Plaintiffs assert that absent immediate injunctive relief the individual Plaintiffs and their businesses will suffer irreparable injury because the plaintiff businesses “will be forever excluded from the PPP loan process[.]” Carmen’s Corner Mem. at 29; Defy Ventures Mem. at 30 (“Plaintiffs will lose any access to [PPP] funds.”). Even assuming that the individual Plaintiffs and their businesses would suffer irreparable injury without access to PPP financing, they no longer face that peril. As

discussed above, at Point I.A, the criminal justice restriction, as amended on June 24, no longer applies to them and no longer prevents them from obtaining PPP loans.

As recently amended, the restriction for business owners on parole applies only to persons whose terms of parole began within the last five years for felonies involving fraud, bribery, embezzlement, or false statements in a loan application or an application for federal financial assistance, and within one year for other felonies. Miller Decl. Exh F. at 6. Plaintiffs Wilks and Merritt were placed on parole in 2018 and 2017, respectively, for felony drug and weapons offenses (Mr. Wilks) and felony narcotics possession (Mr. Merritt), *see Carmen's Corner Store*, Verified Compl. ¶ 8; *id.*, Wilks Decl. (ECF No. 7-1) ¶ 11; Merritt Decl., *Defy Ventures* Compl. Exh. B (ECF No. 1-4), ¶-6, crimes that do not involve fraud, bribery, embezzlement, or false statements. Because their terms of parole began more than one year ago, the criminal justice restriction no longer prevents their businesses from applying for PPP loans.

The situation is the same for plaintiff Garland and his small business. As recently amended, the criminal justice restriction for borrowers subject to pending criminal charges applies only to charges for felony offenses. Miller Decl. Exh. F at 6. Mr. Garland is charged only with misdemeanors. Garland Decl., *Defy Ventures* Compl. Exh. C. ¶ 28. Therefore, the amended criminal justice restriction does not prevent his business from seeking a PPP loan.

Furthermore, to ensure that the individual Plaintiffs and Plaintiff businesses encounter no further difficulties on account of the criminal justice restriction, the SBA has offered to contact their lenders and advise them that the Plaintiff businesses should not be denied PPP loans on the basis of the restriction. *See* Gilligan Decl. ¶¶ 2-3 & Exhs. 1-2. Thus, preliminary injunctive relief is no longer required (if it ever were) to protect the individual Plaintiffs and their businesses from irreparable harm. It is therefore unavailable to them. *DiBiase*, 872 F.3d at 230.

For its part, the remaining Plaintiff, Defy Ventures, does not assert that it applied for a PPP loan or that it was denied a loan because of the criminal justice restriction. Rather, Defy Ventures asserts that its staff had to spend approximately 30 hours' time to respond to inquiries from graduates of its entrepreneurial training programs regarding their eligibility, under the criminal justice exclusion, for PPP loans. Glazer Decl., *Defy Ventures* Compl. Exh. A, ¶ 32. Even if this claimed injury were attributable to the criminal justice restriction rather than Defy Ventures' own unilateral choices—which as discussed in Point I.B above it is not—a claim of past injury such as this is insufficient, as a matter of law, to obtain injunctive relief. *See, e.g., Dyer v. Md. St. Bd. of Educ.*, 187 F. Supp. 3d 599, 609 (D. Md. 2016), *aff'd*, 685 F. App'x 261 (4th Cir. 2017); *Martin v. Brewer*, 2015 WL 4393810, at *3 (W.D. Va. July 16, 2015).

Defy Ventures also asserts that the criminal justice restriction has “impeded the ability of Defy Ventures to accomplish its mission” by “shut[ting] out” formerly incarcerated individuals from financing for their businesses. Garland Decl. ¶ 33. As discussed in Point I.B., this claim of injury does not suffice even to establish Article III injury in fact, much less concrete irreparable harm justifying preliminary injunctive relief.

Because none of the Plaintiffs has made the requisite showing of irreparable harm absent injunctive relief, their motions for preliminary injunctions must be denied.

IV. A PRELIMINARY INJUNCTION WOULD BE CONTRARY TO THE PUBLIC INTEREST

To obtain preliminary relief against the Government, Plaintiffs also must show that the injunctions they seek would be in the public interest. *Nken*, 556 U.S. at 435. Plaintiffs cannot make that showing, because Congress already determined that it was not in the public interest to require that the SBA make PPP loans available to prison inmates, or to persons, who though released, have yet to demonstrate their trustworthiness, and creditworthiness, as borrowers.

As discussed above, when Congress passed the CARES Act, it decided that PPP loans should be made under the same terms and conditions as other Section 7(a) loans, “[e]xcept as otherwise provided” in the CARES Act. 15 U.S.C. § 636(a)(36)(B). The CARES Act sets forth in careful detail which provisions of Section 7(a), and the SBA’s regulations, are waived or modified for purposes of the PPP. *Id.* § 636(a)(36)(D)-(R). Section 7(a)’s mandate that SBA-backed loans be of “sound value” is not among them. Nor is the SBA’s Section 7(a) creditworthiness rule, 13 C.F.R. § 120.150, or criminal justice restriction, *id.* § 120.110(n). Thus, Congress already decided to reserve discretion to the SBA to apply rules of character, and creditworthiness, to assure that PPP loans, too, will be of “sound value.”

Plaintiffs offer no justification for disturbing that legislative judgment. They argue that the public interest “supports allowing Plaintiffs access to the PPP” so they may “support their employees,” *Defy Ventures Mem.* at 31, and their communities, *Carmen’s Corner Mem.* at 30. But now that the criminal justice restriction has again been revised, and further targeted, and no longer applies to the individual Plaintiffs, it no longer stands as an obstacle to the achievement of these objectives. The *Defy Ventures* Plaintiffs argue that injunctive relief would serve the public interest because “the exclusion[] work[s] to disproportionately harm already vulnerable populations[.]” *Defy Ventures Mem.* at 32. Presumably that is the justification, in their eyes, for the programmatic injunctive relief they seek. *Supra*, Point I.C. But not only is the programmatic relief they seek unavailable, as discussed herein; it would also disserve the public interest for the courts to intervene in such fashion in a program so immense and complex as the PPP, striving to meet critical national needs in a time of crisis. *See Am. Ass’n of Political Consultants v. U.S. SBA*, 2020 WL 1935525, at *7 (D.D.C. Apr. 21, 2020) (“For the Judicial Branch to intervene now and issue the requested injunction under these circumstances would not be in the public interest.”).

V. THE INJUNCTION DEMANDED IS UNAVAILABLE

If Plaintiffs were somehow (contrary to law) to prevail on any of their APA contentions, then the proper remedy would not be to issue the sweeping injunction they demand to restructure PPP loan administration, but instead to remand to the SBA for further proceedings at the Agency. Indeed, the “ordinary remand rule,” which teaches that, “[g]enerally speaking,” a reviewing court “should remand a case to an agency for decision of a matter that statutes place primarily in agency hands” (*I.N.S. v. Orlando Ventura*, 537 U.S. 12, 16 (2002) (*per curiam*)), applies with special force here, given that Plaintiffs have rushed to court without presenting their legal and factual contentions to the Agency. The availability of remand obviates the need to consider any other extraordinary equitable relief. *See, e.g., Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (where “the record before the agency does not support the agency action, ... the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.”) (emphasis added). The injunction they demand is improper not only because it defies the “ordinary remand rule,” but also because of many other problems, including the three identified below.

A. Section 634(b)(1) Forecloses The Injunction Demanded Against SBA

First, the injunction sought against the SBA would defy the explicit statutory restriction on the availability of injunctive relief against the SBA. The Small Business Act provides that the SBA may “sue and be sued . . . in any United States District Court, and jurisdiction is conferred upon such district court to determine such controversies . . . ; but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the [agency] or [its] property[.]” 15 U.S.C. § 634(b)(1) (emphasis added). The Fourth Circuit has *repeatedly* enforced his statutory restriction in suits involving SBA based on the Court of Appeals’ conclusion that “courts have no jurisdiction to award injunctive relief against the SBA.” *J.C. Driskill, Inc. v. Abdnor*, 901 F.2d 383, 386 (4th Cir. 1990); *see id.* (“Congress apparently included this limitation to avoid potential interference with and

obstruction of the SBA’s operations, and the prohibition extends not only to attachment, injunction, and garnishment, but also to ‘other similar process.’”); *see also Duncan v. Furrow Auction Co.*, 564 F.2d 1107, 1109 (4th Cir. 1977) (634(b)(1) “prohibits an injunction, which was all the relief asked for, against the SBA”); *Vincent v. SBA*, 402 F.2d 769, 770-71 (4th Cir. 1968) (*per curiam*) (affirming district court dissolution of injunction operating against SBA). Those repeated holdings of the Fourth Circuit are binding here. *See also In re Hidalgo Cty. Emer. Serv. Found.*, 2020 WL 3411190, at *1-2 & n.2 (5th Cir. June 22, 2020) (vacating lower court injunction against SBA’s PPP regulation restricting loans to debtors in bankruptcy, where Fifth Circuit had previously “concluded that all injunctive relief directed at the SBA is *absolutely prohibited*,” because issue “at hand” was “the ability of a court to enjoin the Administrator, whether in regard to the PPP or any other circumstance”). The Fourth Circuit precedents similarly require rejecting Plaintiffs’ contrary contentions based on out-of-Circuit lower court decisions. *See* Defy Mem. 33-34 (relying on lower court decisions within the First, Sixth, and Seventh Circuits).

B. An Order Purporting To Extend The Deadline For PPP Loans Would Disrespect Limits On Spending Imposed By Congress And Thereby Violate The Separation Of Powers

Second, the injunction demanded cannot be granted because it would impermissibly contradict the plain text of Section 1102(b) of the CARES Act, which authorizes the obligation of Government funds for PPP only for “the period beginning on February 15, 2020 and ending on June 30, 2020,” and on that basis would also impermissibly impinge Congress’s constitutional authority to specify limitations on federal spending. Plaintiffs seek an injunction “extend[ing] the PPP application deadline, which is currently set to close on June 30, 2020, by 21 days, to July 21, 2020, for those applicants unlawfully excluded under the challenged criminal-record exclusions” by requiring the Executive Branch to “reserve[e] sufficient funds to cover” a set of applicants Plaintiffs define—applicants who are not parties to these cases. Defy Compl. at 36 ¶¶ C, D (Prayer for Relief). But the

Appropriations Clause of the Constitution provides, “No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” U.S. Const. Art. I, § 9, cl. 7. So no loan may be made or claim paid unless authorized by statute. *See United States v. Testan*, 424 U.S. 392, 398-400 (1976); *OPM v. Richmond*, 496 U.S. 414, 424 (1990).

A fundamental purpose of the Appropriations Clause is to ensure that federal funds are spent only “according to the letter of the difficult judgments reached by Congress” *Richmond*, 496 U.S. at 428; *see Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937) (“no money can be paid out of the Treasury unless it has been appropriated by an act of Congress”); *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1851) (“not a dollar” of funds in the Treasury may be “used in the payment of any thing not thus previously sanctioned” by Congress). Thus, as the Court of Federal Claims has explained, “in the absence of clear Congressional authority, the other branches of government cannot effect payment of Treasury funds.” *Speers v. United States*, 38 Fed. Cl. 197, 202 (1997) (citing *Richmond*). Indeed, Executive Branch actors are not free to ignore statutory limitations on the payment of funds, and to do so knowingly is a federal crime. *See Richmond*, 496 U.S. at 430 (citing 31 U.S.C. §§ 1341, 1350, the Anti-Deficiency Act). Because the demanded injunction would therefore violate federal statutes and trench on Congress’s Spending Clause authority, it must be denied.

C. An Order Requiring SBA To Award Relief To Unidentified Loan Applicants Would Be Impossible For The Agency To Implement

Third, the injunction demanded would impose obligations on the SBA that are impossible to carry out. Plaintiffs seek an order directing the SBA to “reserve[e] sufficient funds to cover *applicants wrongfully excluded* under the challenged terms of the [Interim Final Rule] and the application form.” Defy Compl. at 36 ¶ D (Prayer for Relief) (emphasis added). But, again, those applicants are nonparties here, and the SBA’s PPP loan administration procedures do not include steps identifying applicants that were denied PPP loans by lenders. To the contrary: A PPP loan applicant submits an

application to an authorized lender, which then determines whether the applicant is eligible and whether the lender wishes to make the loan. If so, the lender submits a guarantee application to the SBA, and upon issuance of an SBA loan number the lender may disburse the loan proceeds to the borrower. It is the lenders, not the SBA, that implement the PPP loan application process (as they implement the Section 7(a) process), so “SBA has no records of PPP loan applications rejected by lenders, whether on grounds of program eligibility or otherwise.” *See* Miller Decl. ¶ 16. (Nationwide, there are more than 5,400 participating PPP lenders. *Id.*)

The record before the Court therefore establishes that the injunction demanded is impossible because the SBA cannot identify “applicants wrongfully excluded” by lenders, as Plaintiffs would require. An injunction requiring impossible acts is invalid, because the “sound discretion of an equity court does not embrace enforcement through contempt of a party’s duty to comply with an order that calls him ‘to do an impossibility.’” *NRDC v. Train*, 510 F.2d 692, 705 (D.C. Cir. 1974) (quoting *Maggio v. Zeitz*, 333 U.S. 56, 59 (1948)); *see also Maryland v. Pruitt*, 20 F. Supp. 3d 722, 728 (D. Md. 2018) (“Put simply, the Court should not and will not order Defendants to do that which is impossible or infeasible”).

CONCLUSION

For the reasons stated above, each application for a temporary restraining order and a preliminary injunction should be denied.

Dated: June 24, 2020

JOSEPH H. HUNT
Assistant Attorney General

DAVID M. MORRELL
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Director

ERIC WOMACK
Assistant Director

Respectfully submitted,

/s/ James J. Gilligan

JAMES J. GILLIGAN
Special Litigation Counsel

INDRANEEL SUR
Trial Attorney

Federal Programs Branch,
Civil Division
United States Department of Justice
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 514-3358
E-mail: james.gilligan@usdoj.gov

Counsel for Defendants

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

<hr/>)	
CARMEN’S CORNER STORE, <i>et al.</i> ,)	
	Plaintiffs,)	
v.)	
)	No. 1:20-cv-1736-CCB
UNITED STATES SMALL BUSINESS)	
ADMINISTRATION, <i>et al.</i> ,)	
	Defendants.)	
<hr/>)	
DEFY VENTURES, INC., , <i>et al.</i> ,)	
	Plaintiffs,)	
v.)	
)	No. 1:20-cv-1838-CCB
UNITED STATES SMALL BUSINESS)	
ADMINISTRATION, <i>et al.</i> ,)	
	Defendants.)	
<hr/>)	

DECLARATION OF JOHN A. MILLER

I, John A. Miller, for my declaration pursuant to 28 U.S.C. § 1746, depose and say as follows:

1. I have worked at the United States Small Business Administration (“SBA”) for over twenty years. I currently hold the position of Deputy Associate Administrator for Capital Access. The Office of Capital Access is responsible for the operation of and development of policy for the SBA’s business loan programs authorized under Section 7(a) of the Small Business Act, and the Paycheck Protection Program (“PPP”) authorized under the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act. I am the highest-ranking career official in the Office of Capital Access and am knowledgeable about the Section 7(a) and PPP programs.

2. I submit this declaration in support of the Defendants' opposition to the Plaintiffs' motions for temporary restraining orders and preliminary injunctions in the above-captioned actions. The statements contained in this declaration are based on my personal knowledge and information made available to me in the course of carrying out my duties and responsibilities as SBA Deputy Associate Administrator for Capital Access.

The SBA Section 7(a) Loan Program

3. Section 7(a) of the Small Business Act, codified at 15 U.S.C. § 636(a), authorizes the SBA to provide a wide variety of technical, managerial, and financial assistance to small-business concerns. Under the terms of the statute, SBA financial assistance can take the form of direct loans, joint loans with lenders, or guaranteed loans issued by private lenders but a portion of which the SBA will purchase from the lenders in the event of borrower defaults.

4. In practice, however, the SBA ordinarily guarantees loans made by private lenders, rather than disbursing funds directly to borrowers. Under the Section 7(a) program a small business seeking an SBA-guaranteed loan submits its application to an authorized SBA lender, not the SBA itself. If the lender concludes that the applicant meets applicable statutory and regulatory requirements for SBA financial assistance, and also wishes to make the loan (SBA has no authority to require lenders to make SBA-backed loans), then the lender initiates the loan, and submits a guarantee application to SBA. If the SBA agrees to guarantee the loan in accordance with applicable statutory and regulatory requirements, the lender funds and services the loan. Because the loan-application process is administered by lenders and not the SBA, SBA has no records of Section 7(a) loan applications rejected by lenders, whether on grounds of program eligibility or otherwise, and keeps no permanent records of guarantee applications rejected on the basis of eligibility issues.

5. To qualify for a Section 7(a) loan, an applicant must meet a number of criteria specified by the Small Business Act and SBA regulations. As pertinent here, the SBA requires that applicants meet specified standards of creditworthiness, set forth at 13 C.F.R. § 120.150, so as to provide reasonable assurance that loans are repaid, and that taxpayer funds are not expended unnecessarily to honor SBA guarantees on defaulted loans. This requirement gives effect to the mandate of Section 7(a) that “[a]ll loans made under [Section 7(a)] shall be of such sound value or so secured as reasonably to assure repayment[.]” 15 U.S.C. § 636(a)(6). First among the factors considered by the SBA in assessing a borrower’s creditworthiness is the “[c]haracter, reputation and credit history of the applicant . . ., its Associates, and guarantors.” *Id.* § 120.150(a). An “Associate” of a small business is defined under SBA regulations to include an officer, director, or more-than-20-percent owner of the business, or a key employee of the business, among other individuals and entities. *Id.* § 120.10(2).

6. Over time, on the basis of the agency’s experience, the SBA has determined as a matter of policy that SBA loans should not be made available to certain types of businesses, such as, for example, non-profit businesses, other lenders, businesses in which the lenders own an equity interest, and businesses that have previously defaulted on federal or federally assisted loans resulting in losses to the Government. The types of business concerns deemed ineligible for SBA section 7(a) loans (18 in all) are listed at 13 C.F.R. § 120.110, and as relevant here they include “[b]usinesses with an Associate who is incarcerated, on probation, on parole, or has been indicted for a felony or a crime of moral turpitude.” *Id.* ¶ 120.110(n).

7. The SBA first issued this rule almost a quarter century ago, in January 1996, in connection with a consolidation, clarification, and simplification of its general business loan regulations. *See* 61 Fed. Reg. 3226 (Jan. 31, 1996). However, the policy against making (or

guaranteeing) loans to businesses whose owners (or other Associates) are incarcerated, on probation or parole, or indicted for felonies extends as far back as the 1980s. The policy, and the rule, arise from the concern that the operations of small businesses frequently become impaired when their owners are incarcerated. As a result these businesses have difficulty repaying their loans, and are not reliable credit risks. Similarly, owners or other Associates who are on parole or probation, or who face felony charges, also present risks of incarceration (or re-incarceration) that could lead to an impairment of business operations and reduced ability to repay SBA-backed loans. SBA adopted this “criminal justice” restriction, as codified at 13 C.F.R. § 120.110(n), to safeguard against these risks, which are closely aligned with the creditworthiness and character concerns set forth in 13 C.F.R. § 120.150(a).

8. SBA’s Standard Operating Procedure (“SOP”) 50 10 5(K), provides guidance to SBA lenders regarding the policies and procedures governing the Section 7(a) business loan program. (Relevant excerpts of SOP 50 10 5(K) are attached as Exhibit A to this declaration. The full SOP is available at the SBA website, <https://www.sba.gov/sites/default/files/2019-02/SOP%2050%2010%205%28K%29%20FINAL%202.15.19%20SECURED%20copy%20paste.pdf>.) In accordance with the requirements of 13 C.F.R. § 120.150(a), the SOP instructs lenders that “every proprietor, general partner, officer, director,” or other Associate of an applicant business “must be of good character” to be eligible for a Section 7(a) loan. SOP 50 10 5(K) at 109. Lenders are further instructed that SBA financial assistance is unavailable to businesses with Associates who are (a) “[i]ncarcerated, on probation, or on parole”; or (b) “[c]urrently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction.” *Id.* at 110. The first of these two disqualifications is based on the criminal justice restriction codified at 13 C.F.R. § 120.110(n).

The second is based on the general requirement of good character incorporated into 13 C.F.R. § 120.150(a).

9. The character evaluation process to determine an applicant's program eligibility begins with each Associate of the business submitting a completed SBA Form 1919 to the lender. SOP 50 10 5(K) at 110. (A copy of SBA Form 1919 is attached as Exhibit B to this declaration.) SBA Form 1919 calls for a variety of information concerning the character and creditworthiness of the business's Associates, and in particular asks three questions concerning Associates' criminal history:

17. Are you presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction?
18. Have you been arrested in the last 6 months for any criminal offense?
19. For any criminal offense – other than a minor vehicle violation – have you ever:
1) been convicted; 2) pleaded guilty; 3) pleaded nolo contendere; 4) been placed on pretrial diversion; or 5) been placed on any form of parole or probation (including probation before judgment)?

SBA Form 1919 at 4.

10. If an Associate answers "yes" to question no. 17, then the lender is instructed, in accordance with SBA policy under 13 C.F.R. § 120.150(a), that the applicant business is ineligible for a Section 7(a) loan. SOP 50 10 5(K) at 110. If no Associate answers "yes" to question no. 17, but one or more Associates answer "yes" to question nos. 18 or 19, then a character determination for the Associate(s) who so responded is required to establish the business's eligibility for a Section 7(a) loan. *Id.*

11. To begin the character determination process for an Associate, the Associate must complete within 90 days an SBA Form 912. (A copy of SBA Form 912 is attached to this declaration as Exhibit C.) For each offense with which the Associate is currently charged, for

which he or she has been arrested in the last six months, or for which he or she has been convicted, or placed on probation or parole, SBA Form 912 requires the Associate to furnish details including (i) the date and location of each offense; (ii) a specification of the nature and level (misdemeanor or felony) of the offense; and (iii) the disposition of the charge or conviction, including sentencing, and conditions (such as conditions on parole) which if not complied with can result in (re-)incarceration. The Associate must also furnish supporting court documentation. *See* SBA Form 912 at 1; SOP 50 10 5(K) at 110.

12. If an Associate's completed SBA Form 912 package reveals that any of the charges against him or her resulted in (i) a felony conviction, (ii) a misdemeanor conviction within six months of the date of the application, or (iii) a misdemeanor conviction for a crime against a minor; or that charges were filed against the Associate and finally disposed of within six months of the business's loan application, then the lender is required to forward the Associate's SBA Form 912 package to the SBA for a background investigation. SOP 50 10 5(K) at 112. The investigation entails an FBI fingerprint background check. *Id.* at 112-13. Based on information received from the FBI (and the SBA Form 912 package) the SBA will determine either that the Associate has good character, or, if not, that the applicant business is ineligible for SBA Section 7(a) financial assistance. *Id.* at 113. Altogether this process typically takes several weeks.

The CARES Act and the PPP

13. President Trump signed the CARES Act into law in March 27, 2020, to provide an unprecedented package of emergency economic assistance and other support to help individuals, families, businesses, and health-care providers cope with the enormous economic and public health crises triggered by the worldwide coronavirus (COVID-19) pandemic. Among the measures taken by the CARES Act to address the COVID-19 crisis, the PPP was enacted as an

extension of the SBA's Section 7(a) loan authority to provide relief to small businesses and their employees experiencing economic hardship as a result of the public-health measures being taken to minimize the public's exposure to the COVID-19 virus. As of June 23, 2020, almost 4.7 million PPP loans have been issued to small businesses totaling more than \$515 billion. *See* Paycheck Protection Program, Additional Program Information, <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program>.

14. PPP loans are heavily subsidized and are made available on much more generous terms than ordinary Section 7(a) loans. For example, the interest rate on PPP loans is capped at one percent (1%), and various fees, collateral requirements, and personal guarantee requirements are waived. *See* 85 Fed. Reg. 20811, 20815 (Apr. 15, 2020). The loans are also 100% guaranteed by the SBA. *Id.* at 20812, 20816; *see* 15 U.S.C. § 636(a)(2)(F). In addition, section 1106 of the CARES Act provides for forgiveness of PPP loans to the extent the proceeds are used to cover payroll costs, mortgage interest payments, rent, and/or utility costs. The PPP is a temporary program, however; under section 1102 of the CARES Act the appropriation authorizing expenditures for the PPP expires on June 30, 2020.

15. Because Congress intended that the PPP provide relief to America's small businesses as expeditiously as possible, for purposes of the PPP the SBA significantly streamlined the loan application process ordinarily followed under the Section 7(a) program. Instead of the usual borrower documentation and lender underwriting requirements, the SBA allows PPP lenders to rely on borrower certifications of eligibility under the terms of the CARES Act, with minimal requirements for documentation verifying the borrower's payroll costs, mortgage interest and/or rent payments, and utility costs. 85 Fed. Reg. at 20812, 20814, 20815.

16. Otherwise the application process for PPP loans is similar to the process for Section 7(a) loans, discussed in paragraph 4, above. A small business seeking a PPP loan submits an application to an authorized lender, which then determines whether the borrower is eligible and whether it wishes to make the loan. If so, the lender submits a guarantee application to the SBA, and upon issuance of an SBA loan number the lender may disburse the loan proceeds to the borrower. Because the PPP loan application process, like the Section 7(a) process, is administered by lenders and not the SBA, SBA has no records of PPP loan applications rejected by lenders, whether on grounds of program eligibility or otherwise, and keeps no permanent records of guarantee applications rejected on the basis of eligibility issues. As of June 23, 2020, more than 5,400 lenders nationwide had issued PPP loans. *See Paycheck Protection Program, Additional Program Information*, <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program>.

17. Consistent with Congress's intent to provide immediate assistance to small businesses adversely affected by the COVID-19 crisis, section 1114 of the CARES Act directed the SBA to issue regulations implementing the PPP within 15 days of enactment, without regard to the notice-and-comment requirements of the Administrative Procedure Act. Consistent with this legislative mandate, the SBA issued its first interim final rule to carry out the provisions of the PPP on April 2, 2020. (The rule was initially posted on the SBA website, and on April 15, 2020, published in the Federal Register. *See Business Loan Program Temporary Changes: Paycheck Protection Program, Interim Final Rule*, 85 Fed. Reg. 20811 (Apr. 15, 2020) ("First PPP Interim Final Rule").

18. Because the CARES Act authorizes the SBA to guarantee PPP loans under the same terms, conditions, and processes as Section 7(a) loans (except as otherwise provided by the

CARES Act), in drafting the First PPP Interim Rule the SBA had to determine which terms, conditions, and procedures applied under the Section 7(a) program should be applied to the PPP. As relevant here, the SBA, in consultation with the Department of the Treasury, determined that a restriction for businesses with owners who are incarcerated, on probation, or parole, or charged with a crime, similar to the Section 7(a) restriction under 13 C.F.R. § 120.110(n), was also appropriate under the PPP, based on the same concerns underlying the restriction codified at section 120.110(n). *See* paragraph 7, above. When one or more owners of a small business are incarcerated, frequently the operation of the business becomes impaired and it has difficulty repaying its loans, risking default. Similarly, business owners on parole or probation or facing criminal charges are at greater risk of incarceration (or re-incarceration) than other applicants, presenting a greater risk that the health of the business will deteriorate, rendering it incapable of meeting its debt obligations.

19. In reaching these conclusions, the SBA recognized that concerns about creditworthiness and repayment of PPP loans are less acute where borrowers can obtain loan forgiveness under section 1106 of the CARES Act. But PPP loans may only be forgiven in the event (and to the extent) that borrowers expend the loan proceeds for payroll costs, mortgage interest and/or rent, and utilities in accordance with the requirements of section 1106. In cases where the proceeds have not been used as section 1106 specifies, the loans cannot be forgiven, and borrowers' ability to repay the loans remains a matter of concern.

20. The SBA, in consultation with the Department of the Treasury, similarly determined that some eligibility criteria remained necessary under the PPP, as under Section 7(a), to provide reasonable assurance of applicants' good character. An assurance of good character was deemed necessary to safeguard against the risk of fraud in the streamlined PPP application process

(which, as discussed above, is based largely on borrower self-certifications of eligibility), and also the risk that borrowers would not use their PPP loans to pay their employees or to meet other expenses authorized by Congress under the CARES Act. *See* 15 U.S.C. § 636(a)(36)(F).

21. Ordinarily, as discussed above, the SBA's character evaluation process involves an inquiry into whether any Associate of the applicant business has ever been convicted of or pleaded guilty (or *nolo contendere*) to any criminal offense, or ever been placed on parole or probation. *See* paragraphs 8-10, above. A "yes" answer to this question triggers a character determination process involving the submission of an SBA Form 912 package, possibly followed by an FBI fingerprint background investigation and a determination of the Associate's character by the SBA. SBA anticipated, given the enormous volume of PPP loans to be processed, that the usual time required for individualized SBA character determinations could be prolonged by weeks or months. SBA recognized that delays of that length would be incompatible with the need to make PPP loan eligibility determinations as expeditiously as possible. Therefore, in lieu of the usual Section 7(a) character evaluation process, for purposes of the PPP the SBA, in consultation with the Department of the Treasury, concluded that it would adopt a bright line rule, quickly and easily administered by lenders, under which an applicant would be ineligible for a PPP loan if a 20-percent-or-more owner were convicted of a felony in the last five years. SBA reasoned that owners convicted of felonies more than five years in the past (assuming they were no longer incarcerated or on probation or parole) present less of a credit risk (and risk of fraud) than owners with more recent convictions.

22. In accordance with these conclusions and policy determinations, the First PPP Interim Final Rule provides that a business applying for a PPP loan is ineligible if

[a]n 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[.]

85 Fed. Reg. at 20812.

23. Because both the terms of the CARES Act and the economic crisis created by the COVID-19 pandemic compelled immediate implementation of the PPP, SBA prepared and issued the First PPP Interim Final Rule in a matter of days, without the benefit of public comment beforehand. The agency therefore solicited public comment on all aspects of the rule following its publication, and advised that it would consider any comments submitted and “the need for making any revisions [to the rule] as a result of these comments.” 85 Fed. Reg. at 20811.

24. On April 3, 2020, the day following the publication of the First PPP Interim Final Rule on the SBA’s website, SBA issued a PPP Borrower Application Form, SBA Form 2483 (4/20), that included two questions intended to implement the criminal justice restriction contained in the Rule:

5. Is the Applicant (if an individual) or any individual owning 20% or more of the equity of the Applicant subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction, or presently incarcerated, or on probation or parole?

6. Within the last 5 years, for any felony, has the Applicant (if an individual) or any owner of the Applicant 1) been convicted; 2) pleaded guilty; 3) pleaded nolo contendere; 4) been placed on pretrial diversion; or 5) been placed on any form of parole or probation (including probation before judgment)?

(A copy of SBA Form 2483 (4/20) is attached as Exhibit D to this declaration.) As stated on the form, if either question is answered “yes,” then the applicant’s request for a PPP loan would not be approved.

25. In response to the First PPP Interim Final Rule and the publication of the PPP Borrower Application Form, the SBA received a number of comments from the public. As the agency had committed to do, *see* 85 Fed. Reg. at 20811, the SBA considered these comments and whether the First PPP Interim Final Rule should be revised on the basis of what the commenters had to say.

26. With regard to the Rule's criminal justice restriction, a number of commenters observed that many previously incarcerated individuals turn to entrepreneurship to earn their living because of a lack of employment opportunities elsewhere. These commenters argued that the Rule inappropriately denied PPP financial assistance to individuals with criminal records who had paid their debts to society, started small businesses to give themselves a second chance, created job opportunities for others, and contributed to the vitality of their communities. Other commenters argued that the criminal justice restriction is inconsistent with the policies underlying the correctional and sentencing reforms implemented by the First Step Act of 2018, Pub. L. No. 115-391. It was also proposed by some commenters that the disqualification of persons with felony convictions within the last five years be narrowed to convictions for fraud or other crimes related to trustworthiness for financial assistance.

27. After consideration of the comments received in response to the First PPP Interim Final Rule, the SBA, in consultation with the Department of the Treasury, determined "that a shorter [restriction] for felonies that do not involve fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance is more consistent with Congressional intent to provide relief to small businesses and also promotes the important policies underlying the First Step Act[.]" *See Business Loan Program Temporary Changes: Paycheck Protection Program, Additional Revisions to First [PPP] Interim Final*

Rule, 85 Fed. Reg. 36717, 36718 (June 18, 2020). The SBA revised the criminal justice restriction contained in the First PPP Interim Final Rule accordingly, to provide that an applicant business is ineligible if

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 involving fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance within the last five years or any other felony within the last year[.]*

See id. (emphasis added).

28. Concurrently, the SBA issued a revised SBA Borrower Application Form, SBA Form 2483 (6/20), with a revision to question no. 6, to implement this revision to the criminal justice restriction:

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, or within the last year, for any other felony, has the Applicant (if an individual) or any owner of the Applicant 1) been convicted; 2) pleaded guilty; 3) pleaded nolo contendere; or 4) been placed on any form of parole or probation (including probation before judgment)?

(A copy of SBA Form 2483 (6/20) is attached as Exhibit E to this declaration.) As stated on the form, if either question 5 or 6 is answered “yes,” then the applicant’s request for a PPP loan will not be approved.

29. After giving further consideration to these issues, the SBA, in consultation with the Department of the Treasury, determined that two additional modifications to the criminal justice restriction were appropriate to ensure consistency in its approach to applicants with criminal histories. *See SBA, Business Loan Program Temporary Changes: Paycheck Protection Program—Additional Eligibility Revisions to First [PPP] Interim Final Rule*, <https://www.sba.gov/document/policy-guidance-ppp-interim-final-rule-additional-eligibility->

revisions-first-interim-final-rule, at 5 (posted June 24, 2020) (copy attached as Exhibit F to this declaration). First, SBA, in consultation with the Department of the Treasury, concluded that the restriction for business owners subject to criminal charges should be limited to charges for felony offenses, to align it with the restriction for prior convictions, which is also limited to convictions for felony offenses. *Id.* at 5-6. Second, the agency concluded, in consultation with the Department of the Treasury, that the restriction for business owners on probation or parole should be limited to individuals whose term of probation or parole commenced within the last five years for any felony involving fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance, and within the last one year for other felonies. *Id.* at 6. The purpose of this modification is to align with the identical time restrictions applied to prior felony convictions in the June 18, 2020, modification to the Rule. *Id.* In addition, the SBA also explained its reasons for retaining the criminal justice restriction as a whole in this revised form. *Id.* at 7-9.

30. To implement the June 24, 2020, revisions to the criminal justice exclusion, the SBA issued a revised SBA Borrower Application, SBA Form 2483 (06/20), with corresponding revisions to question nos. 5 and 6. (A copy of the updated SBA Form 2483 (06/20)) is attached to this declaration as Exhibit G.)

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge and belief.

Executed this 24th day of June, 2020.

JOHN MILLER Digitally signed by JOHN MILLER
Date: 2020.06.24 16:03:33 -04'00'

JOHN A. MILLER

EXHIBIT A

SBA

SOP 50 10 5(K)

**Lender and Development
Company Loan Programs**

Office of Financial Assistance

U.S. Small Business Administration

from the Applicant, OR agrees to a “sue and be sued” clause specifically naming U.S. Federal courts as “courts of competent jurisdiction.”

- c) Tribes that are recognized only by a state do not have sovereign immunity. Therefore, the requirement identified in paragraph ii.b) above is not applicable.

- c. Lenders may seek the advice and assistance of the Bureau of Indian Affairs (BIA) personnel when dealing with loans collateralized by Indian lands held in trust.

11. Businesses Engaged in Promoting Religion ([13 CFR § 120.110 \(k\)](#))

- a. If it appears an Applicant may be connected, associated or affiliated with a religious organization, or may have a religious component, the Lender must complete the Religious Eligibility Worksheet ([SBA Form 1971](#)). Any questions regarding this worksheet may be addressed to local SBA Counsel.
- b. Prior to submitting an application to the LGPC (non-delegated) or requesting a loan number (delegated), the Lender must submit the completed worksheet and supporting documentation to the Associate General Counsel for Litigation at Form1971Review@sba.gov for a final Agency decision on eligibility. Such supporting documentation includes, but is not necessarily limited to, Lender’s Credit Memorandum; the Applicant’s business plan; any mission statement of the Applicant; and, where applicable, a detailed statement of Applicant’s curriculum. SBA may request additional documentation as needed to complete the eligibility review. Upon approval by SBA, Lender may proceed to submit the application to the LGPC (non-delegated) or process the loan under its delegated authority. For non-delegated applications, the Lender must submit a copy of SBA’s approval to the LGPC with the application. The delegated Lender must retain the worksheet, supporting documentation, and evidence of SBA’s approval in its loan file and must submit all of the foregoing to SBA with any request for guaranty purchase. SBA also may review the worksheet and supporting documentation when conducting Lender oversight activities.
- c. An Applicant is not ineligible merely because it offers religious books, music, ceremonial items and other religious articles for sale.

12. Businesses Engaged in SBA Loan Packaging ([13 CFR § 120.110\(m\)](#))

An Applicant that receives more than one third of its gross annual revenue from packaging SBA loans, including as a Lender Service Provider, is not eligible.

13. Businesses with an Associate of Poor Character ([13 CFR § 120.110\(n\)](#))

The Agency requires that every proprietor, general partner, officer, director, managing member of a limited liability company (LLC), owner of 20% or more of the equity of the Applicant, Trustor (if the Applicant is owned by a trust), and any person hired by the Applicant to manage day-to-day operations (“Subject Individual”) must be of good character.

A Subject Individual may not reduce his/her ownership in an Applicant business within 6 months prior to the date of the application for the purpose of avoiding compliance with this

section. The only exception to the 6-month rule is when a Subject Individual completely divests his/her interest prior to the date of application. Complete divestiture includes divestiture of all ownership interest and severance of any relationship with the Applicant (and any associated Eligible Passive Company) in any capacity, including being an employee (paid, unpaid, or contracted).

The Agency cannot provide financial assistance to businesses with Associates who are:

- a. Incarcerated, on probation, or on parole, (an individual with a deferred prosecution, conditional discharge, order of protection, or who is on a sex offender registry is treated as if the individual is on probation or parole); or
- b. Currently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction.

The character evaluation process to determine eligibility under this section begins with Subject Individuals answering the applicable questions on [SBA Form 1919](#), "Borrower Information Form" or the [EIB-SBA Joint Form 84-1](#) for Export Working Capital Loans.

(NOTE: A Subject Individual must respond "Yes" even when the individual believes the record is sealed, expunged or otherwise unavailable. Lenders must keep this information private and confidential. There are no exceptions or waivers to this policy.)

- a. If all Subject Individuals respond "No" to Questions 17, 18, and 19 on SBA Form 1919 or Questions C.2.e.1, 2, or 3 on the EIB-SBA Joint Form 84-1, the SBA 7(a) loan application may be processed and the [SBA Form 912](#), "Statement of Personal History" is not required.
- b. If any Subject Individual responds "Yes" to Question 17 on SBA Form 1919 or indicates in response to Question C.2.e.1 on the EIB-SBA Joint Form 84-1 that the Subject Individual is currently under indictment, etc., the Applicant is not eligible for an SBA 7(a) loan.
- c. If any Subject Individual is currently on parole or probation (including probation before judgment), the Applicant is not eligible for an SBA 7(a) loan.
- d. If any Subject Individual responds "Yes" to Questions 18 or 19 on SBA Form 1919 or Question C.2.e.2 or C.2.e.3 on the EIB-SBA Joint Form 84-1, a character determination for the Subject Individual is required to establish eligibility under this section as follows:
 - i. [SBA Form 912](#) Package:

The Subject Individual must provide the Lender with a complete SBA Form 912 Package, which must include:

 - a) A completed SBA Form 912, signed and dated within 90 days of submission to SBA; and
 - b) A detailed written statement, which is separately signed and dated by the Subject Individual, describing the events and circumstances of any "Yes" response, which must include the following:

- i) Date(s) of each offense;
 - ii) City or county and State where the offense(s) occurred;
 - iii) The specific charge(s) and final conviction(s) (e.g. DUI, assault, forgery, etc.) and the level of each charge and conviction (either a misdemeanor or felony); and
 - iv) Disposition of the charge(s) and conviction(s), including all sentencing, conditions, or requirements of the court. This includes conditions, such as registration on the Sex Offenders Registry, which provides for incarceration upon failure to comply with the conditions.
- c) Court documentation evidencing that any sentencing or other conditions of the court have been met. If sentencing and other conditions of the court have not been satisfied, then the Applicant is not eligible.
- i) Court documentation may include but is not limited to:
 - (a) Evidence of the status (paid/unpaid) of fines or restitution imposed;
 - (b) Evidence of attendance or completion of any class or workshop required by the court;
 - (c) Jail time served; or
 - (d) If applicable, the terms of probation including evidence and dates of successful conclusion of the probation.
 - ii) If court documentation is not available, the Subject Individual must submit:
 - (a) A written statement from the applicable court indicating documents are not available; and
 - (b) Verification that there are no outstanding warrants, unpaid fines, or other conditions of the court that have not been satisfied.
- ii. Character Determination by the Lender:
- The Lender may process the application without review of the [SBA Form 912 Package](#) by SBA if the Lender determines upon review of the court's disposition that the case(s) resulted in:
- a) One or multiple misdemeanor convictions whose conditions were met more than 6 months prior to receipt of the application, and the convictions did not involve a crime against a minor (for example, child abuse or endangerment, possession of child pornography, etc.);
 - b) Reduction of the original felony charge(s) to misdemeanor(s); or
 - c) Dismissal of the charges.

The Lender must retain the supporting information and court documentation, including the original complete SBA Form 912 Package in the file for the life of the loan.

iii. Circumstances Requiring an FBI Fingerprint Background Check and a Character Determination by SBA:

The Lender must submit to SBA a copy of the complete [SBA Form 912](#) Package for a background investigation by SBA and the Subject Individual must complete an FBI Fingerprint Background Check in accordance with the following paragraph if the Lender determines upon review of the court's disposition that the case(s) resulted in:

- a) Felony conviction(s);
- b) Misdemeanor conviction(s) within 6 months of the date of the loan Application;
- c) Charge(s) filed and final disposition against the Subject Individual has been completed within 6 months of the date of the loan Application; and/or
- d) Misdemeanor conviction(s) for crime(s) against a minor (for example, child abuse or endangerment, possession of child pornography, etc.).

The Lender may not disburse the loan until it has received written clearance from SBA.

iv. FBI Fingerprint Background Check:

SBA will conduct FBI fingerprint background checks via submission of the Form [FD-258](#) (fingerprint card) or electronic fingerprint submission (if available) to the FBI. "Electronic fingerprint submission" means fingerprints taken and reproduced in a machine-readable format by a fingerprint capture system that complies with the FBI's Electronic Biometric Transmission Specifications. An electronic fingerprint submission must be compatible with the FBI's Automated Fingerprint Identifications System, or any successor system in place for biometric identification. The electronic fingerprint submission will generally be in paper format as produced by the fingerprint capture system, which an individual may attach to [SBA Form 912](#) to expedite character check procedures. When using electronic fingerprint submission, check local requirements, as some localities require individuals to bring one or more Forms FD-258 to facilitate the electronic submission. Where an electronic fingerprint submission is not locally available, Form FD-258 may be used. Local law enforcement agencies will usually assist the individual with the fingerprinting. Lenders may obtain the Form FD-258 from the local SBA Field Office or order the cards from the FBI's website at: <https://www.fbi.gov/services/cjis/fingerprints-and-other-biometrics/ordering-fingerprint-cards-and-training-aids>.

v. Lender Submission to SBA:

Lenders submit completed SBA Form 912 Packages to SBA via overnight mail or courier to: 409 3rd Street, SW., Washington, DC 20416. SBA Form 912 Packages with electronic fingerprint submissions may be submitted via email to: oca912@sba.gov.

The Lender's submission to SBA must include a coversheet with the Lender's contact information (Lender name, point of contact, title, phone number, email, and mailing address). (NOTE: If any form is incomplete or illegible, the SBA Form 912 Package will be screened out and returned to the Lender.)

vi. Character Determination by SBA:

The Director, Office of Financial Assistance (D/FA), or designee, will make the character determination as follows:

- a) Based on the information received from the FBI fingerprint check, OCA will determine either that the Subject Individual has good character, or is not eligible for SBA financial assistance; and
- b) OCA will advise the Lender in writing of the Agency's character determination.

vii. File Retention: Lenders must retain a copy of the Agency's character determination in their loan file for the life of the loan.

- e. If the Subject Individual was cleared by the D/FA or designee on a previous application submitted within 6 months of the date of the current application and the Subject Individual certifies that no other offenses have occurred since the previous application was cleared by the D/FA or designee, non-delegated Lenders may submit a copy of the prior clearance and the Subject Individual's certification with the application. A Delegated Lender processing a loan under its delegated authority must retain this documentation in the loan file and may proceed to process the application.
- f. 912 Decision Appeals: A Subject Individual may request a reconsideration of an adverse character determination within 6 months of the date of SBA's decision.
 - i. Any request for reconsideration must include additional information or documentation supporting the request to reconsider the adverse character determination. Factors that contribute to a favorable reconsideration include:
 - a) Additional information provided by the Subject Individual that satisfactorily explains the circumstances of the prior offense(s);
 - b) The passage of time between the date of the disclosed offense(s) and the date of the application, during which the Subject Individual has not committed additional offenses and has generally led a responsible life and made a contribution to the community; and/or
 - c) Any additional law enforcement and/or court documentation that supports the request.
 - ii. The request for reconsideration should be submitted through the Lender to SBA, either via email to: oca912@sba.gov, or via overnight mail to: U.S.

Small Business Administration, Office of Capital Access, Attn: 912 Processing, 409 3rd Street SW, 8th Floor, Washington, DC 20416.

- iii. The Lender's submission to SBA must include a coversheet with the Lender's contact information (Lender name, point of contact, title, phone number, email, and mailing address).

14. Equity Interest by Lender or Associates in Applicant Concern ([13 CFR § 120.110\(o\)](#))

- a. A Lender or any of its Associates, may not obtain an equity interest, either directly or indirectly, in the Applicant.
- b. The only exception is when the Associate of the Applicant is a Small Business Investment Company (SBIC), in which case the requirements of [13 CFR § 120.104](#) apply. See also [13 CFR § 120.140](#) for a list of ethical requirements that apply to Lenders.

15. Businesses Providing Prurient Sexual Material ([13 CFR § 120.110 \(p\)](#))

- a. A business is not eligible for SBA assistance if:
 - i. It presents live or recorded performances of a prurient sexual nature; or
 - ii. It derives more than 5% of its gross revenue, directly or indirectly, through the sale of products, services or the presentation of any depictions or displays of a prurient sexual nature.
- b. SBA has determined that financing lawful activities of a prurient sexual nature is not in the public interest. The Lender must consider whether the nature and extent of the sexual component causes the business activity to be prurient.
- c. If a Lender finds that the Applicant may have a business aspect of a prurient sexual nature, prior to submitting an application to the LGPC (non-delegated) or requesting a loan number (delegated), the Lender must document and submit the analysis and supporting documentation to the Associate General Counsel for Litigation at PSMReview@sba.gov for a final Agency decision on eligibility. Upon approval by SBA, the Lender may submit the application to the LGPC or may proceed to process the loan under its delegated authority. A non-delegated Lender must submit a copy of SBA's approval with the application to the LGPC. A delegated Lender must retain its analysis, supporting documentation, and evidence of SBA's approval in its loan file and must submit the analysis and supporting documentation to SBA with any request for guaranty purchase. SBA also may review such documentation when conducting Lender oversight activities.

16. Prior Loss to the Government ([13 CFR § 120.110 \(q\)](#)) and Delinquent Federal Debt ([31 CFR § 285.13](#))

- a. Unless waived by SBA for good cause, SBA cannot provide assistance to an Applicant if there has been a Prior Loss to the Government. "Prior Loss" means the dollar amount of any deficiency on a Federal loan or federally assisted financing which has been incurred and recognized by a Federal agency after it has concluded its write-off and/or close-out procedures for the particular account including the

EXHIBIT B

**Purpose of this form:**

The purpose of this form is to collect information about the Small Business Applicant (“Applicant”) and its principals, the loan request, indebtedness, information about current or previous government financing, and certain other topics. The information also facilitates background checks as authorized by section 7(a)(1)(B) of the Small Business Act, 15 U.S.C. 636(a)(1)(B). This form is to be completed by the Applicant and all individuals identified below and **submitted to your SBA Participating Lender**. Submission of the requested information is required for SBA or the Lender to make a determination regarding eligibility for financial assistance. Failure to submit the information would affect that determination.

Instructions for completing this form:

This form is divided into two sections. Section I requests information about the Small Business Applicant and must be completed in its entirety, signed and dated by an authorized representative of the Small Business Applicant that is requesting a business loan. *A separate Section I is required to be completed and signed for each co-applicant (e.g. “Eligible Passive Company (EPC)” or “Operating Company (OC)”)*.

Section II of this form requests information about each of the Small Business Applicant’s principals. This section must be completed in its entirety, signed and dated by the following:

- For a sole proprietorship, the sole proprietor;
- For a partnership, all general partners, and all limited partners owning 20% or more of the equity of the firm; or any partner that is involved in management of the applicant business;
- For a corporation, all owners of 20% or more of the corporation, and each officer and director;
- For limited liability companies, all members owning 20% or more of the company, each officer, director, and managing member;
- Any Person hired by the business to manage day-to-day operations (“key employee”); and
- Any Trustor (if the Small Business Applicant is owned by a trust).

All parties listed above are considered “Associates” of the Small Business Applicant as defined in 13 CFR § 120.10, as well as “principals.” *A separate Section II is required to be completed and signed by each principal of the Small Business Applicant.*

For clarification regarding any of the questions, please contact your Lender.

Definitions:

1. **Affiliation** – Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party (or parties) controls or has power to control both. For example, affiliation may arise through ownership, common management (including through a management agreement), or when there is an identity of interest between close relatives with identical, or substantially identical, business interests. The complete definition of “affiliation” is found at 13 CFR § 121.301(f).
2. **Close Relative** - Close Relative is a spouse; a parent; or a child or sibling, or the spouse of any such person.
3. **Eligible Passive Company (“EPC”)** – is a small entity or trust which does not engage in regular and continuous business activity which leases real or personal property to an Operating Company for use in the Operating Company’s business, and which complies with the conditions set forth in 13 CFR § 120.111.
4. **Household Member** – A “household member” of an SBA employee includes: a) the spouse of the SBA employee; b) the minor children of said individual; and c) the blood relatives of the employee, and the blood relatives of the employee’s spouse who reside in the same place of abode as the employee. [13 CFR § 105.201(d)]
5. **Operating Company (“OC”)** – is an eligible small business actively involved in conducting business operations now or about to be located on real property owned by an Eligible Passive Company, or using or about to use in its business operations personal property owned by an Eligible Passive Company.



SBA 7(a) Borrower Information Form
(Section I: Applicant Business Information)

Applicant Business Legal Name (OC / [] EPC)
DBA or Tradename if applicable
Applicant Business Primary Business Address
Applicant Business Tax ID
Applicant Business Phone
Project Address (if other than primary business address)
Primary Contact
Email Address

Amount of Loan Request: \$
of existing employees employed by business? (including owners):
of jobs to be created as a result of the loan? (including owners):
of jobs that will be retained as a result of the loan that otherwise would have been lost? (including owners):
Purpose of the loan:

Small Business Applicant Ownership

List all proprietors, partners, officers, directors, and holders of outstanding stock. 100% of ownership must be reflected. Attach a separate sheet if necessary. Based on this form's instructions not all owners will need to complete the Principal Information section of this form.

Table with 4 columns: Owner Name, Title, Ownership %, Address

Unless stated otherwise, if any of the questions below are answered "Yes," please provide details on a separate sheet.

Table with 4 columns: #, Question, Yes, No. Contains 11 questions regarding co-applicants, SBA applications, suspensions, franchise agreements, affiliates, bankruptcy, legal actions, loans, exports, and assistance.



SBA 7(a) Borrower Information Form
(Section I: Applicant Business Information)

#		True	False
	SBA may not provide financial assistance to an applicant where there is any appearance of a conflict of interest with an SBA or other governmental employee. With the exception of question 15, <u>if any of the questions below are answered "False," this application may not be submitted under any delegated processing method, but must be submitted to the LGPC for non-delegated processing.</u> Note: This does not mean that your loan will be denied, only that your lender will need to use different SBA procedures to process this loan. If the answer to question 15 is "no," the application may be processed under a lender's delegated authority only after the lender received clearance from SBA.		
12	No SBA employee, or the household member (see definition on page 1) of an SBA employee, is a sole proprietor, partner, officer, director, or stockholder with a 10 percent or more interest, of the Applicant. [13 CFR 105.204]	<input type="checkbox"/>	<input type="checkbox"/>
13	No former SBA employee, who has been separated from SBA for less than one year prior to the request for financial assistance, is an employee, owner, partner, attorney, agent, owner of stock, officer, director, creditor or debtor of the Applicant. [13 CFR 105.203]	<input type="checkbox"/>	<input type="checkbox"/>
14	No member of Congress, or an appointed official or employee of the legislative or judicial branch of the Federal Government, is a sole proprietor, general partner, officer, director, or stockholder with a 10 percent or more interest, or household member of such individual, of the Applicant. [13 CFR 105.301(c)]	<input type="checkbox"/>	<input type="checkbox"/>
15	No Government employee having a grade of at least GS-13 or higher is a sole proprietor, general partner, officer, director, or stockholder with a 10 percent or more interest, or a household member of such individual, of the Applicant. [13 CFR 105.301(a)]	<input type="checkbox"/>	<input type="checkbox"/>
16	No member or employee of a Small Business Advisory Council or a SCORE volunteer is a sole proprietor, general partner, officer, director, or stockholder with a 10 percent or more interest, or a household member of such individual, of the Applicant. [13 CFR 105.302(a)]	<input type="checkbox"/>	<input type="checkbox"/>

By Signing Below, You Make the Following Representations and Certifications

REPRESENTATIONS

I represent that:

- I have read the Statements Required by Law and Executive Order included in this form, and I understand them.
- I will comply, whenever applicable, with the hazard insurance, lead-based paint, civil rights and other limitations in this form.
- All SBA loan proceeds will be used only for business related purposes as specified in the loan application.
- To the extent feasible, I will purchase only American-made equipment and products.

ACCURACY CERTIFICATION

I certify that the information provided in this application and the information that I have provided in all supporting documents and forms is true and accurate. I realize that the penalty for knowingly making a false statement to obtain a guaranteed loan from SBA is that I may be fined up to \$250,000 and/or be put in jail for up to 5 years under 18 USC § 1001 and if false statements are submitted to a Federally insured institution, I may be fined up to \$1,000,000 and/or be put in jail for up to 30 years under 18 USC § 1014.

Signature of Authorized Representative of Applicant Business

Date

Print Name

Title



SBA 7(a) Borrower Information Form (Section II: Principal Information)

Applicant Business: Table with columns: Principal Name, Social Security Number or Tax ID if an Entity, Date of Birth, Place of Birth, Home Address, Home Phone, % of Ownership in the Small Business Applicant.

Veteran/Gender/Race/Ethnicity data is collected for program reporting purposes only. Disclosure is voluntary and has no bearing on the credit decision.

Table for demographic data: Veteran, Gender, Race, Ethnicity with response options and 'Enter Response Below' column.

Unless stated otherwise, if any of the questions below are answered "Yes," please provide details on a separate sheet.

Questions 17-19 regarding criminal history with Yes/No checkboxes and initial response lines.

If you answer "Yes" to questions 18 or 19, you must complete SBA Form 912, "Statement of Personal History." You will need to furnish details, including dates, location, fines, sentences, level of charge (whether misdemeanor or felony), dates of parole/probation, unpaid fines or penalties, name(s) under which charged, and any other pertinent information. If you answer "Yes" to question 19 and are currently on parole or probation, the loan request is not eligible for SBA assistance.

Questions 20-22 regarding suspension, child support, and citizenship with checkboxes and registration/citizenship details.

Questions 23-26 regarding other business ownership, bankruptcy, legal action, and financing with Yes/No checkboxes.



SBA 7(a) Borrower Information Form
(Section II: Principal Information)

By Signing Below, You Make the Following Representations, Authorizations, and Certifications

REPRESENTATIONS AND AUTHORIZATIONS

I represent that:

- I have read the Statements Required by Law and Executive Order and I understand them.
- I will comply, whenever applicable, with the hazard insurance, lead-based paint, civil rights or other limitations in this form.
- All SBA loan proceeds will be used only for business related purposes as specified in the loan application.
- To the extent feasible, I will purchase only American-made equipment and products.

I authorize the SBA to request criminal record information about me from criminal justice agencies for the purpose of determining my eligibility for programs authorized by the Small Business Act, as amended.

ACCURACY CERTIFICATION

I certify that the information provided in this application and the information that I have provided in all supporting documents and forms is true and accurate. I realize that the penalty for knowingly making a false statement to obtain a guaranteed loan from SBA is that I may be fined up to \$250,000 and/or be put in jail for up to 5 years under 18 USC § 1001 and if false statements are submitted to a Federally insured institution, I may be fined up to \$1,000,000 and/or be put in jail for up to 30 years under 18 USC § 1014.

Signature

Date

Print Name/Title



Please read the following notices regarding use of federal financial assistance programs and then sign and date the certification.

SBA is required to withhold or limit financial assistance, to impose special conditions on approved loans, to provide special notices to applicants or borrowers and to require special reports and data from borrowers in order to comply with legislation passed by the Congress and Executive Orders issued by the President and by the provisions of various inter-agency agreements. SBA has issued regulations and procedures that implement these laws and executive orders. These are contained in Parts 112, 113, and 117 of Title 13 of the Code of Federal Regulations and in Standard Operating Procedures.

Privacy Act (5 U.S.C. 552a) -- Under the provisions of the Privacy Act, you are not required to provide your social security number. Failure to provide your social security number may not affect any right, benefit or privilege to which you are entitled. Disclosures of name and other personal identifiers are, however, required for a benefit, as SBA requires an individual seeking assistance from SBA to provide it with sufficient information for it to make a character determination. In determining whether an individual is of good character, SBA considers the person's integrity, candor, and disposition toward criminal actions. Additionally, SBA is specifically authorized to verify your criminal history, or lack thereof, pursuant to section 7(a)(1)(B), 15 USC Section 636(a)(1)(B) of the Small Business Act (the Act). Further, for all forms of assistance, SBA is authorized to make all investigations necessary to ensure that a person has not engaged in acts that violate or will violate the Act or the Small Business Investment Act, 15 USC Sections 634(b)(11) and 687(b)(a), respectively. For these purposes, you are asked to voluntarily provide your social security number to assist SBA in making a character determination and to distinguish you from other individuals with the same or similar name or other personal identifier.

Any person can request to see or get copies of any personal information that SBA has in his or her file when that file is retrieved by individual identifiers such as name or social security numbers. Requests for information about another party may be denied unless SBA has the written permission of the individual to release the information to the requestor or unless the information is subject to disclosure under the Freedom of Information Act.

The Privacy Act authorizes SBA to make certain "routine uses" of information protected by that Act. One such routine use is the disclosure of information maintained in SBA's system of records when this information indicates a violation or potential violation of law, whether civil, criminal, or administrative in nature. Specifically, SBA may refer the information to the appropriate agency, whether Federal, State, local or foreign, charged with responsibility for, or otherwise involved in investigation, prosecution, enforcement or prevention of such violations. Another routine use is disclosure to other Federal agencies conducting background checks; only to the extent the information is relevant to the requesting agencies' function. See, 74 F.R. 14890 (2009), and as amended from time to time for additional background and other routine uses.

Right to Financial Privacy Act of 1978 (12 U.S.C. 3401) -- This is notice to you as required by the Right to Financial Privacy Act of 1978, of SBA's access rights to financial records held by financial institutions that are or have been doing business with you or your business, including any financial institutions participating in a loan or loan guaranty. The law provides that SBA shall have a right of access to your financial records in connection with its consideration or administration of assistance to you in the form of a Government guaranteed loan. SBA is required to provide a certificate of its compliance with the Act to a financial institution in connection with its first request for access to your financial records, after which no further certification is required for subsequent accesses. The law also provides that SBA's access rights continue for the term of any approved loan guaranty agreement. No further notice to you of SBA's access rights is required during the term of any such agreement. The law also authorizes SBA to transfer to another Government authority any financial records included in an application for a loan, or concerning an approved loan or loan guarantee, as necessary to process, service or foreclose on a loan guaranty or collect on a defaulted loan guaranty.

Freedom of Information Act (5 U.S.C. 552) -- This law provides, with some exceptions, that SBA must supply information reflected in agency files and records to a person requesting it. Information about approved loans that will be automatically released includes, among other things, statistics on our loan programs (individual borrowers are not identified in the statistics) and other information such as the names of the borrowers (and their officers, directors, stockholders or partners), the collateral pledged to secure the loan, the amount of the loan, its purpose in general terms and the maturity. Proprietary data on a borrower would not routinely be made available to third parties. All requests under this Act are to be addressed to the nearest SBA office and be identified as a Freedom of Information request.

Flood Disaster Protection Act (42 U.S.C. 4011) -- Regulations have been issued by the Federal Insurance Administration (FIA) and by SBA implementing this Act and its amendments. These regulations prohibit SBA from making certain loans in an FIA designated floodplain unless Federal Flood insurance is purchased as a condition of the loan. Failure to maintain the required level of flood insurance makes the applicant ineligible for any financial assistance from SBA, including disaster assistance.

Executive Orders -- Floodplain Management and Wetland Protection (42 F.R. 26951 and 42 F.R. 26961) -- SBA discourages settlement in or development of a floodplain or a wetland. This statement is to notify all SBA loan applicants that such actions are hazardous to both life and property and should be avoided. The additional cost of flood preventive construction must be considered in addition to the possible loss of all assets and investments due to a future flood.

Occupational Safety and Health Act (15 U.S.C. 651 et seq.) -- This legislation authorizes the Occupational Safety and Health Administration in the Department of Labor to require businesses to modify facilities and procedures to protect employees or pay penalty fees. Businesses can be forced to cease operations or be prevented from starting operations in a new facility. Therefore, SBA may require additional information from an applicant to determine whether the business will be in compliance with OSHA regulations and allowed to operate its facility after the loan is approved and disbursed. Signing this form as an applicant is certification that the OSHA requirements that apply to the applicant business have been determined and that the applicant, to the best of its knowledge, is in compliance. Furthermore, applicant certifies that it will remain in compliance during the life of the loan.



Civil Rights Legislation (13 C.F.R. 112, 113, 117) -- All businesses receiving SBA financial assistance must agree not to discriminate in any business practice, including employment practices and services to the public on the basis of categories cited in 13 C.F.R., Parts 112, 113, and 117 of SBA Regulations. This includes making their goods and services available to handicapped clients or customers. All business borrowers will be required to display the "Equal Employment Opportunity Poster" prescribed by SBA.

Equal Credit Opportunity Act (15 U.S.C. 1691) -- The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status or age (provided the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program, or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

Executive Order 11738 -- Environmental Protection (38 F.R. 251621) -- The Executive Order charges SBA with administering its loan programs in a manner that will result in effective enforcement of the Clean Air Act, the Federal Water Pollution Act and other environment protection legislation.

Debt Collection Act of 1982, Deficit Reduction Act of 1984 (31 U.S.C. 3701 et seq. and other titles) -- These laws require SBA to collect aggressively any loan payments which become delinquent. SBA must obtain your taxpayer identification number when you apply for a loan. If you receive a loan, and do not make payments as they come due, SBA may take one or more of the following actions: (1) report the status of your loan(s) to credit bureaus, (2) hire a collection agency to collect your loan, (3) offset your income tax refund or other amounts due to you from the Federal Government, (4) suspend or debar you or your company from doing business with the Federal Government, (5) refer your loan to the Department of Justice or other attorneys for litigation, or (6) foreclose on collateral or take other action permitted in the loan instruments.

Immigration Reform and Control Act of 1986 (Pub. L. 99-603) -- If you are an alien who was in this country illegally since before January 1, 1982, you may have been granted lawful temporary resident status by the United States Immigration and Naturalization Service pursuant to the Immigration Reform and Control Act of 1986. For five years from the date you are granted such status, you are not eligible for financial assistance from the SBA in the form of a loan guaranty under Section 7(a) of the Small Business Act unless you are disabled or a Cuban or Haitian entrant. When you sign this document, you are making the certification that the Immigration Reform and Control Act of 1986 does not apply to you, or if it does apply, more than five years have elapsed since you have been granted lawful temporary resident status pursuant to such 1986 legislation.

Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821 et seq.) -- Borrowers using SBA funds for the construction or rehabilitation of a residential structure are prohibited from using lead-based paint (as defined in SBA regulations) on all interior surfaces, whether accessible or not, and exterior surfaces, such as stairs, decks, porches, railings, windows and doors, which are readily accessible to children under 7 years of age. A "residential structure" is any home, apartment, hotel, motel, orphanage, boarding school, dormitory, day care center, extended care facility, college or other school housing, hospital, group practice or community facility and all other residential or institutional structures where persons reside.

Executive Order 12549, Debarment and Suspension (2 CFR 180, adopted by reference in 2 CFR Part 2700 (SBA Debarment Regulations)) -- By submission of this loan application, you certify and acknowledge that neither you nor any Principals have within the past three years been: (a) debarred, suspended, declared ineligible from participating in, or voluntarily excluded from participation in a transaction by any Federal department or agency; (b) formally proposed for debarment, with a final determination still pending; (c) indicted, convicted, or had a civil judgment rendered against you for any of the offenses listed in the Regulations; or (d) delinquent on any amounts due and owing to the U.S. Government or its agencies or instrumentalities as of the date of execution of this certification.

If you are unable to certify and acknowledge (a) through (d), you must obtain and attach a written statement of exception from SBA permitting participation in this loan. You further certify that you have not and will not knowingly enter into any agreement in connection with the goods and/or services purchased with the proceeds of this loan with any individual or entity that has been debarred, suspended, declared ineligible from participating in, or voluntarily excluded from participation in a Transaction. All capitalized terms have the meanings set forth in 2 C.F.R. Part 180.

NOTE: According to the 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 burden for completing this form, including time for reviewing instructions, gathering data needed, and completing and reviewing the form is 8 minutes per response. Comments or questions on the burden estimates should be sent to U.S. 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, Rm. 10202, Washington DC 20503.

PLEASE DO NOT SEND FORMS TO THESE ADDRESSES.

EXHIBIT C



United States of America
SMALL BUSINESS ADMINISTRATION
STATEMENT OF PERSONAL HISTORY

Please Read Carefully: SBA uses Form 912 as one part of its assessment of program eligibility. Please reference SBA Regulations and Standard Operating Procedures if you have any questions about who must submit this form and where to submit it. For further information, please call SBA's Answer Desk at 1-800-U-ASK-SBA (1-800-827-5722), or check SBA's website at www.sba.gov. **DO NOT SEND COMPLETED FORMS TO OMB as this will delay the processing of your application; send forms to the address provided by your lender or SBA representative.**

Name and Address of Applicant (Firm Name)(Street, City, State, and ZIP Code)		SBA District/Disaster Area Office	
		Amount Applied for (when applicable)	File No. (if known)
1. Personal Statement of: (State name in full, if no middle name, state (NMN), or if initial only, indicate initial.) List all former names used, and dates each name was used. Use separate sheet if necessary.		2. Give the percentage of ownership or stock owned or to be owned in the small business or the development company	
Social Security No.			
First	Middle	3. Date of Birth (Month, day, and year)	
Last		4. Place of Birth: (City & State or Foreign Country)	

Name and Address of participating lender or surety co. (when applicable and known)	5. U.S. Citizen? <input type="checkbox"/> YES <input type="checkbox"/> NO INITIALS: _____ If No, are you a Lawful Permanent resident alien: <input type="checkbox"/> YES <input type="checkbox"/> NO If non- U.S. citizen provide alien registration number: _____
--	---

6. Present residence address: From: To: Address: Home Telephone No. (Include Area Code): Business Telephone No. (Include Area Code):	Most recent prior address (omit if over 10 years ago): From: To: Address:
---	--

PLEASE SEE REVERSE SIDE FOR EXPLANATION REGARDING DISCLOSURE OF INFORMATION AND THE USES OF SUCH INFORMATION.

YOU MUST INITIAL YOUR RESPONSES TO QUESTIONS 5,7,8 AND 9.

IF YOU ANSWER "YES" TO 7, 8, OR 9, FURNISH DETAILS ON A SEPARATE SHEET. INCLUDE DATES, LOCATION, FINES, SENTENCES, WHETHER MISDEMEANOR OR FELONY, DATES OF PAROLE/PROBATION, UNPAID FINES OR PENALTIES, NAME(S) UNDER WHICH CHARGED, AND ANY OTHER PERTINENT INFORMATION. AN ARREST OR CONVICTION RECORD WILL NOT NECESSARILY DISQUALIFY YOU; HOWEVER, AN UNTRUTHFUL ANSWER WILL CAUSE YOUR APPLICATION TO BE DENIED AND SUBJECT YOU TO OTHER PENALTIES AS NOTED BELOW.

7. Are you presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction?

Yes No **INITIALS:** _____

8. Have you been arrested in the past six months for any criminal offense?

Yes No **INITIALS:** _____

9. For any criminal offense – other than a minor vehicle violation – have you ever: 1) been convicted; 2) plead guilty; 3) plead nolo contendere; 4) been placed on pretrial diversion; or 5) been placed on any form of parole or probation (including probation before judgment).

Yes No **INITIALS:** _____

10. I authorize the Small Business Administration Office of Inspector General to request criminal record information about me from criminal justice agencies for the purpose of determining my eligibility for programs authorized by the Small Business Act, and the Small Business Investment Act.

CAUTION - PENALTIES FOR FALSE STATEMENTS: Knowingly making a false statement on this form is a violation of Federal law and could result in criminal prosecution, significant civil penalties, and a denial of your loan, surety bond, or other program participation. A false statement is punishable under 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.

Signature	Title	Date
-----------	-------	------

Agency Use Only		12. <input type="checkbox"/> Cleared for Processing	Date _____	Approving Authority _____
11. <input type="checkbox"/> Fingerprints Waived	Date _____	Approving Authority _____		
<input type="checkbox"/> Fingerprints Required	Date _____	Approving Authority _____		
Date Sent to OIG _____				
		13. <input type="checkbox"/> Request a Character Evaluation	Date _____	Approving Authority _____
(Required whenever 7, 8 or 9 are answered "yes" even if cleared for processing.)				

PLEASE NOTE: The estimated burden for completing this form is 15 minutes per response. You are not required to respond to any collection of information unless it displays a currently valid OMB approval number. If you wish to submit comments on the burden for completing this form, direct these comments to U.S. Small Business Administration, Chief, AIB, 409 3rd St., S.W., Washington D.C. 20416 and Desk Officer for the Small Business Administration, Office of Management and Budget, New Executive Office Building, Room 10202, Washington, D.C. 20503. OMB Approval 3245-0178. **DO NOT SEND COMPLETED FORMS TO OMB as this will delay the processing of your application; send forms to the address provided by your lender or SBA representative.**

NOTICES REQUIRED BY LAW

The following is a brief summary of the laws applicable to this solicitation of information.

Paperwork Reduction Act (44 U.S.C. Chapter 35)

SBA is collecting the information on this form to make a character and credit eligibility decision to fund or deny you a loan or other form of assistance. The information is required in order for SBA to have sufficient information to determine whether to provide you with the requested assistance. The information collected may be checked against criminal history indices of the Federal Bureau of Investigation.

Privacy Act (5 U.S.C. § 552a)

Any person can request to see or get copies of any personal information that SBA has in his or her file, when that file is retrieved by individual identifiers, such as name or social security numbers. Requests for information about another party may be denied unless SBA has the written permission of the individual to release the information to the requestor or unless the information is subject to disclosure under the Freedom of Information Act.

Under the provisions of the Privacy Act, you are not required to provide your social security number. Failure to provide your social security number may not affect any right, benefit or privilege to which you are entitled. Disclosures of name and other personal identifiers are, however, required for a benefit, as SBA requires an individual seeking assistance from SBA to provide it with sufficient information for it to make a character determination. In determining whether an individual is of good character, SBA considers the person's integrity, candor, and disposition toward criminal actions. In making loans pursuant to section 7(a)(6) the Small Business Act (the Act), 15 USC § 636 (a)(6), SBA is required to have reasonable assurance that the loan is of sound value and will be repaid or that it is in the best interest of the Government to grant the assistance requested. Additionally, SBA is specifically authorized to verify your criminal history, or lack thereof, pursuant to section 7(a)(1)(B), 15 USC § 636(a)(1)(B). Further, for all forms of assistance, SBA is authorized to make all investigations necessary to ensure that a person has not engaged in acts that violate or will violate the Act or the Small Business Investment Act, 15 USC §§ 634(b)(11) and 687b(a). For these purposes, you are asked to voluntarily provide your social security number to assist SBA in making a character determination and to distinguish you from other individuals with the same or similar name or other personal identifier.

When the information collected on this form indicates a violation or potential violation of law, whether civil, criminal, or administrative in nature, SBA may refer it to the appropriate agency, whether Federal, State, local, or foreign, charged with responsibility for or otherwise involved in investigation, prosecution, enforcement or prevention of such violations. See 74 Fed. Reg. 14890 (2009) for other published routine uses.

EXHIBIT D



Paycheck Protection Program Borrower Application Form

OMB Control No.: 3245-0407 Expiration Date: 09/30/2020

Check One: Sole proprietor, Partnership, C-Corp, S-Corp, LLC, Independent contractor, Eligible self-employed individual, 501(c)(3) nonprofit, 501(c)(19) veterans organization, Tribal business, Other. DBA or Tradename if Applicable. Business Legal Name. Business Address, Business TIN (EIN, SSN), Business Phone. Primary Contact, Email Address.

Average Monthly Payroll: \$ x 2.5 + EIDL, Net of Advance (if Applicable) Equals Loan Request: \$ Number of Employees: Purpose of the loan (select more than one): Payroll, Lease / Mortgage Interest, Utilities, Other (explain):

Applicant Ownership

List all owners of 20% or more of the equity of the Applicant. Attach a separate sheet if necessary.

Table with 5 columns: Owner Name, Title, Ownership %, TIN (EIN, SSN), Address

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

Table with 3 columns: Question, Yes, No. Questions 1-4 regarding suspension, loans, other businesses, and SBA Economic Injury Disaster Loan.

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

Table with 3 columns: Question, Yes, No. Questions 5-8 regarding criminal charges, probation, residence, and franchise status.



Paycheck Protection Program
Borrower Application Form

By Signing Below, You Make the Following Representations, Authorizations, and Certifications

CERTIFICATIONS AND AUTHORIZATIONS

I certify that:

- I have read the statements included in this form, including the Statements Required by Law and Executive Orders, and I understand them.
The Applicant is eligible to receive a loan under the rules in effect at the time this application is submitted that have been issued by the Small Business Administration (SBA) implementing the Paycheck Protection Program under Division A, Title I of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (the Paycheck Protection Program Rule).
The Applicant (1) is an independent contractor, eligible self-employed individual, or sole proprietor or (2) employs no more than the greater of 500 or employees or, if applicable, the size standard in number of employees established by the SBA in 13 C.F.R. 121.201 for the Applicant's industry.
I will comply, whenever applicable, with the civil rights and other limitations in this form.
All SBA loan proceeds will be used only for business-related purposes as specified in the loan application and consistent with the Paycheck Protection Program Rule.
To the extent feasible, I will purchase only American-made equipment and products.
The Applicant is not engaged in any activity that is illegal under federal, state or local law.
Any loan received by the Applicant under Section 7(b)(2) of the Small Business Act between January 31, 2020 and April 3, 2020 was for a purpose other than paying payroll costs and other allowable uses loans under the Paycheck Protection Program Rule.

For Applicants who are individuals: I authorize the SBA to request criminal record information about me from criminal justice agencies for the purpose of determining my eligibility for programs authorized by the Small Business Act, as amended.

CERTIFICATIONS

The authorized representative of the Applicant must certify in good faith to all of the below by initialing next to each one:

The Applicant was in operation on February 15, 2020 and had employees for whom it paid salaries and payroll taxes or paid independent contractors, as reported on Form(s) 1099-MISC.

Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.

The funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments, as specified under the Paycheck Protection Program Rule; I understand that if the funds are knowingly used for unauthorized purposes, the federal government may hold me legally liable, such as for charges of fraud.

The Applicant will provide to the Lender documentation verifying the number of full-time equivalent employees on the Applicant's payroll as well as the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the eight-week period following this loan.

I understand that loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities, and not more than 25% of the forgiven amount may be for non-payroll costs.

During the period beginning on February 15, 2020 and ending on December 31, 2020, the Applicant has not and will not receive another loan under the Paycheck Protection Program.

I further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects. I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 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.

I acknowledge that the lender will confirm the eligible loan amount using required documents submitted. I understand, acknowledge and agree that the Lender can share any tax information that I have provided with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of compliance with SBA Loan Program Requirements and all SBA reviews.

Signature of Authorized Representative of Applicant

Date

Print Name

Title

**Paycheck Protection Program
Borrower Application Form****Purpose of this form:**

This form is to be completed by the authorized representative of the Applicant and *submitted to your SBA Participating Lender*. Submission of the requested information is required to make a determination regarding eligibility for financial assistance. Failure to submit the information would affect that determination.

Instructions for completing this form:

With respect to “purpose of the loan,” 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 coverage, including insurance premiums, and retirement; payment of state and local taxes assessed on compensation of employees; and for an independent contractor or sole proprietor, wage, commissions, income, or net earnings from self-employment or similar compensation.

For purposes of calculating “Average Monthly Payroll,” most Applicants will use the average monthly payroll for 2019, excluding costs over \$100,000 on an annualized basis for each employee. For seasonal businesses, the Applicant may elect to instead use average monthly payroll for the time period between February 15, 2019 and June 30, 2019, excluding costs over \$100,000 on an annualized basis for each employee. For new businesses, average monthly payroll may be calculated using the time period from January 1, 2020 to February 29, 2020, excluding costs over \$100,000 on an annualized basis for each employee.

If Applicant is refinancing an Economic Injury Disaster Loan (EIDL): Add the outstanding amount of an EIDL made between January 31, 2020 and April 3, 2020, less the amount of any “advance” under an EIDL COVID-19 loan, to Loan Request as indicated on the form.

All parties listed below are considered owners of the Applicant as defined in 13 CFR § 120.10, as well as “principals”:

- For a sole proprietorship, the sole proprietor;
- For a partnership, all general partners, and all limited partners owning 20% or more of the equity of the firm;
- For a corporation, all owners of 20% or more of the corporation;
- For limited liability companies, all members owning 20% or more of the company; and
- Any Trustor (if the Applicant is owned by a trust).

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 8 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.

Privacy Act (5 U.S.C. 552a) – Under the provisions of the Privacy Act, you are not required to provide your social security number. Failure to provide your social security number may not affect any right, benefit or privilege to which you are entitled. (But see Debt Collection Notice regarding taxpayer identification number below.) Disclosures of name and other personal identifiers are required to provide SBA with sufficient information to make a character determination. When evaluating character, SBA considers the person’s integrity, candor, and disposition toward criminal actions. Additionally, SBA is specifically authorized to verify your criminal history, or lack thereof, pursuant to section 7(a)(1)(B), 15 USC Section 636(a)(1)(B) of the Small Business Act (the Act).

Disclosure of Information – Requests for information about another party may be denied unless SBA has the written permission of the individual to release the information to the requestor or unless the information is subject to disclosure under the Freedom of Information Act. The Privacy Act authorizes SBA to make certain “routine uses” of information protected by that Act. One such routine use is the disclosure of information maintained in SBA’s system of records when this information indicates a violation or potential violation of law, whether civil, criminal, or administrative in nature. Specifically, SBA may refer the information to the appropriate agency, whether Federal, State, local or foreign, charged with responsibility for, or otherwise involved in investigation, prosecution, enforcement or prevention of such violations. Another routine use is disclosure to other Federal agencies conducting background checks but only to the extent the information is relevant to the requesting agencies’ function. See, 74 F.R. 14890 (2009), and as amended from time to time for additional background and other routine uses. In addition, the CARES Act, requires SBA to register every loan made under the Paycheck Protection Act using the Taxpayer Identification Number (TIN) assigned to the borrower.

Debt Collection Act of 1982, Deficit Reduction Act of 1984 (31 U.S.C. 3701 et seq. and other titles) – SBA must obtain your taxpayer identification number when you apply for a loan. If you receive a loan, and do not make payments as they come due, SBA may: (1) report the status of your loan(s) to credit bureaus, (2) hire a collection agency to collect your loan, (3) offset your income tax refund or other amounts due to you from the Federal Government, (4) suspend or debar you or your company from doing business with the Federal Government, (5) refer your loan to the Department of Justice, or (6) foreclose on collateral or take other action permitted in the loan instruments.

Right to Financial Privacy Act of 1978 (12 U.S.C. 3401) – The Right to Financial Privacy Act of 1978, grants SBA access rights to financial records held by financial institutions that are or have been doing business with you or your business including any financial



**Paycheck Protection Program
Borrower Application Form**

institutions participating in a loan or loan guaranty. SBA is only required provide a certificate of its compliance with the Act to a financial institution in connection with its first request for access to your financial records. SBA's access rights continue for the term of any approved loan guaranty agreement. SBA is also authorized to transfer to another Government authority any financial records concerning an approved loan or loan guarantee, as necessary to process, service or foreclose on a loan guaranty or collect on a defaulted loan guaranty.

Freedom of Information Act (5 U.S.C. 552) – Subject to certain exceptions, SBA must supply information reflected in agency files and records to a person requesting it. Information about approved loans that will be automatically released includes, among other things, statistics on our loan programs (individual borrowers are not identified in the statistics) and other information such as the names of the borrowers (and their officers, directors, stockholders or partners), the collateral pledged to secure the loan, the amount of the loan, its purpose in general terms and the maturity. Proprietary data on a borrower would not routinely be made available to third parties. All requests under this Act are to be addressed to the nearest SBA office and be identified as a Freedom of Information request.

Occupational Safety and Health Act (15 U.S.C. 651 et seq.) – The Occupational Safety and Health Administration (OSHA) can require businesses to modify facilities and procedures to protect employees. Businesses that do not comply may be fined, forced to cease operations, or prevented from starting operations. Signing this form is certification that the applicant, to the best of its knowledge, is in compliance with the applicable OSHA requirements, and will remain in compliance during the life of the loan.

Civil Rights (13 C.F.R. 112, 113, 117) – All businesses receiving SBA financial assistance must agree not to discriminate in any business practice, including employment practices and services to the public on the basis of categories cited in 13 C.F.R., Parts 112, 113, and 117 of SBA Regulations. All borrowers must display the "Equal Employment Opportunity Poster" prescribed by SBA.

Equal Credit Opportunity Act (15 U.S.C. 1691) – Creditors are prohibited from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status or age (provided the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

Debarment and Suspension Executive Order 12549; (2 CFR Part 180 and Part 2700) – By submitting this loan application, you certify that neither the Applicant or any owner of the Applicant have within the past three years been: (a) debarred, suspended, declared ineligible or voluntarily excluded from participation in a transaction by any Federal Agency; (b) formally proposed for debarment, with a final determination still pending; (c) indicted, convicted, or had a civil judgment rendered against you for any of the offenses listed in the regulations or (d) delinquent on any amounts owed to the U.S. Government or its instrumentalities as of the date of execution of this certification.

EXHIBIT E



Paycheck Protection Program
Borrower Application Form Revised June 12, 2020

OMB Control No.: 3245-0407
Expiration Date: 10/31/2020

Check One: Sole proprietor, Partnership, C-Corp, S-Corp, LLC, Independent contractor, Eligible self-employed individual, 501(c)(3) nonprofit, 501(c)(19) veterans organization, Tribal business, Other. DBA or Tradename if Applicable. Business Legal Name, Business Address, Business TIN (EIN, SSN), Business Phone, Primary Contact, Email Address.

Average Monthly Payroll: \$ x 2.5 + EIDL, Net of Advance (if Applicable) Equals Loan Request: \$ Number of Employees: Purpose of the loan (select more than one): Payroll, Lease / Mortgage Interest, Utilities, Other (explain):

Applicant Ownership

List all owners of 20% or more of the equity of the Applicant. Attach a separate sheet if necessary.

Table with 5 columns: Owner Name, Title, Ownership %, TIN (EIN, SSN), Address

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

Table with 3 columns: Question, Yes, No. Contains 4 questions regarding applicant status, previous loans, other businesses, and SBA Economic Injury Disaster Loans.

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

Table with 3 columns: Question, Yes, No. Contains 4 questions regarding criminal records, residence, and franchise status.



**Paycheck Protection Program
Borrower Application Form Revised June 12, 2020**

By Signing Below, You Make the Following Representations, Authorizations, and Certifications

CERTIFICATIONS AND AUTHORIZATIONS

I certify that:

- I have read the statements included in this form, including the Statements Required by Law and Executive Orders, and I understand them.
- The Applicant is eligible to receive a loan under the rules in effect at the time this application is submitted that have been issued by the Small Business Administration (SBA) implementing the Paycheck Protection Program under Division A, Title I of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (the Paycheck Protection Program Rule).
- The Applicant (1) is an independent contractor, eligible self-employed individual, or sole proprietor or (2) employs no more than the greater of 500 or employees or, if applicable, the size standard in number of employees established by the SBA in 13 C.F.R. 121.201 for the Applicant's industry.
- I will comply, whenever applicable, with the civil rights and other limitations in this form.
- All SBA loan proceeds will be used only for business-related purposes as specified in the loan application and consistent with the Paycheck Protection Program Rule.
- To the extent feasible, I will purchase only American-made equipment and products.
- The Applicant is not engaged in any activity that is illegal under federal, state or local law.
- Any loan received by the Applicant under Section 7(b)(2) of the Small Business Act between January 31, 2020 and April 3, 2020 was for a purpose other than paying payroll costs and other allowable uses loans under the Paycheck Protection Program Rule.

For Applicants who are individuals: I authorize the SBA to request criminal record information about me from criminal justice agencies for the purpose of determining my eligibility for programs authorized by the Small Business Act, as amended.

CERTIFICATIONS

The authorized representative of the Applicant must certify in good faith to all of the below by **initialing** next to each one:

_____ The Applicant was in operation on February 15, 2020 and had employees for whom it paid salaries and payroll taxes or paid independent contractors, as reported on Form(s) 1099-MISC.

_____ Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.

_____ The funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments, as specified under the Paycheck Protection Program Rule; I understand that if the funds are knowingly used for unauthorized purposes, the federal government may hold me legally liable, such as for charges of fraud.

_____ The Applicant will provide to the Lender documentation verifying the number of full-time equivalent employees on the Applicant's payroll as well as the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the 24-week period following this loan.

_____ I understand that loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities, and not more than 40% of the forgiven amount may be for non-payroll costs.

_____ During the period beginning on February 15, 2020 and ending on December 31, 2020, the Applicant has not and will not receive another loan under the Paycheck Protection Program.

_____ I further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects. I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 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.

_____ I acknowledge that the lender will confirm the eligible loan amount using required documents submitted. I understand, acknowledge and agree that the Lender can share any tax information that I have provided with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of compliance with SBA Loan Program Requirements and all SBA reviews.

Signature of Authorized Representative of Applicant

Date

Print Name

Title



Paycheck Protection Program
Borrower Application Form Revised June 12, 2020

Purpose of this form:

This form is to be completed by the authorized representative of the Applicant and *submitted to your SBA Participating Lender*. Submission of the requested information is required to make a determination regarding eligibility for financial assistance. Failure to submit the information would affect that determination.

Instructions for completing this form:

With respect to “purpose of the loan,” 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 coverage, including insurance premiums, and retirement; payment of state and local taxes assessed on compensation of employees; and for an independent contractor or sole proprietor, wage, commissions, income, or net earnings from self-employment or similar compensation.

For purposes of calculating “Average Monthly Payroll,” most Applicants will use the average monthly payroll for 2019, excluding costs over \$100,000 on an annualized basis for each employee. For seasonal businesses, the Applicant may elect to instead use average monthly payroll for the time period between February 15, 2019 and June 30, 2019 or any 12-week period between May 1, 2019 and September 15, 2019, excluding costs over \$100,000 on an annualized basis for each employee. For new businesses, average monthly payroll may be calculated using the time period from January 1, 2020 to February 29, 2020, excluding costs over \$100,000 on an annualized basis for each employee.

If Applicant is refinancing an Economic Injury Disaster Loan (EIDL): Add the outstanding amount of an EIDL made between January 31, 2020 and April 3, 2020, less the amount of any “advance” under an EIDL COVID-19 loan, to Loan Request as indicated on the form.

All parties listed below are considered owners of the Applicant as defined in 13 CFR § 120.10, as well as “principals”:

- For a sole proprietorship, the sole proprietor;
- For a partnership, all general partners, and all limited partners owning 20% or more of the equity of the firm;
- For a corporation, all owners of 20% or more of the corporation;
- For limited liability companies, all members owning 20% or more of the company; and
- Any Trustor (if the Applicant is owned by a trust).

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 8 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.**

Privacy Act (5 U.S.C. 552a) – Under the provisions of the Privacy Act, you are not required to provide your social security number. Failure to provide your social security number may not affect any right, benefit or privilege to which you are entitled. (But see Debt Collection Notice regarding taxpayer identification number below.) Disclosures of name and other personal identifiers are required to provide SBA with sufficient information to make a character determination. When evaluating character, SBA considers the person’s integrity, candor, and disposition toward criminal actions. Additionally, SBA is specifically authorized to verify your criminal history, or lack thereof, pursuant to section 7(a)(1)(B), 15 USC Section 636(a)(1)(B) of the Small Business Act (the Act).

Disclosure of Information – Requests for information about another party may be denied unless SBA has the written permission of the individual to release the information to the requestor or unless the information is subject to disclosure under the Freedom of Information Act. The Privacy Act authorizes SBA to make certain “routine uses” of information protected by that Act. One such routine use is the disclosure of information maintained in SBA’s system of records when this information indicates a violation or potential violation of law, whether civil, criminal, or administrative in nature. Specifically, SBA may refer the information to the appropriate agency, whether Federal, State, local or foreign, charged with responsibility for, or otherwise involved in investigation, prosecution, enforcement or prevention of such violations. Another routine use is disclosure to other Federal agencies conducting background checks but only to the extent the information is relevant to the requesting agencies’ function. *See*, 74 F.R. 14890 (2009), and as amended from time to time for additional background and other routine uses. In addition, the CARES Act, requires SBA to register every loan made under the Paycheck Protection Act using the Taxpayer Identification Number (TIN) assigned to the borrower.

Debt Collection Act of 1982, Deficit Reduction Act of 1984 (31 U.S.C. 3701 et seq. and other titles) – SBA must obtain your taxpayer identification number when you apply for a loan. If you receive a loan, and do not make payments as they come due, SBA may: (1) report the status of your loan(s) to credit bureaus, (2) hire a collection agency to collect your loan, (3) offset your income tax refund or other amounts due to you from the Federal Government, (4) suspend or debar you or your company from doing business with the Federal Government, (5) refer your loan to the Department of Justice, or (6) foreclose on collateral or take other action permitted in the loan instruments.



**Paycheck Protection Program
Borrower Application Form Revised June 12, 2020**

Right to Financial Privacy Act of 1978 (12 U.S.C. 3401) – The Right to Financial Privacy Act of 1978, grants SBA access rights to financial records held by financial institutions that are or have been doing business with you or your business including any financial institutions participating in a loan or loan guaranty. SBA is only required provide a certificate of its compliance with the Act to a financial institution in connection with its first request for access to your financial records. SBA's access rights continue for the term of any approved loan guaranty agreement. SBA is also authorized to transfer to another Government authority any financial records concerning an approved loan or loan guarantee, as necessary to process, service or foreclose on a loan guaranty or collect on a defaulted loan guaranty.

Freedom of Information Act (5 U.S.C. 552) – Subject to certain exceptions, SBA must supply information reflected in agency files and records to a person requesting it. Information about approved loans that will be automatically released includes, among other things, statistics on our loan programs (individual borrowers are not identified in the statistics) and other information such as the names of the borrowers (and their officers, directors, stockholders or partners), the collateral pledged to secure the loan, the amount of the loan, its purpose in general terms and the maturity. Proprietary data on a borrower would not routinely be made available to third parties. All requests under this Act are to be addressed to the nearest SBA office and be identified as a Freedom of Information request.

Occupational Safety and Health Act (15 U.S.C. 651 et seq.) – The Occupational Safety and Health Administration (OSHA) can require businesses to modify facilities and procedures to protect employees. Businesses that do not comply may be fined, forced to cease operations, or prevented from starting operations. Signing this form is certification that the applicant, to the best of its knowledge, is in compliance with the applicable OSHA requirements, and will remain in compliance during the life of the loan.

Civil Rights (13 C.F.R. 112, 113, 117) – All businesses receiving SBA financial assistance must agree not to discriminate in any business practice, including employment practices and services to the public on the basis of categories cited in 13 C.F.R., Parts 112, 113, and 117 of SBA Regulations. All borrowers must display the "Equal Employment Opportunity Poster" prescribed by SBA.

Equal Credit Opportunity Act (15 U.S.C. 1691) – Creditors are prohibited from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status or age (provided the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

Debarment and Suspension Executive Order 12549; (2 CFR Part 180 and Part 2700) – By submitting this loan application, you certify that neither the Applicant or any owner of the Applicant have within the past three years been: (a) debarred, suspended, declared ineligible or voluntarily excluded from participation in a transaction by any Federal Agency; (b) formally proposed for debarment, with a final determination still pending; (c) indicted, convicted, or had a civil judgment rendered against you for any of the offenses listed in the regulations or (d) delinquent on any amounts owed to the U.S. Government or its instrumentalities as of the date of execution of this certification.

EXHIBIT F

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

Docket No. SBA-2020-0039

RIN 3245-AH53

Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Eligibility Revisions to First Interim Final Rule

AGENCY: U.S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: On April 2, 2020, the U.S. Small Business Administration (SBA) posted on its website an interim final rule relating to the implementation of sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act) (published in the Federal Register on April 15, 2020). Section 1102 of the Act temporarily adds a new product, titled the “Paycheck Protection Program,” to the U.S. Small Business Administration’s (SBA’s) 7(a) Loan Program. Subsequently, SBA issued a number of interim final rules implementing the Paycheck Protection Program. On June 12, 2020, SBA posted on its website an interim final rule revising the interim final rule published in the Federal Register on April 15, 2020 by changing the eligibility requirement related to felony convictions of applicants or owners of the applicant. This interim final rule further revises SBA’s interim final rule published in the Federal Register on April 15, 2020 by further changing that eligibility requirement.

DATES: Effective Dates: The provisions in this interim final rule are effective [INSERT DATE OF FILING AT THE OFFICE OF THE FEDERAL REGISTER].

Comment Date: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by number SBA-2020-0039, 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. 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 are experiencing economic hardship as a direct result of the Federal, State, and local public health measures that are being taken to minimize the public's exposure to the virus. These measures, some of which are government-mandated, have been implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance from others or even stay-at-home orders, have been implemented, resulting in a dramatic 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 or the 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 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 Act temporarily permits SBA to guarantee 100 percent of 7(a) loans under a new program titled the “Paycheck Protection Program.” Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program.

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 PPP. 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.

II. Comments and Immediate Effective Date

This interim final rule is effective without advance notice and public comment because section 1114 of the CARES Act authorizes SBA to issue regulations to implement Title I of the Act without regard to notice requirements. In addition, SBA has determined that there is good cause for dispensing with advance public notice and comment on the grounds that that it would be contrary to the public interest. Specifically, advance public notice and comment would defeat the purpose of this interim final rule given that SBA’s authority to guarantee PPP loans expires on June 30, 2020. These same reasons provide good cause for SBA to dispense with the 30-day

delayed effective date provided in the Administrative Procedure Act (APA). Although this interim final rule is effective on or before date of filing, comments are solicited from interested members of the public on all aspects of the interim final rule, including section III below. These comments must be submitted on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The SBA will consider these comments, comments received on the interim final rule posted on SBA's website April 2, 2020 (the First Interim Final Rule) and published in the Federal Register on April 15, 2020, comments received on the interim final rule posted on SBA's website June 12, 2020 and published in the Federal Register on June 18, 2010, and the need for making any revisions as a result of these comments.

III. Paycheck Protection Program – Additional Eligibility Revisions to First Interim Final Rule (85 FR 20811)

Overview

The CARES Act was enacted to provide immediate assistance to individuals, families, and businesses affected by the COVID-19 emergency. Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under a new 7(a) loan program titled the "Paycheck Protection Program." Loans guaranteed under the Paycheck Protection Program (PPP) will be 100 percent guaranteed by SBA, and the full principal amount of the loans may qualify for loan forgiveness. The purpose of this interim final rule is to make further changes to the First Interim Final Rule, posted on SBA's website on April 2, 2020, and published in the Federal Register on April 15, 2020 (85 FR 20811), as amended by the interim final rule posted on SBA's website on June 12, 2020 and published in the Federal Register on June 18, 2020 (85 FR 36717). The First Interim Final Rule, as amended, should be interpreted

consistent with the frequently asked questions (FAQs) regarding the PPP that are posted on SBA's website¹ and the other interim final rules issued regarding the PPP.²

1. Changes to the First Interim Final Rule

Eligibility Requirements

The First Interim Final Rule provided, among other things, that a PPP loan will not be approved if an owner of 20 percent or more of the equity of the applicant has been convicted of a felony within the last five years. On June 12, 2020, the First Interim Final Rule was amended after the Administrator, in consultation with the Secretary of the Treasury (the Secretary), determined that a shorter timeframe for felonies that do not involve fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance is more consistent with Congressional intent to provide relief to small businesses and also promotes the important policies underlying the First Step Act of 2018 (Pub. L. 115-391).

Upon further consideration, and in consultation with the Secretary, the Administrator has determined that two additional modifications to the First Interim Final Rule are appropriate to ensure a consistent approach to applicants with criminal histories. First, the First Interim Final Rule provided that an applicant is ineligible for a PPP loan if an owner of 20 percent or more of the equity of the applicant is presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction. The Administrator has determined that this restriction should be limited to pending criminal charges for felony offenses, which aligns with the Administrator's prior determination that only felony convictions (but not convictions for other types of offenses)

¹ See <https://www.sba.gov/document/support--faq-lenders-borrowers>.

² See <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program>.

will limit an applicant's eligibility for the PPP, subject to the time periods specified above. Second, the First Interim Final Rule provided that an applicant was ineligible for a PPP loan if an owner of 20 percent or more of the equity of the applicant is on probation or on parole. The Administrator has determined that this restriction should be limited to individuals whose probation or parole commenced within the time periods specified above—*i.e.*, within the last five years for any felony involving fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance, and within the last one year for other felonies. Applying these time limitations to the probation and parole restriction aligns with the Administrator's prior determination to apply the identical time limitations to felony convictions. Moreover, aligning the time limitations applicable to these restrictions is consistent with Congressional intent to provide relief to small businesses and also promotes the important policies underlying the First Step Act of 2018 (Pub. L. 115-391). This amendment does not affect the rule regarding applicants that are presently suspended, debarred, or proposed for debarment, which remains effective. Therefore, Part III.2.b.iii. of the First Interim Final Rule (85 FR 20811, 20812) is revised to read as follows:

b. Could I be ineligible even if I meet the eligibility requirements in (a) above?

You are ineligible for a PPP loan if, for example:

* * * * *

iii. An owner of 20 percent or more of the equity of the applicant is 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; or has been convicted of, pleaded guilty or nolo contendere to, or commenced any form of parole or probation (including

probation before judgment) for, a felony involving fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance within the last five years or any other felony within the last year; or

* * * * *

Under the First Interim Final Rule, as amended, an applicant is ineligible if an owner of 20 percent or more of its equity is presently incarcerated. In considering this amended Interim Final Rule the Administrator, in consultation with the Secretary, has determined that this restriction on eligibility remains appropriate because the operations of small business concerns present a greater danger of becoming impaired when their owners are incarcerated. As a result, they may have greater difficulty repaying their loans and present a greater credit risk. Although PPP loans may be forgiven under section 1106 of the CARES Act, PPP loans may only be forgiven in cases where borrowers can document that the proceeds were expended in accordance with the requirements of section 1106. In situations where the proceeds have not been used appropriately, and the loans, accordingly, cannot be forgiven, the borrowers' ability to repay the loans remains an important consideration. In addition, ineligibility for businesses whose owners are currently incarcerated will help prevent misuse of PPP loan funds, irrespective of loan forgiveness considerations.

Under the First Interim Final Rule, as amended, an applicant is also ineligible if an owner of 20 percent or more of its equity is, for any felony, subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction. Individuals charged with felonies are at risk of imprisonment, which, as discussed above, could place the creditworthiness of their businesses in question. Therefore, the Administrator, in consultation with the Secretary, has determined that this limitation also

remains appropriate to ensure that PPP funds are not allocated to an applicant for which a recent felony charge may impair its ongoing business operations and therefore its ability to repay a PPP loan for reasons unrelated to the COVID-19 pandemic.

Finally, under the First Interim Final Rule, as amended, an applicant is ineligible if an owner of 20 percent or more of its equity has been convicted of, pleaded guilty or nolo contendere to, or commenced any form of parole or probation (including probation before judgment) for, a felony involving fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance within the last five years or any other felony within the last year. The Administrator, in consultation with the Secretary, has determined that, in order to ensure program integrity and safeguard against misuse of PPP funds, it remains appropriate to require that applicants whose owners previously were convicted of or pleaded guilty or nolo contendere to a felony offense have avoided a further felony charge following conviction or incarceration for a period of at least one year before obtaining a PPP loan. This interval provides a reasonable level of assurance that such applicants do not present unacceptable risks of re-incarceration that could, as discussed above, undermine the ability of their businesses to repay their PPP loans. The Administrator, in consultation with the Secretary, has determined that a longer five-year limitation is appropriate for felonies involving fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance because such felonies are most relevant to the applicant's business integrity and responsibility, and may indicate a greater risk of potential misuse of PPP loan funds.

Each of the ineligible applicant categories described above has been formulated to reduce the risk of default and fraud in the PPP and to ensure that PPP loan funds are provided for small

businesses that will be able to support jobs, consistent with Congressional intent in the CARES Act. These measures are particularly necessary in light of the structure of the PPP, in which lenders are subject to relatively few underwriting obligations before issuing loans that are 100 percent guaranteed by SBA and that may be subject to full forgiveness based on documentation provided by the borrower. While neither lenders nor SBA are conducting typical analysis of the characteristics of PPP applicants, the measures described above are intended to mitigate the risk of default, fraud, or misuse of PPP loan funds intended to benefit small business employees and at the same time balance that need with the need to assist in the rehabilitation of felons, who are working to become responsible and productive members of society.

2. Additional Information

SBA may provide further guidance, if needed, through SBA notices which 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 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, and is considered a major rule under the Congressional Review Act. 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 Sections 1102 and 1106 of the CARES Act and the Flexibility 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.

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 a limited retroactive effect consistent with section 3(d) of the Flexibility 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 modification to the existing PPP information collection that is approved under OMB Control Number 3245-0407 as an emergency request until October 31, 2020. As discussed above, this rule amends the PPP eligibility requirements regarding certain criminal activity. As a result of these amendments, conforming changes will be made to Questions 5 and 6 of Form 2483, *Borrower Application Form*, and

Section H of Form 2484, *Lender Application Form*. SBA will submit the revisions to these forms to the Office of Management and Budget for approval.

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 APA 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. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a “small entity” as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for such small government jurisdictions, neither State nor local governments are “small entities.” Similarly, for purposes of the RFA, individual persons are not small entities.

The requirement to conduct a regulatory impact analysis does not apply if the head of the agency “certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” 5 U.S.C. 605(b). The agency must, however, publish the certification in the Federal Register at the time of publication of the rule, “along with a statement providing the factual basis for such certification.” If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA’s waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the Federal Register at the time of promulgation or, if the rule is promulgated in

response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b).

Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a 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. Small Business Administration's Office of Advocacy guide: *How to Comply with the Regulatory Flexibility Act, Ch.1. p.9*. Accordingly, 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.

Jovita Carranza,
Administrator

EXHIBIT G



Paycheck Protection Program

Borrower Application Form Revised June 24, 2020

OMB Control No.: 3245-0407
Expiration Date: 10/31/2020

Check One: Sole proprietor, Partnership, C-Corp, S-Corp, LLC, Independent contractor, Eligible self-employed individual, 501(c)(3) nonprofit, 501(c)(19) veterans organization, Tribal business, Other. DBA or Tradename if Applicable. Business Legal Name. Business Address, Business TIN (EIN, SSN), Business Phone. Primary Contact, Email Address.

Average Monthly Payroll: \$ x 2.5 + EIDL, Net of Advance (if Applicable) Equals Loan Request: \$ Number of Employees:

Purpose of the loan (select more than one): Payroll, Lease / Mortgage Interest, Utilities, Other (explain):

Applicant Ownership

List all owners of 20% or more of the equity of the Applicant. Attach a separate sheet if necessary.

Table with 5 columns: Owner Name, Title, Ownership %, TIN (EIN, SSN), Address

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

Table with 3 columns: Question, Yes, No. Contains 4 questions regarding applicant status, loan history, other businesses, and SBA Economic Injury Disaster Loan.

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

Table with 3 columns: Question, Yes, No. Contains 4 questions regarding applicant criminal record, residence, and franchise status.



**Paycheck Protection Program
Borrower Application Form Revised June 24, 2020**

By Signing Below, You Make the Following Representations, Authorizations, and Certifications

CERTIFICATIONS AND AUTHORIZATIONS

I certify that:

- I have read the statements included in this form, including the Statements Required by Law and Executive Orders, and I understand them.
- The Applicant is eligible to receive a loan under the rules in effect at the time this application is submitted that have been issued by the Small Business Administration (SBA) implementing the Paycheck Protection Program under Division A, Title I of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (the Paycheck Protection Program Rule).
- The Applicant (1) is an independent contractor, eligible self-employed individual, or sole proprietor or (2) employs no more than the greater of 500 or employees or, if applicable, the size standard in number of employees established by the SBA in 13 C.F.R. 121.201 for the Applicant's industry.
- I will comply, whenever applicable, with the civil rights and other limitations in this form.
- All SBA loan proceeds will be used only for business-related purposes as specified in the loan application and consistent with the Paycheck Protection Program Rule.
- To the extent feasible, I will purchase only American-made equipment and products.
- The Applicant is not engaged in any activity that is illegal under federal, state or local law.
- Any loan received by the Applicant under Section 7(b)(2) of the Small Business Act between January 31, 2020 and April 3, 2020 was for a purpose other than paying payroll costs and other allowable uses loans under the Paycheck Protection Program Rule.

For Applicants who are individuals: I authorize the SBA to request criminal record information about me from criminal justice agencies for the purpose of determining my eligibility for programs authorized by the Small Business Act, as amended.

CERTIFICATIONS

The authorized representative of the Applicant must certify in good faith to all of the below by **initialing** next to each one:

_____ The Applicant was in operation on February 15, 2020 and had employees for whom it paid salaries and payroll taxes or paid independent contractors, as reported on Form(s) 1099-MISC.

_____ Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.

_____ The funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments, as specified under the Paycheck Protection Program Rule; I understand that if the funds are knowingly used for unauthorized purposes, the federal government may hold me legally liable, such as for charges of fraud.

_____ The Applicant will provide to the Lender documentation verifying the number of full-time equivalent employees on the Applicant's payroll as well as the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the 24-week period following this loan.

_____ I understand that loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities, and not more than 40% of the forgiven amount may be for non-payroll costs.

_____ During the period beginning on February 15, 2020 and ending on December 31, 2020, the Applicant has not and will not receive another loan under the Paycheck Protection Program.

_____ I further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects. I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 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.

_____ I acknowledge that the lender will confirm the eligible loan amount using required documents submitted. I understand, acknowledge and agree that the Lender can share any tax information that I have provided with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of compliance with SBA Loan Program Requirements and all SBA reviews.

Signature of Authorized Representative of Applicant

Date

Print Name

Title



Paycheck Protection Program
Borrower Application Form Revised June 24, 2020

Purpose of this form:

This form is to be completed by the authorized representative of the Applicant and *submitted to your SBA Participating Lender*. Submission of the requested information is required to make a determination regarding eligibility for financial assistance. Failure to submit the information would affect that determination.

Instructions for completing this form:

With respect to “purpose of the loan,” 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 coverage, including insurance premiums, and retirement; payment of state and local taxes assessed on compensation of employees; and for an independent contractor or sole proprietor, wage, commissions, income, or net earnings from self-employment or similar compensation.

For purposes of calculating “Average Monthly Payroll,” most Applicants will use the average monthly payroll for 2019, excluding costs over \$100,000 on an annualized basis for each employee. For seasonal businesses, the Applicant may elect to instead use average monthly payroll for the time period between February 15, 2019 and June 30, 2019 or any 12-week period between May 1, 2019 and September 15, 2019, excluding costs over \$100,000 on an annualized basis for each employee. For new businesses, average monthly payroll may be calculated using the time period from January 1, 2020 to February 29, 2020, excluding costs over \$100,000 on an annualized basis for each employee.

If Applicant is refinancing an Economic Injury Disaster Loan (EIDL): Add the outstanding amount of an EIDL made between January 31, 2020 and April 3, 2020, less the amount of any “advance” under an EIDL COVID-19 loan, to Loan Request as indicated on the form.

All parties listed below are considered owners of the Applicant as defined in 13 CFR § 120.10, as well as “principals”:

- For a sole proprietorship, the sole proprietor;
- For a partnership, all general partners, and all limited partners owning 20% or more of the equity of the firm;
- For a corporation, all owners of 20% or more of the corporation;
- For limited liability companies, all members owning 20% or more of the company; and
- Any Trustor (if the Applicant is owned by a trust).

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 8 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.**

Privacy Act (5 U.S.C. 552a) – Under the provisions of the Privacy Act, you are not required to provide your social security number. Failure to provide your social security number may not affect any right, benefit or privilege to which you are entitled. (But see Debt Collection Notice regarding taxpayer identification number below.) Disclosures of name and other personal identifiers are required to provide SBA with sufficient information to make a character determination. When evaluating character, SBA considers the person’s integrity, candor, and disposition toward criminal actions. Additionally, SBA is specifically authorized to verify your criminal history, or lack thereof, pursuant to section 7(a)(1)(B), 15 USC Section 636(a)(1)(B) of the Small Business Act (the Act).

Disclosure of Information – Requests for information about another party may be denied unless SBA has the written permission of the individual to release the information to the requestor or unless the information is subject to disclosure under the Freedom of Information Act. The Privacy Act authorizes SBA to make certain “routine uses” of information protected by that Act. One such routine use is the disclosure of information maintained in SBA’s system of records when this information indicates a violation or potential violation of law, whether civil, criminal, or administrative in nature. Specifically, SBA may refer the information to the appropriate agency, whether Federal, State, local or foreign, charged with responsibility for, or otherwise involved in investigation, prosecution, enforcement or prevention of such violations. Another routine use is disclosure to other Federal agencies conducting background checks but only to the extent the information is relevant to the requesting agencies’ function. *See*, 74 F.R. 14890 (2009), and as amended from time to time for additional background and other routine uses. In addition, the CARES Act, requires SBA to register every loan made under the Paycheck Protection Act using the Taxpayer Identification Number (TIN) assigned to the borrower.

Debt Collection Act of 1982, Deficit Reduction Act of 1984 (31 U.S.C. 3701 et seq. and other titles) – SBA must obtain your taxpayer identification number when you apply for a loan. If you receive a loan, and do not make payments as they come due, SBA may: (1) report the status of your loan(s) to credit bureaus, (2) hire a collection agency to collect your loan, (3) offset your income tax refund or other amounts due to you from the Federal Government, (4) suspend or debar you or your company from doing business with the Federal Government, (5) refer your loan to the Department of Justice, or (6) foreclose on collateral or take other action permitted in the loan instruments.



**Paycheck Protection Program
Borrower Application Form Revised June 24, 2020**

Right to Financial Privacy Act of 1978 (12 U.S.C. 3401) – The Right to Financial Privacy Act of 1978, grants SBA access rights to financial records held by financial institutions that are or have been doing business with you or your business including any financial institutions participating in a loan or loan guaranty. SBA is only required provide a certificate of its compliance with the Act to a financial institution in connection with its first request for access to your financial records. SBA's access rights continue for the term of any approved loan guaranty agreement. SBA is also authorized to transfer to another Government authority any financial records concerning an approved loan or loan guarantee, as necessary to process, service or foreclose on a loan guaranty or collect on a defaulted loan guaranty.

Freedom of Information Act (5 U.S.C. 552) – Subject to certain exceptions, SBA must supply information reflected in agency files and records to a person requesting it. Information about approved loans that will be automatically released includes, among other things, statistics on our loan programs (individual borrowers are not identified in the statistics) and other information such as the names of the borrowers (and their officers, directors, stockholders or partners), the collateral pledged to secure the loan, the amount of the loan, its purpose in general terms and the maturity. Proprietary data on a borrower would not routinely be made available to third parties. All requests under this Act are to be addressed to the nearest SBA office and be identified as a Freedom of Information request.

Occupational Safety and Health Act (15 U.S.C. 651 et seq.) – The Occupational Safety and Health Administration (OSHA) can require businesses to modify facilities and procedures to protect employees. Businesses that do not comply may be fined, forced to cease operations, or prevented from starting operations. Signing this form is certification that the applicant, to the best of its knowledge, is in compliance with the applicable OSHA requirements, and will remain in compliance during the life of the loan.

Civil Rights (13 C.F.R. 112, 113, 117) – All businesses receiving SBA financial assistance must agree not to discriminate in any business practice, including employment practices and services to the public on the basis of categories cited in 13 C.F.R., Parts 112, 113, and 117 of SBA Regulations. All borrowers must display the "Equal Employment Opportunity Poster" prescribed by SBA.

Equal Credit Opportunity Act (15 U.S.C. 1691) – Creditors are prohibited from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status or age (provided the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

Debarment and Suspension Executive Order 12549; (2 CFR Part 180 and Part 2700) – By submitting this loan application, you certify that neither the Applicant or any owner of the Applicant have within the past three years been: (a) debarred, suspended, declared ineligible or voluntarily excluded from participation in a transaction by any Federal Agency; (b) formally proposed for debarment, with a final determination still pending; (c) indicted, convicted, or had a civil judgment rendered against you for any of the offenses listed in the regulations or (d) delinquent on any amounts owed to the U.S. Government or its instrumentalities as of the date of execution of this certification.

2. Attached as Exhibit 1 to this declaration is a true and correct copy of an e-mail message that I sent to counsel for Plaintiffs in *Carmen's Corner Store v. United States Small Business Administration*, No. 1:20-cv-1736-CCB on the evening of Monday, June 22, 2020.

3. Attached as Exhibit 2 to this declaration is a true and correct copy of an e-mail message that I sent to counsel for Plaintiffs in *Defy Ventures, Inc. v. United States Small Business Administration*, No. 1:20-cv-1838-CCB on the evening of Monday, June 22, 2020.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge and belief.

Executed this 23rd day of June, 2020.

JAMES J. GILLIGAN

EXHIBIT 1

From: [Gilligan, Jim \(CIV\)](#)
To: [Jared McClain](#); [John Vecchione](#)
Cc: [Lazerow, Alan \(USAMD\)](#); [Sur, Indraneel \(CIV\)](#)
Subject: Carmen's Corner Store et al. v. U.S. Small Business Administration, et al., No. 1:20-cv-1736-CCB
Date: Monday, June 22, 2020 6:27:00 PM

Dear Counsel,

I am writing to inform you that later this evening, or perhaps tomorrow morning, the SBA will be posting a further revision to the criminal justice restriction contained in the First PPP Interim Final Rule. If, as we understand the facts, Mr. Wilks was placed on parole in 2018, then he would not come within the scope of the revised restriction, and it would not present an obstacle to Carmen's Corner Store or Retail4Real obtaining a PPP loan.

If you can confirm that Mr. Wilks' parole began in 2018, and provide us with the name and e-mail address of Mr. Wilks' point of contact at his lender, the SBA will contact his lender and advise them that his businesses should no longer be deemed ineligible for PPP financing on the basis of the criminal justice restriction.

We hope that these developments will allow us to resolve this matter without further need of litigation.

Regards,

Jim Gilligan

James J. Gilligan
Special Litigation Counsel
Civil Division, Federal Programs Branch
U.S. Department of Justice
P.O. Box 883
Washington, D.C. 20044

Tel: 202-514-3358

The information in this transmittal (including attachments, if any) is intended only for the recipient(s) listed above and may contain information that is privileged and confidential. Any review, use, disclosure, distribution, or copying of this transmittal is prohibited except by or on behalf of the intended recipient. If you have received this transmittal in error, please notify me immediately and destroy all copies of the transmittal. Your cooperation is appreciated.

EXHIBIT 2

From: [Gilligan, Jim \(CIV\)](#)
To: [Bracey, Kali N.](#); RMoore@ACLU.org; [Alejandro Ortiz](#); JCalvo-Friedman@ACLU.org; [Deutsch, Elizabeth B.](#); [Tripp, Zack](#); [Alderdice, Jacob D.](#); Joanna_Wasik@washlaw.org; [Hannah Lieberman](#); [Claudia De Palma](#); [Niles-Weed, Robert](#)
Subject: Defy Ventures, et al. v. U.S. Small Business Administration, et al., No. 1:20-cv-1838-CCB (D. Md.)
Date: Monday, June 22, 2020 6:41:00 PM

Dear Counsel,

I am writing to inform you that later this evening, or perhaps tomorrow morning, the SBA will be posting a further revision to the criminal justice restriction contained in the First PPP Interim Final Rule. If, as we understand the facts, Mr. Merritt was placed on parole in 2017, then he would not come within the scope of the revised restriction, and it would not present an obstacle to his business obtaining a PPP loan. And if, as we also understand from your pleadings, the offenses with which Mr. Garland is currently charged are misdemeanors, then the revised restriction would not present an obstacle to his business obtaining a PPP loan either.

If you can confirm that Mr. Merritt's parole began in 2017, confirm that the pending charges against Mr. Garland involve only misdemeanor offenses, and provide us with the names and e-mail addresses of their lenders' points of contact, the SBA will contact Mr. Merritt's and Mr. Garland's lenders and advise them that their businesses should not be deemed ineligible for PPP financing on the basis of the criminal justice restriction.

We hope that these developments will allow us to resolve the claims of Mr. Merritt, Mr. Garland, and their businesses, without further need of litigation.

Regards,

Jim Gilligan

James J. Gilligan
Special Litigation Counsel
Civil Division, Federal Programs Branch
U.S. Department of Justice
P.O. Box 883
Washington, D.C. 20044

Tel: 202-514-3358

The information in this transmittal (including attachments, if any) is intended only for the recipient(s) listed above and may contain information that is privileged and confidential. Any review, use, disclosure, distribution, or copying of this transmittal is prohibited except by or on behalf of the intended recipient. If you have received this transmittal in error, please notify me immediately and destroy all copies of the transmittal. Your cooperation is appreciated.