APPENDIX

TABLE OF CONTENTS

Page

APPENDIX A: Opinion of the United States Court of Appeals for the Third Circuit (Feb. 3, 2026) 1a

APPENDIX B: Judgment by the United States Court of Appeals for the Third Circuit (Dec. 3, 2025)..... 21a

APPENDIX C: Opinion by the United States District Court for the Middle District of Pennsylvania (Dec. 30, 2024) 23a

APPENDIX D: Plaintiff's Statement of Material Facts Filed in the United States District Court for the Middle District of Pennsylvania (Mar. 24, 2023) 48a

APPENDIX E: Excerpts from the United States District Court for the Middle District of Pennsylvania..... 52a

APPENDIX F: Statutory Provisions Involved
15 U.S.C. § 636..... 68a
15 U.S.C. § 636m 102a

APPENDIX G: Selected Excerpt from OHA Record..... 121a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ESSINTIAL ENTERPRISE SOLUTIONS, LLC
v.
The UNITED STATES SMALL BUSINESS ADMINISTRATION; Administrator United States Small Business Administration; Secretary United States Department of Treasury; the United States of America, Appellants.

No. 25-1367
|
Argued: December 3, 2025
|
(Filed: February 3, 2026)

On Appeal from the United States District Court for the Middle District of Pennsylvania (No. 1:22-cv-01507), District Judge: Honorable Julia K. Munley

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Before: CHAGARES, Chief Judge, FREEMAN and BOVE, Circuit Judges.

OPINION OF THE COURT

BOVE, Circuit Judge.

The Small Business Administration (SBA) appeals a finding that the agency violated the Administrative Procedure Act by declining to fully forgive a Paycheck Protection Program loan. The appeal turns on whether the borrower's payments to independent contractors were "payroll costs" under the Program's statutory definition of that term. The interpretive question is not a routine ground ball. The District Court said yes, ruling that payments to independent contractors were covered. As did another district judge in the Western District of Louisiana. A district judge in the Eastern District of Michigan sided with the SBA and said no. So too did two Circuits. The Third will be the third. So we will reverse.

I.

This case arose out of a $7 million loan issued to Essintial Enterprise Solutions, LLC through the Paycheck Protection Program (PPP). Essintial provides staffing and other services to customers in several industries. We get into the details below, but the gist is that Essintial sued the SBA when the SBA refused to forgive the entire loan. The District Court resolved the parties' dueling interpretations of the

relevant statutory definition in Essintial's favor. This appeal followed.

A.

Following the President's March 13, 2020 emergency declaration relating to the COVID-19 pandemic, Congress established the PPP in the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020). The CARES Act included the PPP, which "aimed to help small businesses keep workers employed during the crisis, by providing forgivable, low-interest, federally guaranteed loans to keep employees on the payroll." *Seville Indus., L.L.C. v. SBA*, 144 F.4th 740, 742 (5th Cir. 2025).[1] Eligible applicants could borrow up to $10 million from a private lender, guaranteed by the SBA, based on a formula relating to "payroll costs." *See* 15 U.S.C. § 636(a)(36)(E); *see also id.* § 636(a)(36)(A)(viii) (defining "payroll costs"). Borrowers were eligible for loan forgiveness to the extent loan proceeds were used for specified expenses, including "payroll costs." *Id.* § 636m(b)(1).

The President signed the CARES Act into law on March 27, 2020. The SBA was required to issue implementing regulations within a mere 15 days. *See* 15 U.S.C. § 9012. On April 2, 2020, the SBA published an Interim Final Rule on its website, not effective until April 15, which differentiated between types of "payroll costs" for a traditional business with "employees" and "for an independent contractor or sole

[1] Unless otherwise indicated, case quotations omit all internal citations, quotation marks, footnotes, alterations, and subsequent history.

proprietor." 85 Fed. Reg. at 20813. The Rule confirmed that independent contractors did not "count as employees" because contractors "have the ability to apply for a PPP loan on their own …." *Id.*

On the same day that the SBA issued the Interim Final Rule, the lending bank advised Essintial's principal that "1099 employees are allowed to be included in payroll costs" for purposes of a PPP loan. A 45. On April 4, 2020, Essintial applied for a PPP loan in the amount of $7,219,862. Essintial reported that it had 359 "employees" and calculated the loan amount based on an "Average Monthly Payroll" of $2,887,945. Like the Interim Final Rule, the instructions on the application form differentiated between payroll costs for a traditional business and "for an independent contractor or sole proprietor." A 64.

On April 20, 2020, the bank loaned Essintial $7,028,800, on a two-year term at 1% interest. When Essintial sought forgiveness of the loan in January 2021, the company indicated that it had only 276 "employees" at the time of the loan application. In the forgiveness application, Essintial acknowledged that the SBA "may request additional information for the purposes of evaluating the Borrower's eligibility for the PPP loan and for loan forgiveness." A 75. The bank agreed to forgive the entire loan, but the SBA opened a review of that determination later in January 2021.

In June 2021, the SBA notified Essintial that "[t]he loan documentation does not fully support the disbursed loan amount" because "ineligible payroll expenses were included in the calculation of the loan

amount: 1099 Contractor costs." A 81. After some number crunching, the SBA forgave $3,703,011.60 of the loan. The SBA's Office of Hearings and Appeals affirmed the SBA's determination in May 2022.

B.

In September 2022, Essintial sued the SBA and related government actors in an effort to recover the unforgiven aspects of the PPP loan. Essintial contended that the SBA's forgiveness decision violated the Administrative Procedure Act and argued that the SBA had relied on an improper retroactive application of the Interim Final Rule.

The District Court granted summary judgment to Essintial and held that the SBA's decision was arbitrary and capricious. *See Essintial Enter. Sols., LLC v. SBA*, 2024 WL 5248242 (M.D. Pa. 2024). The court ruled that the SBA did not retroactively apply the Interim Final Rule, but that the SBA erred by interpreting the definition of "payroll costs" in the CARES Act to exclude Essintial's payments to independent contractors. *See id.* at *4-9. The SBA timely appealed.

II.

The District Court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291.

The Administrative Procedure Act directs courts to set aside final agency actions that are arbitrary, capricious, or contrary to law. *See* 5 U.S.C. § 706(2)(A). We conduct *de novo* review of statutory interpretations in support of § 706(2) analysis and legal conclusions in summary judgment decisions. *See Axalta Coating Sys. LLC v. FAA*, 144 F.4th 467, 472 (3d Cir. 2025); *see also*

Jorjani v. N.J. Inst. of Tech., 151 F.4th 135, 140 n.5 (3d Cir. 2025).

III.

We hold that the SBA's interpretation of "payroll costs" under the CARES Act did not violate the Administrative Procedure Act.

Reasonable minds could differ on this one, and some already have. *Compare Veltor Underground, LLC v. SBA*, 143 F.4th 727 (6th Cir. 2025), *and Seville Indus.*, 144 F.4th at 742, *with Essintial*, 2024 WL 5248242, *and Seville Indus. LLC v. SBA*, 2024 WL 697592 (W.D. La. 2024). But in our view, the CARES Act included two alternative definitions of "payroll costs." 15 U.S.C. § 636(a)(36)(A)(viii)(I). The term "means" one of two things depending on the type of borrower. *Id.* The two options are set forth in subsections (aa) and (bb) of the definition. Subsection (aa) defines payroll costs for a traditional business that has "employees." Subsection (bb) defines payroll costs for "a sole proprietor or independent contractor," and it does not cover Essintial's payments to such a contractor. While this interpretation of § 636(a)(36)(A)(viii)(I) is not the only option, it is the single, best meaning based on the statutory text and structure.

A.

"[S]tatutes, no matter how impenetrable, do—in fact, must—have a single, best meaning." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400, 144 S.Ct. 2244, 219 L.Ed.2d 832 (2024). "The words on the page, not the intent of any legislator, go through bicameralism and presentment and become law." *United States v. Safehouse*, 985 F.3d 225, 239 (3d Cir. 2021). Statutes resulting from this process "*are* the

law." *Travers v. Fed. Express Corp.*, 8 F.4th 198, 202 n.9 (3d Cir. 2021). Thus, "every statute's *meaning* is fixed at the time of enactment …." *Wis. Cent. Ltd v. United States*, 585 U.S. 274, 284, 138 S.Ct. 2067, 201 L.Ed.2d 490 (2018).

Experience teaches that a statute's fixed meaning is not obvious in every instance. For example, questions can pop up about the meaning of statutory text when "new *applications* ... arise in light of changes in the world." *Wis. Cent.*, 585 U.S. at 284, 138 S.Ct. 2067. When that happens, "even if a word can bear more than one meaning, it is the best ordinary reading of a statute we seek." *United States v. Johnman*, 948 F.3d 612, 618 n.6 (3d Cir. 2020). That is, we look to the "ordinary, contemporary, common" public meaning of the words at issue at the time the law was passed. *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979); *see also Lopez v. AG*, 49 F.4th 231, 234 n.4 (3d Cir. 2022). Identifying a disputed term's single, best meaning in the context of a justiciable controversy is one of our main jobs.

The District Court deviated from that task in modest but noteworthy ways that contributed to an erroneous conclusion. Despite acknowledging that *Loper Bright* overruled *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the District Court fixated at times on "whether or not [the] statute is ambiguous," including based on "case law interpreting the first step of *Chevron.*" *Essintial*, 2024 WL 5248242, at *5 n.7. *Loper Bright* laid to rest the "Snark hunt" for ambiguity. 603 U.S. at 437, 144 S.Ct. 2244 (Gorsuch, J., concurring); *see also id.* at 407-08, 144 S.Ct. 2244 (explaining that the "defining feature" of *Chevron* was

"the identification of statutory ambiguity ... [b]ut the concept of ambiguity has always evaded meaningful definition").

The District Court also operated under the related misimpression that, in the absence of a specified ambiguity in the statutory definition, the court "need not refer" to "various statutory sections" cited by the SBA outside of the statutory definition. *Essintial*, 2024 WL 5248242, at *9. The scope and application of "payroll costs" was plainly subject to a reasonable dispute between the parties here. And "interpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning." *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 414, 137 S.Ct. 1002, 197 L.Ed.2d 354 (2017). Consequently, it was error to confine the SBA's arguments about other relevant features of the CARES Act to a footnote without analysis. *See Essintial*, 2024 WL 5248242, at *9 n.9. In fact, those arguments are among the contentions that convince us that the SBA is correct about the definition of "payroll costs."

B.

Turning to that definition, Congress used two subsections to create alternative meanings of "payroll costs." 15 U.S.C. § 636(a)(36)(A)(viii)(I). Subsection (aa) addresses types of compensation provided by a business like Essintial to "employees," and subsection (bb) addresses compensation provided by—not paid to—a "sole proprietor or independent contractor." *Id.* The best reading of the definition is that neither subsection covers Essintial's payments to independent contractors.

For ease of reference, the definition looks like this:

> (viii) the term "payroll costs"—
>
> (I) means—
>
> (aa) the sum of payments of any compensation with respect to employees that is a—
>
> (AA) salary, wage, commission, or similar compensation;
>
> (BB) payment of cash tip or equivalent;
>
> (CC) payment for vacation, parental, family, medical, or sick leave;
>
> (DD) allowance for dismissal or separation;
>
> (EE) payment required for the provisions of group health care or group life, disability, vision, or dental insurance benefits, including insurance premiums;
>
> (FF) payment of any retirement benefit; or
>
> (GG) payment of State or local tax assessed on the compensation of employees; and
>
> (bb) the sum of payments of any compensation to or income of a sole proprietor or independent contractor that is a wage, commission, income, net earnings from self-employment, or similar compensation and that is in an amount that is not more than $100,000 on an annualized basis, as prorated for the period during which the payments are made or the obligation to make the payments is incurred

Id.

Section 636(a)(36)(A)(viii)(I) tells us what "payroll costs" "means." Words preceding the em-dash that follows "means" distribute to subsections (aa) "and" (bb). *See Seville Indus.*, 144 F.4th at 746 (citing *United States v. Palomares*, 52 F.4th 640, 650 (5th Cir. 2022) (Oldham, J., concurring)); *see also United States v. Pace*, 48 F.4th 741, 754 (7th Cir. 2022); *Johnman*, 948 F.3d at 618 ("[W]ords are to be given the meaning that proper grammar and usage would assign them."). Payroll costs "means" one thing for a business with "employees." 15 U.S.C. § 636(a)(36)(A)(viii)(I)(aa). And another thing for "a sole proprietor or independent contractor." *Id.* § 636(a)(36)(A)(viii)(I)(bb). The phrase "the sum of payments" introduces each subsection and required the borrower to add up the different types of compensation covered by the applicable subsection. *Id.* § 636(a)(36)(A)(viii)(I)(aa), (bb). Congress could have called for the addition of payments arguably covered by both subsections by, for example, inserting "the sum of" between "means" and the em-dash. *See Seville Indus.*, 144 F.4th at 749. But Congress did not do that. Thus, "[t]he payment universes do not overlap." *Veltor Underground*, 143 F.4th at 733.

Close examination of subsection (bb) further demonstrates that this part of the "payroll costs" definition cannot be invoked by Essintial. The payroll costs that Congress specified in subsection (bb)—"a wage, commission, income, net earnings from self-employment"—are types of compensation that "sole proprietors and independent contractors obtain from (or reinvest into) their businesses." *Veltor Underground*, 143 F.4th at 731; *see also Seville Indus.*, 144 F.4th at 746 ("Subsection (bb) therefore defines

payroll costs as the money *earned by* independent contractors or sole proprietors, not as the money *paid to* them by businesses."). This is "clear enough" with respect to "income" and "net earnings from self-employment." *Veltor Underground*, 143 F.4th at 732. "Only what one gets can be described as 'income' or 'net earnings from self-employment,' not what one gives." *Id.*

Things are admittedly murkier with respect to the "wage" and "commission" examples, which also appear in subsection (aa). We make sense of the overlap by reference to neighboring terms. *See Veltor Underground*, 143 F.4th at 734-35. When situated next to "income" and "net earnings from self-employment," as in subsection (bb), we interpret the words "wage" and "commission" to refer to additional types of payments made by "a sole proprietor or independent contractor." *See id.* at 733 ("A business no more pays its contractors a wage or a commission when it purchases services than a business's customers pay the business's employees a salary when they purchase goods.").

In subsection (aa) on the other hand, "wage" and "commission" have a different neighbor, "salary," which is not included in subsection (bb). "The difference must have significance." *Levins v. Healthcare Revenue Recovery Grp. LLC*, 902 F.3d 274, 283 (3d Cir. 2018). Businesses pay salaries to employees. The same is true of the other examples in the remainder of the list that accompanies subsection (aa), such as tips, paid leave, severance, and insurance and retirement benefits. *See* 15 U.S.C. § 636(a)(36)(A)(viii)(I)(aa)(BB)-(GG). These are additional types of employee compensation. The

salient point here is that subsections (aa) and (bb) are best read as having a parallel structure with alternative definitions based on outlays of "payments and compensation" by the type of borrower at issue. Subsection (bb) "adopt[s] the perspective of a sole proprietor or independent contractor and ask[s] how much he pays himself." *Veltor Underground*, 143 F.4th at 733. It does not cover Essintial's payments to independent contractors.

There is more support for this interpretation in the express exclusions from the "payroll costs" definition. *See* 15 U.S.C. § 636(a)(36)(A)(viii)(II). As relevant here, "any compensation of an employee whose principal place of residence is outside of the United States" cannot be included in a borrower's payroll costs. *Id.* § 636(a)(36)(A)(viii)(II)(cc). This exclusion applies to subsection (aa) by virtue of the reference to an "employee," but there is no corresponding reference to the "sole proprietor or independent contractor" language from subsection (bb). Under our interpretation, "[t]hat makes sense." *Veltor Underground*, 143 F.4th at 733. It would be "freakish" for the CARES Act "to exclude foreign resident employees but include foreign resident independent contractors" for purposes of a traditional business calculating payroll costs. *Seville Indus.*, 144 F.4th at 748.

Zooming out, "[t]he statute as a whole confirms our interpretation." *Star Athletica*, 580 U.S. at 415, 137 S.Ct. 1002. The CARES Act established "[i]ncreased eligibility" for loans. 15 U.S.C. § 636(a)(36)(D). In defining the scope of the increase, Congress used different subsections to differentiate between a potential borrower that "employs ... employees," and

"individuals who operate under a sole proprietorship or as an independent contractor." *Compare id.* § 636(a)(36)(D)(i), *with id.* § 636(a)(36)(D)(ii). The distinction and its subsection structure tracks our interpretation of the alternative definitions of "payroll costs" in subsections (aa) and (bb).

There is also a telling clue in the CARES Act provisions relating to loan forgiveness. Congress limited the grace available to borrowers who reduced the "number of employees," or cut those employees' "salary or wages" by more than 25%. *See Seville Indus.*, 144 F.4th at 748 (citing 15 U.S.C. §§ 636m(d)(2), 636m(d)(3)(A)); *Veltor Underground*, 143 F.4th at 734; *see also* 15 U.S.C. § 636(a)(37)(J)(iv) (similar forgiveness provisions relating to second-draw PPP loans). Congress did not want the SBA forgiving loans issued to borrowers who cut employees because employee retention was the stated objective of the PPP. There is "no corresponding limitation for cuts to independent contractors." *Seville Indus.*, 144 F.4th at 748. We draw the same inference as the other Circuits to have reached the question. Because "[s]ubsection (bb) covers only what a sole proprietor or independent contractor pays himself," "Congress had little need to worry that he would get a loan and then diminish his own wages." *Veltor Underground*, 143 F.4th at 734.

Finally, our interpretation of "payroll costs" prevents the absurd scenario where a business and the independent contractor that the business paid both get PPP loans based on the same payments. That happened in this case for some of the payments at issue. The certification required with PPP applications was not enough to prevent this double

dipping because Essintial was only required to disclose existing "duplicative" loans obtained by the company, not loans issued to third parties such as Essintial's independent contractors. *See* 15 U.S.C. § 636(a)(36)(G)(i)(IV); *see also Veltor Underground*, 143 F.4th at 737 (explaining that the certification "does not require the recipient to ensure that no one else has applied for funds that might cover the same expenses"). "There is no principled reason to think Congress meant to double count money spent on independent contractors, especially in a statute that is otherwise rigorous about avoiding duplication." *Seville Indus.*, 144 F.4th at 750. We agree with the Fifth and Sixth Circuits that Congress did not embrace duplicative draws on the public fisc in the CARES Act. This is another reason that, on balance, the SBA has it right in this case.

C.

In the District Court and this appeal, Essintial presented forceful arguments in support of the company's position. We acknowledge the strength of those contentions but decline to adopt Essintial's interpretation of "payroll costs" because it places too much emphasis on a "hyper-literalist reading[ ] of the word *and*" separating subsections (aa) and (bb). *Palomares*, 52 F.4th at 649 (Oldham, J., concurring).

Essintial correctly notes the presumption in our caselaw that "and" is used in the conjunctive. *See Reese Bros. v. United States*, 447 F.3d 229, 235-36 (3d Cir. 2006). This applies to the "and" separating subsections (aa) and (bb). The question remains: "conjunctive of what?" *Veltor Underground*, 143 F.4th at 736. "[T]he fact that the definition includes both (aa)

and (bb) does not tell us whether (bb) refers [1] to payments a business makes to sole proprietors and independent contractors or [2] to payments that sole proprietors and independent contractors make to themselves." *Id.* Essintial's push for the first option is based on an "arithmetical" reading of the statute, where "payroll costs" means "*the sum of*" the payments described in subsections (aa) "and" (bb). *Seville Indus.*, 144 F.4th at 748. As noted above, Congress used that phrase to introduce each subsection—both start with "*the sum of* payments of any compensation"—but not the entire definition. 15 U.S.C. § 636(a)(36)(A)(viii)(I) (emphasis added). We lack authority to insert those words where Essintial would prefer them, and the placement chosen by Congress does not help Essintial.

In an effort to put a favorable gloss on the meaning of "and," Essintial draws our attention to several other features of the CARES Act. The company's arguments have merit, but they do not carry the day. Focusing on subsection (bb), Essintial relies on a truncated quotation to argue that "payroll costs" include "compensation to ... [an] independent contractor …." 15 U.S.C. § 636(a)(36)(A)(viii)(I)(bb). While this isolated language could be interpreted to include the payments that the SBA rejected, that is not the best reading of this phrase. Subsection (bb) is confined to specific types of "compensation"; compensation "*that is* a wage, commission, income, net earnings from self-employment," and other "similar payments." *Id.* (emphasis added). Essintial's payments to independent contractors do not fit within the ordinary meaning of the words Congress used to restrict the ordinary meaning of "compensation" in subsection (bb).

In rejecting Essintial's argument, we also find significance in the singular form that Congress assigned to "independent contractor" in subsection (bb). *See Seville Indus.*, 144 F.4th at 747; *Veltor Underground*, 143 F.4th at 733. In subsection (aa), the relevant recipients of the compensation in question are "employees," plural. In subsection (bb), however, Congress made a "deliberate" choice to use the singular form of "independent contractor" because the entire definition is written from the standpoint of a single potential borrower with "payroll costs" to be accounted for in the loan and forgiveness applications. *Seville Indus.*, 144 F.4th at 747.

Essintial also points us to the statutory exclusions from "payroll costs," but we have already found one aspect of those exclusions to support the SBA. *See* 15 U.S.C. § 636(a)(36)(A)(viii)(II). The company pushes forward citing caselaw applying the *expressio unius* canon. Essintial contends that Congress's failure to explicitly exclude a business's payments to independent contractors means that such payments are impliedly covered by subsection (bb). *Expressio unius*, which is "not absolute," may serve as an interpretive aid where "Congress includes particular language in one section of a statute but omits it in another section of the same Act." *Bartenwerfer v. Buckley*, 598 U.S. 69, 78, 143 S.Ct. 665, 214 L.Ed.2d 434 (2023). Essintial's argument is too much of a stretch because it is based on two omissions rather than one. The omission of payments to independent contractors from the exclusions is consistent with the fact that Congress omitted words of sufficient clarity in subsection (bb) to cover such payments. There was nothing to exclude. At least nothing Essintial cares

about in this appeal. The better inference, already noted, is that Congress would have excluded payments to foreign contractors, as it did for foreign employees, if subsection (bb) otherwise covered a traditional business's payments to independent contractors. *See* 15 U.S.C. § 636(a)(36)(A)(viii)(II)(cc).

Moving beyond the definition, Essintial relies on one of the loan-eligibility provisions of the CARES Act, which required lenders to consider whether a potential borrower had paid "employees" or "independent contractors, as reported on a Form 1099-MISC." 15 U.S.C. § 636(a)(36)(F)(ii)(II)(bb). Essintial contends that borrower eligibility considerations referencing payments to independent contractors would be "meaningless surplusage" if such payments were not also part of the "payroll costs" that are relevant to the calculation of the loan amount and forgiveness. Appellee's Br. 30. This is another argument that has some purchase. *See Veltor Underground*, 143 F.4th at 738-39 (White, J., concurring). Yet ultimately it fails to persuade.

Here, again, the singular-plural distinction undercuts Essintial's position. Similar to the "payroll costs" definition, the eligibility provision is written from the vantage point of payments by a single potential "borrower"—to "employees," which also appears in the definition's subsection (aa), and "independent contractors," which does not appear in subsection (bb). *Id.* § 636(a)(36)(F)(ii)(II). This parallel structure is consistent with our interpretation that subsection (bb) only covers payments received by—not payments made to—a single independent contractor seeking to participate in the PPP.

Essintial's argument is also weakened by the fact that these provisions serve different ends. The eligibility provision "simply does not address how payroll costs are determined." *Veltor Underground*, 143 F.4th at 737. Congress required private lenders to evaluate eligibility considerations when deciding *whether* to issue a PPP loan at all. The threshold question of eligibility had no bearing on *how much* should be loaned or forgiven, which are both a function of an eligible borrower's "payroll costs" and governed by distinct provisions. *Compare* 15 U.S.C. § 636(a)(36)(F)(ii)(II) (eligibility), *with id.* § 636(a)(36)(E) (maximum loan amount), *and id.* § 636m(b) (loan forgiveness).

The eligibility considerations reflect anti-fraud concerns not apparent on the face of the definition of "payroll costs." The eligibility-related text indicates that Congress sought to ensure that PPP loans were not given to new businesses that were established for the sole purpose of taking advantage of the Program and its expanded eligibility. *See, e.g.*, 15 U.S.C. § 636(a)(36)(D) ("Increased eligibility for certain small businesses and organizations"). We infer this purpose from the fact that, for purposes of eligibility, Congress twice referenced payments that could be verified with tax records; "payroll taxes" for employees and "Form 1099-MISC" for independent contractors. *Id.* § 636(a)(36)(F)(ii)(II)(bb). These objective considerations helped "sort the wheat (real businesses, in need of support) from the chaff (fake businesses, established solely to capitalize on the program)." *Veltor Underground*, 143 F.4th at 737. Thus, while one might wonder why Congress would care about a business's payments to independent contractors for

purposes of eligibility but not loan amount, the statute as a whole provides enough of an answer that any unresolved aspects of the question do not move the needle to Essintial's side.

D.

We are sympathetic to the challenges that the COVID-19 pandemic created for Essintial and other businesses, but we do not agree with Essintial that the company was the victim of a "bait-and-switch" by the government. Appellee's Br. 17.

As a matter of law, Essintial's argument does not address the statutory text and therefore has limited relevance to our analysis. Essintial did not bring an equitable estoppel claim in the District Court, and the company has not relied on equitable estoppel here. Typically, equitable estoppel "will not lie against the Government as it lies against private litigants," and "claims for estoppel cannot be entertained where public money is at stake." *OPM v. Richmond*, 496 U.S. 414, 419, 427, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990); *see also Monongahela Valley Hosp., Inc. v. Sullivan*, 945 F.2d 576, 588-89 (3d Cir. 1991); *Seville Indus.*, 144 F.4th at 750.

Any superficial appeal to the "bait and switch" claim loses traction upon examination of the record. On April 2, 2020, the lender sent Essintial an email stating that "1099 employees are allowed to be included in payroll costs." A 45. On the same day as the email, the SBA posted contrary guidance on its website in the Interim Final Rule. *See* 85 Fed. Reg. at 20814. Essintial submitted the loan application two days after the conflicting guidance from the lender and the SBA. Consistent with the Rule, the application

instructions stated that "payroll costs consist of compensation to employees" as well as a list of other items consistent with subsection (aa), "and for an independent contractor or sole proprietor" a list of items consistent with subparagraph (bb). A 64. Essintial represented that it had 359 "employees" in its PPP application, and the company did not break out independent contractors in response to that question.

We recognize that the Interim Final Rule was not effective until April 15, 2020, and that the Rule was not retroactive. The SBA is not asking for retroactive application or deference to its interpretation, and we afford the Rule neither of those things. Nevertheless, Essintial cannot successfully invoke equity after having received a clear indication of the government's position prior to the issuance of the loan. Once these details are brought to the fore, the SBA's response to Essintial's subsequent forgiveness application in 2021 was not as harsh as Essintial suggests. Certainly not enough to drive a different interpretation of the statute.

IV.

The text and structure of the CARES Act persuade us that Essintial's payments to independent contractors were not "payroll costs" for purposes of a PPP loan. That is the best interpretation of the statute. Therefore, the SBA did not violate the Administrative Procedure Act. Accordingly, we will reverse and remand for further proceedings consistent with this opinion.

All Citations

166 F.4th 380

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 25-1367

ESSINTIAL ENTERPRISE SOLUTIONS, LLC

v.

THE UNITED STATES SMALL BUSINESS ADMINISTRATION; ADMINISTRATOR UNITED STATES SMALL BUSINESS ADMINISTRATION; SECRETARY UNITED STATES DEPARTMENT OF TREASURY; THE UNITED STATES OF AMERICA,
Appellants.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(No. 1:22-cv-01507)
District Judge: Honorable Julia K. Munley

Argued: December 3, 2025

Before: CHAGARES, *Chief Judge*, FREEMAN and BOVE, *Circuit Judges*.

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Middle

District of Pennsylvania and was argued on December 3, 2025.

On consideration whereof, it is now hereby **ORDERED** and **ADJUDGED** by this Court that the December 30, 2024 order of the District Court is **REVERSED** and this matter is **REMANDED** to the District Court for further proceedings. Each party shall bear its own costs.

All of the above in accordance with the opinion of this Court.

APPENDIX C

UNITED STATES DISTRICT COURT, M.D. PENNSYLVANIA.

ESSINTIAL ENTERPRISE SOLUTIONS, LLC, Plaintiff
v.
The UNITED STATES SMALL BUSINESS ADMINISTRATION; Isabella Casillas Guzman, in her official capacity as Administrator of the Small Business Administration; Janet Yellen, in her official capacity as United States Secretary of Treasury; and The United States of America, Defendants

No. 1:22cv1507

Signed December 30, 2024

Attorneys and Law Firms

Bret S. Wacker, Clark Hill Plc, Denver, CO, Danny P. Cerrone Jr., Clark Hill PLC, Pittsburgh, PA, J. Chris White, Clark Hill PLC, Lansing, MI, for Plaintiff.

Michael Butler, United States Attorney's Office, Harrisburg, PA, for Defendants.

MEMORANDUM

JULIA K. MUNLEY, United States District Court Judge

During the nationwide economic crisis brought on by the coronavirus pandemic, Congress issued a

mandate to the Defendant United States Small Business Administration ("SBA") under the CARES Act [1] to make hundreds of billions of dollars in Paycheck Protection Program ("PPP") loans available to American small businesses. *See* 15 U.S.C. § 636(a)(36); (Doc. 34, Defs.' Stmt. Mat. Fact ¶ 1).[2] Loans granted under the PPP may be forgiven if their proceeds were used for certain purposes. 15 U.S.C. § 9005(b). Plaintiff Essintial Enterprise Solutions, Inc. received a PPP loan and then sought forgiveness. Although the SBA did forgive part of the loan, it denied the request for total forgiveness. Plaintiff filed the instant complaint seeking review of the SBA's decision to deny complete forgiveness. Before the court for disposition are cross-motions for summary judgment. The parties have briefed their respective positions, and the matter is ripe for adjudication.

Background

Plaintiff Essintial applied to receive a PPP loan in the amount of $7,028,000.00 from Berkshire Bank ("the Lender"). (Doc. 26, Pl.'s SOF at ¶ 1). The Lender approved the Loan application on April 10, 2020, and at the time, the SBA made no objection. (*Id.* ¶ 3). The Lender funded the Loan in the amount applied for on April 20, 2020. (*Id.* ¶ 4). Plaintiff alleges that it used the proceeds of the Loan to protect the continued employment of its employees. (*Id.* ¶ 5).

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[1] The Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

[2] The court will cite to portions of the Statements of Material Fact which the parties appear to agree upon.

On January 6, 2021, plaintiff applied for full forgiveness of the Loan. (*Id.* ¶ 6). The Lender approved the forgiveness application for full forgiveness of the Loan, and in turn, submitted it to the SBA for approval on January 18, 2021. (*Id.* ¶ 7). In its Final Decision on the application for forgiveness, the SBA found the plaintiff ineligible for full forgiveness of the Loan and that only $3,469,174.00 of the Loan would be forgiven. (*Id.* ¶ 8). The basis for the lower amount of forgiveness was that the original Loan included compensation to independent contractors which the SBA concluded could not be substantiated as an eligible payroll cost. (*Id.* ¶ 9). Plaintiff appealed the SBA's final decision through the United States SBA Office of Hearings and Appeals ("OHA"). During this appeal, the SBA increased the amount of forgiveness by $233,837.60, thus bringing the total amount of forgiveness to $3,703,011.60 and an unforgiven amount of $3,325,788.40. (*Id.* 11).

Ultimately, the OHA denied plaintiff's appeal of the SBA's final decision and affirmed the SBA's final decision. (Doc. 3-2, Compl. Exh. 4, Decision of Clifford Sturek, Administrative Judge). Plaintiff filed a Petition for Reconsideration with the OHA. (Doc. 3-3, Compl. Exh. 5). The OHA denied the Petition for Reconsideration. (Doc. 3-4, Compl. Exh. 6). Thirty days after the plaintiff's receipt of the Reconsideration Decision, it became the final decision of the SBA which entitled plaintiff to file the instant action in this court for review of the SBA's decision. *See* 13 C.F.R. § 134.1211(c) and (g). The plaintiff's complaint contains the following counts:

Count I – Claim for Declaratory and Injunctive Relief on the basis that the defendants acted without

authority in defining payroll costs in a manner inconsistent with the CARES Act;

Count II – Claim for Declaratory Relief regarding the retroactive application of the SBA's Interim Final Rule;

Count III – Application for Temporary Restraining Order and Temporary or Permanent Injunction; and

Count IV – Claim for Attorney's Fees under the Equal Access to Justice Act.

At the case management conference, the court set deadlines for the disclosure of the final administrative record and objections thereto and for the filing of motions for summary judgment by each party. (Doc. 22, Case Management Order). In due course both parties moved for summary judgment and briefed their respective positions. Since the briefing of the summary judgment motions, the plaintiff has filed three notices of supplemental authority (Docs. 38, 41, and 42), bringing the case to its present posture.[3]

Jurisdiction

This court has federal question jurisdiction pursuant 28 U.S.C. § 1331 because this case arises under the Constitution, laws, or treaties of the United States, namely the CARES Act and the Administrative Procedures Act, 5 U.S.C. §§ 551 *etseq*.

Standard of Review

Granting summary judgment is proper " 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

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[3] The Honorable Jennifer P. Wilson transferred this case to the undersigned on November 7, 2023.

show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' " *See Knabe v. Boury Corp.*, 114 F.3d 407, 410 n.4 (3d Cir. 1997) (quoting Fed. R. Civ. P. 56(c)). "[T]his standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original).

In considering a motion for summary judgment, the court must examine the facts in the light most favorable to the party opposing the motion. *Int'l Raw Materials, Ltd. v. Stauffer Chem. Co.*, 898 F.2d 946, 949 (3d Cir. 1990). The burden is on the moving party to demonstrate that the evidence is such that a reasonable jury could not return a verdict for the non-moving party. *Anderson*, 477 U.S. at 248. A fact is material when it might affect the outcome of the suit under the governing law. *Id.* Where the non-moving party will bear the burden of proof at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the non-movant's burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go beyond its pleadings, and designate specific facts by the use of affidavits, depositions, admissions, or answers to interrogatories showing that there is a genuine issue for trial. *Id.* at 324.

At issue with the instant summary judgment motions is a decision from the SBA, a federal agency. The Administrative Procedure Act ("APA") provides for judicial review of federal agency actions. 5 U.S.C. § 702. It also sets forth the extent of judicial authority to review such agency action. The APA provides that a reviewing court shall:

> hold unlawful and set aside agency action, findings, and conclusions found to be –
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> **(A)** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> **(B)** contrary to constitutional right, power, privilege, or immunity;
>
> **(C)** in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> **(D)** without observance of procedure required by law;
>
> **(E)** unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> **(F)** unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706(2). In reviewing a federal agency's decision, such as an SBA decision, the court cannot substitute its own policy judgment for that of the agency, but the court must ensure that "the agency ... acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *See*

F.C.C. v. Prometheus Radio Project, 592 U.S. 414, 423 (2021).

Discussion

The instant matter involves a PPP loan. "The PPP is a ... loan program administered under Section 7(a) of the Small Business Act (codified at 15 U.S.C. § 636(a)). Its purpose [was] to assist small businesses during the COVID-19 crisis by immediately extending them loans on favorable terms." *Camelot Banquet Rooms, Inc. v. U.S. Small Bus. Admin.*, 458 F. Supp. 3d 1044, 1050 (E.D. Wis. 2020). The law provides for forgiveness of such loans for small business borrowers who used most of the loan proceeds for "payroll and certain other expenses like mortgage [interest] or rent payments and utility expenses." 15 U.S.C. §§ 636m(a)(11) and 636m(b). The law requires the SBA to reimburse the private lender for any PPP loan determined to be eligible for forgiveness. 15 U.S.C. § 636m(c)(3). Forgiveness applies to the portions of loans used for "payroll costs" as that term is defined in the CARES Act. The principal issue in this case is whether plaintiff properly calculated its payroll costs in applying for the Loan and whether full forgiveness should have been provided.

Less than a week after Congress passed the CARES Act, the SBA, with the Department of the Treasury, issued the First PPP Interim Final Rule ("IFR"). The SBA posted the rule on the Department of the Treasury website on April 2, 2020. This First PPP IFR's purpose was to administer the CARES Act by setting forth borrower eligibility and application requirements for PPP loans. *See generally* 85 Fed. Reg.

20811 *et seq*. This rule provides that payroll costs do not include payments to independent contractors. *Id.*

As noted above, plaintiffs complaint is comprised of four separate counts. Count I contends that the SBA's denial of full forgiveness of the Loan was arbitrary, capricious, and contrary to law. Count II avers that the SBA applied the IFR retroactively to the Loan. Such retroactive application of the IFR is contrary to the law according to the plaintiff. Count III seeks a temporary restraining order and a temporary or permanent injunction. Finally, Count IV seeks attorney's fees. For an orderly disposition of the issues found in the motions for summary judgment the court will address Count II first and then Counts I, III, and IV in turn.

A. Count II – Retroactive Application of the IFR

Count II of plaintiff's complaint alleges that the SBA committed legal error by applying the IFR to plaintiffs loan retroactively. (Doc. 1, Compl. ¶¶ 79-86). The SBA set the effective date of the IFR as April 15, 2020. Vol. 85 Fed. Reg., No. 73 at 20811. The IFR itself indicates that it has "no preemptive or retroactive effect." *Id.* at 20817. Plaintiff applied for its loan on April 4, 2020, and received approval for the loan on April 10, 2020, prior to the effective date of the IFR. (Doc. 26, Pl.'s SOF at ¶¶ 1, 3).

If the SBA did retroactively apply the IFR, then several issues are presented. If the court finds that the SBA applied the IFR retroactively and that such application is lawful, then the court must determine whether the SBA acted within its statutory authority in enacting the IFR. That is, the court would have to determine whether the IFR is valid. If the court

concludes that the SBA did not apply the IFR retroactively to the Loan, then a statutory analysis must be made to determine if the SBA's interpretation of the CARES Act is appropriate. Thus, the issues are either the validity of the IFR or the validity of the SBA's interpretation of the CARES Act without reference to the IFR.

First, the court will address whether the SBA retroactively applied its rules to plaintiff's Loan. As noted, plaintiff applied for forgiveness of the Loan, and upon initial review, the SBA denied full forgiveness on the basis that plaintiff included independent contractors in its payroll costs. (Doc. 2, at ECF 21). The denial does not mention the IFR. (*Id.*) Plaintiff then appealed to the OHA. It appears that during plaintiff's OHA appeal, the SBA argued that the IFR applied to plaintiff's Loan. As such, the SBA took the position that plaintiff could not include payments to independent contractors as part of its forgivable payroll costs. The OHA decision does not clearly state that the IFR applies to the Loan. Rather, the decision indicates that the IFR clarified the SBA's position as to how independent contractors would be treated in determining countable payroll costs. (Doc. 3-2, OHA Decision at ECF 17-18). Thus, pre-IFR and post-IFR, the SBA's position was that independent contractor expenses could not be included as forgivable payroll costs. In other words, the SBA did not need to rely on the IFR to deny full forgiveness because its position pre-IFR was that payments to independent contractors were not included in payroll costs. Plaintiff filed a motion for reconsideration of the OHA's initial decision. The OHA denied the motion for reconsideration. (Doc. 3-4). This decision, like the

initial OHA, does not explicitly apply the IFR retroactively to the Loan.

Defendants' initial brief does not appear to directly address the retroactivity argument plaintiff has raised. In its reply brief, however, defendants indicates that the IFR had no impermissible retroactive effect because the rule simply explained pre-existing law, that is, it explained the definition of "payroll costs" set forth in the CARES Act. And in any event, the SBA's reliance on the IFR at most constituted harmless error because the IFR interpretation of the term "payroll costs" under the CARES Act was the correct one.

The court's review of the record indicates that the SBA did not retroactively apply the IFR to plaintiff's application for loan forgiveness.[4] It merely applied its interpretation of the CARES Act, which, even prior to the effective date of the IFR, meant that independent contractor payments could not be included in payroll costs. As the SBA did not apply the IFR, the court need not determine whether the SBA properly employed its authority in adopting the IFR. Rather, the court's role is to review the CARES Act and determine whether the SBA's position – prior to the enactment of the IFR - is a valid construction of the

[4] If the IFR had been retroactively applied, the SBA would have committed error. Retroactive rulemaking by an agency is presumptively unauthorized. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Moreover, as stated above, the IFR itself indicates that it is not retroactive. Vol. 85 Fed. Reg., No. 73 at 20817.

CARES Act with regard to payments to independent contractors.[5]

B. Count I – Declaratory Judgment and Injunctive Relief

Count I of plaintiff's complaint is a claim for declaratory judgment and injunctive relief under 5 U.S.C. § 706(2)(A), (C). (Doc. 1, ¶¶ 60-78). This count asserts that the defendants acted without authority when it defined payroll costs in a manner inconsistent with the definition set forth in the CARES Act.[6]

The parties' summary judgment motions call upon the court to construe the CARES Act. Such a statutory analysis proceeds in several steps. *See e.g.*, *B&G. Constr. Co., Inc. v. Office of Workers' Comp. Progs.*, 662 F.3d 233, 248-49 (3d Cir. 2011). First, the court examines the plain language of the statute. Id at 248. If the language is unambiguous the court rarely needs to inquire into the meaning of the statute beyond examining its wording. *Id.*

Second, further inquiry may be needed "where the literal application of the statute will produce a result demonstrably at odds with the intentions of its drafters, or where the result would be so bizarre that Congress could not have intended it." *Id.* (internal quotation marks and citation omitted). "It is

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[5] Although it may appear that the court is explaining a difference without a distinction, it is important to distinguish whether the court needs to rule upon the propriety of the IFR or whether it needs to construe the CARES Act separate from the IFR. The standards the court would apply is different for each.

[6] Plaintiff discusses the remedy it seeks and the substantive legal issues in the same count. The court will here discuss the substance of Count II and the remedy will be discussed below.

inappropriate, however, to reference other statutory provisions in order to create an ambiguity where none would otherwise exist." *In re Phila. Newspapers, LLC*, 418 B.R. 548, 560 (E.D. Pa. 1989) (citing *Dir., Off. of Workers' Comp. Programs v. Sun Ship, Inc.*, 150 F.3d 288, 292 (3d Cir.1998) (finding that related statutory sections could not be used to create an ambiguity where the language was clear)).

1. Plain Language of the Statute

As noted, the first step in a statutory analysis is to examine the plain language of the statute. The United States Supreme Court has explained that when construing statutes, "courts must give effect to the clear meaning of the statutes as written[,] ... giving each word its ordinary, contemporary, common meaning." *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 414 (2017) (internal citations and quotation marks omitted). When a court interprets a statute its goal is to effectuate Congress's intent. *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 257 (3d Cir. 2013). To ascertain whether Congress had an intention on the precise question at issue, the court employs the "traditional tools of statutory construction." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). [7] "The preeminent canon of statutory

[7] The parties' briefs address the standard of review for agency decisions set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). This standard contains two steps. First the court determines whether a statute is silent or ambiguous with regard to a specific issue. If it is silent or ambiguous, then the court proceeds to the second step, which is to provide deference to the agency's interpretation of the statute and the court must determine whether the agency's

interpretation requires [the court] to presume that the legislature says in a statute what it means and means in a statute what it says there." *Bed Roc Ltd., LLC v. U.S.*, 541 U.S. 176, 183 (2004) (internal quotation marks and citations omitted). Accordingly, the court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *Id.*

The court, thus, determines if the statute is ambiguous or unambiguous. The court's analysis proceeds no further if the language is unambiguous. *See id.* To determine if the language is unambiguous, the court reads "the statute in its ordinary and natural sense." *Da Silva v. Att'y Gen. U.S.*, 948 F.3d 629, 635 (3d Cir. 2020) (quoting *In re Phila. Newspapers*, 599 F.3d 298, 304 (3d Cir. 2010)).

When a statute's meaning is unambiguous or plain, the court enforces it according to its terms. "The language of a statute is plain when it admits of no more than one meaning and in such a case the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion." *In re Genesis Health Ventures, Inc.*, 402 F.3d 416, 421 (3d Cir. 2005).

Therefore, the court will review the language of the CARES Act and determine if its language

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interpretation is a "permissible construction." *Id.* at 866. After the briefing in this case was completed, however, the United States Supreme Court overruled *Chevron* with regard to providing deference to the agency's interpretation. *Loper Bright Enters. v. Raimondo*, - - U.S. - -; 144 S.Ct. 2244 (2024). The case law interpreting the first step of Chevron, however, remains instructive on the manner in which the court should determine whether or not a statute is ambiguous.

unambiguously includes payments to independent contractors as payroll costs with respect to PPP loans.

The language at issue here is found in 15 U.S.C. § 636(a)(36)(A)(viii) which provides as follows:

> (viii) the term "payroll costs" –
>
> (I) means
>
> (aa) *the sum of payments of any compensation* with respect to *employees* that is a –
>
> (AA) salary, wage, commission, or similar compensation;
>
> …
>
> *and*
>
> (bb) *the sum of payments of any compensation to* or income of a sole proprietor or *independent contractor* that is a wage, commission, income, net earnings from self-employment, or similar compensation and that is in an amount that is not more than $100,000 ...

15 U.S.C. § 636(a)(36)(A)(viii) (emphasis added).

This definition can be paraphrased as follows: "Payroll costs" means the sum or payments of any compensation with respect to employees and the sum of payments of any compensation to an independent contractor. Upon initial review, it appears that the language is unambiguous.

The statute provides the above definition of the term at issue, "payroll costs". "When a statute includes an explicit definition, [the court] must follow that definition, even if it varies from that term's ordinary meaning." *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000). "Moreover, 'where the statutory language is

unambiguous, the court should not consider statutory purpose or legislative history,' *In re Phila. Newspapers, LLC*, 599 F.3d 298, 304 (3d Cir. 2010), because we operate under the 'assumption that the ordinary meaning of that language accurately expresses the legislative purpose.' " *S.H. ex rel. Durrell*, 729 F.3d at 257 (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)).

Plaintiff argues the language is clear and unambiguous such that a plain reading of the statute reveals that the definition of "payroll costs" includes payments made to employees and payments to independent contractors. It appears that plaintiff is correct. The language of the statute itself indicates that compensation to employees and compensation to independent contractors are both included in the definition of "payroll costs."

Defendants argue that the language is in fact ambiguous. The defendants' argument would be compelling if the court could find the word "and" is ambiguous as used between sections (aa) and (bb) of the CARES Act definition of payroll costs. The Third Circuit Court of Appeals has explained that the usual meaning of the word *"and"* "is conjunctive, and unless the context dictates otherwise, the 'and' is presumed to be used in its ordinary sense[.]" *Reese Bros, Inc. v. U.S.*, 447 F.3d 229, 235-36 (3d Cir. 2006). Here, the context does not dictate otherwise. The language is not ambiguous. The sole reason the definition is in doubt is that the IFR, contrary to the plain language of the statute, indicates that payments to independent contractors are not included in "payroll costs." Merely, drafting a regulation which is contrary to the plain

language of a statute, and which cannot be applied retroactively, does not render that statute ambiguous.

Defendants do not provide a different meaning for the plain language used in the statute. Rather, their position is that the court should not examine the statutory language in isolation, but rather must review it considering other provisions of the CARES Act, and the statutory scheme as a whole. When read in this manner, it is clear, according to the defendants, that the plaintiff's reading of the statute is incorrect. In other words, to determine that the term is ambiguous and does not in fact mean what it says, defendants suggest that the statute be read as a whole, which leads to the second portion of the court's analysis.

2. Result of Applying the Plain Language of the Statute

Once the court determines that the words of the statute have a plain clear meaning, the next step is to determine whether "the literal application of the statute will produce a result demonstrably at odds with the intentions of its drafters, or where the result would be so bizarre that Congress could not have intended it." *B&G Constr. Co*, 662 F.3d at 248. Circumstances where such outcomes result are rare. *Id.* If such results do occur, then the statute is ambiguous, and the court proceeds to further statutory construction tools.

Thus, the law provides that statutory words at issue "must be read in their context and with a view to their place in the overall statutory scheme." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007) (internal quotation marks and citation omitted).

Furthermore, "a reviewing court should not confine itself to examining a particular statutory provision in isolation. Rather, [t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666, 127 S.Ct. 2518, 168 L.Ed.2d 467 (2007) (internal citation and quotation marks omitted). "A court must ... interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (citation and internal quotation marks omitted). Indeed, "[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole." *Yates v. U.S*, 574 U.S. 528, 537 (2015) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

"[I]f the statutory language appears to be unambiguous, a court must look beyond that plain language where a literal interpretation would lead to an absurd result, or would otherwise produce a result 'demonstrably at odds with the intentions of the drafters.' " *In re Phila. Newspapers, LLC*, 418 B.R. 548, 560 (E.D. Pa. 2009) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242, 109 (1989)). The Third Circuit has explained: "We do not look past plain meaning unless it produces a result demonstrably at odds with the intentions of its drafters ... or an outcome so bizarre that Congress could not have intended it." *Mitchell v. Horn*, 318 F.3d 523, 535 (3d Cir. 2003) (internal quotation marks and citations

omitted). The court concludes that allowing an employer to include payments to independent contractors is not an outcome so bizarre that Congress could not have intended it. The purpose of the CARES Act was to provide "fast and direct economic assistance for American workers, families, small businesses, and industries." https://home.treasury.gov/policy-issues/coronavirus/about-the-cares-act (last visited December 30, 2024). The SBA furthered that purpose by quickly approving the Loan, which provided assistance to American workers, specifically plaintiff's employees and independent contractors.[8]

Defendants argue that the context of the statute as a whole indicates that only payments to employees are allowed for forgiveness to plaintiff in this instance. Defendants highlight the fact that the CARES Act permits small businesses to count the compensation they provide to their employees. 15 U.S.C. § 636 (a)(36)(A)(viii)(I)(aa). Additionally, 15 U.S.C. § 636(a)(36)(D)(ii)(I) permits independent contractors to receive their own PPP loans based upon the amount of their income or compensation. According to plaintiff's reading of the statute, an independent contractor who worked for a small business during the statutory period, as well as the small business itself, would be able to count the compensation paid to the independent contractor toward the calculation of their respective PPP loans. In effect, defendants contend

[8] Plaintiff asserts that although it used payments to independent contractors in its calculation of payroll costs, it actually expended 100% of its PPP Loan proceeds on W-2 employees, and no independent contractor received PPP funds from it. (Doc. 36 at 10). One of the primary purposes of the PPP was "keeping workers paid and employed." 85 Fed. Reg. at 20,184.

that plaintiff's reading of the statute would allow for independent contractors to "double count" or "double dip".

The statutory language, however, does not permit such double dipping. With regard to payroll costs and independent contractors, the CARES Act "includes the sum of payments of any compensation to *or* income of a sole proprietor or independent contractor." 15 U.S.C. § 636(a)(36)(A)(viii)(I)(bb). Under a plain reading of this portion of the statute, only one party, the payee or the payor is eligible for the funds. Thus, an independent contractor or a business which employs the independent contractor would not in practice be permitted to double dip when the borrower's eligibility or forgiveness application is reviewed by the lender or the SBA. Moreover, Congress required applicants to certify that they had not already received PPP loans duplicative of the ones they were seeking. 15 U.S.C. § 636(a)(36)(G)(i)(IV). Defendants' concerns of double-dipping are unfounded.

In support of its position that the context of the statute as a whole indicates that the language at issue is ambiguous, defendants also point to various cases where courts examined other portions of a statute or a statutory scheme as a whole to determine statutory language to be ambiguous. None of the cases that defendants cite to, however, address statutes with such clear and unambiguous language from the definitional section of a statute.

For example, the defendants cite to *Graham County Soil and Water Conservation District v. U.S. ex rel. Wilson*, 559 U.S. 280 (2010) where the United States Supreme Court defined the term "administrative" as it

appeared in the False Claims Act. 31 U.S.C. §§ 3729-3733. The term "administrative" "may, in various contexts, bear a range of related meanings[.]" *Id.* at 286 (internal quotation marks and citation omitted). Hence, it was ambiguous. Here, the word Congress used is "and", a word which generally has one meaning rather than having a range of related meanings.

Defendants also cite to *United States v. Andrews*, 12 F.4th 255, 261 (3d Cir. 2021), where the Third Circuit Court of Appeals addressed a compassionate release statute and the term "extraordinary or compelling" and whether specifically non-retroactive sentencing reductions could be read as to be retroactive based on a statute passed nearly forty years earlier. The phrase was not defined in the statute and the court examined the text, dictionary definitions and a policy statement to determine the meaning of "the otherwise amorphous phrase." *Id.* at 260. Here, the general term "Payroll Costs" is indeed defined in the statute.

A third case relied on by the defendants is *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). In this case, the Supreme Court interpreted a section of the Endangered Species Act "against the statutory backdrop of the many mandatory agency directives whose operation it would implicitly abrogate or repeal if it were construed as broadly" as the court of appeals did. *Id.* at 666. Here, applying the words as written will not have the same effect.

The defendants also cite to *Mejia-Castanon v. Attorney General of the United State of America*, 931 F.3d 224, 233-34 (3d Cir. 2019). In that case, the language the court needed to apply was on its face

ambiguous when two sections of the statute were read in context with each other. *Id.* at 234-35. Such is not the case here. Defendants have not pointed to another section that clearly makes the definition ambiguous.

Defendants attempt to use the rules of statutory construction to create an ambiguity here where none exists. The defendants point to various statutory sections that it claims evidence an intention by Congress that independent contractor payments should not be included in the calculation of payroll costs.[9] The court need not refer to these sections,

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[9] Other facets of the CARES Act which the defendants cite to for this proposition include:

a. Independent contractors are eligible for their own loans under the CARES Act;

b. Based upon the structure of § 636(a)(36)(A)(viii), when Congress intended "and" to mean "and" it used the word "sum" also;

c. The CARES Act excludes foreign employees from the "payroll costs" calculation, but did not exclude foreign independent contractors. If independent contractors were meant to be included, foreign independent contractors would have also been excluded; and

d. The manner in which Congress calculated the loans for farmers and ranchers and the different ways in which loans were calculated for farmers and ranchers with employees versus those without employees indicates that "payroll costs" do not include a business's independent contractor costs.

Defendants also point to a number of CARES Act provisions regarding loan forgiveness which they claim anticipate that forgivable payroll costs will include employee compensation but not independent contractor costs. These include:

a. Reduction for employee layoffs or pay cuts;

b. Documentation and certification requirements; and

however, as the statute is not ambiguous and the plain language of the statute controls. The court cannot refer to other statutory provisions to create an ambiguity in a statute where no ambiguity exists otherwise. *Dir., Off. of Workers' Comp. Progs.*, 150 F.3d at 292.

Accordingly, based upon the above reasoning, the court finds that the decision of the SBA to deny full forgiveness of the Loan on the ground that plaintiff included the independent contractor expenses in its calculation of payroll costs was an error of law and thus arbitrary and capricious. Plaintiffs motion for summary judgment on this issue will be granted.

C. Count III – Injunctive Relief

Count III of plaintiffs complaint is an application for a temporary restraining order and temporary or permanent injunction. (Doc. 1, ¶¶ 87-102). Plaintiff's request for a temporary restraining order and temporary injunction will be denied because plaintiff never filed a separate motion for such relief.

The permanent injunction will be denied because injunctive relief is not appropriate. Rather, the proper course of action is to declare that the defendants committed a legal error in denying full forgiveness on the basis of the inclusion of independent contractor expenses in the "payroll costs" calculation and remand the case to the SBA for further action consistent with this opinion. *Hasan v. U.S. Dept. of Labor*, 545 F.3d 248, 251-52 (3d Cir. 2008); *see also NLRB v. Enter. Ass'n of Steam, Hot Water, Hydraulic Sprinkler,*

---

c. Conformity between forgiveness amount and certification requirements.

Pneumatic Tube, Ice Mach., 429 U.S. 507, 522 n. 9, (1977) ("When an administrative agency has made an error of law, the duty of the Court is to 'correct the error of law committed by that body, and, after doing so to remand the case to the (agency) so as to afford it the opportunity of examining the evidence and finding the facts as required by law.' ") (quoting *ICC v. Clyde S.S. Co.*, 181 U.S. 29, 32-33, 21 S.Ct. 512, 45 L.Ed. 729 (1901)).

D. Count IV – Attorney's fees.

The final count of plaintiff's complaint seeks attorneys' fees under the Equal Access to Justice Act, ("EAJA") 28 U.S.C. § 2412. (Doc.1, ¶¶ 103-105)

The EAJA provides:

> A court shall award to a prevailing party other than the United States fees and other expenses ... incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A).

The government bears the burden to establish first that the agency action giving rise to the litigation was substantially justified, and second, that its litigation positions were substantially justified. *Kiareldeen v. Ashcroft*, 273 F.3d 542, 545 (3d Cir. 2001). To be substantially justified the government need not be correct, but instead must demonstrate "(1) a reasonable basis in truth for the facts alleged; (2) a

reasonable basis in law for the theory it propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced." *Id.* at 554 (quoting *Morgan v. Perry*, 142 F.3d 670, 684 (3d Cir. 1998)). The question of substantial justification is entirely distinct from the question of whether the government was correct on the merits. *Id.* Thus, when analyzing the government's legal positions, "[t]he relevant legal question is 'not what the law now is, but what the Government was substantially justified in believing it to have been.' " *Id.* (quoting *Pierce v. Underwood*, 487 U.S. 552, 561 (1988)).

The court finds that the SBA was substantially justified in believing its interpretation of the CARES Act was proper. Defendants made arguments which, in light of the IFR, were appropriate, although, the court has found that ultimately the defendants were not correct on the merits.

Because the court finds that the SBA's position was substantially justified, the award of attorney's fees under the EAJA will be denied.

Conclusion

For the reasons set forth above, the court will grant the plaintiff's summary judgment in part. The motion will be granted to the extent that the decision of the SBA will be overturned as not in accordance with law and arbitrary and capricious. The law does not support the SBA's conclusion that independent contractor expenses cannot be included in plaintiff's "payroll costs" of the Loan. The court will therefore vacate the final decision and order, and remand the case to the SBA for further proceedings consistent with this opinion. Specifically, the SBA is instructed

that denial of forgiveness of the Loan on the basis that it included payment to independent contractors is not proper. The SBA should re-evaluate plaintiff's application for forgiveness and include independent contractor expenses as an appropriate addition to payroll costs. The defendants' motion for summary judgment will be denied. Additionally, plaintiffs request for attorney's fees will be denied. An appropriate order follows.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA HARRISBURG DIVISION

ESSINTIAL ENTERPRISE SOLUTIONS, LLC, Plaintiff, v. THE UNITED STATES SMALL BUSINESS ADMINISTRATION; ISABELLA CASILLAS GUZMAN, in her official capacity as Administrator of the Small Business Administration; JANET YELLEN, in her official capacity as United States Secretary of Treasury; and The United States of America, Defendants.	)	Case No. 1:22-CV-01507 Hon. Jennifer P. Wilson

PLAINTIFF'S STATEMENT OF MATERIAL FACTS

I. PRELIMINARY STATEMENT

Plaintiff, Essintial Enterprise Solutions, LLC ("Essintial"), by and through its attorneys, hereby submits this Statement of Material Facts pursuant to Local Rule 56.1 in support of Plaintiff's Motion for Summary Judgment pursuant to Fed.R.Civ.P.56 and Local Rule 56.1. Essintial contends that each material fact contained herein is undisputed. Essintial contends such facts are undisputed based on the established record (the "Undisputed Facts" and, each, an "Undisputed Fact").

II. UNDISPUTED MATERIAL FACTS

1. On April 4, 2020, Essintial applied for a Payment Protection Program Loan (the "Loan") from Berkshire Bank (the "Lender") in the amount of $7,028,800.00 ("Maximum Loan Amount") certifying its eligibility "under the rules in effect at the time." it. AR Tab 19 at 416.

2. Essintial calculated the Maximum Loan Amount based on "Payroll Costs" as defined by the CARES Act, i.e., the sum of $3,717,886 (Gross Pay), $226,273 (State Unemployment Tax), $2,635,443 (Independent Contractors), and $449,198 (Health Care), or $7,028,800.

3. On or about April 10, 2020, Essintial's Loan Application was approved in the Maximum Loan Amount by the Lender as the delegee, and without objection, of the SBA.

4. On or about April 20, 2020, the Lender funded the Loan in the Maximum Loan Amount.

5. Essintial applied for, and utilized, the proceeds of the Loan to protect the continued employment of its

employees. AR Tab 1 at 11 (providing a breakdown of how Essintial allocated the proceeds of the Loan.); *see also* AR Tab 7 at 941 (SBA Form 3508 indicating at least 50% of the Loan proceeds were spent on payroll.).

6. On or about January 6, 2021, having expended the Loan proceeds for Payroll Costs entirely on W-2 wages, Essintial applied for full forgiveness of the Loan. AR Tab 7 at 0943.

7. The Lender approved the Forgiveness Application for full forgiveness of the Loan and submitted it to the SBA for its approval on January 18, 2021. AR Tab 2 at 1.

8. On October 7, 2021, Essintial received an undated Final Decision from the SBA stating that Essintial was ineligible for a portion of the Loan received and that only $3,469,174.00 of its $7,028,800.00 Loan would be forgiven. AR Tab 2 at 1.

9. The Final Decision recalculated the Maximum Loan Amount for the Loan on the basis that the original Loan amount "included compensation to independent contractors which cannot be substantiated as an eligible payroll, via the documentation provided." *Id.*

10. The Final Decision cited no statutory or regulatory support for this recalculation. *Id.*

11. During the course of the OHA Appeal, the SBA increased the forgiveness amount by an additional $233,837.60, leaving a total Loan amount forgiven by the SBA of $3,703,011.60 (and unforgiven amount of $3,325,788.40). AR Tab 19 at 438.

12. Neither the SBA nor OHA found fault with the size of Essintial as an eligible small business concern.

13. Neither the SBA nor OHA found fault with the form or content of the Forgiveness Application.

Dated: March 24, 2023

Respectfully submitted

By: */s/ Danny P. Cerrone Jr.*

Danny P. Cerrone Jr. (PA201091)
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301 Grant Street, 14th Floor
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ATTORNEYS FOR PLAINTIFF

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA
HARRISBURG DIVISION

ESSINTIAL ENTERPRISE SOLUTIONS, LLC,	)	
Plaintiff,	)	
vs.	)	Case No. _____
THE UNITED STATES SMALL BUSINESS ADMINISTRATION, ISABELLA CASILLAS GUZMAN, in her official Capacity as Administrator of the Small Business Administration; JANET YELLEN, in her official capacity as United States Secretary of Treasury; and The United States of America,	)	
Defendants.	)	

VERIFIED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiff, Essintial Enterprise Solutions, LLC ("Essintial"), for its Verified Complaint for Injunctive and Declaratory Relief, states and alleges as follows:

INTRODUCTION

1. This is an action which seeks judicial review of the legally erroneous and arbitrary and capricious decision by Defendant United States Small Business Administration ("SBA") to deny forgiveness to Essintial of a Paycheck Protection Program ("PPP") Loan (the "Loan") it obtained pursuant to the Coronavirus Aid, Relief and Economic Security Act (the "CARES Act"), Pub. L. No. 116-136, 134 Stat. 281 (2020). The Court should review and reverse the SBA's Final Decision and direct it to forgive Essintial's PPP Loan.

PARTIES

2. Plaintiff Essintial is a limited liability corporation organized under the laws of Delaware with its principal place of business at 431 Railroad Avenue, Camp Hill, Pennsylvania 17011. Essintial provides technical support, installation projects and staffing solutions to customers in the airport, retail, hotel, and restaurant industries, industries especially effected by the various COVID pandemic shutdown orders.

***

4. The SBA Wrongfully Denies Full Forgiveness of Essintial's PPP Loan

36. On or about January 6, 2021, having expended the Loan proceeds for Payroll Costs entirely on W-2

wages, Essintial applied for full forgiveness of the Loan ("Forgiveness Application").

37. The Lender approved the Forgiveness Application for full forgiveness and submitted it to the SBA for its approval on January 10, 2021.

38. On October 7, 2021, Essintial received an undated Final Decision from the SBA stating that it was ineligible for a portion of the PPP Loan received and that only $3,469,174.00 of its $7,028,800.00 PPP loan would be forgiven ("Final Decision"). The Final Decision is attached hereto as Exhibit 2.

39. The Final Decision recalculated the Maximum Loan Amount for the Loan on the basis that the original Loan amount "included compensation to independent contractors which cannot be substantiated as an eligible payroll, via the documentation provided."

40. The Final Decision cited no statutory or regulatory support for this recalculation.

41. The partial forgiveness amount left a balance of $3,559,626.00, which Essintial was purportedly required to repay to the Lender.

***

43. During the course of the OHA Appeal, the SBA increased the forgiveness amount by an additional $233,837.60, leaving a total Loan amount forgiven by the SBA of $3,703,011.60 (and unforgiven amount of $3,325,788.40). Exhibit 1 at 377.

***

SMALL BUSINESS ADMINISTRATION
WASHINGTON, DC 20416

06/07/2021

VIA Forgiveness Platform

scott gillanders

Berkshire Bank

Re: PPP Request for Production of Documents and Information Borrower: ESSINTIAL ENTERPRISE SOLUTIONS LLC
SBA Loan No. 1596507105
Loan Approval Amount: $7,028,800.00
Loan Approval Date: 04/10/2020
Lender Forgiveness Decision Submission Date: 01/18/2021

Dear: scott gillanders

The U.S. Small Business Administration (SBA) is requesting additional documents or information for its review of the above-referenced Paycheck Protection Program (PPP) loan.

***

The loan documentation does not fully support the disbursed loan amount. We noted that ineligible payroll expenses were included in the calculation of the loan amount: 1099 Contractor costs. 3rd party ADP payroll report reflect the following - $14,764,232 wages less $365,007 employees over $100K plus $1,099,572 health benefits and $365,588 State ui forms. Average Monthly payroll cost is $1,321,282 *2.5 $3,303,205. This resulted in a reduction in the forgivable amount, revised from $7,028,800 to $3,303,205. Please see "HOW TO CALCULATE MAXIMUM LOAN AMOUNTS – BY BUSINESS TYPE." PPP--

How-to-Calculate-Maximum-Loan-Amounts-for-First-Draw-PPP-Loans-and-What-Documentation-to-Provide-By-Business-Type.pdf (treasury.gov)

Thank you for your cooperation.

Sincerely,

Office of Financial Program Operations
U.S. Small Business Administration

SMALL BUSINESS ADMINISTRATION
WASHINGTON, DC 20416

VIA FORGIVENESS PLATFORM

scott gillanders

Berkshire Bank

Re: PAYCHECK PROTECTION PROGRAM
FINAL SBA LOAN REVIEW DECISION
Borrower: ESSINTIAL ENTERPRISE SOLUTIONS LLC
SBA Loan No.: 1596507105
Approved Loan Amount: $7,028,800.00
Loan Approval Date: 04/10/2020
Lender Forgiveness Decision Submission Date: 01/18/2021
Lender Forgiveness Decision Amount: $7,028,800.00
SBA Final Forgiveness Amount: $ 3,469,174.00

Dear: scott gillanders

The U.S. Small Business Administration (SBA) has completed its review of the above-referenced Paycheck Protection Program (PPP) loan. Based on a review of lender and/or borrower submissions, and consideration of the facts and circumstances, SBA has made a final SBA loan review decision.

SBA has determined that the borrower was ineligible for the PPP loan amount received. The reason for SBA's decision is as follows:

After review of the documentation provided, the SBA has recalculated the borrower's maximum eligible loan amount and thus limited forgiveness to this eligible amount.

When reviewing the lenders Documentation provided, it is noted that the lender included compensation to independent contractors which cannot be substantiated as an eligible payroll, via the documentation provided.

Gross taxable wages in the amount of $14,764,232 were confirmed with the payroll report submitted. $365,007 were verified in gross pay in excess of $100,000. Employer contributions to health insurance totaled $1,896,223. Additionally, $365,007 in the state unemployment taxes were verified.

The 2019 total payroll cost equals $16,652,036 producing a maximum eligible loan of $3,469,174, which is 2.5 times the average monthly payroll.

Additional information was requested to further evaluate the borrower eligibility; however, no additional documentation was received.

Based on the above stated reason(s), SBA has determined that forgiveness in the amount of $3,469,174.00 is appropriate. Additional details regarding the forgiveness payment amount (if any) will be provided in a Notice of Paycheck Protection Program Forgiveness Payment.

Within 5 business days of the date of this letter, you must provide a copy of this final SBA loan review decision to the borrower.

You must continue to service the loan. You must notify the borrower that the remaining balance of the loan after application of the forgiveness payment (if any) must be repaid on or before the maturity date. The notification must include the date on which the first principal and interest payment is due and the amount

of the borrower's regular payment. As set forth below, if the borrower files a timely appeal with SBA's Office of Hearings and Appeals (OHA), the deferment period of the loan will be extended pursuant to 13 CFR § 134.1211.

Pursuant to 13 CFR § 134.1201(b), the borrower has the right to appeal to SBA's Office of Hearings and Appeals a final SBA loan review decision that the borrower:

1. was ineligible for a PPP loan;
2. was ineligible for the PPP loan amount received or used the PPP loan proceeds for unauthorized uses;
3. is ineligible for PPP loan forgiveness in the amount determined by the lender in its full approval or partial approval decision issued to SBA; and/or
4. is ineligible for PPP loan forgiveness in any amount when the lender has issued a full denial decision to SBA.

Any appeal must be made in accordance with the SBA Rules of Practice for Borrower Appeals of Final SBA Loan Review Decisions Under the Paycheck Protection Program, located at 13 CFR § 134.1201, et seq., including but not limited to the following:

An appeal petition must be filed with SBA's Office of Hearings and Appeals (OHA) within 30 calendar days after the borrower's receipt of the final SBA loan review decision. 13 CFR § 134.1202(a). To file and manage an appeal of a final SBA loan review decision with OHA, refer to Office of Hearings and Appeals.

Borrower must include, among other things, a copy of this final SBA loan review decision with its appeal. 13 CFR § 134.1204(a).

Borrower must provide you (the lender) with a copy of the timely appeal petition filed with OHA so that you can extend the deferment period of the loan. 13 CFR § 134.1202(b).

An appeal to OHA is an administrative remedy that must be exhausted before judicial review of a final SBA loan review decision may be sought in a federal district court. 13 CFR § 134.1201(d).

Thank you for your cooperation.

Sincerely,

Office of Capital Access
U.S. Small Business Administration

***

United States Small Business Administration
Office of Hearings and Appeals

PAYCHECK PROTECTION PROGRAM APPEAL OF,	)	
Essintial Enterprise Solutions, LLC	)	Docket No. PPP-1596507105
Appellant	)	Hon. Clifford Sturek
Appealed from SBA PPP Loan Number 1596507105	)	

Amended and Restated Appeal of Essintial Enterprise Solutions, LLC
Of SBA Final Payroll Protection Plan Loan Forgiveness Decision

***

Category	Essintial Payroll Cost	SBA Payroll Cost	Difference	Explanation
Gross Pay	$3,717,886	$2,998,085	$719,801	Gross pay when considering wages going into and staying through covid
State Unemp Tax	$226,273	$76,043	$150,230	Higher trend as well as SBA error using incorrect information from ADP
ICs (did not apply for PPP)	$2,215,040	-	$2,215,040	ICs that did not apply for or receive PPP; therefore no double dipping of PPP program
ICs (Uncertain if applied for PPP)	$420,403	-	$420,403	Essintial acknowledges these ICs did or may have been PPP recipient
Health Costs	$449,198	$395,046	$54,151	Higher health and claims costs as per Essintial
Total	$7,028,800	$3,469,174	$3,559,626	

CONCLUSION

Essintial reiterates that it requests full forgiveness of its $7,028,000 PPP Loan and that the application amount is justified and in good faith, and in accordance with all relevant regulations and guidance in effect at the time of application. All proceeds were exhausted on allowable and forgivable expenses and Essintial followed the requirements during the entire forgiveness period. Essintial remains open to Alternative Dispute Resolution through mediation should that help expedite / bring closure to this process.

Respectfully Submitted ESSINTIAL ENTERPRISE SOLUTIONS, LLC

April 1,2022

By:_____

—

Name: Robert Kolb

Its: President and Chief Executive Officer

EXHIBIT G

	Portion of EES PPP Loan	Percent of Total
IC's Did Not Receive PPP$	$ 1,856,286	82%
IC's Did Receive PPP$	$ 169,202	7%
Not able to Validate$	$ 251,201	11%
Total	$ 2,276,689	

United States Small Business Administration

Office of Hearings and Appeals

PETITION FOR RECONSIDERATION: Essinitial Enterprise Solutions, LLC	)
Petitioner,	) Decided: June 16, 2022
vs.	)
RE: PPP Appeal of Essintial Enterprise Solutions, LLC, SBA No. PPP-1596507105 (2022)	) Decision No. PFR-1596507105

***

DECISION

***

As an SBA OHA Judge, I have no authority to question or decide the constitutionality of an SBA regulation or policy. Rather, my role is to determine whether the adopted regulations and policies have been appropriately applied to the facts of the case.

As applicable to this case, I have to determine what, if any, SBA regulation or policy was in effect at the time of the Appellant's PPP loan application on April 4, 2020, which resolves the issue of whether payments to independent contractors were permissible expenses of the Appellant in determining the applicable loan amount.

***

This means that publication of the rule in the Federal Register was not required, but SBA did so in furtherance of the intent of the requirement that it issue regulations to carry out the PPP loans. As stated,

SBA published the IFR #1 on April 2, 2020, in advance of Petitioner's loan application, approval and disbursement. The rule indicated, in relevant part:

> p. Do independent contractors count as employees for purposes of PPP loan forgiveness? No, independent contractors have the ability to apply for a PPP loan on their own so they do not count for purposes of a borrower's PPP loan forgiveness.

Thus, at the time of Petitioner's loan application, approval, and disbursement, independent contractors were not to be counted as employees when determining loan eligibility and forgiveness. To conclude otherwise would mean that there were no rules in place from March 27, 2020, until April 15, 2020, when the Rule was published in the Federal Register.

***

As to Petitioner's second argument, it is clear from the Appellant's tax records that there was no significant variation in either the number of employees or wages throughout the year 2019. The following definition in the initial decision is illustrative:

"Seasonal employer" means an employer, other than an employer in the construction industry, who applies to the unemployment agency for designation as a seasonal employer and who the unemployment agency determines is an employer whose operations and business require employees engaged in seasonal employment.
www.lawinsider.com/dictionary/seasonal-employer.

It is emphasized herein, as it was in the initial decision, that there is nothing in the record before me which establishes that the Petitioner's business meets that definition. The Petitioner has the burden of proving all elements of its PFR (13 CFR § 134.1210) but has again failed to do so as to its assertion that it qualifies as a seasonal business.

On reconsideration, I further conclude that Petitioner has not established that the initial decision in this case was based upon a clear error of law material to the decision, and that OHA does not have the authority to question the validity of SBA's regulations or the IFRs. Further, SBA did not err in finding Petitioner ineligible for full forgiveness of its loan, because it was ineligible for the loan amount received, but rather the amount of $3,703,011.60.

Therefore, I DENY Petitioner's PFR, AFFIRM OHA's initial decision, and DENY Essintial Enterprise Solutions, LLC's appeal.

C. Conclusion

For the foregoing reasons, the instant PFR is DENIED. 13 C.F.R. § 134.1211(c). Unless the SBA Administrator elects to review this decision pursuant to 13 C.F.R. § 134.1211(c)(3) & (d), OHA's decision on the request for reconsideration is a reconsidered initial OHA decision and becomes the SBA's final decision 30 calendar days after its service. *See* 13 C.F.R. § 134.1211(c).

CLIFFORD STUREK
Administrative Judge

APPENDIX F

15 U.S.C. § 636: Additional powers

(a) Loans to small business concerns; allowable purposes; qualified business; restrictions and limitations

The Administration is empowered to the extent and in such amounts as provided in advance in appropriation Acts to make loans for plant acquisition, construction, conversion, or expansion, including the acquisition of land, material, supplies, equipment, and working capital, and to make loans to any qualified small business concern, including those owned by qualified Indian tribes, for purposes of this chapter. Such financings may be made either directly or in cooperation with banks or other financial institutions through agreements to participate on an immediate or deferred (guaranteed) basis. These powers shall be subject, however, to the following restrictions, limitations, and provisions:

* * *

(36) Paycheck Protection Program

(A) Definitions

In this paragraph–

(i) the terms "appropriate Federal banking agency" and "insured depository institution" have the meanings given those terms in section 1813 of Title 12;

(ii) the term "covered loan" means a loan made under this paragraph during the covered period;

(iii) the term "covered period" means the period beginning on February 15, 2020 and ending on June 30, 2021;

(iv) the term "eligible recipient" means an individual or entity that is eligible to receive a covered loan;

(v) the term "eligible self-employed individual" has the meaning given the term in section 7002(b) of the Families First Coronavirus Response Act (Public Law 116-127);

(vi) the term "insured credit union" has the meaning given the term in section 1752 of Title 12;

(vii) the term "nonprofit organization" means an organization that is described in section 501(c)(3) of Title 26 and that is exempt from taxation under section 501(a) of Title 26;

(viii) the term "payroll costs"–

(I) means–

(aa) the sum of payments of any compensation with respect to employees that is a—

(AA) salary, wage, commission, or similar compensation;

(BB) payment of cash tip or equivalent;

(CC) payment for vacation, parental, family, medical, or sick leave;

(DD) allowance for dismissal or separation;

(EE) payment required for the provisions of group health care or group life, disability, vision, or dental insurance benefits, including insurance premiums;

(FF) payment of any retirement benefit; or

(GG) payment of State or local tax assessed on the compensation of employees; and

(bb) the sum of payments of any compensation to or income of a sole proprietor or independent contractor that is a wage, commission, income, net earnings from self-employment, or similar compensation and that is in an amount that is not more than $100,000 on an annualized basis, as prorated for the period during which the payments are made or the obligation to make the payments is incurred; and

(II) shall not include–

(aa) the compensation of an individual employee in excess of $100,000 on an annualized basis, as prorated for the period during which

the compensation is paid or the obligation to pay the compensation is incurred;

(bb) taxes imposed or withheld under chapters 21, 22, or 24 of Title 26 during the applicable period;

(cc) any compensation of an employee whose principal place of residence is outside of the United States;

(dd) qualified sick leave wages for which a credit is allowed under section 7001 of the Families First Coronavirus Response Act (Public Law 116-127); or

(ee) qualified family leave wages for which a credit is allowed under section 7003 of the Families First Coronavirus Response Act (Public Law 116-127);

(ix) the term "veterans organization" means an organization that is described in section 501(c)(19) of Title 26 that is exempt from taxation under section 501(a) of Title 26;

(x) the term "community development financial institution" has the meaning given the term in section 4702 of Title 12);

(xi) the term "community financial institutions" means–

(I) a community development financial institution;

(II) a minority depository institution, as defined in section 308 of the Financial

Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 1463 note);

(III) a development company that is certified under title V of the Small Business Investment Act of 1958 (15 U.S.C. 695 et seq.); and

(IV) an intermediary, as defined in subsection (m)(11);

(xii) the term "credit union" means a State credit union or a Federal credit union, as those terms are defined, respectively, in section 1752 of Title 12;

(xiii) the term "seasonal employer" means an eligible recipient that–

(I) does not operate for more than 7 months in any calendar year; or

(II) during the preceding calendar year, had gross receipts for any 6 months of that year that were not more than 33.33 percent of the gross receipts of the employer for the other 6 months of that year;

(xiv) the term "housing cooperative" means a cooperative housing corporation (as defined in section 216(b) of Title 26) that employs not more than 300 employees;

(xv) the term "destination marketing organization" means a nonprofit entity that is–

(I) an organization described in section 501(c) of Title 26 and exempt from tax under section 501(a) of such Title; or

(II) a State, or a political subdivision of a State (including any instrumentality of such entities)–

(aa) engaged in marketing and promoting communities and facilities to businesses and leisure travelers through a range of activities, including–

(AA) assisting with the location of meeting and convention sites;

(BB) providing travel information on area attractions, lodging accommodations, and restaurants;

(CC) providing maps; and

(DD) organizing group tours of local historical, recreational, and cultural attractions; or

(bb) that is engaged in, and derives the majority of the operating budget of the entity from revenue attributable to, providing live events;

(xvi) the terms "exchange", "issuer", and "security" have the meanings given those terms in section 78c(a) of this title; and

(xvii) the term "additional covered nonprofit entity"–

(I) means an organization described in any paragraph of section 501(c) of Title 26, other than paragraph (3), (4), (6), or

(19), and exempt from tax under section 501(a) of such title; and

(II) does not include any entity that, if the entity were a business concern, would be described in section 120.110 of title 13, Code of Federal Regulations (or in any successor regulation or other related guidance or rule that may be issued by the Administrator) other than a business concern described in paragraph (a) or (k) of such section.

(B) Paycheck Protection loans

Except as otherwise provided in this paragraph, the Administrator may guarantee covered loans under the same terms, conditions, and processes as a loan made under this subsection.

(C) Registration of loans

Not later than 15 days after the date on which a loan is made under this paragraph, the Administration shall register the loan using the TIN (as defined in section 7701 of Title 26) assigned to the borrower.

(D) Increased eligibility for certain small businesses and organizations

(i) In general

During the covered period, in addition to small business concerns, any business concern, nonprofit organization, housing cooperative, veterans organization, or Tribal business concern described in section 657a(b)(2)(C) of this title shall be eligible to receive a covered loan if the business

concern, nonprofit organization, housing cooperative, veterans organization, or Tribal business concern employs not more than the greater of–

(I) 500 employees; or

(II) if applicable, the size standard in number of employees established by the Administration for the industry in which the business concern, nonprofit organization, housing cooperative, veterans organization, or Tribal business concern operates.

(ii) Inclusion of sole proprietors, independent contractors, and eligible self-employed individuals

(I) In general

During the covered period, individuals who operate under a sole proprietorship or as an independent contractor and eligible self-employed individuals shall be eligible to receive a covered loan.

(II) Documentation

An eligible self-employed individual, independent contractor, or sole proprietorship seeking a covered loan shall submit such documentation as determined necessary by the Administrator and the Secretary, to establish the applicant as eligible.

(iii) Business concerns with more than 1 physical location

(I) In general

During the covered period, any business concern that employs not more than 500 employees per physical location of the business concern and that is assigned a North American Industry Classification System code beginning with 72 at the time of disbursal shall be eligible to receive a covered loan.

(II) Eligibility of news organizations

(aa) Definition

In this subclause, the term "included business concern" means a business concern, including any station which broadcasts pursuant to a license granted by the Federal Communications Commission under title III of the Communications Act of 1934 (47 U.S.C. 301 et seq.) without regard for whether such a station is a concern as defined in section 121.105 of title 13, Code of Federal Regulations, or any successor thereto–

(AA) that employs not more than 500 employees, or the size standard established by the Administrator for the North American Industry Classification System code applicable to the business concern, per physical location of such business concern; or

(BB) any nonprofit organization or any organization otherwise subject to section 511(a)(2)(B) of Title 26 that is a public broadcasting entity (as defined in section 397(11) of the Communications Act of 1934 (47 U.S.C. 397(11))).

(bb) Eligibility

During the covered period, an included business concern shall be eligible to receive a covered loan if–

(AA) the included business concern is majority owned or controlled by a business concern that is assigned a North American Industry Classification System code beginning with 511110 or 5151 or, with respect to a public broadcasting entity (as defined in section 397(11) of the Communications Act of 1934 (47 U.S.C. 397(11))), has a trade or business that falls under such a code; and

(BB) the included business concern makes a good faith certification that proceeds of the loan will be used to support expenses at the component of the included business concern that produces or distributes locally focused or emergency information.

(III) Eligibility of certain organizations

Subject to the provisions in this subparagraph, during the covered period–

(aa) a nonprofit organization shall be eligible to receive a covered loan if the nonprofit organization employs not more than 500 employees per physical location of the organization; and

(bb) an additional covered nonprofit entity and an organization that, but for subclauses (I)(dd) and (II)(dd) of clause (vii), would be eligible for a covered loan under clause (vii) shall be eligible to receive a covered loan if the entity or organization employs not more than 300 employees per physical location of the entity or organization.

(IV) Eligibility of internet publishing organizations

A business concern or other organization that was not eligible to receive a covered loan the day before March 11, 2021, is assigned a North American Industry Classification System code of 519130, certifies in good faith as an Internet-only news publisher or Internet-only periodical publisher, and is engaged in the collection and distribution of local or regional and national news and information shall be eligible to receive a covered loan for the continued provision

of news, information, content, or emergency information if–

(aa) the business concern or organization employs not more than 500 employees, or the size standard established by the Administrator for that North American Industry Classification code, per physical location of the business concern or organization; and

(bb) the business concern or organization makes a good faith certification that proceeds of the loan will be used to support expenses at the component of the business concern or organization that supports local or regional news.

(iv) Waiver of affiliation rules

During the covered period, the provisions applicable to affiliations under section 121.103 of title 13, Code of Federal Regulations, or any successor regulation, are waived with respect to eligibility for a covered loan for–

(I) any business concern with not more than 500 employees that, as of the date on which the covered loan is disbursed, is assigned a North American Industry Classification System code beginning with 72;

(II) any business concern operating as a franchise that is assigned a franchise identifier code by the Administration;

(III) any business concern that receives financial assistance from a company licensed under section 681 of this title;

(IV)(aa) any business concern (including any station which broadcasts pursuant to a license granted by the Federal Communications Commission under title III of the Communications Act of 1934 (47 U.S.C. 301 et seq.) without regard for whether such a station is a concern as defined in section 121.105 of title 13, Code of Federal Regulations, or any successor thereto) that employs not more than 500 employees, or the size standard established by the Administrator for the North American Industry Classification System code applicable to the business concern, per physical location of such business concern and is majority owned or controlled by a business concern that is assigned a North American Industry Classification System code beginning with 511110 or 5151; or

(bb) any nonprofit organization that is assigned a North American Industry Classification System code beginning with 5151; and

(V) any business concern or other organization that was not eligible to receive a covered loan the day before March 11, 2021, is assigned a North American Industry Classification System code of 519130, certifies in good faith as

an Internet-only news publisher or Internet-only periodical publisher, and is engaged in the collection and distribution of local or regional and national news and information, if the business concern or organization–

(aa) employs not more than 500 employees, or the size standard established by the Administrator for that North American Industry Classification code, per physical location of the business concern or organization; and

(bb) is majority owned or controlled by a business concern or organization that is assigned a North American Industry Classification System code of 519130.

(v) Employee

For purposes of determining whether a business concern, nonprofit organization, veterans organization, or Tribal business concern described in section 657a(b)(2)(C) of this title employs not more than 500 employees under clause (i)(I), or for purposes of determining the number of employees of a housing cooperative or a business concern or organization made eligible for a loan under this paragraph under subclause (II), (III), or (IV) of clause (iii), subclause (IV) or (V) of clause (iv), clause (vii), or clause (ix), the term "employee" includes individuals

employed on a full-time, part-time, or other basis.

(vi) Affiliation

The provisions applicable to affiliations under section 121.103 of title 13, Code of Federal Regulations, or any successor thereto, shall apply with respect to a nonprofit organization a business concern or organization made eligible for a loan under this paragraph under clause (vii), and, a housing cooperative, a veterans organization in the same manner as with respect to a small business concern.

(vii) Eligibility for certain 501(c)(6) organizations

(I) In general

Any organization that is described in section 501(c)(6) of Title 26 and that is exempt from taxation under section 501(a) of such Title (excluding professional sports leagues and organizations with the purpose of promoting or participating in a political campaign or other activity) shall be eligible to receive a covered loan if–

(aa) the organization does not receive more than 15 percent of its receipts from lobbying activities;

(bb) the lobbying activities of the organization do not comprise more than 15 percent of the total activities of the organization;

(cc) the cost of the lobbying activities of the organization did not exceed $1,000,000 during the most recent tax year of the organization that ended prior to February 15, 2020; and[7]

(dd) the organization employs not more than 300 employees.

(II) Destination marketing organizations

Any destination marketing organization shall be eligible to receive a covered loan if–

(aa) the destination marketing organization does not receive more than 15 percent of its receipts from lobbying activities;

(bb) the lobbying activities of the destination marketing organization do not comprise more than 15 percent of the total activities of the organization;

(cc) the cost of the lobbying activities of the destination marketing organization did not exceed $1,000,000 during the most recent tax year of the destination marketing organization that ended prior to February 15, 2020; and[8]

(dd) the destination marketing organization employs not more than 300 employees; and

(ee) the destination marketing organization–

(AA) is described in section 501(c) of Title 26 and is exempt from taxation under section 501(a) of such Title; or

(BB) is a quasi-governmental entity or is a political subdivision of a State or local government, including any instrumentality of those entities.

(viii) Ineligibility of publicly-traded entities

(I) In general

Subject to subclause (II), and notwithstanding any other provision of this paragraph, on and after December 27, 2020, an entity that is an issuer, the securities of which are listed on an exchange registered as a national securities exchange under section 78f of this title, shall be ineligible to receive a covered loan under this paragraph.

(II) Rule for affiliated entities

With respect to a business concern or organization made eligible by subclause (II) or (IV) of clause (iii) or subclause (IV) or (V) of clause (iv) of this subparagraph, the Administrator shall not consider whether any affiliated entity, which for purposes of this subclause shall include any entity that owns or controls such

business concern or organization, is an issuer.

(ix) Eligibility of additional covered nonprofit entities

An additional covered nonprofit entity shall be eligible to receive a covered loan if–

(I) the additional covered nonprofit entity does not receive more than 15 percent of its receipts from lobbying activities;

(II) the lobbying activities of the additional covered nonprofit entity do not comprise more than 15 percent of the total activities of the organization;

(III) the cost of the lobbying activities of the additional covered nonprofit entity did not exceed $1,000,000 during the most recent tax year of the additional covered nonprofit entity that ended prior to February 15, 2020; and

(IV) the additional covered nonprofit entity employs not more than 300 employees.

(E) Maximum loan amount

Except as provided in subparagraph (V), during the covered period, with respect to a covered loan, the maximum loan amount shall be the lesser of–

(i)(I) the sum of–

(aa) the product obtained by multiplying–

(AA) the average total monthly payments by the applicant for payroll costs incurred during the 1-year period before the date on which the loan is made, except that an applicant that is a seasonal employer shall use the average total monthly payments for payroll for any 12-week period selected by the seasonal employer between February 15, 2019, and February 15, 2020; by

(BB) 2.5; and

(bb) the outstanding amount of a loan under subsection (b)(2) that was made during the period beginning on January 31, 2020 and ending on the date on which covered loans are made available to be refinanced under the covered loan; or

(II) if requested by an otherwise eligible recipient that was not in business during the period beginning on February 15, 2019 and ending on June 30, 2019, the sum of–

(aa) the product obtained by multiplying–

(AA) the average total monthly payments by the applicant for payroll costs incurred during the period beginning on January 1, 2020 and ending on February 29, 2020; by

(BB) 2.5; and

(bb) the outstanding amount of a loan under subsection (b)(2) that was made during the period beginning on January 31, 2020 and ending on the date on which covered loans are made available to be refinanced under the covered loan; or

(ii) $10,000,000.

(F) Allowable uses of covered loans

(i) In general

During the covered period, an eligible recipient may, in addition to the allowable uses of a loan made under this subsection, use the proceeds of the covered loan for–

(I) payroll costs;

(II) costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;

(III) employee salaries, commissions, or similar compensations;

(IV) payments of interest on any mortgage obligation (which shall not include any prepayment of or payment of principal on a mortgage obligation);

(V) rent (including rent under a lease agreement);

(VI) utilities;

(VII) interest on any other debt obligations that were incurred before the covered period;

(VIII) covered operations expenditures, as defined in section 636m(a) of this title;

(IX) covered property damage costs, as defined in section 636m(a) of this title;

(X) covered supplier costs, as defined in section 636m(a) of this title; and

(XI) covered worker protection expenditures, as defined in section 636m(a) of this title.

(ii) Delegated authority

(I) In general

For purposes of making covered loans for the purposes described in clause (i), a lender approved to make loans under this subsection shall be deemed to have been delegated authority by the Administrator to make and approve covered loans, subject to the provisions of this paragraph.

(II) Considerations

In evaluating the eligibility of a borrower for a covered loan with the terms described in this paragraph, a lender shall consider whether the borrower–

(aa) was in operation on February 15, 2020; and

(bb)(AA) had employees for whom the borrower paid salaries and payroll taxes; or

(BB) paid independent contractors, as reported on a Form 1099-MISC.

(iii) Additional lenders

The authority to make loans under this paragraph shall be extended to additional lenders determined by the Administrator and the Secretary of the Treasury to have the necessary qualifications to process, close, disburse and service loans made with the guarantee of the Administration.

(iv) Refinance

A loan made under subsection (b)(2) during the period beginning on January 31, 2020 and ending on the date on which covered loans are made available may be refinanced as part of a covered loan.

(v) Nonrecourse

Notwithstanding the waiver of the personal guarantee requirement or collateral under subparagraph (J), the Administrator shall have no recourse against any individual shareholder, member, or partner of an eligible recipient of a covered loan for nonpayment of any covered loan, except to the extent that such shareholder, member, or partner uses the covered loan proceeds for a purpose not authorized under clause (i) or (iv).

(vi) Prohibition

None of the proceeds of a covered loan may be used for–

(I) lobbying activities, as defined in section 1602 of Title 2;

(II) lobbying expenditures related to a State or local election; or

(III) expenditures designed to influence the enactment of legislation, appropriations, regulation, administrative action, or Executive order proposed or pending before Congress or any State government, State legislature, or local legislature or legislative body.

(G) Borrower requirements

(i) Certification

An eligible recipient applying for a covered loan shall make a good faith certification–

(I) that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient;

(II) acknowledging that funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments;

(III) that the eligible recipient does not have an application pending for a loan under this subsection for the same purpose and duplicative of amounts applied for or received under a covered loan; and

(IV) during the period beginning on February 15, 2020 and ending on December 31, 2020, that the eligible recipient has not received amounts under this subsection for the same purpose and duplicative of amounts applied for or received under a covered loan.

(H) Fee waiver

With respect to a covered loan–

(i) in lieu of the fee otherwise applicable under paragraph (23)(A), the Administrator shall collect no fee; and

(ii) in lieu of the fee otherwise applicable under paragraph (18)(A), the Administrator shall collect no fee.

(I) Credit elsewhere

During the covered period, the requirement that a small business concern is unable to obtain credit elsewhere, as defined in section 632(h) of this title, shall not apply to a covered loan.

(J) Waiver of personal guarantee requirement

With respect to a covered loan–

(i) no personal guarantee shall be required for the covered loan; and

(ii) no collateral shall be required for the covered loan.

(K) Maturity for loans with remaining balance after application of forgiveness

With respect to a covered loan that has a remaining balance after reduction based on the loan forgiveness amount under section 636m of this title–

(i) the remaining balance shall continue to be guaranteed by the Administration under this subsection; and

(ii) the covered loan shall have a minimum maturity of 5 years and a maximum maturity of 10 years from the date on which the borrower applies for loan forgiveness under that section.

(L) Interest rate requirements

A covered loan shall bear an interest rate not to exceed 4 percent, calculated on a non-compounding, non-adjustable basis.

(M) Loan deferment

(i) Definition of impacted borrower

(I) In general

In this subparagraph, the term "impacted borrower" means an eligible recipient that–

(aa) is in operation on February 15, 2020; and

(bb) has an application for a covered loan that is approved or pending approval on or after March 27, 2020.

(II) Presumption

For purposes of this subparagraph, an impacted borrower is presumed to have been adversely impacted by COVID-19.

(ii) Deferral

The Administrator shall–

(I) consider each eligible recipient that applies for a covered loan to be an impacted borrower; and

(II) require lenders under this subsection to provide complete payment deferment relief for impacted borrowers with covered loans, including payment of principal, interest, and fees, until the date on which the amount of forgiveness determined under section 636m of this title is remitted to the lender.

(iii) Secondary market

With respect to a covered loan that is sold on the secondary market, if an investor declines to approve a deferral requested by a lender under clause (ii), the Administrator shall exercise the authority to purchase the loan so that the impacted borrower may receive a deferral, including payment of principal, interest, and fees, until the date on which the amount of forgiveness determined under section 636m of this title is remitted to the lender.

(iv) Guidance

Not later than 30 days after March 27, 2020, the Administrator shall provide guidance to lenders under this paragraph on the deferment process described in this subparagraph.

(v) Rule of construction

If an eligible recipient fails to apply for forgiveness of a covered loan within 10 months after the last day of the covered period defined in section 636m(a) of this title, such eligible recipient shall make payments of principal, interest, and fees on such covered loan beginning on the day that is not earlier than the date that is 10 months after the last day of such covered period.

(N) Secondary market sales

A covered loan shall be eligible to be sold in the secondary market consistent with this subsection. The Administrator may not collect any fee for any guarantee sold into the secondary market under this subparagraph.

(O) Regulatory capital requirements

(i) Risk weight

With respect to the appropriate Federal banking agencies or the National Credit Union Administration Board applying capital requirements under their respective risk-based capital requirements, a covered loan shall receive a risk weight of zero percent.

(ii) Temporary relief from TDR disclosures

Notwithstanding any other provision of law, an insured depository institution or an insured credit union that modifies a covered loan in relation to COVID-19-related difficulties in a troubled debt restructuring on or after March 13, 2020, shall not be

required to comply with the Financial Accounting Standards Board Accounting Standards Codification Subtopic 310-40 ("Receivables - Troubled Debt Restructurings by Creditors") for purposes of compliance with the requirements of the Federal Deposit Insurance Act (12 U.S.C. 1811 et seq.), until such time and under such circumstances as the appropriate Federal banking agency or the National Credit Union Administration Board, as applicable, determines appropriate.

(P) Reimbursement for processing

(i) In general

The Administrator shall reimburse a lender authorized to make a covered loan as follows:

(I) With respect to a covered loan made during the period beginning on March 27, 2020, and ending on the day before December 27, 2020, the Administrator shall reimburse such a lender at a rate, based on the balance of the financing outstanding at the time of disbursement of the covered loan, of–

(aa) 5 percent for loans of not more than $350,000;

(bb) 3 percent for loans of more than $350,000 and less than $2,000,000; and

(cc) 1 percent for loans of not less than $2,000,000.

(II) With respect to a covered loan made on or after December 27, 2020, the Administrator shall reimburse such a lender–

(aa) for a covered loan of not more than $50,000, in an amount equal to the lesser of–

(AA) 50 percent of the balance of the financing outstanding at the time of disbursement of the covered loan; or

(BB) $2,500; and

(bb) at a rate, based on the balance of the financing outstanding at the time of disbursement of the covered loan, of–

(AA) 5 percent for a covered loan of more than $50,000 and not more than $350,000;

(BB) 3 percent for a covered loan of more than $350,000 and less than $2,000,000; and

(CC) 1 percent for a covered loan of not less than $2,000,000.

(ii) Fee limits

An agent that assists an eligible recipient to prepare an application for a covered loan may not collect a fee in excess of the limits established by the Administrator. If an eligible recipient has knowingly retained an agent, such fees shall be paid by the eligible recipient and may not be paid out of the

proceeds of a covered loan. A lender shall only be responsible for paying fees to an agent for services for which the lender directly contracts with the agent.

(iii) Timing

A reimbursement described in clause (i) shall be made not later than 5 days after the reported disbursement of the covered loan and may not be required to be repaid by a lender unless the lender is found guilty of an act of fraud in connection with the covered loan.

(iv) Sense of the Senate

It is the sense of the Senate that the Administrator should issue guidance to lenders and agents to ensure that the processing and disbursement of covered loans prioritizes small business concerns and entities in underserved and rural markets, including veterans and members of the military community, small business concerns owned and controlled by socially and economically disadvantaged individuals (as defined in section 637(d)(3)(C) of this title), women, and businesses in operation for less than 2 years.

(Q) Duplication

Nothing in this paragraph shall prohibit a recipient of an economic injury disaster loan made under subsection (b)(2) that is for a purpose other than paying payroll costs and other obligations described in subparagraph (F) from receiving assistance under this paragraph.

(R) Waiver of prepayment penalty

Notwithstanding any other provision of law, there shall be no prepayment penalty for any payment made on a covered loan.

(S) Set-aside for insured depository institutions, credit unions, and community financial institutions

(i) Insured depository institutions and credit unions

In making loan guarantees under this paragraph after April 24, 2020, the Administrator shall guarantee not less than $30,000,000,000 in loans made by–

(I) insured depository institutions with consolidated assets of not less than $10,000,000,000 and less than $50,000,000,000; and

(II) credit unions with consolidated assets of not less than $10,000,000,000 and less than $50,000,000,000.

(ii) Community financial institutions, small insured depository institutions, and credit unions

In making loan guarantees under this paragraph after April 24, 2020, the Administrator shall guarantee not less than $30,000,000,000 in loans made by–

(I) community financial institutions;

(II) insured depository institutions with consolidated assets of less than $10,000,000,000; and

(III) credit unions with consolidated assets of less than $10,000,000,000.

(T) Requirement for date in operation

A business or organization that was not in operation on February 15, 2020 shall not be eligible for a loan under this paragraph.

(U) Exclusion of entities receiving shuttered venue operator grants

An eligible person or entity (as defined under of section 9009a of this title) that receives a grant under such section 9009a shall not be eligible for a loan under this paragraph.

(V) Calculation of maximum loan amount for farmers and ranchers

(i) Definition

In this subparagraph, the term "covered recipient" means an eligible recipient that–

(I) operates as a sole proprietorship or as an independent contractor, or is an eligible self-employed individual;

(II) reports farm income or expenses on a Schedule F (or any equivalent successor schedule); and

(III) was in business as of February 15, 2020.

(ii) No employees

With respect to covered recipient without employees, the maximum covered loan amount shall be the lesser of–

(I) the sum of–

(aa) the product obtained by multiplying–

(AA) the gross income of the covered recipient in 2019, as reported on a Schedule F (or any equivalent successor schedule), that is not more than $100,000, divided by 12; and

(BB) 2.5; and

(bb) the outstanding amount of a loan under subsection (b)(2) that was made during the period beginning on January 31, 2020 and ending on April 3, 2020 that the borrower intends to refinance under the covered loan, not including any amount of any advance under the loan that is not required to be repaid; or

(II) $2,000,000.

(iii) With employees

With respect to a covered recipient with employees, the maximum covered loan amount shall be calculated using the formula described in subparagraph (E), except that the gross income of the covered recipient described in clause (ii)(I)(aa)(AA) of this subparagraph, as divided by 12, shall be added to the sum calculated under subparagraph (E)(i)(I).

(iv) Recalculation

A lender that made a covered loan to a covered recipient before December 27, 2020 may, at the request of the covered recipient–

(I) recalculate the maximum loan amount applicable to that covered loan based on the formula described in clause (ii) or (iii), as applicable, if doing so would result in a larger covered loan amount; and

(II) provide the covered recipient with additional covered loan amounts based on that recalculation.

(W) Fraud enforcement harmonization

Notwithstanding any other provision of law, any criminal charge or civil enforcement action alleging that a borrower engaged in fraud with respect to a covered loan guaranteed under this paragraph shall be filed not later than 10 years after the offense was committed.

* * *

15 U.S.C. § 636m. Loan forgiveness

(a) Definitions

In this section-

(1) the term "covered loan" means a loan guaranteed under section 636(a)(36) of this title;

(2) the term "covered mortgage obligation" means any indebtedness or debt instrument incurred in the ordinary course of business that-

(A) is a liability of the borrower;

(B) is a mortgage on real or personal property; and

(C) was incurred before February 15, 2020;

(3) the term "covered operations expenditure" means a payment for any business software or cloud computing service that facilitates business operations, product or service delivery, the processing, payment, or tracking of payroll expenses, human resources, sales and billing functions, or accounting or tracking of supplies, inventory, records and expenses;

(4) the term "covered period" means the period-

(A) beginning on the date of the origination of a covered loan; and

(B) ending on a date selected by the eligible recipient of the covered loan that occurs during the period-

(i) beginning on the date that is 8 weeks after such date of origination; and

(ii) ending on the date that is 24 weeks after such date of origination;

(5) the term "covered property damage cost" means a cost related to property damage and vandalism or looting due to public disturbances that occurred during 2020 that was not covered by insurance or other compensation;

(6) the term "covered rent obligation" means rent obligated under a leasing agreement in force before February 15, 2020;

(7) the term "covered supplier cost" means an expenditure made by an entity to a supplier of goods for the supply of goods that-

(A) are essential to the operations of the entity at the time at which the expenditure is made; and

(B) is made pursuant to a contract, order, or purchase order-

(i) in effect at any time before the covered period with respect to the applicable covered loan; or

(ii) with respect to perishable goods, in effect before or at any time during the covered period with respect to the applicable covered loan;

(8) the term "covered utility payment" means payment for a service for the distribution of electricity, gas, water, transportation, telephone, or internet access for which service began before February 15, 2020;

(9) the term "covered worker protection expenditure"-

(A) means an operating or a capital expenditure to facilitate the adaptation of the business activities of an entity to comply with requirements established or guidance issued by the Department of

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

(B) may include-

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

(I) a drive-through window facility;

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

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

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

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

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

(ii) the purchase of-

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

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

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

(C) does not include residential real property or intangible property;

(10) the term "eligible recipient" means the recipient of a covered loan;

(11) the term "expected forgiveness amount" means the amount of principal that a lender reasonably expects a borrower to expend during the covered period on the sum of any-

(A) payroll costs;

(B) payments of interest on any covered mortgage obligation (which shall not include any prepayment of or payment of principal on a covered mortgage obligation);

(C) payments on any covered rent obligation;

(D) covered utility payments;

(E) covered operations expenditures;

(F) covered property damage costs;

(G) covered supplier costs; and

(H) covered worker protection expenditures; and

(12) the terms "payroll costs" and "seasonal employer" have the meanings given those terms in section 636(a)(36) of this title. Such payroll costs shall not include qualified wages taken into account in determining the credit allowed under section 2301 of the CARES Act, qualified wages taken into account in determining the credit allowed under subsection (a) or (d) of section 303 of the Taxpayer Certainty and Disaster Relief Act of 2020, or premiums taken into account in determining the credit allowed under section 6432 of title 26. Such payroll costs shall not include qualified wages taken into account in determining the credit allowed under subsection (a) or (d) of section 303 of the Taxpayer Certainty and Disaster Tax Relief Act of 2020.

(b) Forgiveness

An eligible recipient shall be eligible for forgiveness of indebtedness on a covered loan in an amount equal to the sum of the following costs incurred and payments made during the covered period:

(1) Payroll costs.

(2) Any payment of interest on any covered mortgage obligation (which shall not include any prepayment of or payment of principal on a covered mortgage obligation).

(3) Any payment on any covered rent obligation.

(4) Any covered utility payment.

(5) Any covered operations expenditure.

(6) Any covered property damage cost.

(7) Any covered supplier cost.

(8) Any covered worker protection expenditure.

(c) Treatment of amounts forgiven

(1) In general

Amounts which have been forgiven under this section shall be considered canceled indebtedness by a lender authorized under section 636(a) of this title.

(2) Purchase of guarantees

For purposes of the purchase of the guarantee for a covered loan by the Administrator, amounts which are forgiven under this section shall be treated in accordance with the procedures that are otherwise applicable to a loan guaranteed under section 636(a) of this title.

(3) Remittance

Not later than 90 days after the date on which the amount of forgiveness under this section is determined, the Administrator shall remit to the lender an amount equal to the amount of forgiveness, plus any interest accrued through the date of payment.

(4) Advance purchase of covered loan

(A) Report

A lender authorized under section 636(a) of this title, or, at the discretion of the Administrator, a third party participant in the secondary market, may, report to the Administrator an expected forgiveness amount on a covered loan or on a pool of covered loans of up to 100 percent of the principal on the covered loan or pool of covered loans, respectively.

(B) Purchase

The Administrator shall purchase the expected forgiveness amount described in subparagraph (A) as

if the amount were the principal amount of a loan guaranteed under section 636(a) of this title.

(C) Timing

Not later than 15 days after the date on which the Administrator receives a report under subparagraph (A), the Administrator shall purchase the expected forgiveness amount under subparagraph (B) with respect to each covered loan to which the report relates.

(d) Limits on amount of forgiveness

(1) Amount may not exceed principal

The amount of loan forgiveness under this section shall not exceed the principal amount of the financing made available under the applicable covered loan.

(2) Reduction based on reduction in number of employees

(A) In general

The amount of loan forgiveness under this section shall be reduced, but not increased, by multiplying the amount described in subsection (b) by the quotient obtained by dividing-

(i) the average number of full-time equivalent employees per month employed by the eligible recipient during the covered period; by

(ii)(I) at the election of the borrower-

(aa) the average number of full-time equivalent employees per month employed by the eligible recipient during the period beginning on February 15, 2019 and ending on June 30, 2019; or

(bb) the average number of full-time equivalent employees per month employed

by the eligible recipient during the period beginning on January 1, 2020 and ending on February 29, 2020; or

(II) in the case of an eligible recipient that is seasonal employer, as determined by the Administrator, the average number of full-time equivalent employees per month employed by the eligible recipient during the period beginning on February 15, 2019 and ending on June 30, 2019.

(B) Calculation of average number of employees

For purposes of subparagraph (A), the average number of full-time equivalent employees shall be determined by calculating the average number of full-time equivalent employees for each pay period falling within a month.

(3) Reduction relating to salary and wages

(A) In general

The amount of loan forgiveness under this section shall be reduced by the amount of any reduction in total salary or wages of any employee described in subparagraph (B) during the covered period that is in excess of 25 percent of the total salary or wages of the employee during the most recent full quarter during which the employee was employed before the covered period.

(B) Employees described

An employee described in this subparagraph is any employee who did not receive, during any single pay period during 2019, wages or salary at an annualized rate of pay in an amount more than $100,000.

(4) Tipped workers

An eligible recipient with tipped employees described in section 203(m)(2)(A) of title 29 may receive forgiveness for additional wages paid to those employees.

(5) Exemption for re-hires

(A) In general

In a circumstance described in subparagraph (B), the amount of loan forgiveness under this section shall be determined without regard to a reduction in the number of full-time equivalent employees of an eligible recipient or a reduction in the salary of 1 or more employees of the eligible recipient, as applicable, during the period beginning on February 15, 2020 and ending on the date that is 30 days after March 27, 2020.

(B) Circumstances

A circumstance described in this subparagraph is a circumstance-

(i) in which-

(I) during the period beginning on February 15, 2020 and ending on the date that is 30 days after March 27, 2020, there is a reduction, as compared to February 15, 2020, in the number of full-time equivalent employees of an eligible recipient; and

(II) not later than December 31, 2020 (or, with respect to a covered loan made on or after December 27, 2020, not later than the last day of the covered period with respect to such covered loan), the eligible employer has eliminated the reduction in the number of full-time equivalent employees;

(ii) in which-

(I) during the period beginning on February 15, 2020 and ending on the date that is 30

days after March 27, 2020, there is a reduction, as compared to February 15, 2020, in the salary or wages of 1 or more employees of the eligible recipient; and

(II) not later than December 31, 2020 (or, with respect to a covered loan made on or after December 27, 2020, not later than the last day of the covered period with respect to such covered loan), the eligible employer has eliminated the reduction in the salary or wages of such employees; or

(iii) in which the events described in clause (i) and (ii) occur.

(6) Exemptions

The Administrator and the Secretary of the Treasury may prescribe regulations granting de minimis exemptions from the requirements under this subsection.

(7) Exemption based on employee availability

During the period beginning on February 15, 2020, and ending on December 31, 2020 (or, with respect to a covered loan made on or after December 27, 2020, ending on the last day of the covered period with respect to such covered loan), the amount of loan forgiveness under this section shall be determined without regard to a proportional reduction in the number of full-time equivalent employees if an eligible recipient, in good faith-

(A) is able to document-

(i) an inability to rehire individuals who were employees of the eligible recipient on February 15, 2020; and

(ii) an inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020 (or, with respect to a covered loan made on or after December 27, 2020, on or before the last day of the covered period with respect to such covered loan); or

(B) is able to document an inability to return to the same level of business activity as such business was operating at before February 15, 2020, due to compliance with requirements established or guidance issued by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration during the period beginning on March 1, 2020, and ending December 31, 2020 (or, with respect to a covered loan made on or after December 27, 2020, ending on the last day of the covered period with respect to such covered loan), related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID–19.

(8) Limitation on forgiveness

To receive loan forgiveness under this section, an eligible recipient shall use at least 60 percent of the covered loan amount for payroll costs, and may use up to 40 percent of such amount for any payment of interest on any covered mortgage obligation (which shall not include any prepayment of or payment of principal on a covered mortgage obligation), any payment on any covered rent obligation, any payment on any covered operations expenditure, any payment on any covered property damage cost, any payment on any covered supplier cost, any payment on any covered

worker protection expenditure, or any covered utility payment.

(e) Application

Except as provided in subsection (l), an eligible recipient seeking loan forgiveness under this section shall submit to the lender that is servicing the covered loan an application, which shall include-

(1) documentation verifying the number of full-time equivalent employees on payroll and pay rates for the periods described in subsection (d), including-

(A) payroll tax filings reported to the Internal Revenue Service; and

(B) State income, payroll, and unemployment insurance filings;

(2) documentation, including cancelled checks, payment receipts, transcripts of accounts, purchase orders, orders, invoices, or other documents verifying payments on covered mortgage obligations, payments on covered rent obligations, payments on covered operations expenditures, payments on covered property damage costs, payments on covered supplier costs, payments on covered worker protection expenditures, and covered utility payments;

(3) a certification from a representative of the eligible recipient authorized to make such certifications that-

(A) the documentation presented is true and correct; and

(B) the amount for which forgiveness is requested was used to retain employees, make interest payments on a covered mortgage obligation, make payments on a covered rent obligation, make

payments on covered operations expenditures, make payments on covered property damage costs, make payments on covered supplier costs, make payments on covered worker protection expenditures, or make covered utility payments; and

(4) any other documentation the Administrator determines necessary.

(f) Prohibition on forgiveness without documentation

No eligible recipient shall receive forgiveness under this section without submitting to the lender that is servicing the covered loan the documentation required under subsection (e) or the certification required under subsection (l), as applicable.

(g) Decision

Not later than 60 days after the date on which a lender receives an application for loan forgiveness under this section from an eligible recipient, the lender shall issue a decision on the an 1 application.

(h) Hold harmless

(1) Definition

In this subsection, the term "initial or second draw PPP loan" means a covered loan or a loan under paragraph (37) of section 636(a) of this title.

(2) Reliance

A lender may rely on any certification or documentation submitted by an applicant for an initial or second draw PPP loan or an eligible recipient or eligible entity receiving initial or second draw PPP loan that-

(A) is submitted pursuant to all applicable statutory requirements, regulations, and guidance related to initial or second draw PPP loan, including under paragraph (36) or (37) of section 636(a) of this title and under this section; and

(B) attests that the applicant, eligible recipient, or eligible entity, as applicable, has accurately provided the certification or documentation to the lender in accordance with the statutory requirements, regulations, and guidance described in subparagraph (A).

(3) No enforcement action

With respect to a lender that relies on a certification or documentation described in paragraph (2) related to an initial or second draw PPP loan, an enforcement action may not be taken against the lender, and the lender shall not be subject to any penalties relating to loan origination or forgiveness of the initial or second draw PPP loan, if-

(A) the lender acts in good faith relating to loan origination or forgiveness of the initial or second draw PPP loan based on that reliance; and

(B) all other relevant Federal, State, local, and other statutory and regulatory requirements applicable to the lender are satisfied with respect to the initial or second draw PPP loan.

(i) Tax treatment

For purposes of title 26-

(1) no amount shall be included in the gross income of the eligible recipient by reason of forgiveness of indebtedness described in subsection (b),

(2) no deduction shall be denied, no tax attribute shall be reduced, and no basis increase shall be denied, by reason of the exclusion from gross income provided by paragraph (1), and

(3) in the case of an eligible recipient that is a partnership or S corporation-

(A) any amount excluded from income by reason of paragraph (1) shall be treated as tax exempt income for purposes of sections 705 and 1366 of title 26, and

(B) except as provided by the Secretary of the Treasury (or the Secretary's delegate), any increase in the adjusted basis of a partner's interest in a partnership under section 705 of title 26 with respect to any amount described in subparagraph (A) shall equal the partner's distributive share of deductions resulting from costs giving rise to forgiveness described in subsection (b).

(j) Rule of construction

The cancellation of indebtedness on a covered loan under this section shall not otherwise modify the terms and conditions of the covered loan.

(k) Regulations

Not later than 30 days after March 27, 2020, the Administrator shall issue guidance and regulations implementing this section.

(l) Simplified application

(1) Covered loans up to $150,000

(A) In general

With respect to a covered loan made to an eligible recipient that is not more than $150,000, the

covered loan amount shall be forgiven under this section if the eligible recipient-

(i) signs and submits to the lender a certification, to be established by the Administrator not later than 24 days after December 27, 2020, which-

(I) shall be not more than 1 page in length; and

(II) shall only require the eligible recipient to provide-

(aa) a description of the number of employees the eligible recipient was able to retain because of the covered loan;

(bb) the estimated amount of the covered loan amount spent by the eligible recipient on payroll costs; and

(cc) the total loan value;

(ii) attests that the eligible recipient has-

(I) accurately provided the required certification; and

(II) complied with the requirements under section 636(a)(36) of this title; and

(iii) retains records relevant to the form that prove compliance with such requirements-

(I) with respect to employment records, for the 4-year period following submission of the form; and

(II) with respect to other records, for the 3-year period following submission of the form.

(B) Limitation on requiring additional materials

An eligible recipient of a covered loan that is not more than $150,000 shall not, at the time of the application for forgiveness, be required to submit any application or documentation in addition to the certification and information required to substantiate forgiveness.

(C) Records for other requirements

Nothing in subparagraph (A) or (B) shall be construed to exempt an eligible recipient from having to provide documentation independently to a lender to satisfy relevant Federal, State, local, or other statutory or regulatory requirements, or in connection with an audit as authorized under subparagraph (E).

(D) Demographic information

The certification established by the Administrator under subparagraph (A) shall include a means by which an eligible recipient may, at the discretion of the eligible recipient, submit demographic information of the owner of the eligible recipient, including the sex, race, ethnicity, and veteran status of the owner.

(E) Audit authority

The Administrator may-

(i) review and audit covered loans described in subparagraph (A);

(ii) access any records described in subparagraph (A)(iii); and

(iii) in the case of fraud, ineligibility, or other material noncompliance with applicable loan or loan forgiveness requirements, modify-

(I) the amount of a covered loan described in subparagraph (A); or

(II) the loan forgiveness amount with respect to a covered loan described in subparagraph (A).

(2) Covered loans of more than $150,000

(A) In general

With respect to a covered loan in an amount that is more than $150,000, the eligible recipient shall submit to the lender that is servicing the covered loan the documentation described in subsection (e).

(B) Demographic information

The process for submitting the documentation described in subsection (e) shall include a means by which an eligible recipient may, at the discretion of the eligible recipient, submit demographic information of the owner of the eligible recipient, including the sex, race, ethnicity, and veteran status of the owner.

(3) Forgiveness audit plan

(A) In general

Not later than 45 days after December 27, 2020, the Administrator shall submit to the Committee on Small Business and Entrepreneurship of the Senate and the Committee on Small Business of the House of Representatives an audit plan that details-

(i) the policies and procedures of the Administrator for conducting forgiveness reviews and audits of covered loans; and

(ii) the metrics that the Administrator shall use to determine which covered loans will be audited.

(B) Reports

Not later than 30 days after the date on which the Administrator submits the audit plan required under subparagraph (A), and each month thereafter, the Administrator shall submit to the Committee on Small Business and Entrepreneurship of the Senate and the Committee on Small Business of the House of Representatives a report on the forgiveness review and audit activities of the Administrator under this subsection, which shall include-

(i) the number of active reviews and audits;

(ii) the number of reviews and audits that have been ongoing for more than 60 days; and

(iii) any substantial changes made to the audit plan submitted under subparagraph (A).

APPENDIX G

EXHIBIT E

Deborah and Diane,

Essintial respectfully disputes the notice below from the SBA regarding the proposed revised loan calculation. On or about April 2, 2020 when Essintial was preparing to submit the PPP loan application we received guidance and interpreted the Cares Act (which was still changing at the time) to include all workers and employees in the loan calculation. On April 6, 2020 Essintial submitted our PPP loan application and on April 20, 2020 received the proceeds and immediately began executing to our plan by increasing our headcount back to Pre-Covid levels, gave small bonuses to our hourly front-line and warehouse staff, and spent considerable amounts on PPE and Covid related healthcare. All the while our revenue was down by as much as 37% during some of the forgiveness period as our hospitality and transportation customers could not pay us, sought discounts, and significantly decreased orders. Essintial remained steadfast with our headcount, employee compensation, and customer support by using 100% of the loan proceeds on W-2 and related spend. *We would not have taken this approach with a reduced PPP loan.*

Simply put Essintial used all PPP loan proceeds on W-2 and related spend and would struggle immensely to repay any portion of this loan. We operated under

the guidance and presumption that the loan would be forgiven and therefore did not reduce W-2 cost or spend. Furthermore, Essintial elected not to participate in other government programs during the forgiveness period since we had the PPP funds available to support us.

I'll finish by emphasizing again that if Essintial received a smaller loan amount than $7 million we would have taken a very different approach during the forgiveness period by significantly reducing headcount and employee related costs as well as seeking support from other government programs. Since we had these PPP funds we could not "double dip" into any other federal or state relief.

Please Also Note: the calculation of the average payroll is far lower than our run rate of approximately $1.8 million per month of W-2 payroll and related spend prior to Covid which would have supported a loan amount of approximately $4.8 million. This calculation is attached. Essintial would have made seasonality adjustments and used the more recent run rate to calculate average payroll. We still respectfully request full forgiveness of $7.0 million.

Please let me know if we can discuss this response prior to sending to the SBA.

Thanks,

Bob Kolb

The loan documentation does not fully support the disbursed loan amount. We noted that ineligible payroll expenses were included in the calculation of the loan amount: 1099 Contractor costs. 3rd party ADP payroll report reflect the following - $14,764,232 wages less $365,007 employees over $100K plus

$1,099,572 health benefits and $365,588 State ui forms. Average Monthly payroll cost is $1,321,282 *2.5 $3,303,205. This resulted in a reduction in the forgivable amount, revised from $7,028,800 to $3,303,205. Please see "HOW TO CALCULATE MAXIMUM LOAN AMOUNTS – BY BUSINESS TYPE." PPP--How-to-Calculate-Maximum-LoanAmounts-for-First-Draw-PPP-Loans-and-What-Documentation-toProvide-By-Business-Type.pdf (treasury.gov)

* * *

June 14, 2021

RE: PPP Loan Forgiveness on PPP Loan #1596507105 to Essintial Enterprise Solutions LLC

To Whom It May Concern:

We recently received notice that the above referenced loan was approved for partial forgiveness due to SBA's position that the original loan amount was miscalculated as a result of the inclusion of 1099 employees in the calculation.

Our borrower is appealing that decision and has provided the attached correspondence as part of their appeal. As the lender, we are also respectfully requesting a reconsideration for full forgiveness. Both the borrower and lender made every good faith effort to comply with the guidelines and rules as we knew them at the time. As you may recall, several Interim Final Rules and FAQ's were issue during round 1 of PPP.

This particular application was submitted very early in the process. The borrower applied with us on April 6, 2020 and SBA approved the PPP loan on 4/10/2020.

As far as we can tell, the exclusion of 1099 employees was only clarified in the April 15, 2020 Interim Final Rule. As a long time SBA 7a lender, we have historically been accustomed to processing 7a loans according to our interpretation of the regulations prior to any Policy Notice that gets issued by the Agency. In this case, we had received SBA Approval prior to the issuance of the 4/15/2020 Interim Rule so there should be "safe harbor" for the borrower and approval of full forgiveness.

As the borrower mentions, they will have a difficult time repaying the unforgiven balance of the PPP loan. Given the borrower appears to have managed the loan proceeds in accordance with the spirit of the program, we strongly urge the SBA to re-consider full forgiveness.

Thank you in advance for your consideration of this request.

Sincerely,

Greg Poehlmann
Senior Vice President
Berkshire Bank