APPENDIX

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APPENDIX A

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File Name: 25a0185p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

VELTOR UNDERGROUND, LLC,

Plaintiff-Appellant,

v.

U.S. SMALL BUSINESS ADMINISTRATION; KELLY LOEFFLER, Administrator of U.S. Small Business Administration; SCOTT BESSENT, Secretary of U.S. Department of Treasury,

Defendants-Appellees.

No. 24-2025

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 2:23-cv-11183—Jonathan J.C. Grey, District Judge.

Argued: June 12, 2025

Decided and Filed: July 11, 2025

Before: SUTTON, Chief Judge; GIBBONS and WHITE, Circuit Judges.

COUNSEL

ARGUED: Lawrence D. Rosenberg, JONES DAY, Washington, D.C., Stephanie Golden, WEST VIRGINIA UNIVERSITY, Morgantown, West Virginia, for Appellant. Adam C. Jed, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

ON BRIEF: Lawrence D. Rosenberg, JONES DAY, Washington, D.C., for Appellant. Adam C. Jed, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

SUTTON, C.J., delivered the opinion of the court in which GIBBONS and WHITE, JJ., concurred. WHITE, J. (pp. 17–20), delivered a separate concurring opinion.

OPINION

SUTTON, Chief Judge. In the early weeks of the COVID-19 pandemic, Congress created the Paycheck Protection Program to keep American workers employed. The program promised forgivable loans to small businesses that maintained their payrolls during the crisis. One such business, Veltor Underground LLC, claimed that it had six employees when it applied for and received a $125,000 loan. But the Small Business Administration declined to forgive the loan when it discovered that Veltor's six employees were in fact independent contractors. Veltor sued. The district court sided with the government. Because Veltor's payments to independent contractors do not qualify as "payroll costs" under the statute, we affirm.

I.

Veltor is a construction business located in the suburbs of Detroit. The record reveals little about its operations beyond the fact that it focuses on "[u]nderground [d]rilling." R.20 at 69. What we do know is that, at least as of the start of 2020, it was a success. It earned $4.8 million in revenue the previous year and delivered a profit of $400,000 to its sole member, Daniel Pator.

Then came March 2020, and a global pandemic. We do not know how the pandemic affected Veltor. But we do know that it took a toll on many small businesses, more than half of which laid off workers or cut their hours. U.S. Census Bureau, Small Business Pulse Survey, fig. 3 (2022), *available at* https://portal.census.gov/pulse/data.

The National Government responded. By the end of the month, Congress passed, and the President signed into law, the Coronavirus Aid, Relief, and Economic Security Act, better known as the CARES Act, a $2.2-trillion boost to the American economy. Pub. L. No. 116-136, 134 Stat. 281 (2020). Of that sum, $349 billion (later increased to $813 billion) was devoted to the Act's Paycheck Protection Program, which promised forgivable loans to small businesses that pledged to maintain their payrolls over the next several months. *Id.* §§ 1101–1102, 1106, 134 Stat. at 286–94, 297–301 (codified as amended at 15 U.S.C. §§ 636(a), 636m). The program promised the same loans to sole proprietors and independent contractors, again to ensure they could maintain their income streams despite the pandemic. *Id.* The Act's loans, however, did not come directly from the federal

government. *Id.* Private lenders offered the loans, and the Small Business Administration guaranteed them. *Id.* § 1102, 134 Stat. at 290 (codified at 15 U.S.C. § 636(a)).

One such private lender was Bank of America, and one such borrower was Veltor. Veltor applied for a loan a week after the Act's passage through a form created by the Small Business Administration to determine borrowers' "eligibility" for the program. Interim Final Rule for the Paycheck Protection Program, 85 Fed. Reg. 20,811, 20,812 (2020). The form required Veltor to state the "[n]umber of employees" on staff and calculate its "[a]verage monthly payroll," capped at $8,333 per employee. R.20 at 58–60. Veltor said it had six employees and calculated its monthly payroll as $50,000, the maximum amount a business with six employees could claim. These answers qualified Veltor for a $125,000 loan—2.5 times its average monthly payroll—at a one-percent interest rate. Veltor accepted the funds and with them the loan conditions. It acknowledged that the loan would be forgiven only if it spent at least 75% of the funds on "payroll costs." R.20 at 61.

When Veltor sought forgiveness in 2021, it tried to show that it had done just that. It told Bank of America that it had spent all $125,000 "on [p]ayroll [c]osts" for its (now five) "employees." R.20 at 166. When the bank reviewed Veltor's records, it realized that Veltor paid independent contractors, not employees. The bank denied Veltor's application for loan forgiveness, as did the Small Business Administration. The agency told Veltor that payments made "via 1099's"—that is, to independent contractors—do not qualify as "payroll cost[s]" under

the Act, making Veltor "ineligible" for forgiveness. R.20 at 42. Veltor fared no better with the Small Business Administration's internal appeal process.

Veltor sued the Small Business Administration (and a few individuals) in federal court. The district court granted summary judgment for the defendants. Veltor appeals.

II.

At issue is the CARES Act's definition of "payroll costs," the key criterion for determining the size of a borrower's loan and for gauging how much of it the lender and government would forgive. Here is how the Act defines "payroll costs" in relevant, if lengthy, part:

> (viii) the term "payroll costs"—
>
> (1) 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 [applicable] period.

15 U.S.C. § 636(a)(36)(A).

The first type of payroll cost, (aa), addresses "payments of any compensation" to employees," while the second, (bb), addresses "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." At this stage in the case, Veltor acknowledges that its loan did not go to "employees" but only to "independent contractors." That prompts this question: Does subsection (bb) allow only self-employed individuals—sole proprietors and independent contractors—to apply for a loan based on what they pay themselves? Or does it also allow businesses that pay them to count those payments as part of their "payroll" when they apply for a loan?

Text, context, and structure point to the former—that subsection (bb) allows sole proprietors and independent contractors to get a loan based on their own earnings, the closest thing to a "payroll" they have, and does not allow other businesses to bolster their

own loans based on how much they happen to pay self-employed individuals.

Text. Start with subsection (bb)'s text. It applies only to "payments" of "compensation" that are "a wage, commission, income, net earnings from self-employment, or similar compensation." The terms naturally describe the money sole proprietors and independent contractors obtain from (or reinvest into) their businesses. A sole proprietor, by definition, runs his own unincorporated business, and may sell goods or services. Black's Law Dictionary 1677 (11th ed. 2019); *see also McCullough v. Suter*, 757 F.2d 142, 144 (7th Cir. 1985). An independent contractor, by contrast, sells only services, whether as a sole proprietor or through one corporate form or another (a limited liability company, a partnership, and so on). 1 Steven C. Alberty, Advising Small Businesses §§ 2:2–:10 (2024). No matter their structure, independent contractors remain "small businessmen." *United States v. Silk*, 331 U.S. 704, 719 (1947).

"Income" and "net earnings from self-employment" refer to what a business makes—the funds earned by the business on the one hand and those withdrawn for personal use on the other. "Income" refers to the former, the economic "gain" an entity has derived from its "labor, business, or property" over a given period. Webster's Dictionary 1258 (2d ed. 1959) (def. 4a). "Net earnings from self-employment" account for the latter. A person's "net earnings from self-employment" reflect however much he has made "from [his] trade or business" over the course of a given year. 26 U.S.C. § 1402(a); *see also* 20 C.F.R. § 404.1080(a)–(b). In some cases, that will be the business's full income, taken out at one time. In others, that will be some of

what the business has earned, paid out on a piecemeal basis.

"Wage" and "commission" describe more periodic payments. A "wage" is pay received by a person "for labor," typically per hour, Webster's Dictionary, *supra*, at 2863 (def. 1a), and a commission "[t]he percentage or allowance made" to a person for "transacting" particular items of "business," *id.* at 538 (def. 8). Either one can describe what an owner pays himself from his business's funds.

Viewing "wage" and "commission" to describe self-payments makes good sense in light of their association with "income" and "net earnings from self-employment." When Congress conjoins four nouns in a list, they "should be given related meanings." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 195 (2012) (quotation omitted); *see also United States v. Williams*, 553 U.S. 285, 294 (2008). The common denominator is that each one describes what a sole proprietor or independent contractor receives, whether as part of his business's balance sheet or as his own personal compensation. Together they capture the full panoply of his earnings.

When a business buys goods from sole proprietors and services from independent contractors, by contrast, it does not pay a wage, commission, income, or net earnings from self-employment. Subsection (bb)'s terms do not fit that bill.

That is clear enough for "income" and "net earnings from self-employment." Only what one gets can be described as "income" or "net earnings from self-employment," not what one gives.

The same holds for "wage" and "commission," too. Those terms, to repeat, refer to payments made to people, not to businesses. But to be a sole proprietor or independent contractor is to be in business for yourself—to be your own boss. Sole proprietors, by definition, own and operate their own businesses. Black's Law Dictionary, *supra*, at 1677. And it is independent contractors' independence that separates them from employees. Restatement (Second) of Agency § 220(2) (Am. L. Inst. 1958). Unlike employees, they "operate their own independent businesses," *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258–59 (1968), and thus must rely on their own "initiative, judgment, or foresight" to turn receipts into profits, *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947). They may pay themselves a wage or commission from their earnings, but that is not what others pay them.

That accords with common business usage. When businesses compensate sole proprietors and independent contractors, they do not describe those payments internally as wages or commissions (much less income or net earnings from self-employment). Robert Libby et al., *Financial Accounting* 475–78 (11th ed. 2023) (distinguishing "accounts payable," or sums a company owes its vendors for goods and services, from "accrued payroll and benefits," or wages a company owes its employees). When vendors earn those payments, they do not describe them as wages or commissions either. *Id.* at 297–98 (describing "accounts receivable," amounts owed to a business by its trade customers). So too in the tax context, where employers report their employees' "wages" and their contractors' "compensation." *Compare* IRS, Catalog

No. 25979S, General Instructions for Forms W-2 and W-3 (2020), *with* IRS, Catalog No. 27982J, Instructions for Forms 1099-MISC and 1099-NEC (2020).

This distinction has a familiar ring in other areas of law. It is one that was recognized long ago in the context of collecting unpaid liabilities. *See* 2 Roswell Shinn, *A Treatise on the American Law of Attachment and Garnishment* § 558(d), at 944 (1896) ("[The term 'wages'] do[es] not extend to what is earned by him as a contractor . . . ."). And it is one still recognized in labor law. As then-Judge Breyer once put it: "Independent contractors undertake to do a job for a price . . . and depend for their income not upon wages [paid by their customers], but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits." *NLRB v. Amber Delivery Serv., Inc.*, 651 F.2d 57, 60 (1st Cir. 1981) (quotation omitted).

The distinction makes practical sense, too. If a landscaper, say, is promised $10,000 by a business, part of that sum may eventually serve as his take-home pay, but he must first deduct the expenses incurred to complete the job—project-specific outlays, like plants and soil, and other overhead costs, like insurance. To the extent he earns a wage or a commission, it is a wage or commission he pays himself from what his customers pay him. (It is common, in fact, for sole proprietors to assign themselves an hourly rate out of their earnings. *See, e.g.*, Stephen Fishman, *Working for Yourself* 147–51 (12th ed. 2021).) 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 sum, subsection (bb)'s terms adopt the perspective of a sole proprietor or independent contractor and ask how much he pays himself. They do not extend to the payments made to sole proprietors and independent contractors by their customers. Subsection (bb), then, allows sole proprietors and independent contractors to determine their own payroll costs; it does not allow their customers to do so, too.

Context. What the terms of the statute suggest, context confirms. A number of the Act's provisions show how subsections (aa) and (bb) work in tandem—the former for businesses that pay employees, the latter for sole proprietors and independent contractors who pay themselves.

Notice how the Act defines the universe of borrowers. To ensure a wide variety of small businesses have access to the program's loans, the Act said that "any business concern" with fewer than "500 employees" may apply. 15 U.S.C. § 636(a)(36)(D)(i)(I). And to ensure self-employed individuals were not left out, the Act said that "individuals who operate under a sole proprietorship or as an independent contractor" could apply also. *Id.* § 636(a)(36)(D)(ii)(I).

Subsections (aa) and (bb) reinforce this same division. They use the same two categories: a business with employees for (aa), and a sole proprietor or independent contractor for (bb). And they offer a definition of payroll costs for each one. Subsection (aa) allows a business with employees to look at "the sum of payments of any compensation with respect to

[those] employees"—plural. *Id.* § 636(a)(36)(A)(viii)(aa). And subsection (bb) allows "a sole proprietor or independent contractor"—singular—to look at "the sum of payments of any compensation or income" to it. *Id.* § 636(a)(36)(A)(viii)(I)(bb).

Our interpretation honors that division. The payment universes do not overlap, as subsection (aa) covers businesses applying on their employees' behalf, and subsection (bb) covers a single self-employed individual applying on his own behalf. Never the twain shall meet. Otherwise, a business could count not only its payments to employees under subsection (aa) but also its payments to sole proprietors and independent contractors under (bb), meaning that the Small Business Administration would guarantee the same loan twice—once in the business's accounts payable and once in the vendor's accounts receivable. That's a poor fit for a law with limited funds that elsewhere required applicants to certify that their loan applications were not "duplicative" of other credits. *Id.* § 636(a)(36)(G)(i)(IV), (a)(36)(A)(viii)(II)(dd), (ee).

Notice one of the Act's exclusions, which also supports this interpretation. In defining payroll costs, the Act excludes compensation paid to "employee[s] whose principal place of residence is outside of the United States." *Id.* § 636(a)(36)(A)(viii)(II)(cc). But it does not exclude compensation paid to sole proprietors and independent contractors outside the United States. That makes sense. Because only sole proprietors and independent contractors based in the United States could apply for a loan, *see id.* § 636(a)(36)(A)(v), there was no need to exclude

payments made to sole proprietors and independent contractors abroad, as subsection (bb) would not cover those payments. But if subsection (bb) allowed businesses to include their payments to sole proprietors and independent contractors as part of their payroll costs, nothing would stop them from doing so for sole proprietors and independent contractors at home and abroad. That would be odd in a law that expressly excluded payments to employees abroad. And it would be doubly odd in a law that set as its goal "Keeping American Workers Paid and Employed." 134 Stat. at 286.

Notice, too, the Act's loan forgiveness provisions, which likewise cut with this grain. Congress limited businesses' eligibility for forgiveness if they fired any of their employees, 15 U.S.C. § 636m(d)(2)(A), or cut their wages by more than 25 percent, *id.* § 636m(d)(3)(A). But it did not do so for businesses that ended their contracts with sole proprietors and independent contractors. That, again, makes sense. The Act needed to police payments made under subsection (aa), or a business could take out a loan for its five employees and pocket the money without paying them a cent (or nickel). But it had no need to police payments under subsection (bb). Subsection (bb) covers only what a sole proprietor or independent contractor pays himself, so Congress had little need to worry that he would get a loan and then diminish his own wages. That explanation would make little sense, however, if subsection (bb) also covered a business's payments to the sole proprietors and independent contractors with whom it happened to contract. Without any limitation on forgiveness in place, a business could count its payments to vendors to get

loan funds but then cut off those same vendors with impunity. That loophole is nowhere in the Act.

Text and context thus resolve this case. Veltor had no employees, leaving it no expenses to claim under subsection (aa). And Veltor is not a sole proprietorship, and does not argue that it is an independent contractor, leaving it no expenses to claim under subsection (bb). Without paychecks to protect, Veltor was not entitled to have its loan forgiven. It must repay the loan.

III.

Veltor urges a different reading of subsection (bb), one in which a business's payments to its vendors count as part of its "payroll costs."

It starts with text but not the whole text. Even if "income" and "net earnings" may not be read to include payments made by businesses to their vendors, Veltor insists, "wage" and "commission" may be. In its view, we should define those terms more broadly, effectively to include any payment "for work or services." Reply Br. 11 (quoting *Wage*, Collins English Dictionary, *available at* https://collinsdictionary.com/us/dictionary/english/wage). To limit "wage" and "commission" to what businesses pay their employees for purposes of (aa), and to what self-employed individuals pay themselves for purposes of (bb), it argues, would artificially narrow the statute.

This argument starts off on the wrong foot. It assumes that we should analyze each word of subsection (bb) in the abstract, no matter its neighbors. But it is a mistake to accept "the broadest imaginable definition[]" of each of a list's "component words" and leave it at that. *Epic Sys. Corp. v. Lewis*, 584 U.S. 497,

523 (2018) (quotation omitted); *see also Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). Even a Latin phrase tells us so. "Noscitur a sociis," or "it is known by its associates," is shorthand for the commonsense proposition that words are known by the company they keep. Scalia & Garner, *supra*, at 195 (quotation omitted). But we need not resort to legalese (or even common sense), as the statute instructs us to interpret these terms together. It uses a catchall term, "similar compensation," to refer back to the full list of "wage," "commission," "income," and "net earnings from self-employment." 15 U.S.C. § 636(a)(36)(A)(viii)(I)(bb). We must take the Act at its word that these terms "have some quality in common," such that "similar compensation" makes sense. Scalia & Garner, *supra*, at 196.

That quality is one we have already described. Each word can sensibly be read to refer to amounts earned by sole proprietors and independent contractors. For those who are self-employed, their "income" and "compensation" are two sides of the same coin. Their "income" is the economic "gain" their businesses have derived over a given period, Webster's Dictionary, *supra*, at 1258 (def. 4a), while their "compensation" is, more narrowly, what they have received from the business as "remuneration," *id.* at 545 (def. 2)—sometimes in the form of a commission (especially if per sale or service), *see id.* at 538 (def. 8), other times in the form of a wage (especially if per hour), *see id.* at 2863 (def. 1a). They all fit together rather than fall apart. Each one reflects how someone who is self-employed might describe his (or his business's) earnings.

Veltor's interpretation does the opposite. On its view, subsection (bb)'s terms would be wholly unalike. The first two terms, "wage" and "commission," would look to the *customer's* perspective, while the latter two, "income" and "net earnings from self-employment," would look to the *vendor's*. "In some circumstances," it is true, "it may be difficult to discern what a statute's specific listed items share in common." *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 218 (2024). But where there is "an obvious link," judges should accept the gift before them. *Id.*

It's not that easy, Veltor counters. Isn't it odd that subsection (bb) would refer "exclusively to payments to oneself," as if one were one's own employer? Appellant's Br. 5. That common link, Veltor suggests, is not one that most people would consider to be common at all. We do not find it so odd. A number of federal statutes treat a sole proprietor as if he were "his own employer." 26 U.S.C. § 401(c)(4) (Internal Revenue Code); *see also, e.g.*, 29 U.S.C. § 1301(b)(1) (ERISA). These laws "expressly anticipate that a working owner can wear two hats," and sometimes must. *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 16 (2004). It is not uncommon that a closely held business entity would pay its owner some regular compensation, and indeed some corporations must do so. *See Exacto Spring Corp. v. Comm'r*, 196 F.3d 833, 837–38 (7th Cir. 1999). If Congress's aim was to allow self-employed individuals to protect their own paychecks, it made good sense to include all the forms in which they may receive compensation, both in terms of their business's income and their personal remuneration.

What about the reality, Veltor worries, that subsections (aa) and (bb) are connected through the conjunctive, "and," rather than the disjunctive, "or"? In Veltor's view, the only reason Congress would use "and" rather than "or" is because it intended both (aa) and (bb) to be used by most borrowers. "And" does not do that much work. "[I]n grammatical terms," the term "and" "is of course a conjunction—a word whose function is to connect specified items." *Pulsifer v. United States*, 601 U.S. 124, 133 (2024). As a conjunction, the term combines the two parts of the definition, it is true. But conjunctive of what? The word "and" does not tell us what each conjoined part means. For that, the reader has to look at the other terms. Put another way, the fact that the definition includes both (aa) and (bb) does not tell us whether (bb) refers to payments a business makes to sole proprietors and independent contractors or to payments that sole proprietors and independent contractors make to themselves. It is the other words in subsection (bb) that do that.

Veltor turns to context and structure. It contends that our interpretation ignores half of subsection (bb). The subsection, to repeat, includes "payments of any compensation to *or* income of a[n] . . . independent contractor." 15 U.S.C. § 636(a)(36)(A)(viii)(I)(bb) (emphasis added). In Veltor's view, our interpretation leaves no work for the former phrase—"compensation to . . . a[n] . . . independent contractor"—to do. "[H]ad Congress intended to provide subsection (bb) as a way of calculating [the internal] payroll costs [of] independent contractors or sole proprietors only," Veltor says, "there is no reason it could not have simply omitted 'compensation to,'" leaving only

"income of." Appellant's Br. 27. Not so. We have already given one reason why Congress may have paired "compensation to" with "income of." They provide different ways of looking at a self-employed person's earnings. In emergency legislation designed to function at "warp speed," *In re Gateway Radiology Consultants, P.A.*, 983 F.3d 1239, 1262 (11th Cir. 2020), it made sense for Congress to give sole proprietors and independent contractors a few different ways to count their own wages. *Cf. Pugin v. Garland*, 599 U.S. 600, 609 (2023) ("some overlap" between terms in a list is "common in statutory drafting," and often reflects "a congressional effort to be doubly sure" (quotation omitted)). That creates less superfluity and more common sense.

There is at least one other reason Congress would have included both phrases. Under the CARES Act, a business must not only *have* payroll costs to get a loan, but it also must *use* the funds on payroll costs to get its loan forgiven. 15 U.S.C. § 636m(d)(8). "Income of" and "compensation to" plausibly play different roles in this respect. "Income of" allows a self-employed individual to look at how much his business has earned over the past twelve months when he first wishes to qualify for a loan. (Hence he may count his profits toward his "payroll costs," even if he chose to reinvest those funds in the business rather than withdraw them for personal use.) "Compensation to" allows a self-employed individual to use loan funds in particular ways when he wishes to qualify for loan forgiveness—most obviously, to pay himself a "wage." Our interpretation gives content to both phrases and to the statute as a whole.

Veltor argues that a different provision of the statute offers a contextual clue in favor of its position. Under the Act, lenders were required to consider "whether the [putative] borrower . . . paid independent contractors, as reported on a Form 1099-MISC." 15 U.S.C. § 636(a)(36)(F)(ii)(II)(bb). That provision would make "no sense," Veltor says, if the Act's loans "could not be used to cover payments to independent contractors." Appellant's Br. 28. But this overstates the role of the provision. It appears in a subclause that sought to ensure that loan applicants were ongoing concerns that predated the COVID-19 crisis. The subclause establishes two rough proxies for eligibility—that the business was in existence before the COVID-19 crisis began, and that it engaged in bona fide economic activity. The provision accomplished the first goal by ensuring that the loan applicant was "in operation on February 15, 2020," just over a month before Congress passed the Act. 15 U.S.C. § 636(a)(36)(F)(ii)(II)(aa). It accomplished the second goal by ensuring that the business was real, which Congress sensibly determined could be established in one of two objectively provable ways: by having "employees for whom the borrower paid salaries and payroll taxes" or by having "paid independent contractors, as reported on a Form 1099–MISC," *id.* § 636(a)(36)(F)(ii)(II)(bb). That allowed the government to sort the wheat (real businesses, in need of support) from the chaff (fake businesses, established solely to capitalize on the program). And that required the government to focus on "evaluating the eligibility of a borrower" for a loan. *Id.* § 636(a)(36)(F)(ii)(II)(aa). The provision simply does not address how payroll costs are determined.

Veltor suggests that one of the contextual problems we identify with its interpretation, the possibility of duplicative payments, is more hypothetical than real. Because subsection (bb) uses "or" when it describes the "payments of any compensation to or income of" a sole proprietor or independent contractor, Veltor explains, only one party—either the entity that paid the compensation or the entity that received it as income—could claim a particular payment. *Id.* § 636(a)(36)(A)(viii)(I)(bb). And because the statute elsewhere requires "a good faith certification" from the recipient that its loan is not "duplicative of" another loan, double dipping is doubly forbidden. *Id.* § 636(a)(36)(G)(i)(III).

Count us skeptical. Subsection (bb) does not look at each payment in the abstract. It instead asks for a tally: the "sum of payments." *Id.* § 636(a)(36)(A)(viii)(I)(bb). As a textual matter, it is unclear where Veltor gets the idea that each individual payment ought to be assigned to the payor or the payee. The certification provision does not help either. That provision requires the "*recipient*" to certify that *it* "does not have an application pending for a loan" under the Act that would be "duplicative of amounts applied for or received under a covered loan." *Id.* § 636(a)(36)(G)(i)(III) (emphasis added). It does not require the recipient to ensure that no one else has applied for funds that might cover the same expenses.

Even if Veltor's view were textually permissible, we do not see how it could possibly have worked in practice. It would have required businesses and vendors to investigate each other's loan applications in a program designed to operate in a national emergency, with no statutory guidance as to who should prevail if

both sought to claim the same payment—and who should prevail if both received funds and subsequently sought forgiveness. Should it be the first who applied? The first who received funds? Or some other rule? Veltor does not say, and neither does the Act.

Veltor pins the blame on the Small Business Administration, which (Veltor says) could have resolved this issue through canny use of its emergency rulemaking authority. *Id.* § 9012. But we read the statute as Congress wrote it, not as the agency might rewrite it. That Veltor assumes deus-ex-machina intervention from the agency to make the Act workable suggests that it misreads the Act's design.

Veltor turns last of all to policy and legislative history. It argues that Congress prioritized speed over precision, even at the risk of some duplicative loans. "Congress's objective of getting cash out to struggling American businesses," it explains, "predominated any concerns about wasteful spending." Appellant's Br. 41. Perhaps so. But "no law pursues its purposes at all costs." *Luna Perez v. Sturgis Pub. Schs.*, 598 U.S. 142, 150 (2023) (quotation omitted). "[I]t frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522 (1987) (per curiam) (emphasis omitted). As Veltor acknowledges, Congress had to balance a number of objectives in the CARES Act. Yes, it wanted to distribute money quickly. But it also wanted to prevent waste and fraud in a program worth hundreds of billions of dollars. It was hardly irrational for Congress to decide that businesses should support their employees and self-employed individuals should support themselves.

Veltor points to a number of post-enactment press releases and website statements from legislators, many of whom said that "[e]ligiblity" for the program "includes self-employed and contracted workers." Reply Br. 24–25 (quoting Rep. Daniel Webster, *Webster Statement on Senate CARES Act* (Mar. 26, 2020), https://webster.house.gov/2020/3/webster-cares-act). But Veltor pushes on an open door. Everyone agrees that the Act helps sole proprietors and independent contractors. The only question is how, whether just through their own loans (the government's position) or also the loans of their customers (Veltor's).

How about the "settled economic expectations" of small businesses, Veltor asks? Many small businesses "are not particularly sophisticated with respect to parsing the nuances of statutory requirements," it notes, so it would be unfair to tell such businesses that they cannot rely on the guidance they are given. Appellant's Br. 41–42. We take the point, but Veltor is not a poster boy for unfair treatment. The reality is that the Small Business Administration created a form to determine potential borrowers' eligibility, which required applicants to state how many employees they had. Veltor said it had six, when it had none. Had it answered the question accurately, this situation would never have occurred. The company may have been confused by the inquiry, but it was not misled. Enforcing the Act's terms may lead to some unfairness at the margins, but courts must "observe the conditions defined by Congress for charging the public treasury." *Fed. Crop Ins. v. Merrill*, 332 U.S. 380, 385 (1947); *see also Heckler v.*

Cmty. Health Servs. of Crawford County, 467 U.S. 51, 63 (1984). That is all we do today.

For these reasons, we affirm.

CONCURRENCE

HELENE N. WHITE, Circuit Judge, concurring. It is unclear to me what Congress intended with respect to payments to independent contractors.

I.

A.

My reservations in agreeing with the government's reading of the CARES Act stem from the Act's eligibility-considerations provision, 15 U.S.C. § 636(a)(36)(F)(ii)(II), which sets out what a lender must consider when evaluating a prospective borrower's loan eligibility. That provision expressly requires a lender to consider whether the borrower has paid independent contractors—a requirement that seems to be without purpose under the government's reading. In full, the provision states:

> (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.

Id. (emphasis added).

I agree with the majority that the primary purpose of this provision is to ensure that a prospective borrower is a bona fide business that was in operation before the pandemic affected the national economy and that it had covered payroll costs, as evidenced by the payment of wages verified through payroll taxes paid. But under the government's interpretation, a prospective borrower that employs only independent contractors and issues only 1099s has no payroll costs and thus is eligible for neither a loan nor loan forgiveness. Rather, "payroll costs"—the factor that determines both the loan amount and forgiveness—is based on *either* what an employer pays its employees (15 U.S.C. § 636(a)(36)(A)(viii)(I)(aa)) or what an independent contractor or sole proprietor receives as compensation or income (15 U.S.C. § 636(a)(36)(A)(viii)(I)(bb)), but *not* what any borrower pays independent contractors. Thus, whatever a prospective borrower's bona fides, payments to independent contractors are always irrelevant to loan eligibility and forgiveness.[1] Why, then, does the Act require lenders to consider such payments "[i]n evaluating the eligibility of a borrower" for a loan? *Id.* at § 636(a)(36)(F)(ii)(II). Such an inquiry has no purpose if payments to independent contractors are not covered as "payroll costs."

The majority lays out the case for the government's interpretation, under which 15 U.S.C. § 636(a)(36)(A)(viii)(I)(bb) ("subsection bb") applies only to independent contractors, sole proprietors, and eligible self-employed borrowers, all of whom must

[1] Rather, it would seem that an independent contractor's *receipt* of 1099 payments would be the more relevant factor.

apply for their own loans. But the subsection could also be read to apply to *both* a business's payments to independent contractors and an independent contractor's or sole proprietor's income that determines its loan amount. Indeed, the subsection states that payroll costs include "any compensation to or income of" an independent contractor. *Id.* Veltor plausibly argues that Congress intended that the statutory phrase "compensation to . . . [an] independent contractor" refer to what a business pays an independent contractor, and that the phrase "income of . . . [an] independent contractor" refer to what the independent contractor receives as compensation or income. *Id.* In this reading, the meaning of the words remains constant, but the context determines how the provision applies to a particular loan.

B.

Although interpretating "payroll costs" as including payments to independent contractors is reasonable based on subsection bb's text and especially the text of the eligibility-considerations provision, the majority accurately explains that many other provisions of the statute seem to contemplate that an employer's payroll costs include payments to employees only. Most importantly, the statute includes no penalty for borrowers who include payments to independent contractors in their payroll costs and then fail to make such payments. And when seeking loan forgiveness, an eligible recipient must submit documentation of the number of full-time equivalent employees on payroll, pay rates, payroll-tax filings reported to the IRS, and state income, payroll, and unemployment insurance filings. 15 U.S.C. § 636m(e)(1). But the

loan-forgiveness provisions require no documentation that payments were made to independent contractors and make no reference to 1099s, which would confirm such payments. These omissions weigh heavily in favor of the government's interpretation.

Additionally, the SBA made its position on payments to independent contractors clear in its regulations implementing the CARES Act, stating that payments to independent contractors are not "payroll costs." 85 Fed. Reg. at 20,813, 20,814 (§ III(2)(h), (p)). Congress later amended the CARES Act—including the statutory definition of "payroll costs"—but it did not reject the SBA's interpretation. *See* Pub. L. No. 116-260, div. N, § 308(a), 134 Stat. 1182, 2000. This "failure to revise or repeal the agency's interpretation" is "persuasive evidence that the interpretation is the one intended by Congress." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986); *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 159 (2013).

Thus, although I find Congress's intent more uncertain, and Veltor's arguments to have more substance, than does the majority, on balance I ultimately conclude, albeit with reservations, that the statutory text read in its entirety is more consistent with the government's interpretation than with Veltor's. *See also* Op. at 5–11 (discussing CARES Act provisions that support the government's interpretation).

II.

Finally, I observe that Veltor's assertion that it fell victim to a "bait-and-switch" is not simply the complaint of a borrower who made false assertions and

seeks to blame others. R.1 at 3 ¶ 7. To be sure, as the majority observes, the SBA's loan-eligibility form required applicants to state how many employees they had. But Veltor asserts that it stated that it had six employees only after Bank of America—the government's approved lender—"represented to Veltor that independent contractor compensation was *an eligible payroll cost*." R.1 at 3 ¶ 7, 8 ¶ 31. Further, the application form's addendum required Veltor to certify that it "had employees . . . *or paid independent contractors*"—presumably prompted by the statute's eligibility-considerations provision—and that it would use the loan to "retain *workers*"—a term used in the statute's certification provision, 15 U.S.C. § 636(a)(36)(G)(i)(II), that could fairly encompass both employees and independent contractors. R. 20 at 61 (emphases added). And, as discussed above, the statutory text is unclear on this issue. Accordingly, a business in Veltor's position could reasonably have believed when it applied for the loan that it would be forgiven if it continued to pay its independent contractors. But Veltor raises no legal claims based on its allegedly being misled by Bank of America or the SBA. [2] Thus, the only issue here is the proper interpretation of the Act.

* * *

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[2] Veltor does not, for example, argue that the government should be equitably estopped from denying loan forgiveness, or that the Bank falsely represented the terms of the loan. *Cf. Modern Perfection, LLC v. Bank of America*, No. 22-cv-02103-LKG, 2023 WL 5433006, at *1 (D.Md. Aug. 22, 2023) (putative class action alleging that Bank of America "falsely represent[ed] . . . that payments to independent contractors were qualifying payroll costs under the PPP and that these payments would be forgiven").

For the reasons stated, I concur, with reservations.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-2025

VELTOR UNDERGROUND, LLC,

Plaintiff - Appellant,

v.

U.S. SMALL BUSINESS ADMINISTRATION; KELLY LOEFFLER, Administrator of U.S. Small Business Administration; SCOTT BESSENT, Secretary of U.S. Department of Treasury,

Defendants - Appellees.

FILED
Jul 11, 2025
KELLY L. STEPHENS,
Clerk

Before: SUTTON, Chief Judge; GIBBONS and WHITE, Circuit Judges.

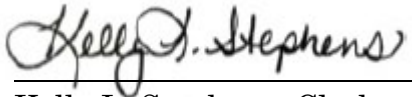
JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens, Clerk

APPENDIX C

No. 24-2025

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED
Sep 12, 2025
KELLY L. STEPHENS, Clerk

VELTOR UNDERGROUND, LLC, Plaintiff-Appellant, v. U.S. SMALL BUSINESS ADMINISTRATION; KELLY LOEFFLER, Administrator of U.S. Small Business Administration; SCOTT BESSENT, Secretary of U.S. Department of Treasury, Defendants-Appellees.	)	ORDER

BEFORE: SUTTON, Chief Judge; GIBBONS and WHITE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has

requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/Kelly L. Stephens
Kelly L. Stephens, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

VELTOR UNDERGROUND, LLC,	Civil Action No. 23-11183
Plaintiff,	HON. JONATHAN J.C. GREY
v.	
THE UNITED STATES SMALL BUSINESS ADMINSTRATION, ISABELLA CASILLAS GUZMAN, Administrator of U.S. Small Business Administration, and JANET YELLEN, Secretary of the U.S. Department of the Treasury,	
Defendants.	
_____/	

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (ECF NO. 21), GRANTING DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT (ECF NO. 22),

AND DISMISSING PLAINTIFF'S CAUSE OF ACTION

I. INTRODUCTION

Plaintiff Veltor Underground, LLC alleges that defendants, including the United States Small Business Administration ("SBA"), Isabella Casillas Guzman (Administrator of the U.S. Small Business Administration), and Janet Yellen (Secretary of the U.S. Department of the Treasury), illegally and retroactively applied an April 15, 2020 rule to Veltor's April 5, 2020 Paycheck Protection Program loan ("PPP loan") application and that Veltor's $125,000 PPP loan should be fully forgiven.

The parties have filed cross-motions for summary judgment. (ECF Nos. 21, 22.) Both motions have been fully briefed, and the parties later filed supplemental briefing in light of the United States Supreme Court's ruling in *Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244, 2273 (2024). Given the adequate briefing, the Court considers the motions without oral argument. E.D. Mich. LR 7.1(f). For the reasons that follow, Veltor's motion for summary judgment is **DENIED**, defendants' motion for summary judgment is **GRANTED**, and this cause of action is **DISMISSED**.

II. BACKGROUND

A. The CARES Act and the PPP

On March 27, 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), which established the "Paycheck Protection Program" ("PPP"). *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (March 27, 2020), codified at 15 U.S.C. § 9001, et seq. A purpose of the CARES Act was to

"keep . . . American workers paid and employed," and to "assist small businesses nationwide adversely impacted by the COVID-19 emergency." 15 U.S.C. Ch. 116, Subchapter I; Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811 (April 15, 2020). The SBA was tasked with implementing the PPP. *Id*. Congress also provided that, "[n]ot later than 15 days after March 27, 2020, the [SBA] shall issue regulations to carry out this title and the amendments made by this title without regard to the notice requirements under section 553(b) of title 5." *See* 15 U.S.C. § 9012 (footnote omitted).

Upon the enactment of the CARES Act, Congress allocated $349 billion to the first round of the PPP, otherwise called the "First Draw." *See* CARES Act § 1102, 134 Stat. at 293. Congress then appropriated an additional $310 billion for First Draw loans in April 2020. *See* Paycheck Protection Program and Health Care Enhancement Act § 101, Pub. L. No. 116–139, 134 Stat. 620 (April 24, 2020).

Prior to the CARES Act, the SBA was required to treat certain classes of businesses as ineligible for similar SBA lending programs. *See* 13 C.F.R. § 120.110. Congress purposefully crafted the CARES Act to provide "increased eligibility" for forgivable PPP Loans and made these loans widely available across the commercial spectrum. 15 U.S.C. § 636(A)(36)(D). The CARES Act expanded the types of borrowers eligible for loans by adding § 636(a)(36)(2)(D), entitled "Increased Eligibility for Certain Small Businesses and Organizations," and explicitly offered covered loans to "any business concern, nonprofit organization, veterans organization, or Tribal business concern . . . if [the borrower] employs not more than the greater of"

500 employees; or "the size standard of the number of employees . . . for the industry[.]" *See* 15 U.S.C. § 636(a)(36)(D)(i).

The CARES Act states that, in determining eligibility for a borrower of a covered loan, "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." *See* 15 U.S.C. § 636(a)(36)(F)(ii)(II). The CARES Act instructs borrowers and lenders to calculate the "maximum loan amount" that a company may claim in its PPP loan application using a business's "payroll costs." 15 U.S.C. § 636(a)(36)(E).

The CARES Act defines "payroll costs" as:

> (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 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 that is in an amount that is not

> more than $100,000 in 1 year, as prorated for the covered period[.]

15 U.S.C. §636(a)(36)(A)(viii)(I).

The CARES Act sets forth types of compensation excluded from the definition of "payroll costs." Among the excluded compensation was "the compensation of an individual employee in excess of $100,000" annually, and compensation paid to an "employee" who resides outside the United States. *See* 15 U.S.C. § 636(a)(36)(A)(viii)(II) at (aa), (cc). Compensation paid to independent contractors in those same categories was not among the express exclusions contained in 15 U.S.C. § 636(a)(36)(A)(viii)(II). In fact, SBA Form 2483 required every PPP loan applicant to certify that it either "had employees for whom it paid salaries and payroll taxes or paid independent contractors, as reported on Form(s) 1099-MISC." (*See* A.R. 0058; [1] (SBA Form 2483, "PPP First Draw Borrower Application Form" (emphasis added)).) With respect to the PPP, the SBA stated that "Borrowers and lenders may rely on the laws, rules, and guidance available at the time of the relevant application."[2]

B. Veltor's PPP Loan

On April 5, 2020, Veltor submitted its PPP loan application dated April 3, 2020 to its lender, Bank of America, National Association (the "Lender"), based on a maximum loan amount of $125,000. (*See* A.R. 0015–0016, 0053–0058.) Veltor claims that it

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[1] Citations herein to "A.R." refer to the Administrative Record filed under seal in this action at ECF No. 20.

[2] *https://www.sba.gov/sites/default/files/2023-03/Final%20PPP%20FAQs.pdf* (SBA FAQ #17 (April 6, 2020)).

calculated its maximum loan amount based on "payroll costs," as defined by the CARES Act, which Veltor interpreted to include compensation it had paid to its independent contractors. (*See* A.R. 0064, 0081; 15 U.S.C. § 636(a)(36)(A)(viii)(I).) Veltor did not have any W-2 employees, and all compensation it paid was to independent contractors. (A.R. 0033.)

After the date of Veltor's PPP loan application and pursuant to authorization by Congress, various interim final rules and frequently asked questions interpreting the parameters of the PPP loan program were implemented. The first Interim Final Rule (hereinafter "the IFR") was not effective until April 15, 2020, but it was available on the SBA's and the Department of Treasury's websites on April 2, 2020.[3] Among the content available on the SBA's and the Department of Treasury's websites on April 2, 2020 were the following question and answer:

> h. Do independent contractors count as employees for purposes of PPP loan calculations?
>
> 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 calculation.

85 Fed. Reg. at 20813. Likewise, independent contractors did not count for purposes of a borrower's PPP loan forgiveness. 85 Fed. Reg. at 20814.

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[3]*See Seville Indus. LLC v. U.S. Small Bus. Admin.*, No. 6:22-CV-06229, 2024 WL 697592 (W.D. La. Feb. 20, 2024). Plaintiff's appeal to the Fifth Circuit Court of Appeals was docketed on March 19, 2024. The Fifth Circuit has not issued a ruling.

According to the U.S. Department of the Treasury, independent contractors could not begin applying for a PPP loan on their own until April 10, 2020.[4] That was five days after Veltor had submitted its PPP loan application to the SBA.[5] By its own terms, IFR did not become effective until April 15, 2020, *see* 85 Fed. Reg. at 20811, and had "no preemptive or retroactive effect." *Id.* at 20817.

On May 1, 2020, Veltor's PPP loan application for $125,000 was approved and fully funded by the Lender. (A.R. 0013, 0162.) The Lender deposited the loan proceeds into Veltor's business checking account the same day. (A.R. 0084.) Veltor asserts that it applied for and utilized the proceeds of the PPP loan "to protect the continued employment of its workers." (ECF No. 21, PageID.317 (citing A.R. 0055 (certifying that Veltor would use its PPP Loan funds to "retain workers and maintain payroll").) During its 24-week covered period, Veltor utilized at least 60% of the PPP funds for "payroll expenses." (ECF No. 21, PageID.317 (citing A.R. 0058).)

On or about February 26, 2021, Veltor submitted its PPP Loan forgiveness application to the Lender, seeking full forgiveness of the PPP loan. (A.R. 0046-0052.) On October 26, 2022, the SBA informed the

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[4] *See https://home.treasury.gov/system/files/136/PPP--Fact-Sheet.pdf*.

[5] Previously available at *https://home.treasury.gov/system/files/136/PPP%20--%20Overview.pdf*. At the time Veltor filed its motion, it believed this webpage had been removed from the U.S. Department of the Treasury's website. The Court also could not find the webpage when it last looked on September 24, 2024.

Lender that the loan forgiveness requested by Veltor was denied, requiring Veltor to pay back the full amount to the SBA, with interest. (A.R. 0013-0014.) The SBA's forgiveness decision concluded that Veltor was ineligible to receive the PPP loan proceeds because, in its original loan calculation, Veltor's payroll costs had been based on payments made to independent contractors. (*See* A.R. 0013-0014 ("The only wages paid were via 1099's which are ineligible. No other eligible wages were provided to include in the Origination calculation.").) The SBA's forgiveness decision cited no statutory or regulatory support for this determination. *Id.*

On November 23, 2022, Veltor filed an appeal of the SBA's forgiveness decision with the SBA's Office of Hearings and Appeals ("OHA"). (A.R. 0001–0012.) On March 21, 2023, the OHA issued an "initial decision" upholding the SBA's decision to deny full forgiveness of Veltor's PPP loan. (A.R. 0184–0196.) The OHA's initial decision became an appealable, final decision 30 calendar days later, on April 20, 2023. *See* 13 C.F.R. § 134.1211(c)(3). Veltor filed this action on May 18, 2023.

III. LEGAL STANDARDS

A. Rule 56 – Summary Judgment

The Rules of Civil Procedure provide that the court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The presence of factual disputes will preclude granting summary judgment only if the disputes are genuine and concern material facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

248 (1986). A dispute about a material fact is "genuine" only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

Although the Court must view the motion in the light most favorable to the nonmoving party, where "the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). Summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Celotex Corp.*, 477 U.S. at 322–23. A court must look to the substantive law to identify which facts are material. *Anderson*, 477 U.S. at 248.

B. Administrative Procedures Act

Courts must review agency actions under the Administrative Procedures Act (the "APA"). Pursuant to the APA, a reviewing court should set aside an agency decision if that decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See* 5 U.S.C. § 706(2)(A). Courts "must take care not to merely rubber stamp agency decisions. Rather the court must ensure that the agency took a hard look at all relevant issues and considered reasonable alternatives." *See Simms v.*

Nat'l Highway Traffic Safety Admin., 45 F.3d 999, 1004 (6th Cir. 1995).

"The APA establishes a scheme of 'reasoned decisionmaking.'" *Coal. for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 475 (6th Cir. 2004). "It requires the party challenging the agency's action to 'show that the action had no rational basis or that it involved a clear and prejudicial violation of applicable statutes or regulations.'" *Id.* (citation omitted). "If there is any evidence to support the agency's decision, the agency's determination is not arbitrary or capricious." *Id.* Judicial review under the arbitrary or capricious standard "is deferential, and a court may not substitute its own policy judgment for that of the agency." *Fed. Commc'ns Comm'n v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021); *Cherokee Forest Voices v. U.S. Forest Serv.*, 182 F. App'x 488, 493 (6th Cir. 2006) (noting a "highly deferential standard"). "A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Prometheus*, 592 U.S. at 423.

IV. CROSS MOTIONS FOR SUMMARY JUDGMENT

Veltor asks the Court to vacate and set aside the OHA's decision denying forgiveness of its PPP loan and require the SBA to grant full forgiveness of its PPP loan. Defendants move the Court to affirm the OHA's decision to deny Veltor's request to forgive its PPP loan. The parties focus on, and the Court's analysis turns on, how to interpret the term "payroll

costs" under the CARES Act, including 15 U.S.C. § 636(a)(36)(A)(viii).

At the outset, the Court notes that Veltor's complaint and motion for summary judgment are substantively identical to the like pleadings by the plaintiff in *Seville Industries LLC v. U.S. Small Business Administration*, No. 6:22-CV-06229, 2024 WL 697592 (W.D. La. Feb. 20, 2024). This is not surprising, as Veltor's primary counsel in this case is one of plaintiff's attorneys in *Seville*. As discussed below, the *Seville* court rejected the plaintiff's position and, to the extent the plaintiff's PPP loan was based on payroll costs attributable to independent contractors, upheld the SBA's decision to deny PPP loan forgiveness. This Court ultimately reaches the same conclusion.

A. No Arbitrary and Capricious Conduct by Defendants

Veltor argues that there is an "Independent Contractor Rule" ("ICR") based on the IFR promulgated by the SBA. Veltor contends that the ICR provides that payments by a PPP loan applicant to independent contractors could not be included in the applicant's loan calculation or loan forgiveness. 85 Fed. Reg. at 20813–20814. Veltor asserts, since the IFR had "no preemptive or retroactive effect," *id.* at 20817, the ICR did not become effective until April 15, 2020. Veltor believes the ICR could not be applied to a PPP loan application completed prior to April 15, 2020. Specifically, Veltor insists that the ICR could not be applied to Veltor's PPP loan application submitted on April 5, 2020 and, by doing so, the SBA acted arbitrarily and capriciously. If Veltor is correct,

it had the right to include the compensation paid to independent contractors for purposes of its loan calculation and loan forgiveness, and its PPP loan should have been forgiven.

The Court agrees with Veltor that the IFR did not become effective until April 15, 2020. And, if defendants solely relied on the IFR to justify their denial of Veltor's request for forgiveness of Veltor's PPP loan, the Court might have adopted Veltor's ICR position and granted Veltor's motion set forth in a non-binding decision rendered by the OHA in August 2022.[6] (*See* ECF No. 20, PageID.122–128.)

On August 9, 2022, the ALJ held that the IFR was not in effect on April 5, 2020, the date of the borrower's PPP loan application. (*Id.* at PageID.127 ("Given the binding effective date of the IFR, I find that the Appellant was not bound by the IFR at the time it submitted its PPP loan application.").) The ALJ reasoned that "[a]pplying the [Interim Final R]ule to

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[6]Unlike the *Seville* court, this Court does not conclude that the absence of a notice requirement means that the IFR parameters were in place on April 2, 2020, when they were published on the SBA's and Department of Treasury's websites. *See Seville*, 2024 WL 697592. As noted above, acting on its statutory mandate, the SBA issued the IFR, which did not require notice. *See* 15 U.S.C. § 9012 (footnote omitted) (emphasis added) ("Not later than 15 days after March 27, 2020, the Administrator shall issue regulations to carry out this title and the amendments made by this title without regard to the notice requirements under section 553(b) of title 5."). The fact that the notice requirement was waived, however, does not change the fact that the effective date of the IFR was April 15, 2020. Therefore, if there was an ICR instituted pursuant to the IFR, it would not have been effective until April 15, 2020, 10 days after Veltor submitted its PPP loan application.

all PPP loans – even those prior to the effective date — would contradict the plain language of the IFR that it has 'no preemptive or retroactive effect.'" (*Id.)* The ALJ determined that the SBA's retroactive application of the IFR to a loan application filed on April 5, 2020 was "clear error" and concluded that the borrower was entitled to forgiveness of its PPP loan with respect to any payments to independent contractors the borrower relied upon in its calculations. (*Id.* at PageID.128.) On December 22, 2022, the ALJ upheld that August 9, 2022 OHA decision upon reconsideration. (ECF No. 21, Ex. A.)

The sole issue before the ALJ in that matter was whether the IFR could be retroactively applied especially because the IFR was on the SBA's and Department of Treasury's websites on April 2, 2020. (ECF No. 20, PageID.127.) The SBA did not present any other basis for denying the borrower's request for PPP loan forgiveness. (*Id.)* The same cannot be said in this case. Although defendants in this case cite to the IFR and the fact that it was on the SBA and Department of Treasury websites as of April 2, 2020, defendants center their arguments elsewhere. Defendants assert that the CARES Act as a whole does not provide that payments by a business to an independent contractor can be included in the business's "payroll costs" for purposes of a PPP loan or PPP forgiveness. The Court now turns to those arguments.

At the core of Veltor's claim that the SBA wrongfully denied Veltor's request for its PPP loan forgiveness is the term "payroll costs" under the CARES Act, specifically 15 U.S.C. § 636(a)(36)(A)(viii). If the Court were reading § 636(a)(36)(A)(viii) in isolation, it would

probably agree with Veltor's theory that independent contractor compensation should be included in PPP loan calculations. In pertinent part, § 636(a)(36)(A)(viii) provides that "payroll costs" are: "(aa) the sum of payments of any compensation with respect to employees . . . ; ***and*** (bb) the sum of payments of any compensation to or income of a sole proprietor or independent contractor that is . . ." *Id.* (emphasis added).

Veltor asserts that the ordinary meaning of "payroll costs," including parts (aa) and (bb) should be read in the conjunctive. (ECF No. 21, PageID.324 (citing *e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, *Reading Law: The Interpretation of Legal Texts*, 116–1125 (2012); BLACK'S LAW DICTIONARY (10th ed. 2014) ("in a legal instrument, 'and' joins a conjunctive list to combine items, while 'or' joins a disjunctive list to create alternatives.").) In other words, Veltor believes "payroll costs" means: (1) the aggregate of compensation paid to employees; plus (2) compensation payments to independent contractors. Veltor maintains that, if Congress intended otherwise, Congress would have used the word "or" instead of "and."

Defendants counter that the use of the word "and" between parts (aa) and (bb) should be read in the "distributive sense." By distributive sense, defendants mean that Congress intended to permit as "payroll costs" *either*: (1) in part (aa), the total amount a business paid as compensation to its employees; *or* (2) in part (bb), the total amount of compensation independent contractors received or paid to themselves as self-employed persons. Defendants insist "payroll costs" did not mean the total of the

amounts in both parts (aa) and (bb). The *Seville* court agreed with the defendants' position, 2024 WL 697 592.

The Court finds that, if read in a vacuum, the text of § 636(a)(36)(A)(viii) itself is unambiguous and supports Veltor's argument. Parts (aa) and (bb) are joined by the word "and," for which the ordinary meaning is conjunctive. Moreover, the language in that section does not indicate why a business could not compensate both employees and independent contractors. It is not unusual, and may even be common, for a business to do so.[7] The Court likewise is not persuaded that the absence of the term "the sum of" prior to parts (aa) and (bb), as opposed to within each of parts (aa) and (bb), detracts from Veltor's argument as it relates to § 636(a)(36)(A)(viii), at least when read in isolation, without considering the balance of the CARES Act.

Ultimately, however, Veltor's argument is not persuasive. As Veltor acknowledges, the Court must consider the language of the ***entire statute***, not simply a section of the statute. (ECF No. 21, PageID.323 (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989).); *Ford Motor Co. v. United States*, 786 F.3d 580, 587 (6th Cir. 2014) (courts "must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.").

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[7] The Court also notes Veltor's arguments regarding "compensation to . . . [an] independent contractor" in part (bb) and agrees that, when considering § 636(a)(36)(A)(viii) in a vacuum, such costs would be included in "payroll costs."

As the *Seville* court stated:

> As this issue presents a question of statutory interpretation, the Court must first begin with the text of the statute itself. *United States v. Lauderdale Cnty., Miss.*, 914 F.3d 960, 961 (5th Cir. 2019). If the text is unambiguous, the analysis ends there. *Bedrock Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004); *United States v. Ary*, 892 F.3d 787, 789 (5th Cir. 2018). The "cardinal canon" of statutory interpretation requires courts to "presume ... a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 239, 253-254 (1992).

Seville, 2024 WL 697592.[8] A court has a "duty to construe statutes, not isolated provisions." *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 290 (2010). Further, provisions "must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989); *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 275 (2023).

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[8]The *Seville* court further stated that, "If 'the agency's answer is based on a permissible construction of the statute,' that is the end of the matter. *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 307, 133 S. Ct. 1863, 1874–75, 185 L. Ed. 2d 941 (2013) (*citing Chevron*, 467 U.S. at 842, 104 S. Ct. 2778)." *Seville*, 2024 WL 697592. Since *Seville* was decided, however, *Chevron* (*Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984)) has been overruled. *See Loper Bright*, 144 S.Ct. at 2273. Accordingly, the Court does not defer to the SBA's answer for purposes of deciding this matter.

For the reasons that follow, when viewing the CARES Act as a whole, the Court concludes that the SBA's determination that part (aa) (addressing payments to employees) and part (bb) (addressing payments to independent contractors) are arbitrary and capricious, *see* 5 U.S.C. § 706(2)(A), and falls within a zone of reasonableness. *Promethueus*, 592 U.S. at 423.

As noted above, § 636(a)(36)(A)(viii)(I) does not provide that "payroll costs" include "the sum of" payments in (aa) and (bb). However, Congress did specify in other provisions of the PPP that the itemized costs to be considered must be calculated as "the sum of" the items listed in the subsections or subparts in the level(s) below the section in which "the sum of" was written. The *Seville* court explained:

> For example, Congress directed in Section 636(a)(36)(E)(i)(I) that a borrower's maximum PPP loan amount be calculated as "the sum of" items (aa) (payroll costs times 2.5) and (bb) (any EIDL loan balance) listed thereunder. Similarly, the maximum loan amount for a farmer or rancher without employees is calculated, per Section 636(a)(36)(V)(ii)(I), as "the sum of" items (aa) (2019 monthly gross income times 2.5) and (bb) (any EIDL loan balance) listed thereunder. *See also* 15 U.S.C. § 636m(b) (specifying in subsection (b) that the forgiveness amount shall be "the sum of" the expenses listed thereunder in paragraphs (1)-(8)). Here, Section 636(a)(36)(A)(viii)(I) states that "payroll costs" means employee compensation as set forth in item (aa), and, separately, compensation to or income of sole proprietors and independent

> contractors as set forth in item (bb). In other words, (aa) and (bb) were not meant to be added together to create a "sum." The text of the statute is clear that for small business employers, "payroll costs" means employee-compensation costs, while, for the self-employed – including independent contractors who were not classified as employees and could obtain PPP loans of their own – "payroll costs" means the income or compensation they earned for themselves.

Seville, 2024 WL 697592 (footnote omitted). For the same reasons, this Court finds that, for purposes of § 636(a)(36)(A)(viii), "'payroll costs' means both things, not the sum of both things." *Id.* at n.6. When considering the CARES Act as a whole, this interpretation affords a logical, "symmetrical and coherent regulatory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

The Court concludes Veltor's proposed interpretation is inconsistent with the CARES Act when the CARES Act is considered in its entirety. Most significantly, as the questions and answers section of the IFR reflects, independent contractors could seek their own PPP loan under the CARES Act. *See* 15 U.S.C. § 636(a)(36)(D)(ii); *see also* 85 Fed. Reg. at 20813. Adopting Veltor's position would mean that an independent contractor could be the beneficiary of "double-dipping" by receiving: (a) his own loan; and (b) the proceeds of a loan obtained by a business for the purpose of making payments to that same independent contractor.

Several provisions of the CARES Act demonstrate Congress's intent to consider employees and

independent contractor separately. One example, although not pertinent in this case due to Veltor's loan amount, is the process for obtaining partial PPP loan forgiveness for loans over $150,000. Under those circumstances, forgiveness requires certain certifications tied to employees but not independent contractors. *See* 15 U.S.C. § 636m (for purposes of certifying a request for forgiveness, a borrower must document the number of the borrower's employees and the amounts used to retain them in order to qualify for partial PPP loan forgiveness). The absence of a similar documentation requirement for independent contractors suggests that Congress did not intend to include independent contractors in "payroll costs."

Another example is that, as an incentive to businesses to retain employees, Congress provided that the amount of a business's PPP loan forgiveness for "payroll costs" may be reduced if the business laid off employees or cut employees' pay after obtaining the PPP loan. *See* 15 U.S.C. §§ 636m(b), 636m(d)(2), (3). This is consistent with the CARES Act objective to keep persons employed. There is no corresponding provision to reduce the forgiveness amount for dismissing independent contractors.

If "payroll costs" included both employees and independent contractors, as Veltor suggests, each of those § 636m provisions is non-sensible because a business would have an incentive to utilize independent contractor relationships to obtain a PPP loan. With no penalty for terminating an independent contractor, a business could immediately terminate the independent contractor and still keep all the loan proceeds. This certainly would not further the purpose

of the CARES Act, which is to keep workers employed and compensated.

Veltor's argument is further undermined by the fact that the CARES Act excludes from "payroll costs" "the compensation of an individual employee in excess of $100,000" annually and compensation paid to an "employee" who resides outside the United States. *See* 15 U.S.C. § 636(a)(36)(A)(viii)(II)(aa), (cc). Because independent contractors are not similarly excluded from "payroll costs," under Veltor's theory a business could seek PPP loans for foreign-based independent contractors (but not foreign-based employees), as well as for highly compensated independent contractors (but not highly compensated employees). Neither of those results is consistent with the purposes of the CARES Act.

The fact that Congress has amended the provisions of the PPP on two occasions supports the conclusion that independent contractors are to be treated separately for purposes of "payroll costs." Despite those amendments, Congress did not (a) alter the IFR's directive that payments to contractors "do not count for purposes of a borrower's PPP loan calculation" or "loan forgiveness," 85 Fed. Reg. at 20813, 20814; or (b) otherwise change the definition of "payroll costs" with respect to independent contractors. *See* PPP Flexibility Act, 15 U.S.C. § 636m(d)(8) (June 5, 2020) (reducing from 75% and 60% the percentage of PPP loan proceeds that had to be spent on payroll to qualify for forgiveness); Consolidated Appropriations Act (December 27, 2020) (adding benefits that a business could count as *employee* compensation when calculating "payroll costs" and specifying that term does not include amounts the borrower relies upon for

certain employee-retention tax credits). "Where an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512535 (1982) (internal quotes and citation omitted).

Finally, the Court agrees with the *Seville* court that:

> [The] IFR is properly considered an interpretive regulation meant to clarify the scope and breadth of the PPP. Interpretative rules "advise the public of the agency's construction of the statutes and rules which it administers." *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 97, 135 S. Ct. 1199, 191 L. Ed. 2d 186 (2015), quoting *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 99, 115 S. Ct. 1232, 131 L. Ed. 2d 106 (1995).

Seville, 2024 WL 697592. The Sixth Circuit has long held the same view:

> A rule clarifying an unsettled or confusing area of the law does not change the law, but restates what the law according to the agency is and has always been: It is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand.

Orr v. Hawk, 156 F.3d 651, 654 (6th Cir. 1998) (internal quotation and citation omitted). As noted above, the CARES Act expressly provided the SBA the power to enact regulations regarding the administration of the PPP. *See* 15 U.S.C. § 9012 (footnote omitted) ("Not later than 15 days after March

27, 2020, the [SBA] shall issue regulations to carry out this title and the amendments made by this title . . .").

The Court finds that the IFR's discussion regarding whether independent contractors are to be considered when calculating "payroll costs" is consistent with the language of the CARES Act itself. The question and answer in the IFR only clarified what the CARES Act provided; it does not create or make retroactive any rule or application. Accordingly, "[s]uch a regulation 'constitutes only a step in the administrative process' and 'is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand.'" *Seville*, 2024 WL 697592, (quoting *Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue*, 297 U.S. 129, 135 (1936)).

For all these reasons, the Court declines to adopt Veltor's argument that payments to both independent contractors and employees should be included in the calculation of "payroll costs" for purposes of 15 U.S.C. § 636(a)(36)(A)(viii). And, because the Court concludes that the CARES Act does not allow payments by a business to an independent contractor to be included in the business's "payroll costs," Veltor's contention that the ICR was improperly retroactively applied to its PPP loan is rendered irrelevant. The Court further concludes that the SBA's decision was not arbitrary and capricious, as the SBA did not retroactively apply any rule, including the ICR, to Veltor's PPP loan. The Court therefore finds that Defendants are entitled to judgment as a matter of law.

B. Veltor's Equitable Estoppel Arguments Lack Merit

Veltor argues that equitable estoppel and principles of fundamental fairness and due process support vacating the OHA decision and granting full forgiveness of its PPP loan. Those arguments generally are not successful against government agencies. *See, e.g., Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 422 (1990) (emphasis added) ("In sum, Courts of Appeals have taken our statements as an invitation to search for an appropriate case in which to apply estoppel against the Government, yet *we have reversed every finding of estoppel that we have reviewed*. Indeed, no less than three of our most recent decisions in this area have been summary reversals of decisions upholding estoppel claims."). Further, as the Sixth Circuit has stated, "at the very minimum, some affirmative misconduct by a government agent is required as a basis of estoppel." *Est. of James v. U.S. Dep't of Agric.*, 404 F.3d 989, 995 (6th Cir. 2005). Affirmative misconduct requires "more than mere negligence . . . It is an act by the government that either intentionally or recklessly misleads the claimant." *Id.*

Here, the Court does not find that Veltor's reliance on the language of the CARES Act, and especially its belief that its PPP loan would be forgiven based on the language in § 636(a)(36)(A(viii), supports awarding equitable relief. Again, while limiting one's focus on §636(a)(36)(A(viii) could support Veltor's theory, it is but one part of the CARES Act. Veltor's misunderstanding or misinterpretation of the statute does not warrant equitable relief against the SBA, especially as Veltor has not identified any affirmative

misconduct by any defendant and certainly no action by any defendant that intentionally or recklessly misled Veltor.

Finally, as discussed above, the Court finds that the SBA's interpretation of the CARES Act and its promulgation of the IFR were not arbitrary and capricious, which is necessary for a finding of a substantive due process violation. *See, e.g., Koenigs, L.L.C. v. City of Savannah, Tennessee*, 2019 WL 1186863 (W.D. Tenn. Mar. 13, 2019) (citing *Paterek v. Village of Armada*, 801 F.3d 630, 648 (6th Cir. 2015)).

Accordingly, the Court finds no merit in Veltor's equitable estoppel, fundamental fairness, and due process claims.

V. CONCLUSION

Accordingly, and for the reasons stated above, **IT IS ORDERED** that Veltor's motion for summary judgment (ECF No. 21) is **DENIED**.

IT IS FURTHER ORDERED that defendants' cross motion for summary judgment (ECF No. 22) is **GRANTED**.

IT IS FURTHER ORDERED that Veltor's claims against defendants SBA, Guzman, and Yellen are **DISMISSED WITH PREJUDICE.**

SO ORDERED.

s/Jonathan J.C. Grey

Date: September 26, 2024 Jonathan J.C. Grey
United States District Judge

APPENDIX E

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).