

LF 5011 adv (9/12)

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

Jul 17, 2020

SEAN F. MCAVOY, CLERK

In re:)	Case No. 19-01189-WLH11
ASTRIA HEALTH, et al.,)	
)	
Debtor(s))	Adv. Proc. No. 20-80016-WLH
ASTRIA HEALTH, et al.,)	
)	
Plaintiff(s))	
)	
UNITED STATES SMALL BUSINESS)	TRANSMITTAL OF MOTION
ADMINISTRATION, et al.)	FOR WITHDRAWAL OF REFERENCE
)	
Defendant)	

To: United States District Court
Eastern District of Washington
PO Box 1493
Spokane, WA 99210-1493

Case Name: Astria Health et al, v United States Small Business Administration, et al.

Bankruptcy Case #: 19-01189-WLH11

Adversary #: 20-80016-WLH

Bankruptcy Judge: Whitman L. Holt

From: United States Bankruptcy Court
Eastern District of Washington
PO Box 2164
Spokane, WA 99210-2164

Comments: Please see attached comments from Judge Holt.

Attachments: Case Docket, Party List, Proceeding Documents

Dated: July 17, 2020

Clerk, U.S. Bankruptcy Court

by: /s/ Kathleen Chamberlin
Deputy Clerk

TRANSMITTAL OF MOTION FOR WITHDRAWAL OF R



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APLDIST, APPEAL

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON (Spokane/Yakima)
Adversary Proceeding #: 20-80016-WLH**

Assigned to: Whitman L Holt

Date Filed: 05/15/20

Lead BK Case: [19-01189](#)

Lead BK Title: Astria Health

Lead BK Chapter: 11

Demand: \$3299000

Nature[s] of Suit: 91 Declaratory judgment
72 Injunctive relief - other
21 Validity, priority or extent of lien or other interest in property
02 Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)

Plaintiff

Astria Health

900 W Chestnut Ave
Yakima, WA 98902
Tax ID / EIN: 81-3979675

represented by **Sam Alberts**

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represented by **Sam Alberts**

(See above for address)

Plaintiff**Kitchen and Bath Furnishings, LLC**

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Tax ID / EIN: 30-0888892

represented by **Sam Alberts**

(See above for address)

Plaintiff**Oxbow Summit, LLC**

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Tax ID / EIN: 47-4281366

represented by **Sam Alberts**

(See above for address)

Plaintiff**SHC Holdco, LLC**

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Tax ID / EIN: 82-2369193

represented by **Sam Alberts**

(See above for address)

Plaintiff

SHC Medical Center - Toppenish

900 W Chestnut Ave

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Tax ID / EIN: 81-4670687

represented by **Sam Alberts**

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Plaintiff

SHC Medical Center - Yakima

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Plaintiff

Sunnyside Community Hospital Association

900 W Chestnut Ave

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Plaintiff

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Plaintiff

Sunnyside Professional Services, LLC

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Tax ID / EIN: 47-5499567

represented by **Sam Alberts**

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Plaintiff**Yakima Home Care Holdings, LLC**

7 S. 10th Ave., Suite 400

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Tax ID / EIN: 81-3825537

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Plaintiff**Yakima HMA Home Health, LLC**

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Tax ID / EIN: 27-0173556

represented by **Sam Alberts**

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V.

Defendant**United States Small Business Administration and
Jovita Carranza, in her capacity as
Administrator for the United States Small
Business Administration**represented by **Brian M Donovan**



United States Attorney's Office













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Filing Date	#	Docket Text
05/15/2020	 1	Adversary case 20-80016. COMPLAINT. Fee Amount \$350. Nature of Suit: (91 (Declaratory judgment)) (72 (Injunctive relief - other)) (21 (Validity, priority or extent of lien or other interest in property)) (02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy))) (Alberts, Sam) (Entered: 05/15/2020)
05/15/2020		RECEIPT of Complaint(20-80016) [cmp,cmp] (350.00) Filing Fee. Receipt number A7614312. Fee amount 350.00 (RE: Complaint 1). (U.S. Treasury) (Entered: 05/15/2020)
05/15/2020	 2	MOTION for Temporary Restraining Order and Request for Hearing and Briefing Schedule With Respect for a Preliminary Injunction. Filed by Sam Alberts on behalf of Astria Health, Glacier Canyon, LLC, Kitchen and Bath Furnishings, LLC, Oxbow Summit, LLC, SHC Holdco, LLC, SHC Medical Center - Toppenish, SHC Medical Center - Yakima, Sunnyside Community Hospital Association, Sunnyside Community Hospital Home Medical Supply, LLC, Sunnyside Home Health, Sunnyside Professional Services, LLC, Yakima HMA Home Health, LLC, Yakima Home Care Holdings, LLC (Attachments: # 1 Exhibits A through F) (Alberts, Sam) Hearing scheduled 5/19/2020 at 11:00 AM at (877) 402-9757, Access 7036041 - Yakima. DEPUTY Clerk Note: Hearing information added and entry clarified. Modified on 5/18/2020 (CMR). (Entered: 05/15/2020)

		05/15/2020)
05/15/2020		Judge Whitman L Holt added to case. (CMR) (Entered: 05/15/2020)
05/15/2020	 3	ORDER Uploaded. Filed by Alberts, Sam. (RE: 2) (Entered: 05/15/2020)
05/15/2020	 4	NOTICE of Scheduling Conference. Written Report due: 6/18/2020. Scheduling Conference scheduled 6/24/2020 at 01:30 PM at (877) 402-9757, Access 7036041 - Yakima. (CMR) (Entered: 05/15/2020)
05/15/2020	 5	SUMMONS Issued. (CMR) (Entered: 05/15/2020)
05/18/2020	 6	ORDER Setting Emergency Hearing Regarding Debtors' Motion for Temporary Restraining Order (RE: Motion for Temporary Restraining Order 2). Hearing scheduled 5/19/2020 at 11:00 AM at (877) 402-9757, Access 7036041 - Yakima. (CMR) (Entered: 05/18/2020)
05/18/2020	 7	CERTIFICATE of Service. Filed by Kurtzman Carson Consultants LLC (RE: Complaint 1 , Motion for Temporary Restraining Order 2 , Notice of Scheduling Conference 4 , Summons Issued 5 , Order 6). (Nguyen, Angela) (Entered: 05/18/2020)
05/19/2020	 8	ORDER Uploaded. Filed by Alberts, Sam. (RE: 2) (Entered: 05/19/2020)
05/19/2020	 9	 PDF with attached Audio File. Court Date & Time [5/19/2020 11:15:17 AM]. File Size [3756 KB]. Run Time [00:15:39]. (NydiaUrlacher). (Entered: 05/19/2020)
05/19/2020	 10	NOTICE of Appearance. Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration. (Donovan, Brian) (Entered: 05/19/2020)
05/19/2020	 11	CERTIFICATE of Service.. Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (RE: Notice of Appearance 10). (Donovan, Brian) (Entered: 05/19/2020)
05/19/2020	 12	MINUTE Entry Re: Motion for Temporary Restraining Order. HELD. The parties reached an agreement and submitted a proposed agreed order. Court finds the schedule outlined is appropriate and will sign/enter order (RE: 2 Motion for Temporary Restraining Order) Appearances: Samuel Maizel, Thomas Buford, Sarah Schrag, Attorneys for Plaintiff; Brian Donovan, Attorney for Defendant United States Small Business Administration. Other parties: John Gallagher with Astria Health; Michael Lane with Astria Health; Gary Dyer, Attorney for US Trustee; Ryan Jareck, Attorney for Lapis Advisers; William Kannel, Attorney for UMB Bank, Lapis Advisers; David Leigh, Attorney for Med One Capital Funding LLC; Richard Hyatt, Attorney for TIAA Commercial Finance Inc; Boris Mankovetskiy, Jane Pearson and Andrew Sherman, Attorneys for the Unsecured Creditors Committee; Darin Dalmat, Attorney for Washington State Nurses Assc; Michael Siderius, Attorney for GE Precision Healthcare LLC (NNU) (Entered: 05/19/2020)

05/20/2020	 13	AGREED ORDER Regarding Scheduling and Reservation of PPP Funds (RE: Motion for Temporary Restraining Order 2). Hearing scheduled 6/3/2020 at 11:00 AM at (877) 402-9757, Access 7036041 - Yakima. (CMR) (Entered: 05/20/2020)
05/26/2020	 14	BRIEF signed by Brian M. Donovan. Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (RE: Motion for Temporary Restraining Order 2). (Attachments: # 1 Exhibit A # 2 Exhibit 1 # 3 Exhibit 2 # 4 Exhibit 3 # 5 Exhibit 4 # 6 Exhibit 5 # 7 Exhibit 6 # 8 Exhibit 7 # 9 Exhibit 8 # 10 Exhibit 9 # 11 Exhibit 10 # 12 Exhibit 11 # 13 Exhibit 12 # 14 Exhibit 13)(Donovan, Brian) (Entered: 05/26/2020)
05/26/2020	 15	CERTIFICATE of Service.. Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (RE: Brief 14). (Donovan, Brian) (Entered: 05/26/2020)
06/01/2020	 16	REPLY signed by Samuel R. Maizel (RE: Brief 14). Filed by Sam Alberts on behalf of Astria Health, Glacier Canyon, LLC, Kitchen and Bath Furnishings, LLC, Oxbow Summit, LLC, SHC Holdco, LLC, SHC Medical Center - Toppenish, SHC Medical Center - Yakima, Sunnyside Community Hospital Association, Sunnyside Community Hospital Home Medical Supply, LLC, Sunnyside Home Health, Sunnyside Professional Services, LLC, Yakima HMA Home Health, LLC, Yakima Home Care Holdings, LLC (Alberts, Sam) (Entered: 06/01/2020)
06/03/2020	 17	 PDF with attached Audio File. Court Date & Time [6/3/2020 11:24:37 AM]. File Size [36135 KB]. Run Time [02:30:34]. (NydiaUrlacher). (Entered: 06/03/2020)
06/03/2020	 19	MINUTE Entry Re: Motion for Temporary Restraining Order and Use of PPP Funds. HELD. The court heard argument of counsel and for the reasons stated on the record, the court grants motion and delivers oral ruling. Proposed form of order to be circulated and submitted to the court for signature. (related document(s): 2 Motion for Temporary Restraining Order filed by Astria Health, Glacier Canyon, LLC, Kitchen and Bath Furnishings, LLC, Oxbow Summit, LLC, SHC Holdco, LLC, SHC Medical Center - Toppenish, SHC Medical Center - Yakima, Sunnyside Community Hospital Association, Sunnyside Community Hospital Home Medical Supply, LLC, Sunnyside Home Health, Sunnyside Professional Services, LLC, Yakima HMA Home Health, LLC, Yakima Home Care Holdings, LLC) Appearances: Sam Alberts, James Day, Samuel Maizel, Geoffrey Miller, Sarah Schrag, Attorneys for Astria/Plaintiff; Mark Sacks and Brian Donovan, Attorneys for US Small Business Administration/Defendant. Other Attendees: William Kannel, Attorney for UMB Bank, N.A., Lapis Advisers; Jane Pearson, Boris Mankovetskiy and Andrew Sherman, Attorneys for Unsecured Creditors Committee; Gary Dyer, Attorney for US Trustee; John Gallagher, CEO of Astria Health; Michael Lane, CRO of Astria Health.(NNU) (Entered: 06/08/2020)
06/08/2020	 18	STIPULATION. Signed by Samuel R. Maizel for the Debtors, William W. Kannel, Attorneys for UMB Bank, N.A., as Trustee and Lapis Advisers, L.P. and Ryan T. Jareck Attorneys for Lapis Advisers, L.P. and the filer.. Filed by Sam Alberts on behalf of Astria Health, Glacier Canyon, LLC, Kitchen and Bath Furnishings, LLC, Oxbow Summit, LLC, SHC Holdco, LLC, SHC Medical

		Center - Toppenish, SHC Medical Center - Yakima, Sunnyside Community Hospital Association, Sunnyside Community Hospital Home Medical Supply, LLC, Sunnyside Home Health, Sunnyside Professional Services, LLC, Yakima HMA Home Health, LLC, Yakima Home Care Holdings, LLC (Alberts, Sam) (Entered: 06/08/2020)
06/09/2020	 20	ORDER Uploaded. Filed by Alberts, Sam. (RE: 2) (Entered: 06/09/2020)
06/09/2020	 21	CERTIFICATE of Service. Filed by Kurtzman Carson Consultants LLC (RE: Reply 16). (Nguyen, Angela) (Entered: 06/09/2020)
06/10/2020	 22	ORDER Granting Preliminary Injunction, Denying Stay Pending Appeal, and Certifying Issues to the Ninth Circuit Court of Appeals (Related Doc # 2). (CMR) (Entered: 06/10/2020)
06/12/2020	 23	CERTIFICATE of Service. Filed by Kurtzman Carson Consultants LLC (RE: Stipulation 18). (Nguyen, Angela) (Entered: 06/12/2020)
06/22/2020	 24	CERTIFICATE of Service. Filed by Kurtzman Carson Consultants LLC (RE: Temporary Restraining Order 22). (Nguyen, Angela) (Entered: 06/22/2020)
06/23/2020	 25	ORDER Uploaded. Filed by Alberts, Sam. (RE: 4) (Entered: 06/23/2020)
06/23/2020	 26	MOTION to Withdraw Reference . Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (Donovan, Brian) DEPUTY Clerk Note: Fee amount removed from docket text - not applicable for US Attorney's Office. Modified on 6/24/2020 (CMR). (Entered: 06/23/2020)
06/23/2020	 27	CERTIFICATE of Service.. Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (RE: Motion to Withdraw Reference 26). (Donovan, Brian) (Entered: 06/23/2020)
06/23/2020	 28	NOTICE of Appeal and Statement of Election to District Court. Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (RE: 22 Temporary Restraining Order). (Donovan, Brian) DEPUTY Clerk Note: Fee amount removed from docket text - not applicable for US Attorney's Office. Modified on 6/24/2020 (CMR). (Entered: 06/23/2020)
06/23/2020	 29	CERTIFICATE of Service.. Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (RE: Notice of Appeal and Statement of Election 28). (Donovan, Brian) (Entered: 06/23/2020)
06/24/2020	 30	 PDF with attached Audio File. Court Date & Time [6/24/2020 1:36:08 AM]. File Size [2320 KB]. Run Time [00:09:40]. (NydiaUrlacher). (Entered: 06/24/2020)

06/24/2020	 31	MINUTE Entry Re: Scheduling Conference. HELD. Court will sign the proposed joint stipulated order submitted by counsel staying the adversary proceeding pending appeal in District Court. (RE: 4 Notice of Scheduling Conference) Appearances: Samuel Maizel, and Sarah Schrag, Attorneys for Plaintiff; Brian Donovan, Attorney for Defendant (NNU) (Entered: 06/24/2020)
06/24/2020	 32	APPEAL Transmittal to District Court. Appellant(s): United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration. Appellee(s): Astria Health, et al (See Exhibit A of ECF 28). Case County: YAKIMA. Date Notice of Appeal Filed: 06/23/2020. Date of Entry of Order on Appeal: 06/10/2020. Date Bankruptcy Case Filed: 05/15/2020. Fee Paid: N/A. Notice of Appeal mailed N/A to N/A. All other parties, including the US Trustee, were electronically served. (RE: Temporary Restraining Order 22 , Notice of Appeal and Statement of Election 28). Certificate of Record due by 8/13/2020. (CMR) (Entered: 06/24/2020)
06/25/2020		CASE Number from Appellate Court, District Court, Case Number: 20-cv-03089-RMP (RE: Notice of Appeal and Statement of Election 28). (CMR) (Entered: 06/25/2020)
06/26/2020	 33	STIPULATED Order (RE: Notice of Scheduling Conference 4). Status Hearing scheduled 8/25/2020 at 01:30 PM at (877) 402-9757, Access 7036041 - Yakima. (CMR) (Entered: 06/26/2020)
07/07/2020	 34	NOTICE of Cross Appeal <i>and Statement of Election</i> . Fee Amount \$298. Filed by Sam Alberts on behalf of Astria Health, SHC Medical Center - Toppenish, Yakima HMA Home Health, LLC (RE: 19 Minutes of Proceedings, 22 Temporary Restraining Order). Appellant Designation due by 07/21/2020. (Alberts, Sam) (Entered: 07/07/2020)
07/07/2020	 35	OBJECTION (RE: Motion to Withdraw Reference 26). Filed by Sam Alberts on behalf of Astria Health (Alberts, Sam) (Entered: 07/07/2020)
07/08/2020	 36	APPEAL Transmittal to District Court. Appellant(s): Astria Health, SHC Medical Center - Toppenish, and Yakima HMA Home Health Care, LLC. Appellee(s): United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration. Case County: YAKIMA. Date Notice of Appeal Filed: 7/7/2020. Date of Entry of Order on Appeal: 6/10/2020. Date Bankruptcy Case Filed: 05/15/2020. Fee Paid: No. Transmittal of Notice of Appeal mailed N/A to N/A. All other parties, including the US Trustee, were electronically served. (RE: Temporary Restraining Order 22 , Notice of Cross Appeal 34). Certificate of Record due by 8/27/2020. (CMR) (Entered: 07/08/2020)
07/09/2020		CASE Number from Appellate Court, District Court, Case Number: 20-cv-03098-RMP (RE: Notice of Cross Appeal 34). (CMR) (Entered: 07/09/2020)
07/09/2020		RECEIPT of Notice of Cross Appeal(20-80016-WLH) [appeal,crssapl] (298.00) Filing Fee. Receipt number A7648026. Fee amount 298.00 (RE: Notice of Cross Appeal 34). (U.S. Treasury) (Entered: 07/09/2020)
07/10/2020	 37	STATUS Report to Appellate Court Regarding Payment of Appeal Filing Fee. Please be advised the filing fee in District Court Case Number 20-cv-03098-RMP

		was paid on 7/9/2020 (RE: Notice of Cross Appeal 34). (CMR) (Entered: 07/10/2020)
07/10/2020	 38	APPELLANT Designation of Contents For Inclusion in Record On Appeal, STATEMENT of Issues. Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (RE: 28 Notice of Appeal and Statement of Election, 32 Appeal Transmittal). (Donovan, Brian) DEPUTY Clerk Note: APPELLANT Designation of Contents For Inclusion in Record On Appeal added to docket text. Modified on 7/13/2020 (CMR). (Entered: 07/10/2020)
07/10/2020	 39	CERTIFICATE of Service.. Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (RE: Statement of Issues 38). (Donovan, Brian) (Entered: 07/10/2020)
07/14/2020	 40	REPLY signed by Brian M. Donovan (RE: Motion to Withdraw Reference 26). Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (Donovan, Brian) (Entered: 07/14/2020)
07/17/2020	 41	JUDGE Comments (RE: Motion to Withdraw Reference 26). (KAC) (Entered: 07/17/2020)

20-80016-WLH Astria Health et al v. United States Small Business Administration and Jo**Case type:** ap **Related bankruptcy:** 19-01189-WLH11 **Judge:** Whitman L Holt**Date filed:** 05/15/2020 **Date of last filing:** 07/17/2020

Parties

Astria Health

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(Plaintiff)

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(Plaintiff)

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United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United

represented
by

Brian M Donovan

United States Attorney's

States Small Business Administration*Added: 05/15/2020**(Defendant)*

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*Assigned: 05/19/20***Yakima HMA Home Health, LLC**

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Assigned: 05/15/20

APLDIST, APPEAL

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON (Spokane/Yakima)
Adversary Proceeding #: 20–80016–WLH**

Assigned to: Whitman L Holt

Date Filed: 05/15/20

Lead BK Case: 19–01189

Lead BK Title: Astria Health

Lead BK Chapter: 11

Demand: \$3299000

Nature[s] of Suit:

- 91 Declaratory judgment
- 72 Injunctive relief – other
- 21 Validity, priority or extent of lien or other interest in property
- 02 Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)

Plaintiff

Astria Health

900 W Chestnut Ave

Yakima, WA 98902

Tax ID / EIN: 81–3979675

represented by **Sam Alberts**

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Plaintiff

Glacier Canyon, LLC
900 W. Chestnut Ave.
Yakima, WA 98902

represented by **Sam Alberts**
(See above for address)

Plaintiff

Kitchen and Bath Furnishings, LLC
900 W Chestnut Ave
Yakima, WA 98902
Tax ID / EIN: 30-0888892

represented by **Sam Alberts**
(See above for address)

Plaintiff

Oxbow Summit, LLC
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Yakima, WA 98902
Tax ID / EIN: 47-4281366

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Plaintiff

SHC Holdco, LLC
900 W Chestnut Ave
Yakima, WA 98902
Tax ID / EIN: 82-2369193

represented by **Sam Alberts**
(See above for address)

Plaintiff

SHC Medical Center – Toppenish
900 W Chestnut Ave
Yakima, WA 98902
Tax ID / EIN: 81-4670687

represented by **Sam Alberts**
(See above for address)

Plaintiff

SHC Medical Center – Yakima
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Yakima, WA 98902
Tax ID / EIN: 81-4653630

represented by **Sam Alberts**
(See above for address)

Plaintiff

Sunnyside Community Hospital Association
900 W Chestnut Ave

represented by **Sam Alberts**
(See above for address)

Yakima, WA 98902
Tax ID / EIN: 91-1286274

Plaintiff

Sunnyside Community Hospital Home Medical Supply, LLC
900 W Chestnut Ave
Yakima, WA 98902
Tax ID / EIN: 47-1344645

represented by **Sam Alberts**
(See above for address)

Plaintiff

Sunnyside Home Health
900 W Chestnut Ave
Yakima, WA 98902
Tax ID / EIN: 81-4552945

represented by **Sam Alberts**
(See above for address)

Plaintiff

Sunnyside Professional Services, LLC
900 W Chestnut Ave
Yakima, WA 98902
Tax ID / EIN: 47-5499567

represented by **Sam Alberts**
(See above for address)

Plaintiff

Yakima Home Care Holdings, LLC
7 S. 10th Ave., Suite 400
Yakima, WA 98902
Tax ID / EIN: 81-3825537

represented by **Sam Alberts**
(See above for address)

Plaintiff

Yakima HMA Home Health, LLC
7 S. 10th Ave.
Yakima, WA 98902
Tax ID / EIN: 27-0173556

represented by **Sam Alberts**
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V.

Defendant

United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration

represented by **Brian M Donovan**
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Filing Date	#	Docket Text
05/15/2020	1	

			Adversary case 20–80016. COMPLAINT. Fee Amount \$350. Nature of Suit: (91 (Declaratory judgment)) (72 (Injunctive relief – other)) (21 (Validity, priority or extent of lien or other interest in property)) (02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy))) (Alberts, Sam) (Entered: 05/15/2020)
06/23/2020		<u>26</u>	MOTION to Withdraw Reference . Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (Donovan, Brian) DEPUTY Clerk Note: Fee amount removed from docket text – not applicable for US Attorney's Office. Modified on 6/24/2020 (CMR). (Entered: 06/23/2020)
06/23/2020		<u>27</u>	CERTIFICATE of Service.. Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (RE: Motion to Withdraw Reference <u>26</u>). (Donovan, Brian) (Entered: 06/23/2020)
07/07/2020		<u>35</u>	OBJECTION (RE: Motion to Withdraw Reference <u>26</u>). Filed by Sam Alberts on behalf of Astria Health (Alberts, Sam) (Entered: 07/07/2020)
07/14/2020		<u>40</u>	REPLY signed by Brian M. Donovan (RE: Motion to Withdraw Reference <u>26</u>). Filed by Brian M Donovan on behalf of United States Small Business Administration and Jovita Carranza, in her capacity as Administrator for the United States Small Business Administration (Donovan, Brian) (Entered: 07/14/2020)
07/17/2020		<u>41</u>	JUDGE Comments (RE: Motion to Withdraw Reference <u>26</u>). (KAC) (Entered: 07/17/2020)

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*Attorneys for the Chapter 11 Debtors and Debtors
 In Possession*

**UNITED STATES BANKRUPTCY COURT
 EASTERN DISTRICT OF WASHINGTON**

In re:

ASTRIA HEALTH, *et al.*,

Debtors and Debtors in
 Possession.¹

ASTRIA HEALTH, *et al.*,

Plaintiffs,

Chapter 11
 Lead Case No. 19-01189-11
 Jointly Administered

**Adv. Proc. Case No. 20-_____ -
 WLH**

VERIFIED COMPLAINT

¹ The Debtors, along with their case numbers, are as follows: Astria Health (19-01189-11), Glacier Canyon, LLC (19-01193-11), Kitchen and Bath Furnishings, LLC (19-01194-11), Oxbow Summit, LLC (19-01195-11), SHC Holdco, LLC (19-01196-11), SHC Medical Center - Toppenish (19-01190-11), SHC Medical Center - Yakima (19-01192-11), Sunnyside Community Hospital Association (19-01191-11), Sunnyside Community Hospital Home Medical Supply, LLC (19-01197-11), Sunnyside Home Health (19-01198-11), Sunnyside Professional Services, LLC (19-01199-11), Yakima Home Care Holdings, LLC (19-01201-11), and Yakima HMA Home Health, LLC (19-01200-11).

**COMPLAINT AGAINST SBA AND
 ADMINISTRATOR re PPP Funds**

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1 v.

2 UNITED STATES SMALL BUSINESS
ADMINISTRATION and JOVITA
3 CARRANZA, in her capacity as
Administrator for the United States Small
4 Business Administration,

5 Defendants.

6 Debtor Astria Health (“Astria”), Debtor SHC Medical Center - Toppenish,
7 doing business as Astria Toppenish Hospital (“Toppenish”), both Washington
8 nonprofit corporations under § 501(c)(3) of title 26 of the United States Code, and
9 Debtor Yakima HMA Home Health LLC doing business as Astria Home Health &
10 Hospice-Yakima (“Astria Home Health”), also a Washington corporation, along with
11 the above-referenced affiliated debtors (collectively, the “Debtors”), the debtors and
12 debtors in possession in the above-captioned chapter 11 bankruptcy cases
13 (collectively, the “Chapter 11 Cases”), hereby file this complaint (the “Complaint”) against Defendant United States Small Business Administration (the “SBA”) acting
14 through Defendant Jovita Carranza in her capacity as the Administrator of the SBA
15 (the “Administrator”, and together with the SBA, the “Defendants”), as follows:

16 I. JURISDICTION AND VENUE

17 1. The Court has jurisdiction over this adversary proceeding pursuant to 28
18 U.S.C. §§ 157, 1331, 1334, 1361, and 2201, and 15 U.S.C. § 634(b). Jurisdiction is
19 20

21 **COMPLAINT AGAINST SBA AND
ADMINISTRATOR re PPP Funds**

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1 also proper under the judicial review provisions of the Administrative Procedure Act
2 (the “APA”), 5 U.S.C. § 702.

3 2. Declaratory and injunctive relief is sought consistent with 5 U.S.C. § 706
4 and as authorized by 28 U.S.C. § 2201 and 2202. The award of costs and attorneys’
5 fees against the United States (“U.S.”) generally or against the SBA specifically is
6 sought pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

7 3. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

8 4. The venue is proper pursuant to 28 U.S.C. §§ 1391, 1408, and 1409.

9 5. The Court has the power to grant the relief requested based on §§ 105,
10 106, and 525 of title 11 of the United States Code, §§ 101 *et seq.* (the “Bankruptcy
11 Code”).

12 6. The Debtors consent to entry of final orders by this Court in this
13 adversary proceeding.

14 II. PARTIES

15 7. Debtor Astria, a Washington nonprofit corporation, is the direct or
16 indirect corporate member of several entities that make it the largest non-profit
17 healthcare system based in Eastern Washington. The Astria system is headquartered
18 in the heart of Yakima Valley, Washington. The Debtors continue to operate
19 Sunnyside Community Hospital Association (“Sunnyside”), a 38-bed critical access
20 hospital in Sunnyside, Washington, and Toppenish, a 63-bed hospital in Toppenish,

1 Washington, as well as several related clinics and related healthcare businesses such
2 as Astria Home Health.

3 8. The SBA is an agency of the United States of America whose central
4 office is located at 409 Third Street, SE Washington, D.C. 20416. The SBA can sue
5 and be sued in a court of competent jurisdiction, including for declaratory relief and
6 damages. *Mar v. Kleppe*, 520 F.2d 867, 869 (10th Cir. 1975).

7 9. The Administrator can sue and be sued on behalf of the SBA in any court
8 of general jurisdiction under § 106(a)² of the Bankruptcy Code and 15 U.S.C.
9 § 634(b),³ and can be served with process pursuant to Rule 7004(b)(4) and (5) of the
10 Federal Rules of Bankruptcy Procedure by United States First Class Mail as follows:

11
12
13 ² As explained in the legislative history of § 106, although “an order against a
14 governmental unit will not be enforceable by attachment or seizure of government
15 assets[,]” the court “retains ample authority to enforce nonmonetary orders and
16 judgments.” 140 Cong. Rec. H10752-01, at H10766, 1994 WL 545773 (Oct. 4, 1994).

17 ³ Courts have expressly found that the SBA Administrator can be enjoined when she
18 acts beyond the scope of her authority. *Ulstein Mar., Ltd. v. United States*, 833 F.2d
19 1052, 1057 (1st Cir. 1987) (“The no injunction language protects the agency from
20 interference with its internal workings . . . but . . . should not be interpreted as a bar

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2 U.S. Small Business Administration
3 409 3rd Street S.W.
4 Washington, D.C. 20416

5 Kerrie Hurd
6 U.S. Small Business Administration
7 2401 4th Ave., Suite 450
8 Seattle, WA 98121

9 William D. Hyslop
10 U.S. Attorney
11 Eastern District of Washington
12 Attn: First Assistant, AUSA, Joseph H. Harrington
13 Attn: Civil Chief, AUSA Timothy M. Durkin
14 Attn: Civil Process Clerk
15 Office of the U.S. Attorney
16 402 E Yakima Ave, Suite 210
17 Yakima, WA 98901

18 Attorney General of the United States
19 Attn: Civil Process
20 U.S. Department of Justice
21 950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Additionally, a copy can be served by e-mail to the following individuals:

22 Ruth Harvey
23 Director
24 Commercial Litigation Branch
25 Civil Division
26 U.S. Department of Justice
27 Ruth.harvey@usdoj.gov

28 _____
29 to judicial review of agency actions that exceed agency authority where the remedies
30 would not interfere with internal agency operations.”).

31 **COMPLAINT AGAINST SBA AND
ADMINISTRATOR re PPP Funds**

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 5 U.S. Small Business Administration
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6 **III. SUMMARY OF RELIEF REQUESTED**

7 10. This adversary proceeding arises out of Banner Bank's denial, at the
 8 direction of the SBA acting through the Administrator, of two of the Debtors'
 9 applications for loans under the Paycheck Protection Program ("PPP") because the
 10 applicants are debtors in bankruptcy. The Debtors seek to have the SBA and the
 11 Administrator enjoined from their improper and unlawful administration of PPP,
 12 which Congress enacted and the President signed as part of the Coronavirus Aid,
 13 Relief, and Economic Security Act (the "CARES Act"), Public Law 116-136.⁴ The
 14 CARES Act included stimulus funds designed to assist businesses, including for-
 15 profits and 501(c)(3) nonprofits, and to ensure that American workers continue to be
 16

17 ⁴ A full text of the CARES Act can be found at
 18 <https://www.govtrack.us/congress/bills/116/hr748/text> (last visited on May 14,
 19 2020).
 20

1 paid despite the economic impact of the Novel Coronavirus (“Covid-19”) and social
 2 distancing measures. Section 1102 of the CARES Act establishes PPP as a
 3 convertible loan program under § 7(a) of the Small Business Act, codified in 15 U.S.C
 4 § 636. While nominally called a “loan,”⁵ PPP disbursements are treated as grants—
 5 and there are no repayment obligations—if, among other things, a certain percentage
 6 of PPP funds are used for payroll and wage expenses, interest on mortgages, rent, or
 7 utilities. Importantly, neither the CARES Act, the Small Business Act, nor any other
 8 applicable law or regulation prohibits the granting of PPP funds to bankruptcy
 9 debtors, with the exception of an SBA rule issued and published after the Debtors
 10 submitted their PPP Applications (defined herein). Nevertheless, the Defendants
 11 denied the Debtors access to PPP disbursements on the sole basis that the Debtors are
 12 in bankruptcy, and in so doing have exceeded their statutory authority and improperly,
 13 unfairly, arbitrarily, capriciously, and unlawfully discriminated against the Debtors.

14 11. If the goal of the PPP is to help small businesses survive economic
 15 hardships caused by the Covid-19 pandemic through funding payroll costs, rent,
 16 interest and utilities during the initial shelter-in-place period, then it is illogical to
 17 require those businesses—particularly hospitals on the “front lines” of treating

18 _____
 19 ⁵ The Debtors’ use of the term “loan” or “loans” herein is not intended to waive or
 20 diminish its contention that PPP is in reality a support/grant program.

1 patients—to be excluded because they are in bankruptcy. In the words of Bankruptcy
 2 Judge Jones from the United States Bankruptcy Court for the Southern District of
 3 Texas on April 24, 2020: “But this can’t be what Congress intended. This can’t be
 4 the way we are supposed to treat our fellow man in this time. It’s inconceivable to
 5 me that this distinction [between a borrower in bankruptcy and one not in bankruptcy]
 6 could be drawn.” *See Hildago Country Emergency Service Foundation v. Carranza*,
 7 hearing transcript, attached hereto as **Exhibit 1**, at p. 32, lines 14-17.

8 12. Therefore, the Debtors seek, among other relief more fully described
 9 herein, an order requiring the Defendants and all agents, servants, employees, and any
 10 parties acting in concert with any of the foregoing (the “Restrained Parties”) to
 11 consider the Debtors’ Applications (defined herein) and any related forms,
 12 applications, or other documents⁶ without any consideration of the involvement of the
 13 Debtors or any owner of the Debtors in any bankruptcy. The Debtors also seek an
 14 order requiring the Restrained Parties to refrain from making or conditioning the
 15 approval of any PPP funds to the Debtors contingent on the Debtors or any owner of
 16 the Debtors not being “presently involved in any bankruptcy.” In addition, the
 17 Debtors seek declaratory relief relating to the Defendants’ violations of the APA and
 18 § 525(a) of the Bankruptcy Code. The Debtors also seek damages and an award of

19 _____
 20 ⁶ This includes the Lender Application (defined below).

1 their costs and attorneys' fees against the United States generally, or against the
 2 Defendants specifically, pursuant to the Equal Access to Justice Act, 28 U.S.C.
 3 § 2412, among other things.

4 **IV. BACKGROUND**

5 **A. General Background.**

6 13. The Debtors filed voluntary petitions for relief under chapter 11 of the
 7 Bankruptcy Code on May 6, 2019 (the "Petition Date"). These Chapter 11 Cases are
 8 currently being jointly administered before the Court. [Lead Docket No. 10]. Since
 9 the Petition Date, the Debtors have been operating their businesses as debtors in
 10 possession pursuant to §§1107 and 1108.

11 14. On May 24, 2019, the Office of the United States Trustee (the "U.S.
 12 Trustee") appointed an Official Committee of Unsecured Creditors (the
 13 "Committee") in these Chapter 11 Cases. [Lead Docket No. 135]. No trustee or
 14 examiner has been appointed.

15 15. Additional background facts on the Debtors, including an overview of
 16 the Debtors' business, information on the Debtors' capital structure, and events
 17 leading up to these Chapter 11 Cases, are contained in the Declaration of John M.
 18 Gallagher [Lead Docket No. 21] (the "Gallagher Declaration") and the Declaration of
 19 Michael Lane [Lead Docket No. 16] (the "Lane Declaration," and together with the
 20 Gallagher Declaration, the "First Day Declarations").

1 **B. Impact of the Novel Coronavirus on the Debtors' Operations.**

2 16. The world is currently experiencing a global pandemic brought on by
 3 widespread transmission of the Covid-19. Since early 2020, the U.S., including the
 4 State of Washington, has been taking steps to mitigate Covid-19's impact on the
 5 health of U.S. citizens and to "flatten the curve." Specifically, governments and local
 6 communities are working to employ strategies of quarantine and social distancing
 7 among residents in an attempt to slow the spread of the virus and give health care
 8 providers time to prepare resources for acute patients suffering from the disease. *See*,
 9 e.g., Washington State, "*Coronavirus Response*," [https://coronavirus.wa.gov/what-](https://coronavirus.wa.gov/what-you-need-know/whats-open-and-closed)
 10 [you-need-know/whats-open-and-closed](https://coronavirus.wa.gov/what-you-need-know/whats-open-and-closed) (last visited on May 12, 2020).

11 17. Flattening the curve will allow volumes of patient care to be more
 12 manageable for the healthcare system. A spike in patient volume could overwhelm
 13 the healthcare system. The Debtors, as providers with acute care facilities, are among
 14 the providers being called on to serve and treat patients during the crisis.

15 18. A significant portion of the Debtors' revenue is derived from outpatient
 16 procedures offering a wide range of medical services to patients.

17 19. Nevertheless, based on recommendations from the federal Centers for
 18
 19
 20

1 Disease Control (the “CDC”)⁷ and an order by the Governor of the State of
 2 Washington,⁸ the Debtors have postponed nonessential elective medical procedures.
 3 Only essential urgent and emergency procedures that if delayed would cause harm are
 4 still being provided. At this time, the Debtors continue to implement procedures in
 5 response to Covid-19 and state and federal directives such as: restricting staff and
 6 visitor access to the hospital; screening all patients, visitors, and staff before entry into
 7 the facility; and providing both in person and telehealth visits to patients. This has

9 ⁷See, e.g., CDC, “Coronavirus Disease 2019 (COVID-19) Healthcare Facility
 10 Guidance,” available at [https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-
 11 hcf.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fhealthcare-facilities%2Fguidance-hcf.html](https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-hcf.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fhealthcare-facilities%2Fguidance-hcf.html) (last visited May 14, 2020.)

13 ⁸ See Proclamation by the Governor of the State of Washington 20-24 entitled
 14 Restrictions on Non Urgent Medical Proceedings, available at
 15 [https://www.governor.wa.gov/sites/default/files/proclamations/20-24%20COVID-
 16 19%20non-urgent%20medical%20procedures%20\(tmp\).pdf](https://www.governor.wa.gov/sites/default/files/proclamations/20-24%20COVID-19%20non-urgent%20medical%20procedures%20(tmp).pdf), (last visited on May 14,
 17 2020) (prohibiting all hospitals from “providing health care services, procedures and
 18 surgeries that, if delayed, are not anticipated to cause harm to the patient within the
 19 next three months”).

1 and continues to have a significant negative impact on the Debtors' cash position.⁹ A
 2 true and correct copy of the Debtors' most current weekly cash flow budget is attached
 3 hereto as Exhibit A.

4 **C. The CARES Act and the SBA's Denial of the Debtors' PPP Applications.**

5 20. Prior to the enactment of the CARES Act, the "SBA 7(a) Loan" was the
 6 SBA's primary loan program for providing financial assistance to small businesses.
 7 Under typical circumstances, the SBA 7(a) Loan (under the pre-CARES Act
 8 requirement) required that the applicant meet, among other things, the credit
 9

10 _____
 11 ⁹ The Debtors are not alone in suffering significant financial impact from foregoing
 12 elective surgeries and other repercussions of the pandemic. "Hospitals across the U.S.
 13 are losing more than \$1 billion in daily revenue as they experience significant declines
 14 in patient volume during the COVID-19 pandemic, according to a report from Crowe,
 15 a public accounting, consulting and technology company." Ayla Ellison, *US hospitals*
 16 *losing \$1.4B in revenue per day, Becker's Hospital CFO Report*, (May 4, 2020),
 17 available at [https://www.beckershospitalreview.com/finance/us-hospitals-losing-1-](https://www.beckershospitalreview.com/finance/us-hospitals-losing-1-4b-in-revenue-per-day.html?origin=CIOE&utm_source=CIOE&utm_medium=email&oly_enc_id=2004C5404478F9G)
 18 [4b-in-revenue-per-](https://www.beckershospitalreview.com/finance/us-hospitals-losing-1-4b-in-revenue-per-day.html?origin=CIOE&utm_source=CIOE&utm_medium=email&oly_enc_id=2004C5404478F9G)
 19 [day.html?origin=CIOE&utm_source=CIOE&utm_medium=email&oly_enc_id=200](https://www.beckershospitalreview.com/finance/us-hospitals-losing-1-4b-in-revenue-per-day.html?origin=CIOE&utm_source=CIOE&utm_medium=email&oly_enc_id=2004C5404478F9G)
 20 [4C5404478F9G](https://www.beckershospitalreview.com/finance/us-hospitals-losing-1-4b-in-revenue-per-day.html?origin=CIOE&utm_source=CIOE&utm_medium=email&oly_enc_id=2004C5404478F9G).

1 requirements detailed in 13 CFR § 120.150. In that regard, 13 CFR § 120.150 lists
2 the following criterion:

3 The applicant (including an Operating Company) must be creditworthy.
4 Loans must be so sound as to reasonably assure repayment. SBA will consider:

- 5 (a) Character, reputation, and credit history of the applicant (and the
Operating Company, if applicable), its Associates, and guarantors;
- 6 (b) Experience and depth of management;
- 7 (c) Strength of the business;
- 8 (d) Past earnings, projected cash flow, and future prospects;
- 9 (e) Ability to repay the loan with earnings from the business;
- 10 (f) Sufficient invested equity to operate on a sound financial basis;
- 11 (g) Potential for long-term success;
- 12 (h) Nature and value of collateral (although inadequate collateral
will not be the sole reason for denial of a loan request); and
- 13 (i) The effect any affiliates (as defined in part 121 of this chapter)
may have on the ultimate repayment ability of the applicant.

14 21. While there is no *per se* listed exclusion of a bankruptcy debtor
15 participating in the prior SBA 7(a) Loan program, when these criteria are coupled
16 with the requirements that the associated lending institution practice appropriate
17 diligence and credit assessment, the effect was *de facto* exclusion of any bankruptcy
18 debtors from securing an SBA 7(a) Loan.

19 22. On or about March 27, 2020, Congress enacted and the President signed
20 the CARES Act.

21 23. The CARES Act included stimulus funds designed to assist businesses,
including 501(c)(3) nonprofits, and to ensure that American workers continue to be

1 paid despite the economic impact of Covid-19 and social distancing measures.

2 24. Section 1102 of the CARES Act establishes PPP as a convertible loan
3 program under § 7(a) of the Small Business Act, codified at 15 U.S.C § 636. While
4 nominally called a “loan,” PPP disbursements are treated as grants—and there are no
5 repayment obligations—if, among other things, seventy-five percent (75%) of PPP
6 funds are used for payroll and wage expenses, interest on mortgages, rent, or
7 utilities.¹⁰

8 25. A qualified borrower may receive PPP funds equal to two and a half (2.5)
9 times its average monthly payroll, up to a limit of \$10 million. A borrower need not
10 exhaust its other credit options prior to receiving PPP funds.

11 26. A borrower can obtain funds under PPP by applying with any federally
12 insured participating lender using an application form created by the SBA, and the
13 SBA guarantees the loan.

14 27. The entire purpose of the program is to provide grants to companies in
15 order to ensure that workers can be paid. The CARES Act specifically waives all
16 underwriting considerations under § 7(a) of the Small Business Act, including but not

17 _____
18 ¹⁰ Funds not used in conformity with this ratio would be required to be repaid, but at
19 a low, fixed interest rate, with payments deferred for up to a year. *See* § 1102(g) of
20 the CARES Act.

1 limited to, underwriting requirements, collateral review, or loan covenants. There is
 2 no evaluation of risk because there is no expectation of repayment, provided funds
 3 are used for permitted purposes. All small businesses have a right to apply for PPP
 4 funds.

5 28. Section 1114 of the CARES Act grants the SBA emergency rule making
 6 authority and charges the SBA to issue regulations to carry out certain of the programs
 7 contemplated in the CARES Act, including PPP.

8 29. On April 2, 2020, the SBA and the Administrator issued an interim final
 9 rule (the “First Interim Rule”) providing guidance on, *inter alia*, the eligibility
 10 requirements to receive funds under PPP. The First Interim Rule adopts the eligibility
 11 standards contained in 13 CFR § 120.110, as further described in the SBA’s Standard
 12 Operating Procedure 50-10, subpart B, Chapter 2 (the “SOP 50-10”). See First
 13 Interim Rule, 2(c) (“Businesses that are not eligible for PPP loans are identified in 13
 14 CFR 120.110 and described further in SBA’s Standard Operating Procedure”).

15 30. The SOP 50-10 provides that in order to be eligible for a small business
 16 loan, an applicant must: “be an operating business;” “be organized for profit;”¹¹ “be
 17 located in the United States (including its territories and possessions);” “be small
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 19

20 ¹¹ The CARES Act has been extended to 501(c)(3) nonprofits.

1 under SBA size requirements,” and “demonstrate the need for desired credit.” *See*
 2 SOP 50-10, pp. 91-104.

3 31. The SOP-50-10 expressly states that the types of businesses listed as
 4 ineligible in 13 CFR § 120-110 are not eligible for an SBA loan. Importantly,
 5 bankruptcy debtors are not listed as ineligible businesses in 13 CFR § CFR 120-110
 6 and the SOP 50-10. *See* SOP 50-10, pp. 104-117.

7 32. The First Interim Rule also states that “[t]he program requirements of
 8 PPP identified in this rule temporarily supersede any conflicting Loan Program
 9 Requirement (as defined in 13 CFR 120.10).”

10 33. The First Interim Rule contains no explicit or implicit exclusion for
 11 debtors. The SBA and the Administrator published the First Interim Rule on April
 12 15, 2020. A true and correct copy of the First Interim Rule is attached here to as
 13 **Exhibit B.**

14 34. On April 2, 2020, in conjunction with issuing the First Interim Rule, the
 15 SBA and the Administrator released Official SBA Form 2483, titled “Paycheck
 16 Protection Program Borrower Application Form,” which is the SBA’s official form
 17 that borrowers must submit in connection with a PPP funds request. Other than filling
 18 out the official form of application, there is no underwriting, and the Administrator is
 19 relying upon assistance of commercial lenders acting in concert with the SBA to
 20 administer PPP.

35. Even though no law, regulation, or rule of any kind (including § 1102 of the CARES Act or the First Interim Rule) disqualified or authorized the SBA or the Administrator to disqualify bankruptcy debtors from participating in PPP, Official SBA Form 2483 asks whether “the Applicant . . . [is] presently involved in any bankruptcy” and then goes on to state that answering “yes” to that question means a request for PPP funds will not be approved.¹²

36. In addition, the SBA and the Administrator released Official SBA Form 2484, titled “Lender Application Form–Paycheck Protection Program Loan Guaranty,” which is the SBA’s official form that lenders must submit to the SBA in connection with a PPP funds request (the “Lender Application” and, together with the PPP application, the “PPP Applications”). A copy of the Lender Application is attached to this Complaint as **Exhibit D**.

¹² Notably, Senator Susan Collins, who drafted PPP, sent a letter to the Administrator stating her disagreement with the Administrator’s position that hospital-debtors cannot participate in PPP. Senators Angus King, Patrick Leahy, and Bernard Sanders, along with Congressman Peter Welch, have also submitted letters to the Administrator echoing the Debtor’s position. A copy of these letters are attached as **Exhibit C**. The Collins letter refers to a possible waiver by the SBA of certain requirements. Upon information and belief, this is unavailable.

1 37. The Lender Application asks the lender whether “[t]he Applicant has
2 certified to the Lender that neither the Applicant nor any owner (as defined in the
3 Applicant’s SBA Form 2483) is . . . presently involved in any bankruptcy.” The
4 Lender Application states that if the lender answers “no” to this question, “the loan
5 cannot be approved.”

6 38. On or about April 4, 2020, the SBA and the Administrator issued a
7 supplemental interim final rule (the “Second Interim Rule”) providing further
8 guidance on PPP. Like the First Interim Rule, the Second Interim Rule does not state
9 that bankruptcy debtors are ineligible for PPP funds. On April 15, 2020, the SBA and
10 the Administrator published the Second Interim Rule. A true and correct copy of the
11 Second Interim Rule is attached here to as **Exhibit E**.

12 39. On April 14, 2020, the SBA issued a third interim final rule (the “Third
13 Interim Rule”). Not only does the Third Interim Rule make no mention of bankruptcy
14 debtors, but it specifically states, “The Administrator recognizes that, unlike other
15 SBA loan programs, the financial terms for PPP Loans are uniform for all borrowers,
16 and the standard underwriting process does not apply because no creditworthiness
17 assessment is required for PPP Loans.” This disavowal by the SBA and the
18 Administrator of any concern for creditworthiness cuts directly against any argument
19 they might make that their exclusion of bankruptcy debtors is motivated by this
20 concern. On April 20, 2020, the SBA and the Administrator published the Third

1 Interim Rule. A true and correct copy of the Third Interim Rule is attached here to as
 2 **Exhibit F.**

3 40. The Debtors are precisely the sort of business PPP was enacted to
 4 protect—they are a small business (as defined by the SBA) in one of the industries
 5 hardest hit by the pandemic and are attempting to obtain funding to meet payroll for
 6 their employees, among other permitted uses. PPP funds would allow the Debtors to
 7 endure the pandemic without having to make further layoffs. However, due to what
 8 appears to be a completely arbitrary, baseless, and discriminatory requirement
 9 imposed by the SBA and the Administrator, the Debtors are ineligible to participate
 10 based solely on their status as a debtor under the Bankruptcy Code. The Debtors
 11 otherwise meet the criteria for eligibility to participate in PPP.

12 41. As early as April 3, 2020, the Debtors considered submitting an
 13 application for PPP funds; however, they were informed such application would be
 14 denied because of their status as debtors in bankruptcy.

15 42. PPP funds are available on a first come, first served basis. The first
 16 tranche of PPP funding was completely exhausted on April 16, 2020. Congress
 17 subsequently provided more funds, but PPP ends June 30, 2020 or when PPP funds
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 20

1 are exhausted, whichever comes first.¹³

2 43. In anticipation of additional PPP funding, on April 17, 2020, Debtors
3 Toppenish and Astria Home Health submitted PPP applications (the “Toppenish
4 Application” and the “Astria Home Health Application”, respectively, and together
5 the “Applications”) to their commercial lender, Banner Bank. A copy of the
6 Applications are attached as **Exhibits G and H**.

7 44. Based on an average monthly payroll of \$1,130,622.00 for its 318
8 employees, the Toppenish Application requests a total of \$2,826,556.00, to be used
9 for solely for payroll, lease and/or mortgage interest, and utilities. **Exhibit G.**

10 45. Based on an average monthly payroll of \$188,790.00 for its twenty-four
11 (24) employees, the Astria Home Health Application requests a total of \$471,975.00,
12 to be used solely for payroll purposes. **Exhibit H.**

13 46. The Debtors sized their request for PPP funds to ensure that the funds
14 would be treated as a grant and be forgivable. To the extent any portion of the funds
15

16 ¹³ See Robin Saks Frankel, *Congress Passed Another Coronavirus Relief Bill. What’s*
17 *In It For Small Businesses?*, FORBES (April 22, 2020, 9:37 AM), available at
18 [https://www.forbes.com/sites/advisor/2020/04/22/the-senate-passed-another-](https://www.forbes.com/sites/advisor/2020/04/22/the-senate-passed-another-coronavirus-relief-bill-whats-in-it-for-small-businesses/#19ba34c0114a)
19 [coronavirus-relief-bill-whats-in-it-for-small-businesses/#19ba34c0114a](https://www.forbes.com/sites/advisor/2020/04/22/the-senate-passed-another-coronavirus-relief-bill-whats-in-it-for-small-businesses/#19ba34c0114a).
20

1 requested by the Debtors would exceed the amount to be forgiven, the Debtors intend
 2 to immediately repay that amount. The Debtors also intend to use the PPP funds in
 3 such a manner that they would be eligible for forgiveness under the PPP.

4 47. The Debtors truthfully answered “yes” to question 1 on the Applications.

5 48. Upon information and belief, the SBA directed Banner Bank not to
 6 process the Applications because the Debtors answered “yes” to question 1 on the
 7 Applications.

8 49. On April 21, 2020, Banner Bank’s Vice President and Sunnyside Branch
 9 Manager, Cece Ibarra (“Ms. Ibarra”), contacted the Debtors’ Controller, Sandra
 10 Cortez, via electronic mail regarding the Applications. A true and correct copy of
 11 Ms. Ibarra’s correspondence is attached hereto as **Exhibit I**. In this e-mail, Ms. Ibarra,
 12 explaining that the Debtors are not eligible for PPP funds, informs the Debtors that it
 13 is “an SBA rule” that “the bankruptcy is going to prevent you [the Debtors’] from
 14 qualify[ing] for the loans” and that this rule “appl[ies] to any entity that was included
 15 in the bankruptcy.” Ms. Ibarra further writes, “Sorry[,] I personally think that if
 16 someone deserves this loan [it] is the Hospitals. But that’s an SBA rule.”

17 50. On or about April 23, 2020, Congress enacted legislation making
 18 additional funds available for PPP. This second tranche of funding has not yet been
 19 exhausted.

20 51. On April 24, 2020, the SBA and the Administrator proposed another

interim final rule (the “Fourth Interim Rule”) with respect to PPP that states “[i]f the applicant or the owner of the applicant is the debtor in a bankruptcy proceeding, either at the time it submits the application or at any time before the loan is disbursed, the applicant is ineligible to receive a PPP loan.” The stated basis for this rule is that the Administrator “determined that providing PPP loans to debtors in bankruptcy would present an unacceptably high risk of an unauthorized use of funds or non-repayment of unforgiven loans.” A copy of this Fourth Interim Rule is attached hereto as **Exhibit**

J. The SBA and the Administrator published the Fourth Interim Rule on April 28, 2020.

52. After receiving no official denial from Banner Bank or the SBA, on or about April 30, 2020, the Debtors’ President and Chief Executive Officer, John Gallagher (“Mr. Gallagher”), spoke to Ms. Ibarra, who again stated that it was the SBA’s rule that entities like the Debtors who were in bankruptcy were ineligible for PPP funds. Ms. Ibarra also informed Mr. Gallagher that denial letters were not being sent because the focus was on processing eligible applications.

53. On May 6, 2020, the Debtors received official notice (the “May 6, 2020 Notice”) that Banner Bank was unable to approve the Debtors Applications because

1 the Debtors “do[] not meet SBA eligibility criteria.”¹⁴ A true and correct copy of the
 2 May 6, 2020 Notice is attached hereto as **Exhibit K**.

3 54. The Debtors understand that Banner Bank is willing to advance funds
 4 through PPP if the Applications (or a subsequently amended applications) can be
 5 processed and approved as meeting the SBA’s criteria.

6 55. The Fourth Interim Rule had not been proposed at the time the Debtors
 7 submitted their Applications or when the SBA and the Administrator directed Banner
 8 Bank not to process the Applications. One of the interim final rules in effect at the
 9 time the Debtors submitted their Applications, the First Interim Rule, states that “[t]he
 10 program requirements of PPP identified in this rule temporarily supersede any
 11 conflicting Loan Program Requirement (as defined in 13 CFR 120.10).” The CARES

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 14 ¹⁴ The Debtors actually received two identical notices, both for Toppenish. The
 15 Debtors believe this was in error and that Banner Bank intended that one of the notices
 16 be in regards to Astria Home Health. The Debtors have asked for confirmation from
 17 Banner Bank that the second notice was intended for Astria Home Health, but as of
 18 the date of filing have received no answer. Nevertheless, the Debtors were informed
 19 orally that the Astria Home Health Application was denied. The Debtors will
 20 supplement this filing with an exhibit of the notice as soon as they receive it.

1 Act, the Small Business Act, the First Interim Rule, the Second Interim Rule, and the
2 Third Interim Rule contained no exclusion against debtors receiving PPP funds.

3 56. The PPP funds are critical to the Debtors' ability to continue to operate
4 their businesses. These funds are vital to maintaining healthcare offerings to the
5 surrounding community. Lack of funding under this program would impair the
6 Debtors' ability to reorganize in the anticipated timeframe.

7 57. The Debtors already missed out on the first tranche of PPP funding, and
8 the second tranche is expected to be depleted quickly.¹⁵

12 ¹⁵ See, e.g., Robin Saks Frankel, *The Paycheck Protection Program Ran Out Of*
13 *Funding. What's Next For Small Business Owners?*, FORBES, (April 16, 2020, 5:44
14 PM) (noting that the first tranche of PPP funding ran out in 14 days), *available at*
15 [https://www.forbes.com/sites/advisor/2020/04/16/the-paycheck-protection-program-](https://www.forbes.com/sites/advisor/2020/04/16/the-paycheck-protection-program-ran-out-of-funding-whats-next-for-small-business-owners/#1b5be58c7440)
16 [ran-out-of-funding-whats-next-for-small-business-owners/#1b5be58c7440](https://www.forbes.com/sites/advisor/2020/04/16/the-paycheck-protection-program-ran-out-of-funding-whats-next-for-small-business-owners/#1b5be58c7440); Stephen
17 Gandel, *Round 2 Of Paycheck Protection Program Starts. Better Hurry*, CBS News
18 (April 28, 2020, 6:43 AM), *available at* [https://www.cbsnews.com/news/paycheck-](https://www.cbsnews.com/news/paycheck-protection-program-small-business-lending-round-2/)
19 [protection-program-small-business-lending-round-2/](https://www.cbsnews.com/news/paycheck-protection-program-small-business-lending-round-2/).

(Preliminary and Permanent Injunction)

6 59. The Debtors incorporate the allegations of Paragraphs 1 through 58 as if
7 set forth fully herein.

8 60. The Debtors are entitled to seek relief against the SBA, the
9 Administrator, and the Restrained Parties acting in concert with the Defendants under
10 Rule 65 of the Federal Rules of Civil Procedure, which is applicable to this action
11 pursuant to Rule 7065 of the Federal Rules of Bankruptcy Procedure.

61. There is no prohibition in the CARES Act or under § 7(a) of the Small Business Act prohibiting lending to debtors.

62. Moreover, the CARES Act specifically waives all underwriting considerations under § 7(a) of the Small Business Act.

63. The Debtors are likely to prevail on the merits of their claim for an injunction as well as for declaratory relief.

64. The balance of hardships favors issuance of preliminary injunctive relief. The inability to obtain PPP funds would cause the Debtors to suffer immediate and irreparable harm. In this case, the Debtors Toppenish and Astria Home Health have

1 had their cash flow negatively impacted by the Covid-19 pandemic and, therefore,
 2 access to the PPP funds will allow the Debtors to continue in operation providing
 3 medical care to the community in general and COVID-19 patients in particular. The
 4 current PPP funds are part of a second tranche of funds that is expected to be
 5 exhausted quickly (the first tranche lasted less than two weeks) and may not be
 6 replenished once exhausted. Thus, if the Court does not grant the Debtors a temporary
 7 restraining order pending resolution of the adversary proceeding, the PPP funds most
 8 likely will no longer available to the Debtors. Absent a temporary restraining order,
 9 there are no monetary damages that will be available, because the second tranche of
 10 PPP funds will be exhausted. Hence, the injury is real, imminent and incapable of
 11 being remedied by monetary damages. Moreover, preliminary and permanent
 12 injunctive relief while this matter is pending will not harm the SBA, the
 13 Administrator, or the Restrained Parties.

14 65. The Debtors seek an order enjoining the SBA, the Administrator, the
 15 Restrained Parties, including any commercial lender provided notice of the Court's
 16 order, *see* Fed. R. Civ. P. 65(d)(2)(C), from denying any application under PPP on the
 17 basis that the applicant is a debtor in bankruptcy and requiring that any application of
 18 the Debtors to participate in PPP be considered without the words "presently involved
 19 in any bankruptcy" being considered.

20 66. Due to the "first come, first served" nature of PPP appropriations, the

Debtors further seek an order enjoining the SBA, the Administrator, and the Restrained Parties from issuing loan guaranties or approving PPP Applications in an amount that would leave insufficient funds for the Debtors' funding pursuant to the Applications (or any subsequent applications filed shortly hereafter) until the Debtors' claims in this Complaint are resolved.

COUNT II

(Declaratory Relief)

67. The Debtors incorporate each of Paragraphs 1 through 58 as if set forth fully herein.

68. The Debtors are entitled to seek declaratory relief pursuant to 28 U.S.C. § 2201 and Rule 7001(9) of the Federal Rules of Bankruptcy Procedure.

69. Neither the CARES Act nor the Small Business Act prohibit disbursements under PPP to the Debtors based on their status as debtors under chapter 11 of the Bankruptcy Code.

70. The Debtors have a legal right to apply for funds under PPP and to have their Applications (or any amended applications) considered on the same terms as other applicants without regard to their status as debtors under chapter 11 of the Bankruptcy Code.

71. By prohibiting Banner Bank from processing the Applications, and by prohibiting disbursements to debtors under PPP, the SBA and the Administrator have

1 exceeded their statutory authority.

2 72. The Debtors are entitled to a declaratory judgment that the CARES Act
3 requires their Applications to be considered on the same terms as other qualified
4 businesses that are not presently debtors in cases arising under the Bankruptcy Code.

5 COUNT III

6 (Violation of 11 U.S.C. § 525(a) – Discriminatory Treatment)

7 73. The Debtors incorporate each of Paragraphs 1 through 58 as if set forth
8 fully herein.

9 74. Section 525(a) of the Bankruptcy Code prohibits the federal government
10 from discriminating against a person based on that person's status as a debtor with
11 respect to a "license, permit, charter, franchise, or other similar grant[.]" Section
12 525(a)'s list is illustrative, and not exhaustive. Courts have applied § 525(a) to
13 matters involving government contracts, student loan applications, public housing,
14 insurance, public mortgage financing, utility service, building permits, employment
15 termination, and agricultural subsidies. *See generally Rees v. Employment Security*
16 *Commission of Wyoming (In re Rees)*, 61 B.R. 114, 120 (Bankr. D. Utah
17 1986)(collecting cases).

18 75. The Debtors are debtors under chapter 11 of the Bankruptcy Code.

19 76. PPP constitutes a federal program within the meaning of § 525(a) of the
20 Bankruptcy Code in that the program is designed to provide forgivable loans to

1 qualified businesses that are akin to grants.

2 77. The Debtors are each a small business within the meaning of the CARES
3 Act and are eligible to participate in the funding of forgivable loans, which are
4 functionally grants, under PPP.

5 78. The Debtors have, in fact, sized their PPP funding request to be
6 forgivable and, to the extent any funds would not qualify for forgiveness, intend to
7 immediately repay (and there is no prepayment penalty under PPP).

8 79. The April 21, 2020 e-mail from Ms. Ibarra, the bankruptcy-related
9 question on the PPP Applications, the communication between Mr. Gallagher and Ms.
10 Ibarra, the May 6, 2020 Notice, and the Fourth Interim Rule demonstrate that the SBA
11 and the Administrator have violated § 525(a) of the Bankruptcy Code with respect to
12 the Debtors.

13 80. Importantly, the Debtors are not being denied access to PPP because of
14 their creditworthiness. In fact, PPP was enacted precisely to provide relief to
15 struggling small businesses such as the Debtors in industries hard hit by the pandemic,
16 without regard to their creditworthiness. The Third Interim Rule states as much, “The
17 Administrator recognizes that, unlike other SBA loan programs, the financial terms
18 for PPP Loans are uniform for all borrowers, and the standard underwriting process
19 does not apply because no creditworthiness assessment is required for PPP Loans.”

20 81. This disavowal by the SBA and the Administrator of any concern for
21

1 creditworthiness cuts directly against any argument they might make that their
 2 exclusion of bankruptcy debtors is motivated by a concern regarding
 3 creditworthiness.

4 82. But for their status as debtors in bankruptcy, the Debtors are otherwise
 5 qualified for PPP funds. Having disclaimed any concern for creditworthiness, the
 6 SBA's sole basis for denying the Debtors the ability to participate in PPP appears to
 7 be simply the Debtors' label as "bankruptcy debtors." The SBA, therefore, has clearly
 8 violated, and continues to violate, § 525(a) of the Bankruptcy Code by discriminating
 9 against debtors in bankruptcy.

10 83. Any argument in the Fourth Interim Rule regarding risk are not based on
 11 any facts and arbitrarily presumes all debtors either mismanage estate funds or are
 12 fraudsters. Moreover, this argument is belied by that fact that the Debtors, like all
 13 Chapter 11 debtors, are subjected to substantial reporting requirements and are under
 14 significant oversight from this Court; the U.S. Trustee; the Committee; the general
 15 creditor body; and even the press.

16 84. Accordingly, the "bankruptcy disqualification" provisions of PPP
 17 Applications are denying the Debtors an opportunity to reorganize and to retain their
 18 employees, many of whom are crucial to the Debtors' ability to maintain business
 19 operations.

20 85. The SBA's violation of § 525(a) is causing ongoing harm to the Debtors.

COUNT IV

(Administrative Procedure Act – Exceeding Statutory Authority)

86. The Debtors incorporate each of Paragraphs 1 through 58 as if set forth fully herein.

87. Under the APA, courts must “hold unlawful and set aside agency action” that is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(c)(2).

88. The SBA and the Administrator may only exercise the authority conferred upon them by statute.

89. No law, regulation, or rule of any kind disqualifies, or authorizes the SBA or the Administrator to disqualify, bankruptcy debtors from participating in PPP.

90. However, the SBA and the Administrator issued PPP Applications, which state that PPP funds will not be approved if the applicant is “presently involved in any bankruptcy.” The SBA and the Administrator’s implementation of PPP in a manner that causes debtors in bankruptcy, including the Debtors, to be automatically ineligible is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” in violation of the APA. 5 U.S.C. §706(2)(C).

91. The SBA and the Administrator have made a final determination with respect to the issuance of PPP Applications and the arbitrary exclusion of bankruptcy debtors from the benefits and protections of PPP.

1 92. No administrative appeals or remedies are available to the Debtors to
 2 seek review of the SBA and the Administrator's determination to issue PPP
 3 Applications and their exclusion of bankruptcy debtors.

4 93. The SBA and the Administrator's violation of the APA is causing
 5 ongoing harm to the Debtors.

6 94. The Debtors are entitled to a declaratory judgment that the SBA and the
 7 Administrator's implementation of PPP in a manner that causes debtors in
 8 bankruptcy, including the Debtors, to be ineligible is "in excess of statutory
 9 jurisdiction, authority, or limitations, or short of statutory right," in violation of the
 10 APA.

11 95. The Debtors have no adequate remedy at law.

12 COUNT V

13 (Administrative Procedure Act – Arbitrary and Capricious)

14 96. The Debtors incorporate each of Paragraphs 1 through 58 as if set forth
 15 fully herein.

16 97. The APA provides that courts must "hold unlawful and set aside" agency
 17 action that is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. §706(2)(A).

18 98. The SBA has adopted a policy of automatically disqualifying bankruptcy
 19 debtors from participating in PPP, and has designed PPP Applications to carry out
 20 this policy.

1 99. As described above, no law, regulation, or rule of any kind disqualifies,
2 or authorizes the SBA or the Administrator to disqualify, bankruptcy debtors from
3 participating in PPP.

4 100. Moreover, the Debtors are precisely the sort of business targeted by
5 PPP—a small business in a hard hit area of the economy struggling to meet their payroll
6 obligations and remain operational. The SBA and the Administrator’s automatic
7 disqualification of the Debtors runs completely counter to the mandate of PPP.

8 101. The SBA and the Administrator’s implementation of PPP in a manner
9 that causes debtors in bankruptcy, including the Debtors, to be ineligible is therefore
10 “arbitrary, capricious, [or] an abuse of discretion” in violation of the APA. 5 U.S.C.
11 §706(2)(A).

12 102. The SBA and the Administrator have made a final determination with
13 respect to the issuance of PPP Applications and their arbitrary and unjustifiable
14 exclusion of bankruptcy debtors from participating in PPP.

15 103. No administrative appeals or remedies are available to the Debtors to
16 seek review of the SBA and the Administrator’s determination to issue PPP
17 Applications and their arbitrary exclusion of bankruptcy debtors.

18 104. The SBA and the Administrator’s violation of the APA is causing
19 ongoing harm to the Debtors.

6 COUNT VI

8 107. The Debtor incorporates each of Paragraphs 1 through 58 as if set forth
9 fully herein.

16 || 109. The SBA and the Administrator breached this duty.

17 110. The Debtors have the right to have an application for funds pursuant to
18 PPP considered without discrimination based on the Debtors' status as bankruptcy
19 debtors.

20 111. The SBA and the Administrator have no discretion to discriminate

1 against the Debtors based on their status as debtors in bankruptcy.

2 112. Upon information and belief, there are no administrative remedies
3 available to the Debtors at this time. The Debtors have based this belief upon
4 communications by staff for certain members of Congress who advised that the SBA
5 and the Administrator have taken the position that there is no administrative waiver
6 process with respect to PPP.

7 113. The Debtors are entitled to a writ of mandamus under 28 U.S.C. § 1361
8 to compel the SBA and the Administrator to remove from all PPP Applications all
9 prohibitions against debtors in bankruptcy participating in PPP, because the SBA and
10 the Administrator acted illegally and beyond their statutory authority in instituting
11 this disqualifying factor.

12 114. Accordingly, the Debtors respectfully request: a writ of mandamus
13 under 28 U.S.C. § 1361 to compel the SBA and the Administrator to remove from all
14 PPP Applications all purported prohibitions against debtors in bankruptcy
15 participating in PPP.

16 COUNT VII

17 (Declaration Regarding Interpretation of Ambiguous Language)

18 115. The Debtors incorporate each of Paragraphs 1 through 58 as if set forth
19 fully herein.

20 116. PPP Applications state that any applicant “presently involved in any

1 bankruptcy” is ineligible to participate in PPP.

2 117. The phrase “involved in any bankruptcy” is overly broad, vague, and
 3 difficult to apply. If given its plain meaning, this phrase would disqualify any
 4 applicant who is a creditor or vendor to a debtor in a bankruptcy case, or even just a
 5 party in interest of any kind. This interpretation would be nonsensical, and should be
 6 avoided. *See, e.g., In re Kaiser Aluminum Corp.*, 456 F.3d 328, 338 (3d Cir. 2006)
 7 (“A basic tenet of statutory construction is that courts should interpret a law to avoid
 8 absurd or bizarre results.”).

9 118. The phrase “involved in any bankruptcy” is therefore ambiguous, as its
 10 intended scope is unclear. *See, e.g., In re Idleaire Technologies Corp.*, No. 08-10960,
 11 2009 WL 4131117, *8 (Bankr. D. Del. Feb. 18, 2009) (stating that language can be
 12 considered ambiguous when applying plain meaning would lead to absurd result).

13 119. Where language in a statute is ambiguous, a court may look to legislative
 14 intent to determine the meaning. *See, e.g., Kaiser Aluminum*, 456 F.3d at 338 (“It is
 15 true that interpretations of a statute which would produce absurd results are to be
 16 avoided if alternative interpretations consistent with the legislative purpose are
 17 available.”) (quoting *Griffin v. Oceanic Contractors, Inc.*, 548 U.S. 564, 575, 102
 18 S.Ct. 3245, 3252 (1982)).

19 120. In a press release accompanying the unveiling of PPP, the SBA itself
 20 described the purpose of the program:

1 These loans will bring immediate economic relief and eight
 2 weeks of financial certainty to millions of small businesses and
 3 their employees,” SBA Administrator Carranza said. “We urge
 4 every struggling small business to take advantage of this
 unprecedented federal resource – their viability is critically
 important to their employees, their community, and the
 country.¹⁶

5 121. The goal of making PPP funds available to “every struggling small
 6 business” would best be achieved by applying as narrow an interpretation as possible
 7 of the phrase “involved in any bankruptcy.” Interpreting this phrase as an across-the-
 8 board disqualification of struggling-but-potentially-viable-businesses such as
 9 debtors in possession under the Bankruptcy Code would be demonstrably at odds with
 10 the intent of PPP as expressed by the Administrator.

11 122. Instead, the Debtors submit that of the possible interpretations of the
 12 phrase “involved in any bankruptcy,” the one most consistent with the purpose of PPP
 13 would apply the phrase only to *chapter 7* debtors. These businesses, by definition,
 14 have already ceased operations, are in the process of liquidation, and are beyond

15
 16 ¹⁶ SBA, “*SBA’s Paycheck Protection Program for Small Businesses Affected by the*
 17 *Coronavirus Pandemic Launches*,” (April 3, 2020) available at
 18 [https://www.sba.gov/about-sba/sba-newsroom/press-releases-media-advisories/sbas-](https://www.sba.gov/about-sba/sba-newsroom/press-releases-media-advisories/sbas-paycheck-protection-program-small-businesses-affected-coronavirus-pandemic-launches)
 19 [paycheck-protection-program-small-businesses-affected-coronavirus-pandemic-](https://www.sba.gov/about-sba/sba-newsroom/press-releases-media-advisories/sbas-paycheck-protection-program-small-businesses-affected-coronavirus-pandemic-launches)
 20 [launches](https://www.sba.gov/about-sba/sba-newsroom/press-releases-media-advisories/sbas-paycheck-protection-program-small-businesses-affected-coronavirus-pandemic-launches).

1 rescue.

2 123. On the other hand, no principled distinction can be made between a
3 chapter 11 debtor in possession and any other “struggling small business.” In fact,
4 businesses having the characteristics of most debtors in possession are among the core
5 targets of PPP.

6 124. Accordingly, the best-fit interpretation of the phrase “involved in any
7 bankruptcy,” should not disqualify chapter 11 debtors in possession from PPP.

8 **V. NO BOND IS REQUIRED**

9 125. Due to the nature of this request, no bond is required for the enforcement
10 of an injunction, and under these circumstances, no bond should be required for the
11 temporary emergency relief sought by way of Rule 7065 of the Federal Rules of
12 Bankruptcy Procedure. *See, e.g., Mississippi Power & Light Co. v. United Gas Pipe*
13 *Line Co.*, 760 F.2d 618 (5th Cir 1985); 7 MOORE'S FEDERAL PRACTICE ¶ 65.04[1] at
14 65-38.

15 **VI. RELIEF REQUESTED**

16 With respect to **Count I**, the Debtors seek the following relief:

17 (A) That the Court enter a preliminary injunction enjoining the SBA, the
18 Administrator, the Restrained Parties, or any commercial lender from
19 denying an application under PPP funds on the basis that the applicant is
20 a debtor in bankruptcy or because of the words “presently involved in
21

any bankruptcy” on the PPP Application. The Debtors request that this relief be granted until such time as a final judgment is entered on their claims in **Count II, Count III, Count IV, Count V, Count VI, and Count VII;**

(B) That the Court enter a preliminary injunction enjoining the SBA and the Administrator from issuing loan guaranties or approving PPP Applications in an amount that would leave insufficient funds for the Debtors’ funding pursuant to the Applications (or any amended applications) until entry of final judgment on the Debtors’ claims in **Count II, Count III, Count IV, Count V, Count VI, and Count VII;** and

(C) That the Court enter permanent injunctive relief with respect to the relief in the two immediately preceding sub-paragraphs.

With respect to **Count II**, the Debtors seek the following relief:

(A) That the Court enter a declaratory judgment that the CARES Act does not prohibit the Applications (or any amended applications) from being considered on the same terms as other qualified businesses that are not debtors in cases arising under the Bankruptcy Code and which are also seeking PPP funding.

With respect to **Count III**, the Debtor seeks the following relief:

1 (A) That the Court make a determination that the SBA and the Administrator
 2 have violated § 525(a) of the Bankruptcy Code with respect to the
 3 Debtors' Applications;

4 (B) That the Court make a determination that the SBA and the Administrator
 5 have violated § 525(a) of the Bankruptcy Code by issuing its Fourth
 6 Interim Rule and promulgating PPP Applications excluding debtors; and

7 (C) That the Court award damages in an amount not less than \$3,298,531.00
 8 in the event that the Court does not grant the relief requested in **Count I**
 9 on a temporary or preliminary basis and it is later determined that the
 10 Debtors were eligible for PPP funds but none remain available.

11 With respect to **Count IV**, the Debtors seek the following relief:

12 (A) That the Court enter a declaratory judgment that the SBA and the
 13 Administrator's implementation of PPP in a manner that causes debtors
 14 in bankruptcy, including the Debtors, to be ineligible is "in excess of
 15 statutory jurisdiction, authority, or limitations, or short of statutory
 16 right," in violation of the APA.

17 With respect to **Count V**, the Debtors seek the following relief:

18 (A) That the Court enter a declaratory judgment that the SBA and the
 19 Administrator's implementation of PPP in a manner that causes debtors in
 20 bankruptcy, including the Debtors, to be ineligible is "arbitrary, capricious,

[or] an abuse of discretion” in violation of the APA.

With respect to **Count VI**, the Debtors seek the following relief:

- (A) That the Court issue a writ of mandamus under 28 U.S.C. § 1361 to compel the SBA and the Administrator to remove from all PPP Applications all purported prohibitions against debtors in bankruptcy participating in PPP and to process the Debtors’ Applications without regard to their status as debtors in bankruptcy; and
- (B) That the Court award damages in an amount not less than \$3,298,531.00 in the event that the Court does not grant the relief requested in **Count I** on a temporary or preliminary basis and it is later determined that the Debtors were eligible for PPP funds but none remain available.

With respect to **Count VII**, the Debtors seek the following relief:

- (A) That the Court make a determination that the SBA and the Administrator’s use of the phrase “involved in any bankruptcy” in the Fourth Interim Rule and the PPP Applications is overly broad, vague, and difficult to apply, and therefore ambiguous;
- (B) That the Court enter a declaratory judgment stating that the questions in the PPP Applications that ask whether the applicant is “presently involved in any bankruptcy” shall be interpreted as asking only whether the applicant is a debtor in a case under chapter 7 of the Bankruptcy Code; and

(C) That the Court award damages in an amount not less than \$3,298,531.00 in the event that the Court does not grant the relief requested in **Count I** on a temporary or preliminary basis and it is later determined that the Debtors were eligible for PPP funds but none remain available.

With respect to **Count I, Count II, Count III, Count IV, Count V, Count VI, and Count VII**, the Debtors request that they be awarded attorneys' fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(b). *See Murkeldove v. Astrue*, 635 F.3d 784 (5th Cir. 2011); *In re Transcon Lines*, 178 B.R. 228, 232 (Bankr. C.D. Cal. 1995) ("bankruptcy court has jurisdiction to award fees" under EAJA).

The Debtors also request any other and further relief be granted that may be appropriate.

Dated: May 15, 2020

/s/ Samuel R. Maizel

JAMES L. DAY (WSBA #20474)
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DENTONS US LLP

*Attorneys for the Chapter 11 Debtors
and Debtors In Possession*

VERIFICATION OF JOHN M. GALLAGHER

I, John M. Gallagher, submit this Verification in support of the complaint (the “Complaint”) the Debtors file against Defendant United States Small Business Administration (the “SBA”) acting through Defendant Jovita Carranza in her capacity as the Administrator of the SBA (the “Administrator”, and together with the SBA, the “Defendants”), and hereby state and declare as follows:

1. I am the President and Chief Executive Officer for Astria Health (“CEO”).

2. I declare under penalty of perjury under the laws of the United States of America that the allegations in the foregoing Verified Complaint are true and accurate, to the best of my knowledge and belief, and, if not based on my own personal knowledge, that I believe such allegations to be true and correct.

Dated: May 15, 2020

ASTRIA HEALTH

By: 

John M. Gallagher

President and Chief Executive
Officer

**COMPLAINT AGAINST SBA AND
ADMINISTRATOR re PPP Funds**

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Exhibit 1

(Hildago Country Emergency Service Foundation Hearing Transcript)

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**COMPLAINT AGAINST SBA AND
ADMINISTRATOR re PPP Funds**

1

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

HIDALGO COUNTY EMERGENCY)	CASE NO: 20-02006
SERVICE FOUNDATION,)	ADVERSARY
)	
Plaintiff,)	Houston, Texas
)	
vs.)	Friday, April 24, 2020
)	
JOVITA CARRANZA,)	(9:01 a.m. to 10:04 a.m.)
)	
Defendant.)	

HEARING

BEFORE THE HONORABLE DAVID R. JONES,
UNITED STATES BANKRUPTCY JUDGE

REMOTE AND TELEPHONIC APPEARANCES:

For Plaintiff: NATHANIEL PETER HOLZER, ESQ.
Jordan Holzer & Ortiz
500 N. Shoreline Drive
Suite 900
Corpus Christi, TX 78401

Also present: DAVID ELLIOTT

For Defendant: RICHARD A. KINCHELOE, ESQ.
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Court Reporter: Recorded; FTR-Mobile

Transcribed by: Exceptional Reporting Services, Inc.
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Corpus Christi, TX 78468
361 949-2988

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

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Houston, Texas; Friday, April 24, 2020; 9:01 a.m.

(Remote and telephonic appearances)

(Call to order)

THE COURT: All right, good morning, everyone. This is Judge Jones. Today is Friday, April the 24th, 2020, which is the docket for Corpus Christi, Texas.

First matter on this morning's docket is Adversary Number 20-2006, Hidalgo County Emergency Services versus the director of the Small Business Administration. Take appearances, please.

Mr. Holzer, I see you there, you want to lead us off, please.

MR. HOLZER: Pete Holzer, your Honor, for the Plaintiff, Hidalgo County Emergency Service Foundation. I believe my co-counsel, Kay Walker, is on the line, and also believe the Chief Restructuring Officer of the Debtor, Mr. Romero, was going to call in.

THE COURT: All right, thank you. Good morning to everyone.

Mr. Kincheloe, and I look at the official title, I said director of the SBA. I see that the title is administrator. I meant nothing by it, my apologies. Do you want to go ahead and make your appearance, please?

MR. KINCHELOE: Thank you, your Honor, Rick Kincheloe for the Defendant.

1 **THE COURT:** All right, thank you. Anyone else wish
2 to make an appearance?

3 **MR. ELLIOTT:** This is David Elliott (indisc.) for
4 Hidalgo County.

5 **THE COURT:** All right, thank you, Mr. Elliott. Good
6 morning to you. Anyone else?

7 **MR. ELLIOTT:** Good morning (indisc.)

8 **THE COURT:** All right, thank you, Mr. Castillo. Let
9 me -- Mr. Holzer and Mr. Kincheloe, let me sort of bring you
10 sort of full circle in my thoughts since yesterday. I spent a
11 good part of the night reading the entirety of the CARES Act.
12 I have come to conclude it is a very long and often complicated
13 document to work your way through, but I spent a lot of time
14 with it. I also have spent significant time reviewing the
15 SBA's final interim (indisc.) I believe the number is 2020-
16 0015. I have also looked at relevant provisions governing --
17 and, again, I will apologize if I don't get the title right,
18 but SBA 7(A) loans. I have also thought a great deal about the
19 jurisdictional issues that are present. And I have gone back
20 and reviewed some recent decisions by my circuit. And I am --
21 it is very clear to me that my circuit has concerns as to just
22 how far the jurisdiction of an Article One court goes. And I
23 don't want to entertain that argument today. And so to the
24 extent that I grant any relief, it will be as to this debtor
25 only in this adversary only. And to the extent that there are

1 what I'm going to call class-like issues, I do not want Rule 23
2 or anything close to Rule 23 to become part of this discussion.
3 I -- for a couple of reasons. Number one, it's my belief that
4 by the time that we were able to work through all of those
5 issues, the Debtor's economic situation might probably have
6 dictated the outcome. And that shouldn't be anyone's goal. I
7 also think that to the extent that there are (indisc.) 23
8 issues in a case like this, they are better left to my Article
9 Three colleagues. I think that's all I wanted to say in terms
10 of what I've done in preparation. Obviously I've read
11 everything. Mr. Kincheloe, I have read your brief. I have had
12 a time -- I have had an opportunity to review the authorities
13 cited in that brief. I've had a chance to do my own research.
14 So I feel like as though I'm fairly well-educated on the
15 applicable law. I think I understand the issue. That doesn't
16 mean that you shouldn't take the opportunity to advance any
17 position that you think. But I am prepared to talk about a
18 number of issues as we work our way through that. Any
19 questions before we get started?

20 **MR. HOLZER:** No, your Honor.

21 **MR. KINCHELOE:** No, your Honor.

22 **THE COURT:** All right, thank you. Mr. Holzer, I
23 think that it is your burden so if you'd like to lead off,
24 please.

25 **MR. HOLZER:** Thank you, your Honor. Pete Holzer for

1 the Plaintiff, Hidalgo County Emergency Services Foundation. I
2 know the Court is up to speed. I'm not going to belabor the
3 facts that have before you in the three sworn declarations.
4 The one of Mr. Romero in the sworn complaint, certain
5 paragraphs of that factual basis. There is a sworn declaration
6 of Mr. Elliott that was filed last night. And then just a few
7 moments ago Mr. Ponce's declaration hit the docket. I don't
8 know if the Court has had a chance to see Mr. Elliott and
9 Mr. Ponce's declarations.

10 **THE COURT:** I've read Mr. Elliott's. I did not see
11 Mister you said Ponce, I've not seen (indisc.) --

12 **MR. HOLZER:** Mr. Ponce.

13 **THE COURT:** Yes, I have not seen that one. I am
14 reading it as you talk. So go ahead.

15 **MR. HOLZER:** I was going to let you finish reading,
16 Judge.

17 **THE COURT:** Pretty short, direct, four paragraphs, I
18 got it.

19 **MR. HOLZER:** Okay, so Mr. Ponce really talks about
20 the background of the company and where it is and touches on
21 the impact of the coronavirus problem.

22 Mr. Elliott is certainly much more specific addressed
23 a few things that may have not been in the complaint that we
24 talked about yesterday, that is the process by which we got to
25 where we are and what we think happened and so forth.

1 So I think what I really want to do is talk sort of
2 in general about some of the issues that Mr. Kincheloe raised
3 in his brief, which is actually quite helpful in my thinking
4 about how things go together and what the administrator does
5 and how the government looks at these kind of issues. I think
6 one very important thing is that despite what we now know from
7 Mr. Kincheloe's brief, we still don't know who, where, why, or
8 how the bankruptcy exclusion came to be -- came about as part
9 of the application form. There's no doubt that it's there in
10 the form. And I do see the I'll call it a tenuous connection
11 that the government makes between the implementing rule and
12 that there's a form, okay, so there is a connection. But it
13 doesn't really tell us -- we just have no understanding and no
14 knowledge or any idea how, who, where, or why this exception
15 language showed up in this application on the PPP loan program.
16 I can speculate, and here's what my speculation is. First of
17 all, I think we're all aware that there are other lawsuits now,
18 a lot of them from what I've read in the papers, where the SBA
19 is being sued about giving these PPP loans to a larger
20 corporation, Fortune 500 companies, that really didn't make any
21 sense to be allowed under the PPP loan program and wound up
22 exhausting it, all these big-monied corporations. And so
23 that's ongoing. That's not really before this Court but it's
24 certainly out there. But it looks to me like what happened in
25 this agency is they took this CARES Act, which I agree, I've

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1 read the whole thing, too, and it's, you know, about what you'd
2 expect from legislation that occurred over just a period of a
3 few days and weeks. There is a section that has loans for
4 large companies and like the airlines and so on and so forth
5 that does have a bankruptcy exclusion, it's a specific one in
6 there. And then there's the paycheck protection loan under --
7 in Section 1100, 1102, that does not. And so it looks to me
8 like what the SBA has done is they then drafted the bankruptcy
9 exclusion in the large company section and they've applied it
10 also to the PPP loan protection. And then conversely they let
11 the --

12 **THE COURT:** (Indisc.)

13 **MR. HOLZER:** -- large companies into the PPP
14 (indisc.) --

15 **THE COURT:** Mr. Holzer, if I could just interrupt you
16 because I want to make sure that the record is clear. The
17 bankruptcy exclusion is actually in the section for midsized
18 businesses defined those companies with more than 500, less
19 than 10,000 employees, can be found at page 193 of the Act. I
20 have read it, I'm familiar with it. I just -- I don't think
21 there necessarily is a section that I read with respect to
22 large-sized businesses. The actual subtitle of the provision
23 are loans for midsized businesses.

24 **MR. HOLZER:** All right, (indisc.) --

25 **THE COURT:** (Indisc.)

1 **MR. HOLZER:** -- then I apologize, Judge. I conflated
2 those two and I've done the same mistake that I'm accusing the
3 SBA of. So I'm not -- I guess the point being, there's no ill
4 will. This is not a intentional ill will, they're out to get
5 the bankrupt companies. I think it's just a mistake in a badly
6 implemented process that they've done here, as evidenced by the
7 lawsuits for the big companies getting into this program and
8 exhausting it. In any event, I think it's an abuse of
9 discretion the way they've handled this and the way they've put
10 this bankruptcy exception. They've conflated these two
11 different programs. And then we're faced with this form that
12 has this exception and bank lenders that look at the form and
13 say, well, here's the exception, it's right here in the form I
14 have to use so I can't give you a loan. So with respect to the
15 abuse of discretion, and we are arguing, Judge, both Section
16 525, 523, I forget the number, is discrimination and a exercise
17 of authority that doesn't comply with the statute. And then so
18 I want to jump down to some cases Mr. Kincheloe has. His brief
19 talks about the Anti-Injunction Act in section -- in the Small
20 Business Act. And I looked at those cases. I have a couple of
21 cases, your Honor, if you need them that explain why in a
22 situation like this, the -- in a situation where the
23 administrator of a government agency exceeds the scope of their
24 authority like they're arguing here, that Anti-Injunction Act
25 doesn't apply. And I would start with the Supreme Court. It's

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1 the case is -- oh, where'd it go? *South Carolina versus Regan*
2 at 465 U.S. 367 from 1984. That case is a holding where the
3 anti-injunction provisions are inapplicable where Congress
4 didn't provide the plaintiff with an alternative legal way to
5 challenge the administration's ruling. And that was a case
6 related to taxes. We have *Canterbury Career School versus*
7 *Riley*, District of New Jersey, 1993, 833 F.Supp. 1097 basically
8 saying the same thing. This is a Secretary of Department of
9 Education has a similar anti-injunction provision in their
10 statute. The court said if the defendant, the Secretary of
11 Department of Education, has exceeded the scope of his
12 authority, then this court has jurisdiction to grant
13 appropriate injunctive relief, notwithstanding the anti-
14 injunction provision. And then, lastly, a case out of this
15 court from Judge Schmidt back in 1992, an unreported case, it's
16 a 1992 Westlaw 551256 pointing out that the Fifth Circuit has
17 left (indisc.) by implication recognizing that injunctive
18 relief is permissible where the government agency exceeds its
19 statutory authority. So with those cases and my arguments, I
20 think the question of whether or not this Court has
21 jurisdiction authority to enter an injunction, I think it does.
22 And I think it's well-supported in the law and under the facts
23 of this case.

24 So I wanted to talk about next a -- what I think is
25 why this statute does exceed the administrator's authority.

1 And it's partly a policy argument. So let's talk about a
2 hypothetical. So let's say you have a loan applicant who's
3 preparing for bankruptcy, hired bankruptcy counsel, hired the -
4 - hired a -- hired bankruptcy lawyer, paid them a retainer,
5 they're working on the schedules, but they haven't filed
6 bankruptcy yet. And so would that company -- would that
7 potential debtor qualify for these loans? Yes, because they
8 could answer that question "no." Let's talk about another
9 company (indisc.) --

10 **THE COURT:** Could they? I mean, Mr. Holzer, could
11 they?

12 **MR. HOLZER:** Could they --

13 **THE COURT:** (Indisc.)

14 **MR. HOLZER:** Could they?

15 **THE COURT:** I mean, if you look at the -- if you
16 compare the wording in the portion of the statute involving
17 midsize debtors, it actually says you aren't eligible if you
18 are a debtor in a case. The words in the form are: "presently
19 involved in a bankruptcy case." What does that mean? Does
20 that mean that if you (indisc.) a claim against someone in
21 bankruptcy, that you're not eligible under the Act? Does it
22 mean that if you consult with a bankruptcy (indisc.)
23 contemplated bankruptcy that you are not eligible for
24 participation (indisc.). What do the words "presently
25 involved" actually mean in your mind?

1 **MR. HOLZER:** Yes, I don't know because you're right,
2 a creditor in a bankruptcy could be presently involved. A
3 (indisc.) --

4 **THE COURT:** What if you're (indisc.) who has a lease,
5 are you presently involved in a bankruptcy case?

6 **MR. HOLZER:** Right. I do think the most natural
7 construction there is that you're a debtor in bankruptcy. I'm
8 not sure that there's any difference in the way I look at that
9 language and the way the government looks at the language. But
10 I do agree with the Court that there is some ambiguity. But
11 that's -- if you look at that language, a company that's
12 preparing to file bankruptcy is not presently involved in a
13 bankruptcy. It's just thinking about it. And if it hasn't
14 already, would it qualify for this loan, could it check the
15 "no" box on that form? I think there's no doubt it could and
16 should and would qualify for a loan. So let's talk about
17 another company that's insolvent and hasn't hired a bankruptcy
18 lawyer, but they're broke, they (indisc.) business, all the
19 employees have gone home, they're out of money, and they have
20 no idea whether they're going to survive, and can they apply
21 for a loan, you know, get the employees (indisc.) and the
22 answer is, yes, they would check that box "no." And so another
23 company that's virtually shut down, it's overdrawn on its bank
24 account, and would they be able to check the "no" box? The
25 answer is of course, they check the "no" box. And so all three

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1 of those hypotheticals are ways where a company who is
2 completely uncreditworthy can get one of these PPP loans. So
3 compare that to a debtor in possession that's operating,
4 complying with all the rules, filing its monthly operating
5 reports, running its business, and not only that, it's a
6 systemically important business, particularly in the time of an
7 active pandemic, and operating, but they don't qualify. It
8 simply makes no sense for the other companies that would
9 qualify to be able to get one of these forgivable loans and for
10 my client (indisc.) that I'm (indisc.) is not.

11 **THE COURT:** Mr. Holzer, let me go back to your
12 example because I'm not sure you really vetted that example
13 out. What if you have a company that is as you said
14 contemplating bankruptcy, and you have an owner in the business
15 who owns one percent of that company and is a creditor in a
16 large oil and gas bankruptcy case that's pending because they
17 own -- that person owns a small royalty interest, could the
18 company check the box or not?

19 **MR. HOLZER:** Haven't though through that one, Judge.
20 I would think they could check the "no" box. But, you know,
21 there's certainly a --

22 **THE COURT:** (Indisc.)

23 **MR. HOLZER:** -- (indisc.) of the language --

24 **THE COURT:** Read the language --

25 **MR. HOLZER:** -- that they would -- yeah.

1 **THE COURT:** Read the language. Is the business or
2 any owner presently involved in any bankruptcy?

3 **MR. HOLZER:** That's right. I think that you're
4 highlighting, your Honor, the flaws in this -- in what this
5 form says and all the ambiguities that are evidence of a poorly
6 instituted program beyond the administrator's authority. All
7 right, so let's see. So that's arbitrary and capricious is
8 what I think and gives you a basis to enter an injunction.

9 Let me just say that I do understand that the limit
10 on the jurisdiction. We never intended to seek relief for
11 anybody but my client, the Plaintiff in this lawsuit. Whether
12 it would be appropriate for a nationwide injunction or even a
13 Southern District injunction is not our concern. I'm only
14 worried about my client. My client only cares about its
15 survival.

16 So I wanted to then go to the question of whether or
17 not this is bankruptcy discrimination. I do agree in reading
18 Mr. Kincheloe's brief, he cited the Exquisito (phonetic) case
19 out of the Fifth Circuit and the Ares (phonetic) case out of I
20 believe it's the Fourth Circuit. And they're both in his brief
21 and those are cases that we came up in our research as well.
22 And I do think they -- those two cases are useful to compare
23 and contrast. Exquisito involved a program that the court
24 said, well, this is really about the jobs, not about a loan.
25 And so the -- so it was discrimination. Ares was more about a

1 loan than anything else and so that was not. So the case law
2 does say that if it's just a loan program, then the anti-
3 injunction -- excuse me, the -- it's not bankruptcy
4 discrimination.

5 So let's look at what we have here. Is this more
6 like the facts in *Exquisito* or more like the facts in *Ares*? I
7 think it's clearly this is more about saving jobs, preventing
8 collapse of the economy. It's not really about a company
9 borrowing money that under the statute it has to show its
10 ability to pay back. And that's in fact if you read the
11 requirements for qualify for a loan, that's just not in there.
12 You just have to say what you're going to use it for and that's
13 what my client needs it for is to pay payroll and help with the
14 rent and the other permissible uses for the funds. It's really
15 more of a grant to protect the economy, save jobs, than it is a
16 straightforward loan. So I would say that the cases that say
17 loans don't apply really don't have any impact here.

18 There's another case Mr. Kincheloe cited in his
19 brief, the *Toth*, T-O-T-H, case, and that also involved an
20 extension of credit which is really not what's happening here.
21 This is a different animal. So with that, Judge, I think I've
22 said everything I wanted to say for now. I think the facts are
23 pretty clear what happened that we qualify, except for this
24 arbitrary inclusion of a bankruptcy exception on the
25 application form, and that it is bankruptcy discrimination and

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1 the Court should grant an injunction.

2 **THE COURT:** All right, thank you. Mr. Kincheloe.

3 **MR. KINCHELOE:** Yes, your Honor, Rick Kincheloe.

4 (Indisc.) start with Mr. Holzer's discussion of he -- the
5 reasons for the exclusion. And I will say I really appreciate
6 Mr. Holzer sending me the cases he was going to discuss before
7 today. It certainly was an extreme professional courtesy.

8 I have received a regulation that I understand is
9 going to be published imminently like Monday. I can broadcast
10 it for the Court if the Court would like to read it because I
11 think it does explain (indisc.) saying about the wording of the
12 application but the regulation that's going to be published
13 does add some color to that. So just this is going to be at 13
14 CFR (indisc.) and 121. And then the bankruptcy exclusion
15 appears here. And so this is that if an applicant is currently
16 a debtor in bankruptcy or if it files bankruptcy before the
17 loan is funded, then it is ineligible. And this -- the second
18 paragraph explains kind of the rationale. There's a concern
19 that the SBA loses control over the funds because they become
20 property of the estate. There's also a concern the Court --
21 your Honor, is the Court done reading? I'll stop sharing so I
22 can go back to video.

23 **THE COURT:** Yeah, no, I read it. Thank you.

24 **MR. KINCHELOE:** Okay.

25 **MR. HOLZER:** Mr. Kincheloe, I'm -- I didn't --

1 **MR. KINCHELOE:** Oh, I --

2 **MR. HOLZER:** -- (indisc.) second page.

3 **MR. KINCHELOE:** The second page --

4 **MR. HOLZER:** (Indisc.)

5 **MR. KINCHELOE:** -- is just -- I can send it to you
6 shortly.

7 **MR. HOLZER:** Okay, that'll be fine.

8 **MR. KINCHELOE:** I don't think it was relevant. But
9 the other concern is the pandemic has created a unique public
10 need with unprecedented unemployment to get loans funded
11 extremely quickly. And in this need for speed, the traditional
12 underwriting is just not going to work. it's going to take too
13 long. And so to avoid that traditional underwriting and to get
14 this -- get these loans out guaranteed by SBA as quickly as
15 (indisc.) could, the decision was made to say if you're in
16 bankruptcy, you're excluded. We certainly had maybe a good --
17 it can be argued whether that's a good or bad decision from
18 public policy standpoint but at least that was the motivation
19 is get these loans out quickly and minimize the amount of
20 underwriting that needs to be done.

21 **THE COURT:** In fact there really is no underwriting
22 that's done, right? I mean, aren't the lenders authorized to
23 simply accept what's on the form and act just on the form, and
24 so long as they rely on the form, then they are protected;
25 isn't that the way that it works?

1 **MR. KINCHELOE:** From the interim rule I've read, yes.

2 But from the --

3 **THE COURT:** (Indisc.)

4 **MR. KINCHELOE:** -- regulation I just posted, I
5 haven't read the entire regulation. I got it maybe five
6 minutes before we started. And so unless something in the
7 regulation changes that, that's my understanding.

8 **THE COURT:** Got it.

9 **MR. KINCHELOE:** Turning to the jurisdictional issue,
10 admittedly the provision in the Small Business Act is unique.
11 I'm not aware of any other provision this broad. And certainly
12 there are other anti-injunctive language that appears in
13 various statutes. You know, the Anti-Injunction Act deals
14 (indisc.) I think that's a little different. The one thing I -
15 - there's a case -- well, it's -- there's so many other cases
16 out there, and one that Mr. Holzer shared, where there's a
17 statute that said except as otherwise provided herein, you
18 can't issue an injunction. And certainly that language seems
19 to suggest that, well, okay, if you violate the statute, we can
20 enjoin you, we just can't enjoin you otherwise. For 634, 15
21 USC 634, I don't see any similar condition. I mean, it just is
22 (indisc.) the Fifth Circuit (indisc.) decision I cite at
23 footnote six which, you know, I suppose we could, you know,
24 dispute whether it's holding or dicta, but it's a pretty
25 blanket assertion, thou shalt not enjoin the SBA. And again we

1 can argue whether Congress made a good or bad policy decision
2 in enacting that but I think that's the law. And so turning to
3 106, honestly 106 waives sovereign immunity for the entire
4 Federal government for purposes of 525. But (a)(4) states that
5 waiver is only to the extent it's consistent with applicable
6 non-bankruptcy law, and so I think we have to turn to this
7 likely unique provision applicable to the SBA administrator and
8 say, courts can't enjoin the SBA. Whether that's a good or bad
9 idea, so be it but that's what it says. And so I think
10 106(a)(4) coupled with 15 USC 634 I think means that there is
11 not a waiver of sovereign immunity for an injunction against
12 the SBA, depriving the Court of jurisdiction.

13 On -- moving to the 525(a) argument, it -- in the
14 Exquisito case, as I read it, it seemed to -- one thing that
15 was distinguishable is there was a preexisting relationship
16 between the SBA and the Air Force. That's one thing that's --
17 is noteworthy. The injunction in that case was not against the
18 SBA, it was against the Air Force. The -- there was a pre-
19 bankruptcy relationship in that case. And the Fifth Circuit
20 kind of thought through it and said, you know what, this
21 program is really designed to train minority-owned businesses
22 and so we view it more in the nature of a franchise. Fine, if
23 you're going to call it a franchise then, yeah, it's covered
24 under 525(a). What the Fifth Circuit has not decided, at least
25 as far as I can find, which the (indisc.) court, the *Toth* court

1 and I believe the (indisc.) Watts (phonetic) court in the Third
2 Circuit, and then the Second Circuit in Goldrich (phonetic) --
3 well, Goldrich dealt with student loans which has been
4 abrogated by 525(c), --

5 **THE COURT:** Right.

6 **MR. KINCHELOE:** -- those courts look at the decision
7 to extend credit, more specifically in the (indisc.) case
8 extend a guarantee of credit. That's something totally
9 different. It doesn't trigger this traditional gatekeeper
10 function of the government. Like, you know, for example, state
11 bar licensing, 525 expresses this desire that we don't want
12 lawyers to file bankruptcy, then they'd be unable to practice
13 law because they filed bankruptcy. No, we want them to be able
14 to continue to engage in the profession. Real estate brokers,
15 any other number of professions, we want them to continue being
16 able to engage in that profession and we don't want the
17 government's gatekeeper role to be influenced by bankruptcy.
18 That doesn't mean the government is not allowed to discriminate
19 in other ways. Again, maybe right, maybe wrong, but 525(a)
20 says it only bars discrimination in the context of licenses,
21 permits, charters, franchises, or other similar grant. The
22 (indisc.) case and the other ones, *Toth* and *Watts*, say that a
23 loan guaranteeing a loan is not really similar to these other
24 claims because it doesn't implicate this gatekeeper function.
25 And because it's not similar, it's not covered by 525(a) so we

1 don't even need to get to the question of whether the
2 government was motivated by the bankruptcy. It's just not
3 covered.

4 On the -- I heard -- as I understand the complaint,
5 there's not an APA claim asserted and so it's just whether
6 statutory authority was exceeded. The language in the CARES
7 Act is very broad. I mean, it's just the language for 1102
8 implementing the PPP loan guarantees (indisc.) may and that
9 leaves a very broad, open-ended grant of authority, leaves a
10 lot of discretion in the administrator which makes sense given
11 the context. I mean, this is imagine probably one of the
12 fastest pieces of legislation ever to make it through House,
13 Senate, and White House. And --

14 **THE COURT:** Well, wouldn't you agree that that
15 discretion has certain boundaries on it? For instance, that
16 discretion shouldn't be allowed to frustrate the purpose of the
17 Act itself, agreed?

18 **MR. KINCHELOE:** (No audible response)

19 **THE COURT:** (Indisc.) there are limits. You simply
20 can't say that you can implement rules and make an argument
21 that says, well, that discretion allows me to implement rules
22 that frustrate the application of the law.

23 **MR. KINCHELOE:** So, your Honor, --

24 **THE COURT:** (Indisc.)

25 **MR. KINCHELOE:** -- I agree that there are limits but

1 I think the use of the word "may," as I read the statute now
2 (indisc.) didn't happen and no one intends for this to happen
3 but if we're just taking the thought experiment to the extreme,
4 I think the use of the word "may," the administrator can say,
5 okay, I've got this authority, I don't have to exercise it.
6 And I think Congress would probably come back and put a shell
7 in there. But I think the way the statute's written, it's
8 pretty broad. Now, there are other limits in the Small
9 Business Act, like the administrator has to ensure that the,
10 you know, loans made under this section are of such sound value
11 or so secured as reasonably to assure repayment. So (indisc.)
12 administrator doesn't do that, the administrator violates the
13 statute. But because Congress prohibited injunctions on the
14 SBA, it really creates this strange space where, yeah, the
15 statute says the administrator has limits but I don't think the
16 statutory -- the statute authorized an injunction against the
17 administrator if the administrator exceeds those limits.

18 **THE COURT:** All right, so let me ask you this. And
19 we're going to come back to that issue in a second. But do I
20 even need to get there? Didn't the SBA effectively delegate
21 the authority to determine who's eligible to the participating
22 financial institutions?

23 **MR. KINCHELOE:** I don't (indisc.)

24 **THE COURT:** Let's take a practical example.

25 Mr. Holzer comes into his local financial institution for a PPE

1 -- I'm sorry, a PPP loan. He fills out the application. Who
2 makes the decision of whether or not he's eligible?

3 **MR. KINCHELOE:** So the -- as I read (indisc.) then
4 the bank has to receive the form, and as long as the bank
5 follows the form and the guidance, it may issue the loan and
6 it's going to be guaranteed by SBA. But it is still SBA who
7 decided those parameters that go into the form.

8 **THE COURT:** I'm not arguing with you on that. I'm
9 just saying who makes the decision of who's eligible and who's
10 not? The bank. Has to be that way. SBA couldn't do it. SBA
11 doesn't have enough employees, it doesn't have enough local
12 offices. It had to delegate part of that process to financial
13 institutions; otherwise, it would have been a program with
14 absolutely no ability to implement. I'm not complaining. I'm
15 just trying to be practical about it.

16 **MR. KINCHELOE:** Right, yeah. So again with the need
17 for speed, the analysis of whether a borrower meets the
18 appropriate criteria is sent to the banks.

19 **THE COURT:** Right. And in fact there really isn't an
20 underwriting function. I mean, if your instruction is
21 (indisc.) this form and you make the decision off the form,
22 there really isn't an underwriting function. There's no
23 evaluation of ability to repay, there's no evaluation of
24 collateral. And you know what I'm doing, I'm undermining your
25 argument that it's consistent with the (indisc.) power of SBA

1 7(A). You know, that just doesn't exist in this program. In
2 fact, let's just be practical. The entire intent of the
3 program is for people not to pay this back. It's a way of
4 getting money from the government to people that are being
5 harmed. And so long as they use it in the right way, they
6 don't have to pay it back. Am I -- tell me where I'm wrong
7 about that.

8 **MR. KINCHELOE:** Your Honor, I (indisc.) agree with
9 the Court that the intent was to get money to people who needed
10 it quickly. And certainly to the extent it's used for the
11 proper purpose, it is intended to be forgiven. And, you know,
12 I think the Court's correct, I mean, the amount of underwriting
13 is virtually nil. I mean, the SBA set up parameters and said
14 banks (indisc.) somebody meets these parameters, that's the
15 amount of underwriting we're going to do. And one of the
16 decisions made by SBA was, well, since we can't really -- we
17 don't have the time to go through and do a traditional credit
18 inquiry, we're going to exclude companies in bankruptcy, you
19 know, together with this purpose of we can't control the money
20 once it goes into the bankruptcy estate (indisc.)

21 **THE COURT:** (Indisc.) said that, I mean, (indisc.)
22 hundred and eighty degrees wrong, I mean, isn't part of my job
23 to ensure that debtors act in accordance with the law? I mean,
24 I would think, I mean, assuming that I'm doing my job, and I
25 try really hard to do my job every day, isn't there actually a

1 greater level of oversight than for someone who's not in
2 bankruptcy who can simply theoretically do what they want to
3 with the money once they get it?

4 **MR. KINCHELOE:** I disagree, your -- I disagree with
5 your Honor's point. It's not a question of oversight. I think
6 it's a question of the way the statute is written, if Hidalgo
7 receives a PPP loan outside of bankruptcy, they are free to
8 choose how to use those funds. Now, --

9 **THE COURT:** Are they?

10 **MR. KINCHELOE:** -- (indisc.) they use -- well, I
11 think they are. But if they use it for certain purposes,
12 they're required to repay it. If they use it for payroll
13 (indisc.) gets forgiven but if let's say company receives a
14 loan, a week later files bankruptcy. Well, all of those funds
15 then become property of the estate, subject to administrative
16 claims. And I don't think there's anything in the CARES Act
17 which would cause the proceeds of a PPP guaranteed loan to be
18 excluded from property of the estate or to be immune from the
19 claim of (indisc.) creditors or priority creditors.

20 **THE COURT:** Okay.

21 **MR. KINCHELOE:** So that's the motivation. Again, the
22 statutory authority is broad. I hear the Court's comment about
23 underwriting and the requirement to make sound loans. This is
24 the administrator's decision. But I go back to the anti-
25 injunction language in the Small Business Act that even to the

1 extent the administrator is wrong, the United States has not
2 waived sovereign immunity for an injunction to be issued
3 against the administrator.

4 **THE COURT:** And tell me why I can't issue -- because
5 it -- there's no doubt that the financial institution is
6 (indisc.) participation with the SBA. I think you just told me
7 they are given follow the form and process these loans. And
8 Rule 65 gives me the ability to issue injunctive relief against
9 anyone acting in participation with the parties, agreed?

10 **MR. KINCHELOE:** Would the Court give me a moment?

11 **THE COURT:** Of course. It would be 65(d)(2).
12 Actually (d)(2)(C).

13 **MR. KINCHELOE:** So, your Honor, I don't think the
14 Court can enjoin the bank. As I read this and I -- the Court
15 knows it way better than I do, but at least my quick reading of
16 the language of the rule is this would be if the Court enjoined
17 the administrator and anyone acting in concert with her, that
18 would capture this. I don't know that this lets the Court
19 enjoin the bank without also enjoining the administrator;
20 because without an injunction against the administrator, the
21 administrator doesn't have to guarantee the loan.

22 **THE COURT:** Well, I think -- I agree with you that I
23 can't order the SBA to guarantee a loan. I 100 percent agree
24 with that. The issue is can I order that the application be
25 considered without those four or five words. And if you're

1 telling me the person making that decision is, what was it,
2 PlainsCapital Bank, Mr. Holzer?

3 **MR. HOLZER:** Yes, your Honor.

4 **THE COURT:** You're telling me that I can't order
5 PlainsCapital Bank to consider the application without giving
6 any consideration for those words in the form?

7 **MR. KINCHELOE:** Then again I don't know that it
8 becomes a can't. I think it becomes a question of should or
9 should not. And with that question of whether or not the Court
10 should enjoin PlainsCapital Bank, I think there is a
11 substantial threat of irreparable injury to the bank because if
12 the bank --

13 **THE COURT:** (Indisc.)

14 **MR. KINCHELOE:** Well, because I think if the bank
15 follows the Court's order, ignores that line, and then issues
16 the loan, I think they are at risk if the SBA says we weren't
17 ordered to guarantee it, we're not guaranteeing it.

18 **THE COURT:** Okay, so you just say that I need to
19 order the SBA to comply with the law if I find discrimination.

20 **MR. KINCHELOE:** No, your Honor.

21 **THE COURT:** Is that it?

22 **MR. KINCHELOE:** I -- that -- your Honor, on that one
23 I think it's a question of can or cannot.

24 **THE COURT:** All right. So you're telling me that I
25 took an oath to uphold the statute, and if I find the statute's

1 been violated by the SBA, that I can do nothing about it?

2 **MR. KINCHELOE:** I think the Court is unable to issue
3 an injunction against the SBA, even if the statute has been
4 violated.

5 **THE COURT:** So tell me what it is I can do.

6 **MR. KINCHELOE:** I don't know, your Honor. For today
7 (indisc.) TRO, I do not think the Court can enter a TRO.

8 **THE COURT:** Got it, okay. Anything else?

9 **MR. HOLZER:** Your Honor, briefly.

10 **THE COURT:** No, I don't need anything else.

11 **MR. HOLZER:** Okay (indisc.)

12 **THE COURT:** Anything else, Mr. Kincheloe?

13 **MR. KINCHELOE:** Yes, your Honor. Just in closing, I
14 do dispute that the public policy considerations weigh in favor
15 of enjoining -- of issuing an injunction allowing this loan to
16 go -- to be made and guaranteed -- and/or guaranteed due to the
17 policy considerations. If the SBA is required to implement
18 traditional underwriting requirements, it is likely to slow
19 down this program and likely to delay proceeds to other
20 applicants.

21 **THE COURT:** Well how can it implement traditional
22 underwriting when it's been told what to do?

23 **MR. KINCHELOE:** Your Honor, I mean --

24 **THE COURT:** Simply because if I were to say that
25 there has been discrimination, that doesn't require the SBA to

1 do anything other than to not discriminate.

2 (Pause)

3 MR. KINCHELOE: Your Honor, I -- sorry, I don't think
4 I understand the Court's point.

5 THE COURT: I got it. Anything else?

6 MR. KINCHELOE: No, your Honor.

7 THE COURT: All right. So I have before me the
8 Debtor's request for a temporary restraining order against the
9 administrator of the SBA. I do find that I have jurisdiction
10 over the matter pursuant to (indisc.) Section 1334. I do find
11 that the adversary and the request for injunctive relief
12 constitutes a core proceeding under 28 USC Section 157. I
13 further find that I have the requisite constitutional authority
14 under the guidance given by our Supreme Court to enter, to the
15 extent it is a final order, and I'm not sure it is, but it may
16 practically be a final order, I do find that I have the
17 requisite constitutional authority to enter final order.

18 I want to go through a couple of the arguments
19 because, again, I spent a lot of time reading all of the
20 relevant wording. And there are certainly the arguments that I
21 simply -- they need to be addressed and I simply think that
22 they just have no foundation in logic or law or fact. I want
23 to start with the argument that (indisc.) that there remains
24 intact, and I wrote it down as a quote, that there's this
25 (indisc.) ensuring that there is sound value or so secure as to

1 reasonably assure repayment. That is so out of context in this
2 program that it's a frivolous argument. The entire --
3 everything said by our President, everything put out by our
4 administration, everything put out by our Congress reflects
5 that this was an emergency reaction to a series of events that
6 had never before been experienced. This isn't a loan program.
7 This is a support program. It is phrased the way it is to try
8 and ensure that the money ends up in the right hands and used
9 for the right purposes. It is intended to protect tax-paying
10 citizens from the effects of government shutdowns, stay-at-home
11 orders, and simply the public not being able to engage in
12 ongoing commerce. To suggest that this is a program that
13 enjoys underwriting and scrutiny in terms of who receives the
14 money is to simply ignore the obvious. The SBA's own rules
15 (indisc.) effectively look at the form, make the loans. You
16 make the loans, and so long as they're used for the right
17 purposes, there's no need to pay it back. That is not a
18 traditional loan program. There is no collateral valuation,
19 there is no credit worthiness test. And, again, to make that
20 argument is simply frivolous.

21 I also want to talk about the 525 argument. And I
22 take a quote out of the briefs. It says that issues under 525
23 (indisc.) the gatekeeper role of the governments or a
24 government entity in determining who may pursue certain
25 livelihoods. All of the cases cited have dealt with the

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1 government engaging in regulated commerce. There were
2 commercial alternatives, there were private sector
3 opportunities. Practically speaking, this program isn't
4 designed to be a commercial product; it is a support product.
5 The only entity that would ever engage in this type of activity
6 is the government because, again, it's a support for citizens.
7 I can think of no greater example of the government performing
8 its gatekeeping role as to who can engage in commerce and
9 pursue certain livelihoods than this particular program;
10 because if we didn't have this program, there would be no
11 ambulance services, there would be no nail salons, there would
12 be no convenience stores. Society would be in a very difficult
13 (indisc.) so I do think the requirements of Section 525(a) are
14 absolutely in play. I do think that the choice of the words in
15 the form -- and, again, I made the example with Mr. Holzer, and
16 I am bothered by the use of the words. I disagree with
17 Mr. Holzer that, well, of course everybody knows what that
18 means, it's simply if you're a debtor. Couldn't be further
19 from the truth. Congress knew how to say we don't give these
20 loans to debtors. They did it within the CARES Act itself.
21 And then to have a form that simply says if an owner or a
22 business is presently involved in a bankruptcy, I have zero
23 idea what that means. It means if you have filed a proof of
24 claim in the General Motors bankruptcy umpteen years ago and
25 haven't yet received a final distribution on your claim, you

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1 have to check that box "no." That's silly. It's even sillier
2 in light of the purpose of this program.

3 I also have found but I've not been cited to any
4 legitimate basis for including that language in the form. I
5 take umbrage of the fact that if I look at question one and I
6 look at the list and I think just rules of normal construction,
7 and I realize that this is not a statute but it's a form that
8 is derived from a statute, it says if a business or owner is
9 presently suspended, debarred, proposed to be debarred declared
10 ineligible, voluntarily excluded from participation in this
11 transaction by any (indisc.) department or agency all conduct
12 which society frowns upon, involves potentially wrongful acts,
13 involves potentially criminal conduct. And then as an add-on,
14 it says: "Or presently involved in any bankruptcy." Plain
15 meaning: as a creditor, as a landlord, as a partner in another
16 business, as a shareholder in another business. It's entirely
17 inappropriate that those words were added into that form in
18 that list in that manner. And I see no authority anywhere for
19 including those words in that form. It serves no purpose. I
20 do find that by including the words "or presently involved in
21 any bankruptcy," they are intended to be discriminatory. They
22 are intended to be discriminatory toward debtors for reasons
23 offered that somehow we lose control of the money, again I find
24 to be completely frivolous. I cannot imagine anything less
25 controlling than to simply give out money with no underwriting,

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1 with no oversight, and then complain that if I have a Federal
2 judge who makes sure that the debtor complies with the law,
3 ensures that the debtors file monthly operating reports, ensure
4 that copies of bank statements are filed on the docket every
5 month, that they somehow lost control. I simply don't buy it.
6 I find the arguments to lack any good faith.

7 I am worried about the argument that I cannot enjoin
8 the administrator of the SBA. I agree I can't tell the SBA
9 administrator what loans to guarantee, what loans to grant. I
10 simply do not accept that when I have evidence of bankruptcy
11 discrimination that I can do nothing about it. And if I am
12 wrong about that, I am very certain that my Article Three
13 colleagues will tell me that I am wrong, and I will accept that
14 criticism. But this can't be what Congress intended. This
15 can't be the way that we are supposed to treat our fellow man
16 in this time. It's inconceivable to me that this distinction
17 could be drawn. The people that need the most help and who
18 have sought protection under our laws are the people who are
19 the targets of discrimination in a government support program;
20 can't possibly be.

21 So I am going to grant the TRO. I am going to enjoin
22 the administrator of the SBA and all those acting in concert
23 with her, which includes PlainsCapital Bank, in the following
24 manner. I am requiring that the application form for the
25 paycheck protection program submitted by Hidalgo County

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1 Emergency Service Foundation be considered in accordance with
2 the program without the words in question one: "or presently
3 involved in any bankruptcy." They are stricken from
4 consideration. The application shall be considered on its
5 merits and in accordance with the law with those six words
6 stricken. It is my hope that my government that I serve will
7 realize the error that it has made and that it will act
8 appropriately and ensure that all of our citizens have access
9 to the support they needed.

10 Mr. Holzer, I want you to prepare a revised TRO in
11 accordance with the ruling that I've made on the record
12 pursuant to 7052. Also want to go through in accordance with
13 Rule 65, I am required to state, and I am incorporating my
14 comments on the record, into the form of order to be submitted
15 pursuant to 7052. I have stated the reasons why the temporary
16 restraining order should issue. I have specifically stated its
17 terms. I have specifically described in reasonable detail the
18 limits of the TRO and those acts that are required under the
19 TRO. I will find that pursuant to Bankruptcy Rule 7065, there
20 is no security required. I am also required to set a hearing
21 for issuance of a preliminary injunction. I don't know that it
22 will be necessary because this may all become moot by then.
23 And I recognize, Mr. Kincheloe, that at a preliminary
24 injunction hearing, you may tell me that the law has changed.
25 But as I sit here today, the CFR that you showed me, I'm not

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1 aware it's actually governing law; is that correct?

2 **MR. KINCHELOE:** That's correct, your Honor. It has
3 not been published in the register.

4 **THE COURT:** All right, thank you. Let's see,
5 Mr. Kincheloe, Mr. Holzer, can you look at your collective
6 schedules?

7 **MR. HOLZER:** Have it in front of me, Judge.

8 **THE COURT:** All right, today's the 24th. My guess is
9 it's probably, and please tell me if you think I'm wrong, it's
10 probably a better use of everyone's time if we simply go as
11 close to the 14 days as possible to see what actually happens.
12 It may very well be that without waiving any right of review or
13 appeal that the SBA may have, it may make sense to extend the
14 original time. But obviously we're not going to decide that
15 today. Let me ask the parties, does it make sense to set this
16 -- I'm issuing this at 10:00 o'clock on Friday, can we set this
17 for 9:30 on Friday, May the 8th; does that make sense?

18 **MR. KINCHELOE:** Yes, your Honor. I was going to ask
19 for May 8th so perfect.

20 **THE COURT:** Okay, fair enough. And, Mr. Holzer, does
21 that work for your calendar?

22 **MR. HOLZER:** It does, your Honor.

23 **THE COURT:** All right, thank you. What I would like
24 for you to do is once you finish drafting the TRO, I'd like for
25 you to send it to Mr. Kincheloe to review as to form only.

1 Mr. Kincheloe, consistent with my normal practice, by agreement
2 as to form only, you're not waiving any right of review or
3 complaint that you may have, you're simply acknowledging that
4 the paper is consistent with the ruling that I've made on the
5 record. Is that enough of a (indisc.) that you feel
6 comfortable looking at the document?

7 **MR. KINCHELOE:** Absolutely, your Honor. And I'll
8 remain at my computer until I receive it from Mr. Holzer so
9 there's no delay.

10 **THE COURT:** Terrific, thank you. Gentlemen, I very
11 much appreciate the argument. Yes, sir.

12 **MR. HOLZER:** Just a clarification, and I'm trying to
13 think practically about the next two weeks, I understand your
14 ruling and I think I'll be able to get the TRO drafted
15 correctly, but is my client authorized to resubmit an
16 application form striking out that language about the
17 bankruptcy and checking the "no" box in question one?

18 **THE COURT:** Yes. What I would envision, so that
19 there is -- I don't want anyone at the bank to have an issue, I
20 don't want anyone within the SBA to have an issue, is that what
21 I would suggest that we do until this -- until we have an order
22 to the contrary is that your client's authorized to strike
23 through that language, check the box assuming that it (indisc.)
24 and it satisfies all of the other requirements of question one,
25 and then simply attach a copy of the TRO so that it's in the

1 file and everyone understands exactly what the issues are. I
2 would hate for someone to --

3 **(Automated telephone recording played)**

4 **THE COURT:** I don't -- I have 50 people on the
5 telephone so I'm not going to try to spend the time to figure
6 out who that was. You're absolutely authorized to strike
7 through the question. I can't remember where I stopped.
8 Attach a copy of the TRO, that way there is absolutely no
9 chance for error as to why the application was submitted the
10 way it was. And if the Debtor doesn't need -- I want to make
11 it very clear, if the Debtor doesn't meet the requirements,
12 then I'm not changing that. All I'm simply requiring is the
13 application be considered consistent with the (indisc.)
14 practices and governing (indisc.) as all other applications
15 with simply (indisc.) those six words stricken.

16 **MR. HOLZER:** Understood, your Honor. Thank you.

17 **THE COURT:** All right, Mr. Kincheloe, anything else
18 that I -- any lack of clarification or any issues that we need
19 to talk about?

20 **MR. KINCHELOE:** One issue, your Honor.

21 **THE COURT:** Certainly.

22 **MR. KINCHELOE:** (Indisc.) carry out instructions I
23 need to ask the Court if it will entertain an oral motion for
24 stay pending appeal.

25 **THE COURT:** Of course. And that's denied.

EXCEPTIONAL REPORTING SERVICES, INC

1 **MR. KINCHELOE:** Thank you, your Honor.

2 **THE COURT:** All right, anything else, folks? I very
3 much appreciate the argument. Mr. Holzer, I appreciate the way
4 in which you conducted yourself on behalf of the Debtor. And,
5 Mr. Kincheloe, you know that I think you're the greatest thing
6 ever and I very much appreciate what you do for our country.

7 **MR. KINCHELOE:** Thank you, your Honor.

8 **THE COURT:** Thank you, gentlemen.

9 **MR. HOLZER:** (Indisc.) have a good weekend.

10 **THE COURT:** (Indisc.)

11 **MR. KINCHELOE:** You, too, your Honor.

12 **(This proceeding was adjourned at 10:04 a.m.)**

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

A handwritten signature in black ink, appearing to read "Toni Hudson", is written above a horizontal line.

Signed

April 25, 2020

Dated

TONI HUDSON, TRANSCRIBER

EXCEPTIONAL REPORTING SERVICES, INC

Exhibit A

(Weekly Cash Flow Budget)

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**COMPLAINT AGAINST SBA AND
ADMINISTRATOR re PPP Funds**

1

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(\$ in thousands)

Weekly Cash Flow Budget

Week	52 (A)			53 (P)	54 (P)	55 (P)	56 (P)	57 (P)	58 (P)	59 (P)	60 (P)	61 (P)	62 (P)	63 (P)
		Actual	+ / -											
Week-ending date	5/1			5/8	5/15	5/22	5/29	6/5	6/12	6/19	6/26	7/3	7/10	7/17
Beginning operating cash balance	9,979	9,979		8,913	17,406	18,283	18,749	17,515	17,769	17,330	19,125	19,630	20,140	20,058
Collections														
Yakima / Toppenish	935	691	(244)	775	775	775	935	775	775	775	775	925	775	775
Topp Behavioral Adjustment		-	-											
Sunnyside	2,500	1,922	(578)	2,350	2,350	2,350	2,350	2,350	2,350	2,350	2,350	2,350	2,350	2,350
Elective Procedures Change	(1,156)		1,156	(1,191)	(1,191)	(485)	(325)	(485)	(485)	168	168	328	168	523
Provider Tax										100	90	70		
ARMC Rent					1,500					532				
ARMC Pass Through					250					89				
COVID Grant				8,694										
DIP Loan Borrowing														
Total Collections	2,279	2,612	334	10,628	3,684	2,640	2,960	2,640	2,640	4,014	3,383	3,673	3,293	3,648
Disbursements														
Payroll, taxes, and other -Y/T	237	357	(120)	474	237	507	404	540	270	540	270	540	270	540
Payroll & Other ASH	730	906	(176)	262	730	324	1,380	387	980	387	980	387	980	387
Other Op Ex	94	82	12	35	29	29	100	29	29	29	29	100	29	29
Purchased services	302	592	(290)	332	439	302	632	332	439	302	632	332	439	302
Contract labor	255	9	246	255	125	125	125	125	125	125	125	125	125	125
Rent	60	107	(47)	60	40	70	200	60	40	70	200	60	40	70
Medical professionals	-	57	(57)	-	-	125	-	-	-	125	-	-	-	125
Utilities	82	17	65	82	82	82	82	82	82	82	82	82	82	82
Prop Tax and Ins	-	391	(391)	31	70			246	100			86	100	
Supplies, pharma., and dietary	325	330	(5)	455	455	460	460	460	465	460	460	465	460	460
Corporate Overhead	214	204	10	-	-	-	157	-	-	-	-	157	-	-
Provider Tax	-	-	-	-	-	-	-	-	-	-	-	200	200	900
CRO Fees	145	145	-				145					145		
UMR Payments	150	94	56	150	150	150	125	125	100	100	100	100	100	100
Medicaid Repayment ASH			-											
Professional Fees	-	-	-	-	450	-	-	-	450	-	-	-	550	-
Cash Out for Loan Payoff			-											
DIP Fees and Expenses			-											
DIP Interest	385	389	(4)	-	-	-	385	-	-	-	-	385	-	-
UST Fees	-	-	-											
Total Disbursements	2,979	3,679	(700)	2,135	2,807	2,174	4,195	2,386	3,080	2,220	2,878	3,164	3,375	3,120
WEEKLY NET CASH FLOW	(700)	(1,066)	(366)	8,493	877	466	(1,235)	255	(440)	1,795	505	510	(82)	529
ENDING CASH (ACTUAL)	9,279	8,913		17,406	18,283	18,749	17,515	17,769	17,330	19,125	19,630	20,140	20,058	20,587

Exhibit B

(First Interim Rule)

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**COMPLAINT AGAINST SBA AND
ADMINISTRATOR re PPP Funds**

1

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Rules and Regulations

Federal Register

Vol. 85, No. 73

Wednesday, April 15, 2020

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents.

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

[Docket No. SBA-2020-0015]

RIN 3245-AH34

Business Loan Program Temporary Changes; Paycheck Protection Program

AGENCY: U.S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: This interim final rule announces the implementation of sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act). Section 1102 of the Act temporarily adds a new product, titled the "Paycheck Protection Program," to the U.S. Small Business Administration's (SBA's) 7(a) Loan Program. Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program. The Paycheck Protection Program and loan forgiveness are intended to provide economic relief to small businesses nationwide adversely impacted under the Coronavirus Disease 2019 (COVID-19) Emergency Declaration (COVID-19 Emergency Declaration) issued by President Trump on March 13, 2020. This interim final rule outlines the key provisions of SBA's implementation of sections 1102 and 1106 of the Act in formal guidance and requests public comment.

DATES:

Effective date: This interim final rule is effective April 15, 2020.

Applicability date: This interim final rule applies to applications submitted under the Paycheck Protection Program through June 30, 2020, or until funds made available for this purpose are exhausted.

Comment Date: Comments must be received on or before May 15, 2020.

ADDRESSES: You may submit comments, identified by number SBA-2020-0015 through the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

SBA will post all comments on www.regulations.gov. If you wish to submit confidential business information (CBI) as defined in the User Notice at www.regulations.gov, please send an email to ppp-ifr@sba.gov. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Call Center Representative at 833-572-0502, or the local SBA Field Office; the list of offices can be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

SUPPLEMENTARY INFORMATION:

I. Background Information

On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID-19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all states, territories, and the District of Columbia. With the COVID-19 emergency, many small businesses nationwide are experiencing economic hardship as a direct result of the Federal, State, and local public health measures that are being taken to minimize the public's exposure to the virus. These measures, some of which are government-mandated, are being implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance from others or even stay-at-home orders, are being implemented, resulting in a dramatic decrease in economic activity as the public avoids malls, retail stores, and other businesses.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act or the Act) (Pub. L. 116-136) to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic. The Small Business Administration (SBA) received funding

and authority through the Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID-19 emergency.

Section 1102 of the Act temporarily permits SBA to guarantee 100 percent of 7(a) loans under a new program titled the "Paycheck Protection Program." Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program. A more detailed discussion of sections 1102 and 1106 of the Act is found in section III below.

II. Comments and Immediate Effective Date

The intent of the Act is that SBA provide relief to America's small businesses expeditiously. This intent, along with the dramatic decrease in economic activity nationwide, provides good cause for SBA to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act. Specifically, small businesses need to be informed on how to apply for a loan and the terms of the loan under section 1102 of the Act as soon as possible because the last day to apply for and receive a loan is June 30, 2020. The immediate effective date of this interim final rule will benefit small businesses so that they can immediately apply for the loan with a full understanding of loan terms and conditions. This interim final rule is effective without advance notice and public comment because section 1114 of the Act authorizes SBA to issue regulations to implement Title 1 of the Act without regard to notice requirements. This rule is being issued to allow for immediate implementation of this program. Although this interim final rule is effective immediately, comments are solicited from interested members of the public on all aspects of the interim final rule, including section III below. These comments must be submitted on or before May 15, 2020. The SBA will consider these comments and the need for making any revisions as a result of these comments.

III. Temporary New Business Loan Program: Paycheck Protection Program

Overview

The CARES Act was enacted to provide immediate assistance to individuals, families, and businesses

affected by the COVID-19 emergency. Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under a new 7(a) loan program titled the "Paycheck Protection Program." Loans guaranteed under the Paycheck Protection Program (PPP) will be 100 percent guaranteed by SBA, and the full principal amount of the loans may qualify for loan forgiveness. The following outlines the key provisions of the PPP.

1. General

SBA is authorized to guarantee loans under the PPP through June 30, 2020. Congress authorized a program level of \$349,000,000,000 to provide guaranteed loans under this new 7(a) program. The intent of the Act is that SBA provide relief to America's small businesses expeditiously, which is expressed in the Act by giving all lenders delegated authority and streamlining the requirements of the regular 7(a) loan program. For example, for loans made under the PPP, SBA will not require the lenders to comply with section 120.150 "What are SBA's lending criteria?." SBA will allow lenders to rely on certifications of the borrower in order to determine eligibility of the borrower and use of loan proceeds and to rely on specified documents provided by the borrower to determine qualifying loan amount and eligibility for loan forgiveness. Lenders must comply with the applicable lender obligations set forth in this interim final rule, but will be held harmless for borrowers' failure to comply with program criteria; remedies for borrower violations or fraud are separately addressed in this interim final rule. The program requirements of the PPP identified in this rule temporarily supersede any conflicting Loan Program Requirement (as defined in 13 CFR 120.10).

2. What do borrowers need to know and do?

a. Am I eligible?

You are eligible for a PPP loan if you have 500 or fewer employees whose principal place of residence is in the United States, or are a business that operates in a certain industry and meet the applicable SBA employee-based size standards for that industry, and:

i. You are:

A. A small business concern as defined in section 3 of the Small Business Act (15 U.S.C. 632), and subject to SBA's affiliation rules under 13 CFR 121.301(f) unless specifically waived in the Act; or

B. A tax-exempt nonprofit organization described in section

501(c)(3) of the Internal Revenue Code (IRC), a tax-exempt veterans organization described in section 501(c)(19) of the IRC, Tribal business concern described in section 31(b)(2)(C) of the Small Business Act, or any other business; and

ii. You were in operation on February 15, 2020 and either had employees for whom you paid salaries and payroll taxes or paid independent contractors, as reported on a Form 1099-MISC.

You are also eligible for a PPP loan if you are an individual who operates under a sole proprietorship or as an independent contractor or eligible self-employed individual, and you were in operation on February 15, 2020.

You must also submit such documentation as is necessary to establish eligibility such as payroll processor records, payroll tax filings, or Form 1099-MISC, or income and expenses from a sole proprietorship. For borrowers that do not have any such documentation, the borrower must provide other supporting documentation, such as bank records, sufficient to demonstrate the qualifying payroll amount.

SBA intends to promptly issue additional guidance with regard to the applicability of affiliation rules at 13 CFR 121.103 and 121.301 to PPP loans.

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

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

i. You are engaged in any activity that is illegal under Federal, state, or local law;

ii. You are a household employer (individuals who employ household employees such as nannies or housekeepers);

iii. An owner of 20 percent or more of the equity of the applicant is incarcerated, on probation, on parole; presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction; or has been convicted of a felony within the last five years; or

iv. You, or any business owned or controlled by you or any of your owners, has ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is currently delinquent or has defaulted within the last seven years and caused a loss to the government.

The Administrator, in consultation with the Secretary of the Treasury (the Secretary), determined that household employers are ineligible because they are not businesses. 13 CFR 120.100.

c. How do I determine if I am ineligible?

Businesses that are not eligible for PPP loans are identified in 13 CFR 120.110 and described further in SBA's Standard Operating Procedure (SOP) 50 10, Subpart B, Chapter 2, except that nonprofit organizations authorized under the Act are eligible. (SOP 50 10 can be found at <https://www.sba.gov/document/sop-50-10-5-lender-development-company-loan-programs>.)

d. I have determined that I am eligible. How much can I borrow?

Under the PPP, the maximum loan amount is the lesser of \$10 million or an amount that you will calculate using a payroll-based formula specified in the Act, as explained below.

e. How do I calculate the maximum amount I can borrow?

The following methodology, which is one of the methodologies contained in the Act, will be most useful for many applicants.

i. Step 1: Aggregate payroll costs (defined in detail below in f.) from the last twelve months for employees whose principal place of residence is the United States.

ii. Step 2: Subtract any compensation paid to an employee in excess of an annual salary of \$100,000 and/or any amounts paid to an independent contractor or sole proprietor in excess of \$100,000 per year.

iii. Step 3: Calculate average monthly payroll costs (divide the amount from Step 2 by 12).

iv. Step 4: Multiply the average monthly payroll costs from Step 3 by 2.5.

v. Step 5: Add the outstanding amount of an Economic Injury Disaster Loan (EIDL) made between January 31, 2020 and April 3, 2020, less the amount of any "advance" under an EIDL COVID-19 loan (because it does not have to be repaid).

The examples below illustrate this methodology.

i. Example 1—No employees make more than \$100,000

Annual payroll: \$120,000

Average monthly payroll: \$10,000

Multiply by 2.5 = \$25,000

Maximum loan amount is \$25,000

ii. Example 2—Some employees make more than \$100,000

Annual payroll: \$1,500,000

Subtract compensation amounts in excess of an annual salary of \$100,000: \$1,200,000

Average monthly qualifying payroll: \$100,000

Multiply by 2.5 = \$250,000

Maximum loan amount is \$250,000

iii. Example 3—No employees make more than \$100,000, outstanding EIDL loan of \$10,000.

Annual payroll: \$120,000

Average monthly payroll: \$10,000

Multiply by 2.5 = \$25,000

Add EIDL loan of \$10,000 = \$35,000

Maximum loan amount is \$35,000

iv. Example 4—Some employees make more than \$100,000, outstanding EIDL loan of \$10,000

Annual payroll: \$1,500,000

Subtract compensation amounts in excess of an annual salary of \$100,000: \$1,200,000

Average monthly qualifying payroll: \$100,000

Multiply by 2.5 = \$250,000

Add EIDL loan of \$10,000 = \$260,000

Maximum loan amount is \$260,000

f. What qualifies as “payroll costs?”

Payroll costs consist of compensation to employees (whose principal place of residence is the United States) in the form of salary, wages, commissions, or similar compensation; cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips); payment for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal; payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums, and retirement; payment of state and local taxes assessed on compensation of employees; and for an independent contractor or sole proprietor, wages, commissions, income, or net earnings from self-employment, or similar compensation.

g. Is there anything that is expressly excluded from the definition of payroll costs?

Yes. The Act expressly excludes the following:

i. Any compensation of an employee whose principal place of residence is outside of the United States;

ii. The compensation of an individual employee in excess of an annual salary of \$100,000, prorated as necessary;

iii. Federal employment taxes imposed or withheld between February 15, 2020 and June 30, 2020, including the employee's and employer's share of FICA (Federal Insurance Contributions Act) and Railroad Retirement Act taxes, and income taxes required to be withheld from employees; and

iv. Qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act (Pub. L. 116–127).

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.

i. What is the interest rate on a PPP loan?

The interest rate will be 100 basis points or one percent.

The Administrator, in consultation with the Secretary, determined that a one percent interest rate is appropriate. First, it provides low cost funds to borrowers to meet eligible payroll costs and other eligible expenses during this temporary period of economic dislocation caused by the coronavirus. Second, for lenders, the 100 basis points offers an attractive interest rate relative to the cost of funding for comparable maturities. For example, the FDIC's weekly national average rate for a 24-month CD deposit product for the week of March 30, 2020 is 42 basis points for non-jumbo and 44 basis points for jumbo (<https://www.fdic.gov/regulations/resources/rates/>). Third, the interest rate is higher than the yield on Treasury securities of comparable maturity. For example, the yield on the Treasury two-year note is approximately 23 basis points. This higher yield combined with the fact that the loans are 100 percent guaranteed by the SBA and the fact that lenders will receive a substantial processing fee from the SBA provide ample inducement for lenders to participate in the PPP.

j. What will be the maturity date on a PPP loan?

The maturity is two years. While the Act provides that a loan will have a maximum maturity of up to ten years from the date the borrower applies for loan forgiveness (described below), the Administrator, in consultation with the Secretary, determined that a two year loan term is sufficient in light of the temporary economic dislocations caused by the coronavirus. Specifically, the considerable economic disruption caused by the coronavirus is expected to abate well before the two year maturity date such that borrowers will be able to re-commence business operations and pay off any outstanding balances on their PPP loans.

k. Can I apply for more than one PPP loan?

No. The Administrator, in consultation with the Secretary, determined that no eligible borrower may receive more than one PPP loan. This means that if you apply for a PPP

loan you should consider applying for the maximum amount. While the Act does not expressly provide that each eligible borrower may only receive one PPP loan, the Administrator has determined, in consultation with the Secretary, that because all PPP loans must be made on or before June 30, 2020, a one loan per borrower limitation is necessary to help ensure that as many eligible borrowers as possible may obtain a PPP loan. This limitation will also help advance Congress' goal of keeping workers paid and employed across the United States.

l. Can I use e-signatures or e-consents if a borrower has multiple owners?

Yes, e-signature or e-consents can be used regardless of the number of owners.

m. Is the PPP “first-come, first-served?”

Yes.

n. When will I have to begin paying principal and interest on my PPP loan?

You will not have to make any payments for six months following the date of disbursement of the loan. However, interest will continue to accrue on PPP loans during this six-month deferment. The Act authorizes the Administrator to defer loan payments for up to one year. The Administrator determined, in consultation with the Secretary, that a six-month deferment period is appropriate in light of the modest interest rate (one percent) on PPP loans and the loan forgiveness provisions contained in the Act.

o. Can my PPP loan be forgiven in whole or in part?

Yes. The amount of loan forgiveness can be up to the full principal amount of the loan and any accrued interest. That is, the borrower will not be responsible for any loan payment if the borrower uses all of the loan proceeds for forgivable purposes described below and employee and compensation levels are maintained. The actual amount of loan forgiveness will depend, in part, on the total amount of payroll costs, payments of interest on mortgage obligations incurred before February 15, 2020, rent payments on leases dated before February 15, 2020, and utility payments under service agreements dated before February 15, 2020, over the eight-week period following the date of the loan. However, not more than 25 percent of the loan forgiveness amount may be attributable to non-payroll costs. While the Act provides that borrowers are eligible for forgiveness in an amount equal to the sum of payroll costs and

any payments of mortgage interest, rent, and utilities, the Administrator has determined that the non-payroll portion of the forgivable loan amount should be limited to effectuate the core purpose of the statute and ensure finite program resources are devoted primarily to payroll. The Administrator has determined in consultation with the Secretary that 75 percent is an appropriate percentage in light of the Act's overarching focus on keeping workers paid and employed. Further, the Administrator and the Secretary believe that applying this threshold to loan forgiveness is consistent with the structure of the Act, which provides a loan amount 75 percent of which is equivalent to eight weeks of payroll (8 weeks/2.5 months = 56 days/76 days = 74 percent rounded up to 75 percent). Limiting non-payroll costs to 25 percent of the forgiveness amount will align these elements of the program, and will also help to ensure that the finite appropriations available for PPP loan forgiveness are directed toward payroll protection. SBA will issue additional guidance on loan forgiveness.

p. Do independent contractors count as employees for purposes of PPP loan forgiveness?

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

q. What forms do I need and how do I submit an application?

The applicant must submit SBA Form 2483 (Paycheck Protection Program Application Form) and payroll documentation, as described above. The lender must submit SBA Form 2484 (Paycheck Protection Program Lender's Application for 7(a) Loan Guaranty) electronically in accordance with program requirements and maintain the forms and supporting documentation in its files.

r. How can PPP loans be used?

The proceeds of a PPP loan are to be used for:

- i. payroll costs (as defined in the Act and in 2.f.);
- ii. costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;
- iii. mortgage interest payments (but not mortgage prepayments or principal payments);
- iv. rent payments;
- v. utility payments;
- vi. interest payments on any other debt obligations that were incurred before February 15, 2020; and/or

vii. refinancing an SBA EIDL loan made between January 31, 2020 and April 3, 2020. If you received an SBA EIDL loan from January 31, 2020 through April 3, 2020, you can apply for a PPP loan. If your EIDL loan was not used for payroll costs, it does not affect your eligibility for a PPP loan. If your EIDL loan was used for payroll costs, your PPP loan must be used to refinance your EIDL loan. Proceeds from any advance up to \$10,000 on the EIDL loan will be deducted from the loan forgiveness amount on the PPP loan.

However, at least 75 percent of the PPP loan proceeds shall be used for payroll costs. For purposes of determining the percentage of use of proceeds for payroll costs, the amount of any EIDL refinanced will be included. For purposes of loan forgiveness, however, the borrower will have to document the proceeds used for payroll costs in order to determine the amount of forgiveness. While the Act provides that PPP loan proceeds may be used for the purposes listed above and for other allowable uses described in section 7(a) of the Small Business Act (15 U.S.C. 636(a)), the Administrator believes that finite appropriations and the structure of the Act warrant a requirement that borrowers use a substantial portion of the loan proceeds for payroll costs, consistent with Congress' overarching goal of keeping workers paid and employed. As with the similar limitation on the forgiveness amount explained earlier, the Administrator, in consultation with the Secretary, has determined that 75 percent is an appropriate percentage that will align this element of the program with the loan amount, 75 percent of which is equivalent to eight weeks of payroll. This limitation on use of the loan funds will help to ensure that the finite appropriations available for these loans are directed toward payroll protection, as each loan that is issued depletes the appropriation, regardless of whether portions of the loan are later forgiven.

s. What happens if PPP loan funds are misused?

If you use PPP funds for unauthorized purposes, SBA will direct you to repay those amounts. If you knowingly use the funds for unauthorized purposes, you will be subject to additional liability such as charges for fraud. If one of your shareholders, members, or partners uses PPP funds for unauthorized purposes, SBA will have recourse against the shareholder, member, or partner for the unauthorized use.

t. What certifications need to be made?

On the Paycheck Protection Program application, an authorized representative of the applicant must certify in good faith to all of the below:¹

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

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

iii. The funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments; I understand that if the funds are knowingly used for unauthorized purposes, the Federal Government may hold me legally liable such as for charges of fraud. As explained above, not more than 25 percent of loan proceeds may be used for non-payroll costs.

iv. Documentation verifying the number of full-time equivalent employees on payroll as well as the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the eight week period following this loan will be provided to the lender.

v. Loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities. As explained above, not more than 25 percent of the forgiven amount may be for non-payroll costs.

vi. During the period beginning on February 15, 2020 and ending on December 31, 2020, the applicant has not and will not receive another loan under this program.

vii. I further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects. I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 18 U.S.C. 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 U.S.C. 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a federally insured institution, under 18 U.S.C. 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.

¹ A representative of the applicant can certify for the business as a whole if the representative is legally authorized to do so.

viii. I acknowledge that the lender will confirm the eligible loan amount using tax documents I have submitted. I affirm that these tax documents are identical to those submitted to the Internal Revenue Service. I also understand, acknowledge, and agree that the Lender can share the tax information with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of compliance with SBA Loan Program Requirements and all SBA reviews.

3. What do lenders need to know and do?

a. Who is eligible to make PPP loans?

i. All SBA 7(a) lenders are automatically approved to make PPP loans on a delegated basis.

ii. The Act provides that the authority to make PPP loans can be extended to additional lenders determined by the Administrator and the Secretary to have the necessary qualifications to process, close, disburse, and service loans made with the SBA guarantee. Since SBA is authorized to make PPP loans up to \$349 billion by June 30, 2020, the Administrator and the Secretary have jointly determined that authorizing additional lenders is necessary to achieve the purpose of allowing as many eligible borrowers as possible to receive loans by the June 30, 2020 deadline.

iii. The following types of lenders have been determined to meet the criteria and are eligible to make PPP loans unless they currently are designated in Troubled Condition by their primary Federal regulator or are subject to a formal enforcement action with their primary Federal regulator that addresses unsafe or unsound lending practices:

I. Any federally insured depository institution or any federally insured credit union;

II. Any Farm Credit System institution (other than the Federal Agricultural Mortgage Corporation) as defined in 12 U.S.C. 2002(a) that applies the requirements under the Bank Secrecy Act and its implementing regulations (collectively, BSA) as a federally regulated financial institution, or functionally equivalent requirements that are not altered by this rule; and

III. Any depository or non-depository financing provider that originates, maintains, and services business loans or other commercial financial receivables and participation interests; has a formalized compliance program; applies the requirements under the BSA as a federally regulated financial

institution, or the BSA requirements of an equivalent federally regulated financial institution; has been operating since at least February 15, 2019, and has originated, maintained, and serviced more than \$50 million in business loans or other commercial financial receivables during a consecutive 12 month period in the past 36 months, or is a service provider to any insured depository institution that has a contract to support such institution's lending activities in accordance with 12 U.S.C. 1867(c) and is in good standing with the appropriate Federal banking agency.

iv. Qualified institutions described in 3.a.iii.I. and II. will be automatically qualified under delegated authority by the SBA upon transmission of CARES Act Section 1102 Lender Agreement (SBA Form 3506) unless they currently are designated in Troubled Condition by their primary Federal regulator or are subject to a formal enforcement action by their primary Federal regulator that addresses unsafe or unsound lending practices.

b. What do lenders have to do in terms of loan underwriting?

Each lender shall:

i. Confirm receipt of borrower certifications contained in Paycheck Protection Program Application form issued by the Administration;

ii. Confirm receipt of information demonstrating that a borrower had employees for whom the borrower paid salaries and payroll taxes on or around February 15, 2020;

iii. Confirm the dollar amount of average monthly payroll costs for the preceding calendar year by reviewing the payroll documentation submitted with the borrower's application; and

iv. Follow applicable BSA requirements:

I. Federally insured depository institutions and federally insured credit unions should continue to follow their existing BSA protocols when making PPP loans to either new or existing customers who are eligible borrowers under the PPP. PPP loans for existing customers will not require re-verification under applicable BSA requirements, unless otherwise indicated by the institution's risk-based approach to BSA compliance.

II. Entities that are not presently subject to the requirements of the BSA, should, prior to engaging in PPP lending activities, including making PPP loans to either new or existing customers who are eligible borrowers under the PPP, establish an anti-money laundering (AML) compliance program equivalent to that of a comparable federally regulated institution. Depending upon

the comparable federally regulated institution, such a program may include a customer identification program (CIP), which includes identifying and verifying their PPP borrowers' identities (including e.g., date of birth, address, and taxpayer identification number), and, if that PPP borrower is a company, following any applicable beneficial ownership information collection requirements. Alternatively, if available, entities may rely on the CIP of a federally insured depository institution or federally insured credit union with an established CIP as part of its AML program. In either instance, entities should also understand the nature and purpose of their PPP customer relationships to develop customer risk profiles. Such entities will also generally have to identify and report certain suspicious activity to the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN). If such entities have questions with regard to meeting these requirements, they should contact the FinCEN Regulatory Support Section at FRC@fincen.gov. In addition, FinCEN has created a COVID-19-specific contact channel, via a specific drop-down category, for entities to communicate to FinCEN COVID-19-related concerns while adhering to their BSA obligations. Entities that wish to communicate such COVID-19-related concerns to FinCEN should go to www.FinCEN.gov, click on "Need Assistance," and select "COVID19" in the subject drop-down list.

Each lender's underwriting obligation under the PPP is limited to the items above and reviewing the "Paycheck Protection Application Form." Borrowers must submit such documentation as is necessary to establish eligibility such as payroll processor records, payroll tax filings, or Form 1099-MISC, or income and expenses from a sole proprietorship. For borrowers that do not have any such documentation, the borrower must provide other supporting documentation, such as bank records, sufficient to demonstrate the qualifying payroll amount.

c. Can lenders rely on borrower documentation for loan forgiveness?

Yes. The lender does not need to conduct any verification if the borrower submits documentation supporting its request for loan forgiveness and attests that it has accurately verified the payments for eligible costs. The Administrator will hold harmless any lender that relies on such borrower documents and attestation from a borrower. The Administrator, in

consultation with the Secretary, has determined that lender reliance on a borrower's required documents and attestation is necessary and appropriate in light of section 1106(h) of the Act, which prohibits the Administrator from taking an enforcement action or imposing penalties if the lender has received a borrower attestation.

d. What fees will lenders be paid?

SBA will pay lenders fees for processing PPP loans in the following amounts:

- i. Five (5) percent for loans of not more than \$350,000;
- ii. Three (3) percent for loans of more than \$350,000 and less than \$2,000,000; and
- iii. One (1) percent for loans of at least \$2,000,000.

e. Do lenders have to apply the "credit elsewhere test"?

No. When evaluating an applicant's eligibility lenders will not be required to apply the "credit elsewhere test" (as set forth in section 7(a)(1)(A) of the Small Business Act (15 U.S.C. 636) and SBA regulations at 13 CFR 120.101)).

4. What do both borrowers and lenders need to know and do?

a. What are the loan terms and conditions?

Loans will be guaranteed under the PPP under the same terms, conditions and processes as other 7(a) loans, with certain changes including but not limited to:

- i. The guarantee percentage is 100 percent.
- ii. No collateral will be required.
- iii. No personal guarantees will be required.
- iv. The interest rate will be 100 basis points or one percent.
- v. All loans will be processed by all lenders under delegated authority and lenders will be permitted to rely on certifications of the borrower in order to determine eligibility of the borrower and the use of loan proceeds.

b. Are there any fee waivers?

- i. There will be no up-front guarantee fee payable to SBA by the Borrower;
- ii. There will be no lender's annual service fee ("on-going guaranty fee") payable to SBA;
- iii. There will be no subsidy recoupment fee; and
- iv. There will be no fee payable to SBA for any guarantee sold into the secondary market.

c. Who pays the fee to an agent who assists a borrower?

Agent fees will be paid by the lender out of the fees the lender receives from

SBA. Agents may not collect fees from the borrower or be paid out of the PPP loan proceeds. The total amount that an agent may collect from the lender for assistance in preparing an application for a PPP loan (including referral to the lender) may not exceed:

- i. One (1) percent for loans of not more than \$350,000;
- ii. 0.50 percent for loans of more than \$350,000 and less than \$2 million; and
- iii. 0.25 percent for loans of at least \$2 million.

The Act authorizes the Administrator to establish limits on agent fees. The Administrator, in consultation with the Secretary, determined that the agent fee limits set forth above are reasonable based upon the application requirements and the fees that lenders receive for making PPP loans.

d. Can PPP loans be sold into the secondary market?

Yes. A PPP loan may be sold on the secondary market after the loan is fully disbursed. A PPP loan may be sold on the secondary market at a premium or a discount to par value. SBA will issue guidance regarding any advance purchase for loans sold in the secondary market.

e. Can SBA purchase some or all of the loan in advance?

Yes. A lender may request that the SBA purchase the expected forgiveness amount of a PPP loan or pool of PPP loans at the end of week seven of the covered period. The expected forgiveness amount is the amount of loan principal the lender reasonably expects the borrower to expend on payroll costs, covered mortgage interest, covered rent, and covered utility payments during the eight week period after loan disbursement. At least 75 percent of the expected forgiveness amount shall be for payroll costs, as provided in 2.o. To submit a PPP loan or pool of PPP loans for advance purchase, a lender shall submit a report requesting advance purchase with the expected forgiveness amount to the SBA. The report shall include: the Paycheck Protection Program Application Form (SBA Form 2483) and any supporting documentation submitted with such application; the Paycheck Protection Program Lender's Application for 7(a) Loan Guaranty (SBA Form 2484) and any supporting documentation; a detailed narrative explaining the assumptions used in determining the expected forgiveness amount, the basis for those assumptions, alternative assumptions considered, and why alternative assumptions were not used; any information obtained from the

borrower since the loan was disbursed that the lender used to determine the expected forgiveness amount, which should include the same documentation required to apply for loan forgiveness such as payroll tax filings, cancelled checks, and other payment documentation; and any additional information the Administrator may require to determine whether the expected forgiveness amount is reasonable. The Administrator, in consultation with the Secretary, determined that seven weeks is the minimum period of time necessary for a lender to reasonably determine the expected forgiveness amount for a PPP loan or pool of PPP loans, since the PPP is a new program and the likelihood that many borrowers will be new clients of the lender. The expected forgiveness amount may not exceed the total amount of principal on the PPP loan or pool of loans. The Administrator will purchase the expected forgiveness amount of the PPP loan(s) within 15 days of the date on which the Administrator receives a complete report that demonstrates that the expected forgiveness amount is indeed reasonable.

5. Additional Information

All loans guaranteed by the SBA pursuant to the CARES Act will be made consistent with constitutional, statutory, and regulatory protections for religious liberty, including the First Amendment to the Constitution, the Religious Freedom Restoration Act, 42 U.S.C. 2000bb-1 and bb-3, and SBA regulation at 13 CFR 113.3-1h, which provides that nothing in SBA nondiscrimination regulations shall apply to a religious corporation, association, educational institution or society with respect to the membership or the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its religious activities. SBA intends to promptly issue additional guidance with regard to religious liberty protections under this program.

SBA may provide further guidance, if needed, through SBA notices and a program guide which will be posted on SBA's website at www.sba.gov.

Questions on the Paycheck Protection Program 7(a) Loans may be directed to the Lender Relations Specialist in the local SBA Field Office. The local SBA Field Office may be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

Compliance With Executive Orders 12866, 12988, 13132, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

E.O. 12866 and E.O. 13563

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563. SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID-19 emergency. This rule's designation under Executive Order 13771 will be informed by public comment.

This rule is necessary to implement Sections 1102 and 1106 of the CARES Act in order to provide economic relief to small businesses nationwide adversely impacted under the COVID-19 Emergency Declaration. We anticipate that this rule will result in substantial benefits to small businesses, their employees, and the communities they serve. However, we lack data to estimate the effects of this rule.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

SBA has determined that this rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA has determined that this rule will impose recordkeeping or reporting requirements under the Paperwork Reduction Act ("PRA"). SBA has obtained emergency approval under OMB Control Number 3245-0407 for the information collection (IC) required to implement the program described above. This IC consists of Form 2483 (Paycheck Protection Program Application Form), SBA Form 2484 (Paycheck Protection Program Lender's Application for 7(a) Loan Guaranty), and SBA Form 3506 (CARES Act

Section 1102 Lender Agreement), and SBA Form 3507 (CARES Act Section 1102 Lender Agreement—Non-Bank and Non-Insured Depository Institution Lender). The collection is approved for use until September 30, 2020.

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a "small entity" as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for such small government jurisdictions, neither State nor local governments are "small entities." Similarly, for purposes of the RFA, individual persons are not small entities.

The requirement to conduct a regulatory impact analysis does not apply if the head of the agency "certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. 605(b). The agency must, however, publish the certification in the **Federal Register** at the time of publication of the rule, "along with a statement providing the factual basis for such certification." If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA's waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the **Federal Register** at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b).

Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable,

unnecessary, or contrary to the public interest. Small Business Administration's Office of Advocacy guide: *How to Comply with the Regulatory Flexibility Act. Ch.1. p.9*. Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

Authority: 15 U.S.C. 636(a)(36); Coronavirus Aid, Relief, and Economic Security Act, Public Law 116–136, Section 1114.

Jovita Carranza,

Administrator.

[FR Doc. 2020–07672 Filed 4–10–20; 4:15 pm]

BILLING CODE P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

[Docket No. SBA–2020–0019]

RIN 3245–AH35

Business Loan Program Temporary Changes; Paycheck Protection Program

AGENCY: U.S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: Elsewhere in this issue of the **Federal Register**, the U.S. Small Business Administration (SBA) is publishing an interim final rule (the Initial Rule) announcing the implementation of sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act). Section 1102 of the Act temporarily adds a new program, titled the "Paycheck Protection Program," to the SBA's 7(a) Loan Program. Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program. The Paycheck Protection Program and loan forgiveness are intended to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID-19). This interim final rule supplements the Initial Rule with additional guidance regarding the application of certain affiliate rules applicable to SBA's implementation of sections 1102 and 1106 of the Act and requests public comment.

DATES:

Effective date: This interim final rule is effective April 15, 2020.

Applicability date: This interim final rule applies to applications submitted under the Paycheck Protection Program through June 30, 2020, or until funds made available for this purpose are exhausted.

Exhibit C

(Congressional Letters to the SBA)

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**COMPLAINT AGAINST SBA AND
ADMINISTRATOR re PPP Funds**

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WASHINGTON, DC 20510-1904
(202) 224-2623
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United States Senate

WASHINGTON, DC 20510-1904

April 24, 2020

COMMITTEES:
SPECIAL COMMITTEE
ON AGING,
CHAIRMAN
APPROPRIATIONS
HEALTH, EDUCATION,
LABOR, AND PENSIONS
SELECT COMMITTEE
ON INTELLIGENCE

Ms. Jovita Carranza
Administrator
U.S. Small Business Administration
409 34d St., SW
Washington, DC 20416

Dear Administrator Carranza:

I am writing to express my concerns regarding the ability of financially distressed hospitals to access badly needed relief for payroll for their employees through the Paycheck Protection Program (PPP). While hospitals are not prohibited from participating in the program, those that have previously been or are currently under bankruptcy protection in order to restructure debt and maintain viability have been unable to access PPP funds, due to an interpretation of underlying Small Business Administration 7(a) program rules.

Hospitals are critical infrastructure and their employees are essential in the COVID-19 response effort. Many hospitals are experiencing substantial increases in expenses associated with preparing for and responding to the pandemic. They are simultaneously facing sharp declines in revenue associated with declining patient volumes due to the cancellation of routine and elective procedures, in order to protect the public health and conserve limited supplies of Personal Protective Equipment, consistent with current guidance from the Centers for Medicare and Medicaid Services.

It is my understanding that waiver authorities do exist for SBA to allow loans to be made to entities with defaulted debt to the federal government, when the applicant shows good cause. Given the critical importance of maintaining health care infrastructure and keeping essential hospital workers employed to care for patients throughout the nation in these unprecedented times, I ask that the SBA give every appropriate consideration, in accordance with all applicable laws and regulations, to exercise this waiver authority and allow financially distressed hospitals to access PPP loans.

Thank you for your consideration of this urgent request. I look forward to your response. If you have any questions, or need additional information, please do not hesitate to contact me or have your staff contact Mark LeDuc in my office at 202-224-3364.

Sincerely,



Susan M. Collins
United States Senator

United States Senate

WASHINGTON, DC 20510

April 17, 2020

The Honorable Jovita Carranza
Administrator
Small Business Administration
409 Third Street, SW
Washington, DC 20416

Dear Administrator Carranza:

Thank you for speaking with me last Friday regarding the urgent need for the Small Business Administration ("SBA") to clarify that rural hospitals currently undergoing Chapter 11 reorganization are eligible for Paycheck Protection Program ("PPP") loans. As we discussed, there appears to be no legal basis to deny PPP loans to such hospitals. I urge you to revise the PPP Borrower Application form immediately so that it includes hospitals undergoing Chapter 11 reorganization as eligible recipients of PPP loans.

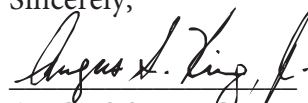
I write today because after our urgent call last Friday and follow-up by my staff, the SBA has thus far failed to change its Borrower Application form. Yesterday, PPP appropriations were exhausted. By not changing the PPP Borrower Application form in a timely manner, the SBA denied Penobscot Valley and Calais Memorial Hospitals in Maine the PPP funding that they desperately require during their time of maximum need, leaving their operations at risk.

Aside from the loss of essential medical resources at this time of critical need, the closure of Calais Memorial or Penobscot Valley Hospital would have economic effects on two rural communities in Maine that echo far beyond the facilities' walls. Rural hospitals are the backbone of small-town economies, contributing to the tax base and employing hundreds. Calais Regional Hospital is the largest employer in Calais, Maine, employing more than 200 people, with an annual economic impact of \$55 million; and Penobscot Valley Hospital employs approximately 200 people, with an annual economic impact of \$38 million.

Current law does not prevent either hospital from receiving PPP funds. Yet, the SBA has chosen to administer the PPP such that an applicant's ongoing bankruptcy reorganization automatically disqualifies the applicant for PPP assistance. This choice denies critical funding to rural hospitals that are reorganizing their debts in a responsible way.

Rural hospitals and the communities that depend upon them need your help today. As Congress considers providing the SBA with additional PPP funding, I urge you to change the PPP Borrower Application form immediately so that rural hospitals undergoing Chapter 11 reorganizations may receive PPP loans and eventual loan forgiveness. Thank you for your work to support the Nation during this difficult time.

Sincerely,



ANGUS S. KING, JR.

United States Senator

Congress of the United States
Washington, DC 20510

April 24, 2020

The Honorable Jovita Carranza
Administrator Small Business Administration
409 Third Street, SW
Washington, DC 20416

Dear Administrator Carranza:

We are writing to urge you to reconsider the blanket exclusion of organizations undergoing Chapter 11 reorganization from participation in the Paycheck Protection Program (PPP). Specifically, we ask you to consider the advisability of allowing essential health organizations, such as critical access hospitals and federally qualified health centers, to participate. These hospitals in Vermont and across the country are on the front lines of the COVID-19 pandemic response and we need the critical services they provide now more than ever before. We should be making all resources available to our health care providers to help them keep the lights on in their time of need.

In rural and underserved areas in Vermont and throughout the country, these facilities are not only essential medical providers, but are the economic backbone of our communities. It is particularly important right now to keep access to care affordable and available for patients in rural areas during the COVID-19 pandemic. If Vermont were to lose any of our critical access hospitals during this uncertain time, it would have a devastating effect on the state's COVID response and rural economy.

Eligibility criteria for PPP set in statute does not specifically exclude entities undergoing Chapter 11 bankruptcy. Yet, the SBA has chosen to administer the PPP such that an applicant's ongoing bankruptcy reorganization automatically disqualifies the applicant for PPP assistance. This decision denies the potential for critical funding to hospitals, health centers, and other essential services that are reorganizing their debt in a responsible way. Availability of PPP assistance to these entities will allow them to continue to provide vital services, pay their workforce, and mitigate the risk of closure. To achieve this outcome, SBA should ensure PPP assistance is used for these purposes and not compensating secured and unsecured creditors.

We urge you to amend the Borrower Application without delay to ensure that critical care in our communities remains available. Thank you for your consideration.

Sincerely,



PATRICK LEAHY
United States Senator



BERNARD SANDERS
United States Senator



PETER WELCH
United States Congressman

Exhibit D

(Lenders Application)

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**COMPLAINT AGAINST SBA AND
ADMINISTRATOR re PPP Funds**

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**Lender Application Form - Paycheck Protection Program Loan Guaranty**

The purpose of this form is to collect identifying information about the Lender, the Applicant, the loan guaranty request, sources and uses of funds, the proposed structure (which includes pricing and the loan term), and compliance with SBA Loan Program Requirements. This form reflects the data fields that will be collected electronically from lenders; no paper version of this form is required or permitted to be submitted. As used in this application, "Paycheck Protection Program Rule" refers to the rules in effect at the time you submit this application that have been issued by the Small Business Administration (SBA) implementing the Paycheck Protection Program under Division A, Title I of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).

Instructions for Lenders

All Paycheck Protection Program (PPP) loans are processed by all Lenders under delegated authority from SBA. This application must be submitted and signed electronically in accordance with program requirements, and the information requested is to be retained in the Lender's loan file.

A. Lender Information								
Lender Name: _____				Lender Location ID: _____				
Address: _____		City: _____		St: _____		Zip: _____		
Lender Contact: _____		Ph: () - _____		Cell or Ext: () - _____				
Contact Email: _____				Title: _____				
B. Applicant Information								
Applicant	Check One: <input type="checkbox"/> Sole Proprietor <input type="checkbox"/> Partnership <input type="checkbox"/> C-Corp <input type="checkbox"/> S-Corp <input type="checkbox"/> LLC <input type="checkbox"/> Independent contractor <input type="checkbox"/> Eligible self-employed individual <input type="checkbox"/> 501(c)(3) nonprofit <input type="checkbox"/> 501(c)(19) veterans organization <input type="checkbox"/> Tribal business (sec. 31(b)(2)(C) of Small Business Act) <input type="checkbox"/> Other							
	Applicant Legal Name: _____				Business Tax ID: _____			
	DBA: _____				City, State, Zip: _____			
	Applicant Address: _____				Phone: () - _____			
	Applicant Primary Contact: _____							
C. Loan Structure Information								
Amount of Loan Request: \$		Guarantee %:		100%		Loan Term in # of Months: 24		
Payment:		Deferred 6 mos.						
Applicant must provide documentation to Lender supporting how the loan amount was calculated in accordance with the Paycheck Protection Program Rule and the CARES Act, and Lender must retain all such supporting documentation in Lender's file.								
Interest Rate:		1%						
D. Loan Amount Information								
Average Monthly Payroll multiplied by 2.5						\$		
Refinance of Eligible Economic Injury Disaster Loan, net of Advance (if Applicable; see Paycheck Protection Program Rule)						\$		
Total						\$		
E. General Eligibility (If the answer is no to either, the loan cannot be approved)								
<ul style="list-style-type: none"> The Applicant has certified to the Lender that (1) it was in operation on February 15, 2020 and had employees for whom the Applicant paid salaries and payroll taxes or paid independent contractors, as reported on Form(s) 1099-MISC, (2) current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant, (3) the funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments, and (4) the Applicant has not received another Paycheck Protection Program loan. <input type="checkbox"/> Yes <input type="checkbox"/> No The Applicant has certified to the Lender that it (1) is an independent contractor, eligible self-employed individual, or sole proprietor or (2) employs no more than the greater of 500 or employees or, if applicable, meets the size standard in number of employees established by the SBA in 13 C.F.R. 121.201 for the Applicant's industry. <input type="checkbox"/> Yes <input type="checkbox"/> No 								
F. Applicant Certification of Eligibility (If not true, the loan cannot be approved)								
<ul style="list-style-type: none"> The Applicant has certified to the Lender that the Applicant is eligible under the Paycheck Protection Program Rule. <input type="checkbox"/> True 								
G. Franchise/License/Jobber/Membership or Similar Agreement (If applicable and no, the loan cannot be approved)								
<ul style="list-style-type: none"> The Applicant has represented to the Lender that it is a franchise that is listed in the SBA's Franchise Directory. <input type="checkbox"/> Yes <input type="checkbox"/> No 								

H. Character Determination <i>(If no, the loan cannot be approved)</i>	
<ul style="list-style-type: none"> The Applicant has represented to the Lender that neither the Applicant (if an individual) nor any individual owning 20% or more of the equity of the Applicant is subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction, or is presently incarcerated, or on probation or parole. 	<input type="checkbox"/> Yes <input type="checkbox"/> No
<ul style="list-style-type: none"> The Applicant has represented to the Lender that neither the Applicant (if an individual) nor any individual owning 20% or more of the equity of the Applicant has within the last 5 years, for any felony: 1) been convicted; 2) pleaded guilty; 3) pleaded nolo contendere; 4) been placed on pretrial diversion; or 5) been placed on any form of parole or probation (including probation before judgment). 	<input type="checkbox"/> Yes <input type="checkbox"/> No
I. Prior Loss to Government/Delinquent Federal Debt <i>(If no, the loan cannot be approved)</i>	
<ul style="list-style-type: none"> The Applicant has certified to the Lender that neither the Applicant nor any owner (as defined in the Applicant's SBA Form 2483) is presently suspended, debarred, proposed for debarment, declared ineligible, voluntarily excluded from participation in this transaction by any Federal department or agency, or presently involved in any bankruptcy. 	<input type="checkbox"/> Yes <input type="checkbox"/> No
<ul style="list-style-type: none"> The Applicant has certified to the Lender that neither the Applicant nor any of its owners, nor any business owned or controlled by any of them, ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is currently delinquent or has defaulted in the last 7 years and caused a loss to the government. 	<input type="checkbox"/> Yes <input type="checkbox"/> No
J. U.S. Employees <i>(If no, the loan cannot be approved)</i>	
<ul style="list-style-type: none"> The Applicant has certified that the principal place of residence for all employees included in the Applicant's payroll calculation is the United States. 	<input type="checkbox"/> Yes <input type="checkbox"/> No
K. Fees <i>(If yes, Lender may not pass any agent fee through to the Applicant or offset or pay the fee with the proceeds of this loan)</i>	
<ul style="list-style-type: none"> Is the Lender using a third party to assist in the preparation of the loan application or application materials, or to perform other services in connection with this loan? 	<input type="checkbox"/> Yes <input type="checkbox"/> No

SBA Certification to Financial Institution under Right to Financial Privacy Act (12 U.S.C. 3401)

By signing SBA Form 2483, Borrower Information Form in connection with this application for an SBA-guaranteed loan, the Applicant certifies that it has read the Statements Required by Law and Executive Orders, which is attached to Form 2483. As such, SBA certifies that it has complied with the applicable provisions of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401) and, pursuant to that Act, no further certification is required for subsequent access by SBA to financial records of the Applicant/Borrower during the term of the loan guaranty.

Lender Certification

On behalf of the Lender, I certify that:

- The Lender has complied with the applicable lender obligations set forth in paragraphs 3.b(i)-(iii) of the Paycheck Protection Program Rule.
- The Lender has obtained and reviewed the required application (including documents demonstrating qualifying payroll amounts) of the Applicant and will retain copies of such documents in the Applicant's loan file.

I certify that:

- Neither the undersigned Authorized Lender Official, nor such individual's spouse or children, has a financial interest in the Applicant.

Authorized Lender Official: _____
Signature

Date: _____

Type or Print Name: _____

Title: _____

NOTE: According to the Paperwork Reduction Act, you are not required to respond to this collection of information unless it displays a currently valid OMB Control Number. The estimated burden for completing this form, including time for reviewing instructions, gathering data needed, and completing and reviewing the form is 25 minutes per response. Comments or questions on the burden estimates should be sent to U.S. Small Business Administration, Director, Records Management Division, 409 3rd St., SW, Washington DC 20416, and/or SBA Desk Officer, Office of Management and Budget, New Executive Office Building, Rm. 10202, Washington DC 20503. **PLEASE DO NOT SEND FORMS TO THESE ADDRESSES.**

Exhibit E

(Second Interim Rule)

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**COMPLAINT AGAINST SBA AND
ADMINISTRATOR re PPP Funds**

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DENTONS US LLP
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Compliance With Executive Orders 12866, 12988, 13132, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

E.O. 12866 and E.O. 13563

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563. SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID-19 emergency. This rule's designation under Executive Order 13771 will be informed by public comment.

This rule is necessary to implement Sections 1102 and 1106 of the CARES Act in order to provide economic relief to small businesses nationwide adversely impacted under the COVID-19 Emergency Declaration. We anticipate that this rule will result in substantial benefits to small businesses, their employees, and the communities they serve. However, we lack data to estimate the effects of this rule.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

SBA has determined that this rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA has determined that this rule will impose recordkeeping or reporting requirements under the Paperwork Reduction Act ("PRA"). SBA has obtained emergency approval under OMB Control Number 3245-0407 for the information collection (IC) required to implement the program described above. This IC consists of Form 2483 (Paycheck Protection Program Application Form), SBA Form 2484 (Paycheck Protection Program Lender's Application for 7(a) Loan Guaranty), and SBA Form 3506 (CARES Act

Section 1102 Lender Agreement), and SBA Form 3507 (CARES Act Section 1102 Lender Agreement—Non-Bank and Non-Insured Depository Institution Lender). The collection is approved for use until September 30, 2020.

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a "small entity" as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for such small government jurisdictions, neither State nor local governments are "small entities." Similarly, for purposes of the RFA, individual persons are not small entities.

The requirement to conduct a regulatory impact analysis does not apply if the head of the agency "certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. 605(b). The agency must, however, publish the certification in the **Federal Register** at the time of publication of the rule, "along with a statement providing the factual basis for such certification." If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA's waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the **Federal Register** at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b).

Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable,

unnecessary, or contrary to the public interest. Small Business Administration's Office of Advocacy guide: *How to Comply with the Regulatory Flexibility Act. Ch.1. p.9*. Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

Authority: 15 U.S.C. 636(a)(36); Coronavirus Aid, Relief, and Economic Security Act, Public Law 116–136, Section 1114.

Jovita Carranza,

Administrator.

[FR Doc. 2020–07672 Filed 4–10–20; 4:15 pm]

BILLING CODE P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

[Docket No. SBA–2020–0019]

RIN 3245–AH35

Business Loan Program Temporary Changes; Paycheck Protection Program

AGENCY: U.S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: Elsewhere in this issue of the **Federal Register**, the U.S. Small Business Administration (SBA) is publishing an interim final rule (the Initial Rule) announcing the implementation of sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act). Section 1102 of the Act temporarily adds a new program, titled the "Paycheck Protection Program," to the SBA's 7(a) Loan Program. Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program. The Paycheck Protection Program and loan forgiveness are intended to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID–19). This interim final rule supplements the Initial Rule with additional guidance regarding the application of certain affiliate rules applicable to SBA's implementation of sections 1102 and 1106 of the Act and requests public comment.

DATES:

Effective date: This interim final rule is effective April 15, 2020.

Applicability date: This interim final rule applies to applications submitted under the Paycheck Protection Program through June 30, 2020, or until funds made available for this purpose are exhausted.

Comment Date: Comments must be received on or before May 15, 2020.

ADDRESSES: You may submit comments, identified by number SBA–2020–0019 through the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

SBA will post all comments on www.regulations.gov. If you wish to submit confidential business information (CBI) as defined in the User Notice at www.regulations.gov, please send an email to ppp-ifr@sba.gov. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Call Center Representative at 833–572–0502, or the local SBA Field Office; the list of offices can be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

SUPPLEMENTARY INFORMATION:

I. Background Information

On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID–19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all States, territories, and the District of Columbia. With the COVID–19 emergency, many small businesses nationwide are experiencing economic hardship as a direct result of the Federal, State, tribal, and local public health measures that are being taken to minimize the public's exposure to the virus. These measures, some of which are government-mandated, are being implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance from others or even stay-at-home orders, are being implemented, resulting in a dramatic decrease in economic activity as the public avoids malls, retail stores, and other businesses.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act or the Act) (Pub. L. 116–136) to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic. The Small Business Administration (SBA) received funding and authority through the Act to modify existing loan programs and establish a new loan program to assist small

businesses nationwide adversely impacted by the COVID–19 emergency.

Section 1102 of the Act temporarily permits SBA to guarantee 100 percent of 7(a) loans under a new program titled the “Paycheck Protection Program.” Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program. On April 2, 2020, SBA issued an interim final rule (the Initial Rule) announcing the implementation of sections 1102 and 1106 of the Act. A more detailed discussion of sections 1102 and 1106 of the Act is found in section III of the Initial Rule.

This interim final rule supplements the Initial Rule with additional guidance regarding the application of certain affiliate rules applicable to SBA's implementation of sections 1102 and 1106 of the Act and requests public comment.

II. Comments and Immediate Effective Date

The intent of the Act is that SBA provide relief to America's small businesses expeditiously. This intent, along with the dramatic decrease in economic activity nationwide, provides good cause for SBA to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act (5 U.S.C. 553(b)(3)(B)). Specifically, small businesses need to be informed on how to apply for a loan and the terms of the loan under section 1102 of the Act as soon as possible because the last day to apply for and receive a loan is June 30, 2020. The immediate effective date of this interim final rule will benefit small businesses so that they can immediately apply for the loan with a better understanding of loan terms and conditions. This interim final rule is effective without advance notice and public comment because section 1114 of the Act authorizes SBA to issue regulations to implement Title 1 of the Act without regard to notice requirements. This rule is being issued to allow for immediate implementation of this program. Although this interim final rule is effective immediately, comments are solicited from interested members of the public on all aspects of the interim final rule. These comments must be submitted on or before May 15, 2020. The SBA will consider these comments and the need for making any revisions as a result of these comments.

III. Affiliate Rules for Paycheck Protection Program

Overview

The CARES Act was enacted to provide immediate assistance to individuals, families, and organizations affected by the COVID–19 emergency. Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under the Paycheck Protection Program (PPP). Loans under the PPP will be 100 percent guaranteed by SBA, and the full principal amount of the loans may qualify for loan forgiveness. Additional information about the PPP is available in the Initial Rule.

1. Affiliation Rules Generally

Are affiliates considered together for purposes of determining eligibility?

In most cases, a borrower will be considered together with its affiliates for purposes of determining eligibility for the PPP.¹ Under SBA rules, entities may be considered affiliates based on factors including stock ownership, overlapping management,² and identity of interest. 13 CFR 121.301.

How do SBA's affiliation rules affect my eligibility and apply to me under the PPP?

An entity generally is eligible for the PPP if it, combined with its affiliates, is a small business as defined in section 3 of the Small Business Act (15 U.S.C. 632), or (1) has 500 or fewer employees whose principal place of residence is in the United States or is a business that operates in a certain industry and meets applicable SBA employee-based size standards for that industry, and (2) is a

¹ Section 7(a)(36)(D)(iv) of the Small Business Act (15 U.S.C. 636(a)(36)(D)(iv)), as added by the Act, waives the affiliation rules contained in § 121.103 for (1) any business concern with not more than 500 employees that, as of the date on which the loan is disbursed, is assigned a North American Industry Classification System code beginning with 72; (2) any business concern operating as a franchise that is assigned a franchise identifier code by the Administration; and (3) any business concern that receives financial assistance from a company licensed under section 301 of the Small Business Investment Act of 1958 (15 U.S.C. 681). This interim final rule has no effect on these statutory waivers, which remain in full force and effect. As a result, the affiliation rules contained in section 121.301 also do not apply to these types of entities.

² In order to help potential borrowers identify other businesses with which they may be deemed to be affiliated under the common management standard, the Borrower Application Form, SBA Form 2483, released on April 2, 2020, requires applicants to list other businesses with which they have common management. The information supplied by the applicant in response to that information request should be used by applicants as they assess whether they have affiliates that should be included in their number of employees reported on SBA Form 2483.

tax-exempt nonprofit organization described in section 501(c)(3) of the Internal Revenue Code (IRC), a tax-exempt veterans organization described in section 501(c)(19) of the IRC, a Tribal business concern described in section 31(b)(2)(C) of the Small Business Act, or any other business concern. Prior to the Act, the nonprofit organizations listed above were not eligible for SBA Business Loan Programs under section 7(a) of the Small Business Act; only for-profit small business concerns were eligible. The Act made such nonprofit organizations not only eligible for the PPP, but also subjected them to SBA's affiliation rules. Specifically, section 1102 of the Act provides that the provisions applicable to affiliations under 13 CFR 121.103 apply with respect to nonprofit organizations and veterans organizations in the same manner as with respect to small business concerns. However, the detailed affiliation standards contained in § 121.103 currently do not apply to PPP borrowers, because § 121.103(a)(8) provides that applicants in SBA's Business Loan Programs (which include the PPP) are subject to the affiliation rule contained in 13 CFR 121.301.

2. Faith-Based Organizations

This rule exempts otherwise qualified faith-based organizations from the SBA's affiliation rules, including those set forth in 13 CFR part 121, where the application of the affiliation rules would substantially burden those organizations' religious exercise. This exemption is required, or at a minimum authorized, by the Religious Freedom Restoration Act (RFRA) (Pub. L. 103–141), which provides that the “[g]overnment shall not substantially burden a person's exercise of religion” unless the government can “demonstrate[] that application of the burden” to the person is both “in furtherance of a compelling governmental interest” and “the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. 2000bb–1.

A substantial burden under RFRA includes both government action that compels a person to violate his sincere religious beliefs or suffer a penalty, *see, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014), and the imposition of a substantial burden through “indirect” measures. *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717–18 (1981). Notably, the government imposes a substantial burden on religious exercise when it “conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such

a benefit because of conduct mandated by religious belief.” *Id.* at 718. For example, in *Sherbert v. Verner*, 374 U.S. 398 (1963), a State denied the plaintiff unemployment benefits because she would not work on Saturday, the Sabbath of her faith. *Id.* at 400–01. Even though no “sanctions directly compel[led]” her to work on Saturday, the Supreme Court held that the State's denial of benefits “puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship.” *Id.* at 404. As the Court observed, the State's framework “forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.” *Id.* Consistent with these precedents, RFRA explicitly contemplates that “the denial of government funding, benefits, or exemptions” may violate its protections. 42 U.S.C. 2000bb–4.

SBA is aware of the existence of faith-based organizations that would qualify for relief under the CARES Act but for their affiliation with other entities as an aspect of their religious practice. Supreme Court precedent has long recognized that the organizational structure of faith-based entities may itself be a matter of significant religious concern and that faith-based organizations are therefore guaranteed the “power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). Moreover, an assessment of the extent to which questions concerning religious polity rest upon theological or other religious foundations presents particular difficulties, for the First Amendment “forbids civil courts” from “the interpretation of particular church doctrines and the importance of those doctrines to the religion.” *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969). A number of faith-based organizations understand their affiliation with other religious entities as a part of their exercise of religion, as a mandate given the “hierarchical or connectional” structure of their church, *Jones v. Wolf*, 443 U.S. 595, 597 (1979), or as an expression of their sincere religious belief. *Cf.* 1 W. Cole Durham & Robert Smith, *Religious Organizations and the Law* section 8.19 (Westlaw rev. ed. 2017) (“Religious organizations, such as parishes or mission centers, normally tend to choose the civil-

property-holding structures that most closely mirror their own ecclesiology or polity.”). Either affiliation decision falls within the definition of “religious exercise” that applies to RFRA, which “includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” *See* 42 U.S.C. 2000cc–5(7)(A); 2000bb–2(4) (“the term ‘exercise of religion’ means religious exercise, as defined in section 2000cc–5 of this title”).

As applied to these faith-based organizations, the affiliation rules would impose a substantial burden. The affiliation rules would deny an important benefit (participation in a program for which they would otherwise be eligible under the CARES Act) because of the exercise of sincere religious belief (affiliation with other religious entities).

The Administrator has also concluded that she does not have a compelling interest in denying emergency assistance to faith-based organizations that are facing the same economic hardship to which the CARES Act responded and who would be eligible for PPP but for their faith-based organizational and associational decisions. This conclusion is reinforced by the fact that the affiliation rules already contain numerous exemptions, *see generally* 13 CFR 121.103(b), ranging from “[b]usiness concerns owned and controlled by Indian Tribes, Alaska Native Corporations, [and] Native Hawaiian Organizations,” *id.* § 121.103(b)(2)(i) to “member shareholders of a small agricultural cooperative.” *Id.* § 121.103(b)(7). In light of these exemptions, it is difficult to maintain that denying relief to these faith-based organizations is necessary to further a compelling government interest, let alone the least restrictive means of doing so. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (“[A] law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited.”) (cleaned up); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006) (applying same principle under RFRA). SBA accordingly must exempt faith-based organizations that would otherwise be disqualified from the PPP based on features of those organizations' affiliations that are a matter of sincere religious exercise as defined in 42 U.S.C. 2000bb–2.

This action is also supported by 15 U.S.C. 634(b)(6), which authorizes the Administrator to “make such rules and regulations as he deems necessary to

carry out the authority vested in him by or pursuant to this chapter.” As relevant here, the CARES Act expanded eligibility for the covered loans during the covered period for nonprofit organizations that employ not more than 500 employees or, if applicable, the size standard in number of employees established by the Administrator for the industry in which the nonprofit organization operates. 15 U.S.C. 636(a)(36)(D)(i). That expansion posed unique concerns for the Administrator, who is tasked with applying the “provisions applicable to affiliations under section 121.103 of title 13, Code of Federal Regulations, or any successor thereto, . . . with respect to a nonprofit organization and a veterans organizations in the same manner as with respect to a small business concern.” *Id.* 636(a)(36)(D)(vi). Although these rules may easily be applied to faith-based organizations in many cases, their application to certain faith-based organizations presents significant challenges, in particular because of the large number of faith-based organizations who would now be eligible for the PPP but for their religious exercise.

As discussed above, carrying the affiliation rules over to all faith-based organizations without modification would raise concerns under RFRA. Moreover, application of the affiliation rules, which, for example, provide for assessment of whether one faith-based organization “controls or has the power to control” another organization, 13 CFR 121.103(a)(1), could involve SBA in questions of church governance concerning “the allocation of power within a (hierarchical) church so as to decide . . . religious law (governing church polity),” in violation of the First Amendment. *Serbian E. Orthodox Diocese for the U.S.A. & Canada v. Milivojevic*, 426 U.S. 696, 709 (1979) (internal quotation marks omitted)). Finally, affiliation rules developed in the context of for-profit enterprises present significant administrative difficulties where faith-based organizations are concerned. For example, “the notion of corporate subsidiarity or affiliation in civil law is entirely foreign to the polity of religious organizations,” and there is a significant risk that civil authorities will “mischaracterize or misinterpret the polity of a religious body.” 1 W. Cole Durham & Robert Smith, *Religious Organizations and the Law* sections 8.19, 8.21 (discussing examples of judicial mischaracterizations). Consistent with these concerns, it is also notable that other areas of federal law

approach issues analogous to affiliation differently for religious organizations. *See, e.g.*, 26 U.S.C. 512 (b)(12).

For these reasons, in addition to the RFRA mandate, the Administrator has determined that it is appropriate to exercise the authority granted under 15 U.S.C. 634(b)(6) to exempt from application of SBA’s affiliation rules faith-based organizations that would otherwise be disqualified from participation in PPP because of affiliations that are a part of their religious exercise.

Accordingly, the SBA’s affiliation rules, including those set forth in 13 CFR part 121, do not apply to the relationship of any church, convention or association of churches, or other faith-based organization or entity to any other person, group, organization, or entity that is based on a sincere religious teaching or belief or otherwise constitutes a part of the exercise of religion. This includes any relationship to a parent or subsidiary and other applicable aspects of organizational structure or form. A faith-based organization seeking loans under this program may rely on a reasonable, good faith interpretation in determining whether its relationship to any other person, group, organization, or entity is exempt from the affiliation rules under this provision, and SBA will not assess, and will not require participating lenders to assess, the reasonableness of the faith-based organization’s determination.

3. Additional Information

SBA may provide further guidance, if needed, through SBA notices and a program guide which will be posted on SBA’s website at www.sba.gov.

Questions on the Paycheck Protection Program 7(a) Loans may be directed to the Lender Relations Specialist in the local SBA Field Office. The local SBA Field Office may be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

Compliance With Executive Orders 12866, 12988, 13132, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Orders 12866, 13563, and 13771

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563, and is considered a major rule under the Congressional Review Act. SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the

need to move expeditiously to mitigate the current economic conditions arising from the COVID–19 emergency. This rule’s designation under Executive Order 13771 will be informed by public comment.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

SBA has determined that this rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA has determined that this rule will impose recordkeeping or reporting requirements under the Paperwork Reduction Act (“PRA”). SBA has obtained emergency approval under OMB Control Number 3245–0407 for the information collection (IC) required to implement the program described above. This IC consists of Form 2483 (Paycheck Protection Program Application Form) and SBA Form 2484 (Paycheck Protection Program Lender’s Application for 7(a) Loan Guaranty) SBA Form 3506 (CARES Act Section 1102 Lender Agreement), and SBA Form 3507 (CARES Act Section 1102 Lender Agreement—Non-Bank and Non-Insured Depository Institution Lender). The collection is approved for use until October 31, 2020.

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a “small entity” as (1) a proprietary firm meeting the size standards of the Small Business

Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for such small government jurisdictions, neither State nor local governments are “small entities.” Similarly, for purposes of the RFA, individual persons are not small entities.

The requirement to conduct a regulatory impact analysis does not apply if the head of the agency “certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” 5 U.S.C. 605(b). The agency must, however, publish the certification in the **Federal Register** at the time of publication of the rule, “along with a statement providing the factual basis for such certification.” If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA’s waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the **Federal Register** at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b).

Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. SBA Office of Advocacy guide: *How to Comply with the Regulatory Flexibility Act, Ch.1, p.9*. Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

List of Subjects in 13 CFR Part 121

Administrative practice and procedure, Authority delegations (Government agencies), Intergovernmental relations, Investigations, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Small Business

Administration amends 13 CFR part 121 as set forth below:

PART 121—SMALL BUSINESS SIZE REGULATIONS

■ 1. The authority citation for part 121 is revised to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 636(a)(36), 662, and 694a(9); Pub. L. 116–136, Section 1114.

■ 2. Amend § 121.103 by adding paragraph (b)(10) to read as follows:

§ 121.103 How does SBA determine affiliation?

* * * * *

(b) * * *

(10)(i) The relationship of a faith-based organization to another organization is not considered an affiliation with the other organization under this subpart if the relationship is based on a religious teaching or belief or otherwise constitutes a part of the exercise of religion. In addition, the eligibility criteria set forth in 15 U.S.C. 636(a)(36)(D) are satisfied for any faith-based organization having not more than 500 employees (including individuals employed on a full-time, part-time, or other basis) that pays Federal payroll taxes using its own Internal Revenue Service Employer Identification Number (EIN) or that would support a deduction under the second sentence of 26 U.S.C. 512(b)(12) if the organization generated unrelated business taxable income. For purposes of this paragraph (b)(10), the term “faith-based organization” includes, but is not limited to, any organization associated with a church or convention or association of churches within the meaning of 26 U.S.C. 414(e)(3)(D). The term “organization” has the meaning given in 26 U.S.C. 414(m)(6)(A). The terms “church” and “convention or association of churches” have the same meaning that they have in 26 U.S.C. 414.

(ii) No specific process or filing is necessary to claim the benefit of the exemption in paragraph (b)(10)(i) of this section. In applying for a loan under the Paycheck Protection Program (PPP), a faith-based organization may make all necessary certifications with respect to common ownership or management or other eligibility criteria based upon

affiliation, if the organization would be an eligible borrower but for application of SBA affiliation rules and if the organization falls within the terms of the exemption described in paragraph (b)(10)(i) of this section. If a faith-based organization indicates any relationship that may pertain to affiliation, such as ownership of, ownership by, or common management with any other organization, on or in connection with a loan application, and if the faith-based organization applying for a loan falls within the terms of the exemption described in paragraph (b)(10)(i) of this section with respect to that relationship, the faith-based organization may indicate on a separate sheet that it is entitled to the exemption. That sheet may be identified as addendum A, and no further listing of the other organization or description of the relationship to that organization is required. See appendix A to this part for a sample “Addendum A”, but the format need not be used as long as the substance is the same.

* * * * *

■ 3. Add appendix A to part 121 to read as follows:

Appendix A to Part 121—Paycheck Protection Program Sample Addendum A

[Sample]

ADDENDUM A

✓ The Applicant claims an exemption from all SBA affiliation rules applicable to Paycheck Protection Program loan eligibility because the Applicant has made a reasonable, good faith determination that the Applicant qualifies for a religious exemption under 13 CFR 121.103(b)(10), which says that “[t]he relationship of a faith-based organization to another organization is not considered an affiliation with the other organization . . . if the relationship is based on a religious teaching or belief or otherwise constitutes a part of the exercise of religion.”

Jovita Carranza,
Administrator.

[FR Doc. 2020–07673 Filed 4–10–20; 4:15 pm]

BILLING CODE P

Exhibit F

(Third Interim Rule)

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**COMPLAINT AGAINST SBA AND
ADMINISTRATOR re PPP Funds**

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Where:

\dot{m}_{SD} = dry air mass flow rate of infiltration air for single-duct portable air conditioners, in pounds per minute (lb/m).

\dot{m}_{95} and \dot{m}_{83} = dry air mass flow rate of infiltration air for dual-duct portable air conditioners, as calculated based on testing according to the test conditions in Table 1 of this appendix, in lb/m.

V_{co_SD} , V_{co_95} , and V_{co_83} = average volumetric flow rate of the condenser outlet air during cooling mode testing for single-duct portable air conditioners; and at the 95 °F and 83 °F dry-bulb outdoor conditions for dual-duct portable air conditioners, respectively, in cubic feet per minute (cfm).

V_{ci_95} and V_{ci_83} = average volumetric flow rate of the condenser inlet air during cooling mode testing at the 95 °F and 83 °F dry-bulb outdoor conditions for dual-duct portable air conditioners, respectively, in cfm.

ρ_{co_SD} , ρ_{co_95} , and ρ_{co_83} = average density of the condenser outlet air during cooling mode testing for single-duct portable air conditioners, and at the 95 °F and 83 °F dry-bulb outdoor conditions for dual-duct portable air conditioners, respectively, in pounds mass per cubic foot (lb_m/ft³).

ρ_{ci_95} and ρ_{ci_83} = average density of the condenser inlet air during cooling mode testing at the 95 °F and 83 °F dry-bulb outdoor conditions for dual-duct portable air conditioners, respectively, in lb_m/ft³.

ω_{co_SD} , ω_{co_95} , and ω_{co_83} = average humidity ratio of condenser outlet air during cooling mode testing for single-duct portable air conditioners, and at the 95 °F and 83 °F dry-bulb outdoor conditions for dual-duct portable air conditioners, respectively, in pounds mass of water vapor per pounds mass of dry air (lb_w/lb_{da}).

ω_{ci_95} and ω_{ci_83} = average humidity ratio of condenser inlet air during cooling mode testing at the 95 °F and 83 °F dry-bulb outdoor conditions for dual-duct portable air conditioners, respectively, in lb_w/lb_{da}.

For single-duct and dual-duct portable air conditioners, calculate the sensible component of infiltration air heat contribution according to:

$$Q_{s_95} = \dot{m} \times 60 \times [(c_{p_da} \times (T_{ia_95} - T_{indoor})) + (c_{p_wv} \times (\omega_{ia_95} \times T_{ia_95} - \omega_{indoor} \times T_{indoor}))]$$

$$Q_{s_83} = \dot{m} \times 60 \times [(c_{p_da} \times (T_{ia_83} - T_{indoor})) + (c_{p_wv} \times (\omega_{ia_83} \times T_{ia_83} - \omega_{indoor} \times T_{indoor}))]$$

Where:

Q_{s_95} and Q_{s_83} = sensible heat added to the room by infiltration air, calculated at the 95 °F and 83 °F dry-bulb outdoor conditions in Table 1 of this appendix, in Btu/h.

\dot{m} = dry air mass flow rate of infiltration air, \dot{m}_{SD} or \dot{m}_{95} when calculating Q_{s_95} and \dot{m}_{SD} or \dot{m}_{83} when calculating Q_{s_83} , in lb/m.

c_{p_da} = specific heat of dry air, 0.24 Btu/lb_m-°F.

c_{p_wv} = specific heat of water vapor, 0.444 Btu/lb_m-°F.

T_{indoor} = indoor chamber dry-bulb temperature, 80 °F.

T_{ia_95} and T_{ia_83} = infiltration air dry-bulb temperatures for the two test conditions in Table 1 of this appendix, 95 °F and 83 °F, respectively.

ω_{ia_95} and ω_{ia_83} = humidity ratios of the 95 °F and 83 °F dry-bulb infiltration air, 0.0141 and 0.01086 lb_w/lb_{da}, respectively.

ω_{indoor} = humidity ratio of the indoor chamber air, 0.0112 lb_w/lb_{da}.

60 = conversion factor from minutes to hours.

Calculate the latent heat contribution of the infiltration air according to:

$$Q_{L_95} = \dot{m} \times 60 \times H_{fg} \times (\omega_{ia_95} - \omega_{indoor})$$

$$Q_{L_83} = \dot{m} \times 60 \times H_{fg} \times (\omega_{ia_83} - \omega_{indoor})$$

Where:

Q_{L_95} and Q_{L_83} = latent heat added to the room by infiltration air, calculated at the 95 °F and 83 °F dry-bulb outdoor conditions in Table 1 of this appendix, in Btu/h.

\dot{m} = mass flow rate of infiltration air, \dot{m}_{SD} or \dot{m}_{95} when calculating Q_{L_95} and \dot{m}_{SD} or \dot{m}_{83} when calculating Q_{L_83} , in lb/m.

H_{fg} = latent heat of vaporization for water vapor, 1061 Btu/lb_m.

ω_{ia_95} and ω_{ia_83} = humidity ratios of the 95 °F and 83 °F dry-bulb infiltration air, 0.0141 and 0.01086 lb_w/lb_{da}, respectively.

ω_{indoor} = humidity ratio of the indoor chamber air, 0.0112 lb_w/lb_{da}.

60 = conversion factor from minutes to hours.

The total heat contribution of the infiltration air is the sum of the sensible and latent heat:

$$Q_{infiltration_95} = Q_{s_95} + Q_{L_95}$$

$$Q_{infiltration_83} = Q_{s_83} + Q_{L_83}$$

Where:

$Q_{infiltration_95}$ and $Q_{infiltration_83}$ = total infiltration air heat in cooling mode, calculated at the 95 °F and 83 °F dry-bulb outdoor conditions in Table 1 of this appendix, in Btu/h.

Q_{s_95} and Q_{s_83} = sensible heat added to the room by infiltration air, calculated at the 95 °F and 83 °F dry-bulb outdoor conditions in Table 1 of this appendix, in Btu/h.

Q_{L_95} and Q_{L_83} = latent heat added to the room by infiltration air, calculated at the 95 °F and 83 °F dry-bulb outdoor conditions in Table 1 of this appendix, in Btu/h.

* * * * *

[FR Doc. 2020-07733 Filed 4-17-20; 8:45 am]

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SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

[Docket Number SBA-2020-0020]

RIN 3245-AH36

Business Loan Program Temporary Changes; Paycheck Protection Program—Additional Eligibility Criteria and Requirements for Certain Pledges of Loans

AGENCY: U. S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: On April 2, 2020, the U.S. Small Business Administration (SBA) posted an interim final rule (the First PPP Interim Final Rule) announcing the implementation of sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act). Section 1102 of the Act temporarily adds a new program, titled the “Paycheck Protection Program,” to the SBA’s 7(a) Loan Program. Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program (PPP). The PPP is intended to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID-19). This interim final rule supplements the First PPP Interim Final Rule with guidance for individuals with self-employment income who file a Form 1040, Schedule C. This rule also addresses eligibility issues for certain business concerns and requirements for certain pledges of PPP loans. This interim final rule supplements SBA’s implementation of sections 1102 and 1106 of the Act and requests public comment.

DATES:

Effective Date: This rule is effective April 20, 2020.

Applicability Date: This interim final rule applies to applications submitted under the Paycheck Protection Program through June 30, 2020, or until funds made available for this purpose are exhausted.

Comment Date: Comments must be received on or before May 20, 2020.

ADDRESSES: You may submit comments, identified by number SBA-2020-0020 through the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. SBA will post all comments on www.regulations.gov. If you wish to submit confidential business information (CBI) as defined in the User Notice at www.regulations.gov, please send an email to ppp-ifr@sba.gov.

Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: A Call Center Representative at 833-572-0502, or the local SBA Field Office; the list of offices can be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

SUPPLEMENTARY INFORMATION:

I. Background Information

On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID-19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all States, territories, and the District of Columbia. With the COVID-19 emergency, many small businesses nationwide are experiencing economic hardship as a direct result of the Federal, State, tribal, and local public health measures that are being taken to minimize the public's exposure to the virus. These measures, some of which are government-mandated, are being implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance from others or even stay-at-home orders, are being implemented, resulting in a dramatic decrease in economic activity as the public avoids malls, retail stores, and other businesses.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act or the Act) (Pub. L. 116-136) to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic. The Small Business Administration (SBA) received funding and authority through the Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID-19 emergency. Section 1102 of the Act temporarily permits SBA to guarantee 100 percent of 7(a) loans under a new program titled the "Paycheck Protection Program." Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program.

II. Comments and Immediate Effective Date

The intent of the Act is that SBA provide relief to America's small businesses expeditiously. This intent, along with the dramatic decrease in economic activity nationwide, provides good cause for SBA to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act. Specifically, small businesses need to be informed on whether they are eligible to apply for a loan, how to apply for a loan, and the terms of the loan under section 1102 of the Act as soon as possible because the last day to apply for and receive a loan is June 30, 2020. The immediate effective date of this interim final rule will benefit small businesses so that they can immediately determine their eligibility and apply for the loan with a full understanding of loan terms and conditions. This interim final rule is effective without advance notice and public comment because section 1114 of the Act authorizes SBA to issue regulations to implement Title I of the Act without regard to notice requirements. This rule is being issued to allow for immediate implementation of this program. Although this interim final rule is effective immediately, comments are solicited from interested members of the public on all aspects of the interim final rule, including section III below. These comments must be submitted on or before May 20, 2020. SBA will consider these comments and the need for making any revisions as a result of these comments.

III. Additional Paycheck Protection Program Eligibility Criteria and Requirements for Certain Pledges of Loans

Overview

The CARES Act was enacted to provide immediate assistance to individuals, families, and organizations affected by the COVID-19 emergency. Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under the Paycheck Protection Program (PPP). Loans under the PPP will be 100 percent guaranteed by SBA, and the full principal amount of the loans and any accrued interest may qualify for loan forgiveness. Additional information about the PPP is available in the First PPP Interim Final Rule (85 FR 20811) and a second interim final rule (85 FR 20817) posted April 3, 2020.

1. Individuals With Self-Employment Income Who File a Form 1040, Schedule C

a. I have income from self-employment and file a Form 1040, Schedule C. Am I eligible for a PPP Loan?

You are eligible for a PPP loan if: (i) You were in operation on February 15, 2020; (ii) you are an individual with self-employment income (such as an independent contractor or a sole proprietor); (iii) your principal place of residence is in the United States; and (iv) you filed or will file a Form 1040 Schedule C for 2019. However, if you are a partner in a partnership, you may not submit a separate PPP loan application for yourself as a self-employed individual. Instead, the self-employment income of general active partners may be reported as a payroll cost, up to \$100,000 annualized, on a PPP loan application filed by or on behalf of the partnership. Partnerships are eligible for PPP loans under the Act, and the Administrator has determined, in consultation with the Secretary of the Treasury (Secretary), that limiting a partnership and its partners (and an LLC filing taxes as a partnership) to one PPP loan is necessary to help ensure that as many eligible borrowers as possible obtain PPP loans before the statutory deadline of June 30, 2020. This limitation will allow lenders to more quickly process applications and lower the burdens of applying for partnerships/partners. The Administrator has further determined that permitting partners to apply as self-employed individuals would create unnecessary confusion regarding which entity, the partner or the partnership, applies for partner and LLC member income, and would generate loan proceeds use coordination and allocation issues. Rent, mortgage interest, utilities, and other debt service are generally incurred at the partnership level, not partner level, so it is most natural to provide the funds for these expenses to the partnership, not individual partners. In addition, you should be aware that participation in the PPP may affect your eligibility for state-administered unemployment compensation or unemployment assistance programs, including the programs authorized by Title II, Subtitle A of the CARES Act, or CARES Act Employee Retention Credits. SBA will issue additional guidance for those individuals with self-employment income who: (i) Were not in operation in 2019 but who were in operation on February 15, 2020, and (ii) will file a Form 1040 Schedule C for 2020.

b. How do I calculate the maximum amount I can borrow and what documentation is required?

How you calculate your maximum loan amount depends upon whether or not you employ other individuals. If you have no employees, the following methodology should be used to calculate your maximum loan amount:

- i. Step 1: Find your 2019 IRS Form 1040 Schedule C line 31 net profit amount (if you have not yet filed a 2019 return, fill it out and compute the value). If this amount is over \$100,000, reduce it to \$100,000. If this amount is zero or less, you are not eligible for a PPP loan.
- ii. Step 2: Calculate the average monthly net profit amount (divide the amount from Step 1 by 12).
- iii. Step 3: Multiply the average monthly net profit amount from Step 2 by 2.5.

iv. Step 4: Add the outstanding amount of any Economic Injury Disaster Loan (EIDL) made between January 31, 2020 and April 3, 2020 that you seek to refinance, less the amount of any advance under an EIDL COVID-19 loan (because it does not have to be repaid).

Regardless of whether you have filed a 2019 tax return with the IRS, you must provide the 2019 Form 1040 Schedule C with your PPP loan application to substantiate the applied-for PPP loan amount and a 2019 IRS Form 1099-MISC detailing nonemployee compensation received (box 7), invoice, bank statement, or book of record that establishes you are self-employed. You must provide a 2020 invoice, bank statement, or book of record to establish you were in operation on or around February 15, 2020.

If you have employees, the following methodology should be used to calculate your maximum loan amount:

- i. Step 1: Compute 2019 payroll by adding the following:
 - a. Your 2019 Form 1040 Schedule C line 31 net profit amount (if you have not yet filed a 2019 return, fill it out and compute the value), up to \$100,000 annualized, if this amount is over \$100,000, reduce it to \$100,000, if this amount is less than zero, set this amount at zero;
 - b. 2019 gross wages and tips paid to your employees whose principal place of residence is in the United States computed using 2019 IRS Form 941 Taxable Medicare wages & tips (line 5c—column 1) from each quarter plus any pre-tax employee contributions for health insurance or other fringe benefits excluded from Taxable Medicare wages & tips; subtract any amounts paid to any individual employee in excess of \$100,000 annualized and any amounts

paid to any employee whose principal place of residence is outside the United States; and

c. 2019 employer health insurance contributions (health insurance component of Form 1040 Schedule C line 14), retirement contributions (Form 1040 Schedule C line 19), and state and local taxes assessed on employee compensation (primarily under state laws commonly referred to as the State Unemployment Tax Act or SUTA from state quarterly wage reporting forms).

ii. Step 2: Calculate the average monthly amount (divide the amount from Step 1 by 12).

iii. Step 3: Multiply the average monthly amount from Step 2 by 2.5.

iv. Step 4: Add the outstanding amount of any EIDL made between January 31, 2020 and April 3, 2020 that you seek to refinance, less the amount of any advance under an EIDL COVID-19 loan (because it does not have to be repaid).

You must supply your 2019 Form 1040 Schedule C, Form 941 (or other tax forms or equivalent payroll processor records containing similar information) and state quarterly wage unemployment insurance tax reporting forms from each quarter in 2019 or equivalent payroll processor records, along with evidence of any retirement and health insurance contributions, if applicable. A payroll statement or similar documentation from the pay period that covered February 15, 2020 must be provided to establish you were in operation on February 15, 2020.

d. How can PPP loans be used by individuals with income from self-employment who file a 2019 Form 1040, Schedule C?

The proceeds of a PPP loan are to be used for the following.

- i. Owner compensation replacement, calculated based on 2019 net profit as described in Paragraph 1.b. above.
- ii. Employee payroll costs (as defined in the First PPP Interim Final Rule) for employees whose principal place of residence is in the United States, if you have employees.
- iii. Mortgage interest payments (but not mortgage prepayments or principal payments) on any business mortgage obligation on real or personal property (e.g., the interest on your mortgage for the warehouse you purchased to store business equipment or the interest on an auto loan for a vehicle you use to perform your business), business rent payments (e.g., the warehouse where you store business equipment or the vehicle you use to perform your business), and business utility payments (e.g., the cost of electricity in the warehouse you rent or gas you use

driving your business vehicle). You must have claimed or be entitled to claim a deduction for such expenses on your 2019 Form 1040 Schedule C for them to be a permissible use during the eight-week period following the first disbursement of the loan (the “covered period”). For example, if you did not claim or are not entitled to claim utilities expenses on your 2019 Form 1040 Schedule C, you cannot use the proceeds for utilities during the covered period.

iv. Interest payments on any other debt obligations that were incurred before February 15, 2020 (such amounts are not eligible for PPP loan forgiveness).

v. Refinancing an SBA EIDL loan made between January 31, 2020 and April 3, 2020 (maturity will be reset to PPP’s maturity of two years). If you received an SBA EIDL loan from January 31, 2020 through April 3, 2020, you can apply for a PPP loan. If your EIDL loan was not used for payroll costs, it does not affect your eligibility for a PPP loan. If your EIDL loan was used for payroll costs, your PPP loan must be used to refinance your EIDL loan. Proceeds from any advance up to \$10,000 on the EIDL loan will be deducted from the loan forgiveness amount on the PPP loan.

The Administrator, in consultation with the Secretary, determined that it is appropriate to limit self-employed individuals’ (who file a Form 1040 Schedule C) use of loan proceeds to those types of allowable uses for which the borrower made expenditures in 2019. The Administrator has determined that this limitation on self-employed individuals who file a Form 1040 Schedule C is consistent with the borrower certification required by the Act; specifically, that the PPP loan is necessary “to support the ongoing operations” of the borrower. The Administrator and the Secretary thus believe that this limitation is consistent with the structure of the Act to maintain existing operations and payroll and not for business expansion. This limitation on the use of PPP loan proceeds will also help to ensure that the finite appropriations available for these loans are directed toward maintaining existing operations and payroll, as each loan that is made depletes the appropriation. Finally, although the Act makes businesses in operation on February 15, 2020 eligible for PPP loans, the Administrator, in consultation with the Secretary, has determined that self-employed individuals will need to rely on their 2019 Form 1040 Schedule C, which provides verifiable documentation on expenses between January 1, 2019 and December 31, 2019.

For individuals with income from self-employment from 2019 for which they have filed or will file a 2019 Form 1040 Schedule C, expenses incurred between January 1, 2020 and February 14, 2020 may not be considered because of the lack of verifiable documentation on expenses in this period. SBA will issue additional guidance for those individuals with self-employment income who: (i) Were not in operation in 2019 but who were in operation on February 15, 2020, and (ii) will file a Form 1040 Schedule C for 2020.

e. Are there any other restrictions on how I can use PPP loan proceeds?

Yes. At least 75 percent of the PPP loan proceeds shall be used for payroll costs. For purposes of determining the percentage of use of proceeds for payroll costs (but not for forgiveness purposes), the amount of any refinanced EIDL will be included. The rationale for this 75 percent floor is contained in the First PPP Interim Final Rule.

f. What amounts shall be eligible for forgiveness?

The amount of loan forgiveness can be up to the full principal amount of the loan plus accrued interest. The actual amount of loan forgiveness will depend, in part, on the total amount spent over the covered period on:

i. Payroll costs including salary, wages, and tips, up to \$100,000 of annualized pay per employee (for eight weeks, a maximum of \$15,385 per individual), as well as covered benefits for employees (but not owners), including health care expenses, retirement contributions, and state taxes imposed on employee payroll paid by the employer (such as unemployment insurance premiums);

ii. owner compensation replacement, calculated based on 2019 net profit as described in Paragraph 1.b. above, with forgiveness of such amounts limited to eight weeks' worth (8/52) of 2019 net profit, but excluding any qualified sick leave equivalent amount for which a credit is claimed under section 7002 of the Families First Coronavirus Response Act (FFCRA) (Pub. L. 116-127) or qualified family leave equivalent amount for which a credit is claimed under section 7004 of FFCRA;

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

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

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

The Administrator, in consultation with the Secretary, has determined that it is appropriate to limit the forgiveness of owner compensation replacement for individuals with self-employment income who file a Schedule C to eight weeks' worth (8/52) of 2019 net profit. This is most consistent with the structure of the Act and its overarching focus on keeping workers paid, and will prevent windfalls that Congress did not intend.

Congress determined that the maximum loan amount is based on 2.5 months of the borrower's payroll during the one-year period preceding the loan.

Congress also determined that the maximum amount of loan forgiveness is based on the borrower's eligible payments—i.e., the sum of payroll costs and certain overhead expenses—over the eight-week period following the date of loan disbursement. For individuals with self-employment income who file a Schedule C, the Administrator, in consultation with the Secretary, has determined that it is appropriate to limit loan forgiveness to a proportionate eight-week share of 2019 net profit, as reflected in the individual's 2019 Form 1040 Schedule C. This is because many self-employed individuals have few of the overhead expenses that qualify for forgiveness under the Act. For example, many such individuals operate out of either their homes, vehicles, or sheds and thus do not incur qualifying mortgage interest, rent, or utility payments. As a result, most of their receipts will constitute net income. Allowing such a self-employed individual to treat the full amount of a PPP loan as net income would result in a windfall. The entire amount of the PPP loan (a maximum of 2.5 times monthly payroll costs) would be forgiven even though Congress designed this program to limit forgiveness to certain eligible expenses incurred in an eight-week covered period. Limiting forgiveness to eight weeks of net profit from the owner's 2019 Form 1040 Schedule C is consistent with the structure of the Act, which provides for loan forgiveness based on eight weeks of expenditures. This limitation will also help to ensure that the finite appropriations are directed toward payroll protection, consistent with the Act's central objective. Finally, 75 percent of the amount forgiven must be attributable to payroll costs for the reasons specified in the First PPP Interim Final Rule.

g. What documentation will I be required to submit to my lender with my request for loan forgiveness?

In addition to the borrower certification required by Section 1106(e)(3) of the Act, to substantiate your request for loan forgiveness, if you have employees, you should submit Form 941 and state quarterly wage unemployment insurance tax reporting forms or equivalent payroll processor records that best correspond to the covered period (with evidence of any retirement and health insurance contributions). Whether or not you have employees, you must submit evidence of business rent, business mortgage interest payments on real or personal property, or business utility payments during the covered period if you used loan proceeds for those purposes.

The 2019 Form 1040 Schedule C that was provided at the time of the PPP loan application must be used to determine the amount of net profit allocated to the owner for the eight-week covered period. The Administrator, in consultation with the Secretary, determined that for purposes of loan forgiveness it is appropriate to require self-employed individuals to rely on the 2019 Form 1040 Schedule C to determine the amount of net profit allocated to the owner during the covered period for the reasons described in Paragraph 1.d. above.

2. Clarification Regarding Eligible Businesses

a. Are eligible businesses owned by directors or shareholders of a PPP Lender permitted to apply for a PPP Loan through the Lender with which they are associated?

The Administrator recognizes that, unlike other SBA loan programs, the financial terms for PPP Loans are uniform for all borrowers, and the standard underwriting process does not apply because no creditworthiness assessment is required for PPP Loans. Consequently, there is no meaningful risk of underwriting bias or below-market rates and terms. The Administrator also recognizes that many directors and equity holders of PPP Lenders are owners of unrelated businesses. For those reasons, the Administrator, in consultation with the Secretary, has determined that SBA regulations (including 13 CFR 120.110 and 120.140) shall not apply to prohibit an otherwise eligible business owned (in whole or part) by an outside director or holder of a less than 30 percent equity interest in a PPP Lender from obtaining a PPP loan from the PPP Lender on whose board the director serves or in which the equity owner

holds an interest, provided that the eligible business owned by the director or equity holder follows the same process as any similarly situated customer or account holder of the Lender. Favoritism by the Lender in processing time or prioritization of the director's or equity holder's PPP application is prohibited. The Administrator cautions, however, that Lenders should comply with all other applicable state and federal regulations concerning loans to associates of the Lender. Lenders should also consult their own internal policies concerning lending to individuals or entities associated with the Lender.

The foregoing paragraph does not apply to a director or owner who is also an officer or key employee of the PPP Lender. Officers and key employees of a PPP Lender may obtain a PPP Loan from a different lender, but not from the PPP Lender with which they are associated. SBA also reminds Lenders that the "Authorized Lender Official" for each PPP Loan is subject to the limitations described in the Lender Application Form, which states in relevant part: "Neither the undersigned Authorized Lender Official, nor such individual's spouse or children, has a financial interest in the Applicant [Borrower]."

b. Are businesses that receive revenue from legal gaming eligible for a PPP Loan?

A business that is otherwise eligible for a PPP Loan is not rendered ineligible due to its receipt of legal gaming revenues if the existing standard in 13 CFR 120.110(g) is met or the following two conditions are satisfied: (a) The business's legal gaming revenue (net of payouts but not other expenses) did not exceed \$1 million in 2019; and (b) legal gaming revenue (net of payouts but not other expenses) comprised less than 50 percent of the business's total revenue in 2019. Businesses that received illegal gaming revenue are categorically ineligible. The Administrator, in consultation with the Secretary, believes this test appropriately balances the longstanding policy reasons for limiting lending to businesses primarily and substantially engaged in gaming activity with the policy aim of making the PPP Loan available to a broad segment of U.S. businesses and their employees.

3. Requirements for Certain Pledges of PPP Loans

Do the requirements for loan pledges under 13 CFR 120.434 apply to PPP loans pledged for borrowings from a Federal Reserve Bank (FRB) or advances by a Federal Home Loan Bank (FHLB)?

No. Pursuant to SBA regulations at 13 CFR 120.435(d) and (e), a pledge of 7(a) loans to a FRB or FHLB does not require SBA's prior written consent or notice to Treasury. SBA, in consultation with Treasury, has determined that for purposes of loans made under the PPP, the additional requirements set forth in 120.434 shall also not apply. This would mean, for example, that SBA would not have to approve loan documents or require a multi-party agreement among SBA, the lender, and others.

4. Additional Information

SBA may provide further guidance, if needed, through SBA notices that will be posted on SBA's website at www.sba.gov. Questions on the Paycheck Protection Program may be directed to the Lender Relations Specialist in the local SBA Field Office. The local SBA Field Office may be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

Compliance With Executive Orders 12866, 12988, 13132, 13563, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Orders 12866, 13563, and 13771

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563, and is considered a major rule under the Congressional Review Act. SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID-19 emergency. This rule's designation under Executive Order 13771 will be informed by public comment.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

SBA has determined that this rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA has determined that this rule will not impose new or modify existing recordkeeping or reporting requirements under the Paperwork Reduction Act.

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a "small entity" as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for such small government jurisdictions, neither State nor local governments are "small entities." Similarly, for purposes of the RFA, individual persons are not small entities. The requirement to conduct a regulatory impact analysis does not apply if the head of the agency "certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. 605(b). The agency must, however, publish the certification in the **Federal Register** at the time of publication of the rule, "along with a statement providing the factual basis for such certification." If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA's waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the **Federal Register** at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b). Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary

to the public interest. SBA Office of Advocacy guide: How to Comply with the Regulatory Flexibility Act. Ch.1. p.9. Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

List of Subjects in 13 CFR Part 120

Community development, Environmental protection, Equal employment opportunity, Exports, Loan programs—business, Reporting and recordkeeping requirements, Small businesses.

For the reasons stated above, the Small Business Administration amends 13 CFR part 120 as set forth below.

PART 120—BUSINESS LOANS

■ 1. The authority citation for part 120 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), (b)(7), (b)(14), (h), and note, 636(a), (h) and (m), and note, 650, 657t, and note, 657u, and note, 687(f), 696(3) and (7), and note, and 697(a) and (e), and note.

■ 2. Revise § 120.435 to read as follows:

§ 120.435 Which loan pledges do not require notice to or consent by SBA?

(a) Notwithstanding the provisions of § 120.434(e), 7(a) loans may be pledged for the following purposes without notice to or consent by SBA:

- (1) Treasury tax and loan accounts;
- (2) The deposit of public funds;
- (3) Uninvested trust funds;
- (4) Borrowings from a Federal Reserve Bank; or
- (5) Advances by a Federal Home Loan Bank.

(b) For purposes of the Paycheck Protection Program (PPP), the other provisions of § 120.434 shall also not apply to PPP loans pledged under paragraph (a)(4) or (5) of this section.

Jovita Carranza,
Administrator.

[FR Doc. 2020–08257 Filed 4–17–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2019–1074; Product Identifier 2019–NM–191–AD; Amendment 39–19900; AD 2020–07–21]

RIN 2120–AA64

Airworthiness Directives; Yaborã Indústria Aeronáutica S.A. (Type Certificate Previously Held by Embraer S.A.) Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Yaborã Indústria Aeronáutica S.A. Model ERJ–170 airplanes and Model ERJ 190–100 STD, –100 LR, –100 ECJ, –100 IGW, –200 STD, –200 LR, and –200 IGW airplanes. This AD was prompted by a determination that certain main landing gear (MLG) aft pintle pins repaired using a sulphamate nickel plating have a life limit that is less than the certified life limit. This AD requires a one-time records review or a general visual inspection (GVI) of the MLG aft pintle pins to determine if certain repairs were done, and replacement of certain MLG aft pintle pins with serviceable MLG aft pintle pins, as specified in an Agência Nacional de Aviação Civil (ANAC) Brazilian AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective May 26, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of May 26, 2020.

ADDRESSES: For the material incorporated by reference (IBR) in this AD contact National Civil Aviation Agency, Aeronautical Products Certification Branch (GGCP), Rua Laurent Martins, n° 209, Jardim Esplanada, CEP 12242–431—São José dos Campos—SP, Brazil; telephone 55 (12) 3203–6600; email pac@anac.gov.br; internet www.anac.gov.br/en/. You may find this IBR material on the ANAC website at <https://sistemas.anac.gov.br/certificacao/DA/DAE.asp>. You may view this IBR material at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket on

the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA–2019–1074.

Examining the AD Docket

You may examine the AD docket on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA–2019–1074; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the regulatory evaluation, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT:

Krista Greer, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3221; email krista.greer@faa.gov.

SUPPLEMENTARY INFORMATION:

Discussion

The ANAC, which is the aviation authority for Brazil, has issued Brazilian AD 2019–11–07, effective November 18, 2019 (“Brazilian AD 2019–11–07”) (also referred to as the Mandatory Continuing Airworthiness Information, or “the MCAI”), to correct an unsafe condition for certain Yaborã Indústria Aeronáutica S.A. Model ERJ 170–100 LR, –100 STD, –100 SE, and –100 SU airplanes; Model ERJ 170–200 LR, –200 SU, –200 STD, and –200 LL airplanes; and Model ERJ 190–100 STD, –100 LR, –100 ECJ, –100 IGW, –100 SR, –200 STD, –200 LR, and –200 IGW airplanes. Model ERJ 190–100 SR airplanes are not certified by the FAA and are not included on the U.S. type certificate data sheet; this AD, therefore, does not include those airplanes in the applicability.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Yaborã Indústria Aeronáutica S.A. Model ERJ 170–100 LR, –100 STD, –100 SE, and –100 SU airplanes; Model ERJ 170–200 LR, –200 SU, –200 STD, and –200 LL airplanes; and Model ERJ 190–100 STD, –100 LR, –100 ECJ, –100 IGW, –200 STD, –200 LR, and –200 IGW airplanes. The NPRM published in the **Federal Register** on January 17, 2020 (85 FR 2909). The NPRM was prompted by a determination that certain MLG aft pintle pins repaired using a sulphamate

Exhibit G

(Toppenish Application)

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**COMPLAINT AGAINST SBA AND
ADMINISTRATOR re PPP Funds**

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Seattle, Washington 98101-2375
Telephone (206) 292-2110
Facsimile (206) 292-2104

Exhibit H

(Astria Home Health Application)

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Exhibit I

(April 21, 2020 E-mail from Ms. Ibarra)

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Sandra L. Cortez

From: Cece Ibarra <Cibarra@bannerbank.com>
Sent: Tuesday, April 21, 2020 12:33 PM
To: Sandra L. Cortez
Subject: {[*EXTERNAL*]}Loans

Hi Sandra,

Did you get an email on the loans? It looks like the bankruptcy is going to prevent you from qualify for the loans this would apply to any entity that was included in the bankruptcy. But an email should come if it hasn't already. Sorry ☹️ I personally think that if someone deserves this loan is the Hospitals. But that's an SBA rule.



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Exhibit J

(Fourth Interim Rule)

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**COMPLAINT AGAINST SBA AND
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1

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23450

Federal Register / Vol. 85, No. 82 / Tuesday, April 28, 2020 / Rules and Regulations

SMALL BUSINESS ADMINISTRATION**[Docket Number SBA–2020–0021]****13 CFR Parts 120 and 121****RIN 3245–AH37****Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Promissory Notes, Authorizations, Affiliation, and Eligibility****AGENCY:** U.S. Small Business Administration.**ACTION:** Interim final rule.

SUMMARY: On April 2, 2020, the U.S. Small Business Administration (SBA) posted an interim final rule (the First PPP Interim Final Rule) announcing the implementation of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act). The Act temporarily adds a new program, titled the “Paycheck Protection Program,” to the SBA’s 7(a) Loan Program. The Act also provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program (PPP). The PPP is intended to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID–19). SBA posted additional interim final rules on April 3, 2020, and April 14, 2020. This interim final rule supplements the previously posted interim final rules with additional guidance. SBA requests public comment on this additional guidance.

DATES: *Effective date:* This rule is effective April 28, 2020.

Applicability date: This interim final rule applies to applications submitted under the Paycheck Protection Program through June 30, 2020, or until funds made available for this purpose are exhausted.

Comment date: Comments must be received on or before May 28, 2020.

ADDRESSES: You may submit comments, identified by number SBA–2020–0021 through the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. SBA will post all comments on www.regulations.gov. If you wish to submit confidential business information (CBI) as defined in the User Notice at www.regulations.gov, please send an email to ppp-ifr@sba.gov. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the

final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: A Call Center Representative at 833–572–0502, or the local SBA Field Office; the list of offices can be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

SUPPLEMENTARY INFORMATION:**I. Background Information**

On March 13, 2020, President Trump declared the ongoing Coronavirus Disease 2019 (COVID–19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all States, territories, and the District of Columbia. With the COVID–19 emergency, many small businesses nationwide are experiencing economic hardship as a direct result of the Federal, State, tribal, and local public health measures that are being taken to minimize the public’s exposure to the virus. These measures, some of which are government-mandated, are being implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance from others or even stay-at-home orders, are being implemented, resulting in a dramatic decrease in economic activity as the public avoids malls, retail stores, and other businesses.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act or the Act) (Pub. L. 116–136) to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic. The Small Business Administration (SBA) received funding and authority through the Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID–19 emergency. Section 1102 of the Act temporarily permits SBA to guarantee 100 percent of 7(a) loans under a new program titled the “Paycheck Protection Program.” Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program.

II. Comments and Immediate Effective Date

The intent of the Act is that SBA provide relief to America’s small businesses expeditiously. This intent, along with the dramatic decrease in economic activity nationwide, provides good cause for SBA to dispense with the

30-day delayed effective date provided in the Administrative Procedure Act. Specifically, it is critical to meet lenders’ and borrowers’ need for clarity concerning program requirements as rapidly as possible because the last day eligible borrowers can apply for and receive a loan is June 30, 2020.

This interim final rule supplements previous regulations and guidance on several important, discrete issues. The immediate effective date of this interim final rule will benefit lenders so that they can swiftly close and disburse loans to small businesses. This interim final rule is effective without advance notice and public comment because section 1114 of the Act authorizes SBA to issue regulations to implement Title I of the Act without regard to notice requirements. This rule is being issued to allow for immediate implementation of this program. Although this interim final rule is effective immediately, comments are solicited from interested members of the public on all aspects of the interim final rule, including section III below. These comments must be submitted on or before May 28, 2020. SBA will consider these comments and the need for making any revisions as a result of these comments.

III. Paycheck Protection Program Requirements for Promissory Notes, Authorizations, Affiliation, and Eligibility*Overview*

The CARES Act was enacted to provide immediate assistance to individuals, families, and organizations affected by the COVID–19 emergency. Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under the Paycheck Protection Program (PPP). Loans under the PPP will be 100 percent guaranteed by SBA, and the full principal amount of the loans and any accrued interest may qualify for loan forgiveness. Additional information about the PPP is available in the First PPP Interim Final Rule (85 FR 20811), a second interim final rule (85 FR 20817) (the Second PPP Interim Final Rule), and a third interim final rule (the Third PPP Interim Final Rule) (85 FR 21747) (collectively, the PPP Interim Final Rules).

1. Requirements for Promissory Notes and Authorizations

This guidance is substantively identical to previously posted FAQ guidance.

a. Are lenders required to use a promissory note provided by SBA or may they use their own?

Lenders may use their own promissory note or an SBA form of promissory note. *See* FAQ 19 (posted April 8, 2020).

b. Are lenders required to use a separate SBA Authorization document to issue PPP loans?

No. A lender does not need a separate SBA Authorization for SBA to guarantee a PPP loan. However, lenders must have executed SBA Form 2484 (the Lender Application Form—Paycheck Protection Program Loan Guaranty)¹ to issue PPP loans and receive a loan number for each originated PPP loan. Lenders may include in their promissory notes for PPP loans any terms and conditions, including relating to amortization and disclosure, that are not inconsistent with Sections 1102 and 1106 of the CARES Act, the PPP Interim Final Rules and guidance, and SBA Form 2484. *See* FAQ 21 (posted April 13, 2020). The decision not to require a separate SBA Authorization in order to ensure that critical PPP loans are disbursed as efficiently as practicable.

2. Clarification Regarding Eligible Businesses

a. Is a hedge fund or private equity firm eligible for a PPP loan?

No. Hedge funds and private equity firms are primarily engaged in investment or speculation, and such businesses are therefore ineligible to receive a PPP loan. The Administrator, in consultation with the Secretary, does not believe that Congress intended for these types of businesses, which are generally ineligible for section 7(a) loans under existing SBA regulations, to obtain PPP financing.

b. Do the SBA affiliation rules prohibit a portfolio company of a private equity fund from being eligible for a PPP loan?

Borrowers must apply the affiliation rules that appear in 13 CFR 121.301(f), as set forth in the Second PPP Interim Final Rule (85 FR 20817). The affiliation rules apply to private equity-owned businesses in the same manner as any other business subject to outside ownership or control.² However, in addition to applying any applicable affiliation rules, all borrowers should

carefully review the required certification on the Paycheck Protection Program Borrower Application Form (SBA Form 2483) stating that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”

c. Is a hospital owned by governmental entities eligible for a PPP loan?

A hospital that is otherwise eligible to receive a PPP loan as a business concern or nonprofit organization (described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code) shall not be rendered ineligible for a PPP loan due to ownership by a state or local government if the hospital receives less than 50% of its funding from state or local government sources, exclusive of Medicaid.

The Administrator, in consultation with the Secretary, determined that this exception to the general ineligibility of government-owned entities, 13 CFR 120.110(j), is appropriate to effectuate the purposes of the CARES Act.

d. Part III.2.b. of the Third PPP Interim Final Rule (85 FR 21747, 21751) is revised to read as follows:

Are businesses that receive revenue from legal gaming eligible for a PPP Loan?

A business that is otherwise eligible for a PPP Loan is not rendered ineligible due to its receipt of legal gaming revenues, and 13 CFR 120.110(g) is inapplicable to PPP loans. Businesses that received illegal gaming revenue remain categorically ineligible. On further consideration, the Administrator, in consultation with the Secretary, believes this approach is more consistent with the policy aim of making PPP loans available to a broad segment of U.S. businesses.

3. Business Participation in Employee Stock Ownership Plans

Does participation in an employee stock ownership plan (ESOP) trigger application of the affiliation rules?

No. For purposes of the PPP, a business's participation in an ESOP (as defined in 15 U.S.C. 632(q)(6)) does not result in an affiliation between the business and the ESOP. The Administrator, in consultation with the Secretary, determined that this is appropriate given the nature of such plans. Under an ESOP, a business concern contributes its stock (or money to buy its stock or to pay off a loan that was used to buy stock) to the plan for the benefit of the company's employees. The plan maintains an account for each employee participating in the plan. Shares of stock vest over time before an

employee is entitled to them. However, with an ESOP, an employee generally does not buy or hold the stock directly while still employed with the company. Instead, the employee generally receives the shares in his or her personal account only upon the cessation of employment with the company, including retirement, disability, death, or termination.

4. Eligibility of Businesses Presently Involved in Bankruptcy Proceedings

Will I be approved for a PPP loan if my business is in bankruptcy?

No. If the applicant or the owner of the applicant is the debtor in a bankruptcy proceeding, either at the time it submits the application or at any time before the loan is disbursed, the applicant is ineligible to receive a PPP loan. If the applicant or the owner of the applicant becomes the debtor in a bankruptcy proceeding after submitting a PPP application but before the loan is disbursed, it is the applicant's obligation to notify the lender and request cancellation of the application. Failure by the applicant to do so will be regarded as a use of PPP funds for unauthorized purposes.

The Administrator, in consultation with the Secretary, determined that providing PPP loans to debtors in bankruptcy would present an unacceptably high risk of an unauthorized use of funds or non-repayment of unforgiven loans. In addition, the Bankruptcy Code does not require any person to make a loan or a financial accommodation to a debtor in bankruptcy. The Borrower Application Form for PPP loans (SBA Form 2483), which reflects this restriction in the form of a borrower certification, is a loan program requirement. Lenders may rely on an applicant's representation concerning the applicant's or an owner of the applicant's involvement in a bankruptcy proceeding.

5. Limited Safe Harbor With Respect to Certification Concerning Need for PPP Loan Request

Consistent with section 1102 of the CARES Act, the Borrower Application Form requires PPP applicants to certify that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”

Any borrower that applied for a PPP loan prior to the issuance of this regulation and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.

The Administrator, in consultation with the Secretary, determined that this safe harbor is necessary and appropriate

¹ This requirement is satisfied by a lender when the lender completes the process of submitting a loan through the E-Tran system; no transmission or retention of a physical copy of Form 2484 is required.

² However, the Act waives the affiliation rules if the borrower receives financial assistance from an SBA-licensed Small Business Investment Company (SBIC) in any amount. This includes any type of financing listed in 13 CFR 107.50, such as loans, debt with equity features, equity, and guarantees. Affiliation is waived even if the borrower has investment from other non-SBIC investors.

to ensure that borrowers promptly repay PPP loan funds that the borrower obtained based on a misunderstanding or misapplication of the required certification standard.

6. Additional Information

SBA may provide further guidance, if needed, through SBA notices that will be posted on SBA's website at www.sba.gov. Questions on the Paycheck Protection Program may be directed to the Lender Relations Specialist in the local SBA Field Office. The local SBA Field Office may be found at <https://www.sba.gov/tools/local-assistance/districtoffices>.

Compliance With Executive Orders 12866, 12988, 13132, 13563, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Orders 12866, 13563, and 13771

This interim final rule is economically significant for the purposes of Executive Orders 12866 and 13563, and is considered a major rule under the Congressional Review Act. SBA, however, is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the need to move expeditiously to mitigate the current economic conditions arising from the COVID–19 emergency. This rule's designation under Executive Order 13771 will be informed by public comment.

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

SBA has determined that this rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Chapter 35

SBA has determined that this rule will not impose new or modify existing recordkeeping or reporting requirements under the Paperwork Reduction Act.

Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the **Federal Register**. 5 U.S.C. 603, 604. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. Such analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. The RFA defines a “small entity” as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a nonprofit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. 5 U.S.C. 601(3)–(6). Except for such small government jurisdictions, neither State nor local governments are “small entities.” Similarly, for purposes of the RFA, individual persons are not small entities. The requirement to conduct a regulatory impact analysis does not apply if the head of the agency “certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” 5 U.S.C. 605(b). The agency must, however, publish the certification in the **Federal Register** at the time of publication of the rule, “along with a statement providing the factual basis for such certification.” If the agency head has not waived the requirements for a regulatory flexibility analysis in accordance with the RFA's waiver provision, and no other RFA exception applies, the agency must prepare the regulatory flexibility analysis and publish it in the **Federal Register** at the time of promulgation or, if the rule is promulgated in response to an emergency that makes timely compliance impracticable, within 180 days of publication of the final rule. 5 U.S.C. 604(a), 608(b). Rules that are exempt from notice and comment are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. SBA Office of Advocacy guide: How to Comply with the Regulatory Flexibility Act, Ch.1. p.9.

Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

Jovita Carranza,
Administrator.

[FR Doc. 2020–09098 Filed 4–27–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0095; Product Identifier 2019–NM–192–AD; Amendment 39–19904; AD 2020–08–12]

RIN 2120-AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain The Boeing Company Model 747–8 and 747–8F series airplanes. This AD was prompted by an evaluation by the design approval holder (DAH) indicating that the skin lap joints at certain stringers are subject to widespread fatigue damage (WFD). This AD requires modifying the left and right side lap joints of the fuselage skin, repetitive post-modification inspections for cracking, and applicable on-condition actions. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective June 2, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of June 2, 2020.

ADDRESSES: For service information identified in this final rule, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminister Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; internet <https://www.myboeingfleet.com>. You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA–2020–0095.

Examining the AD Docket

You may examine the AD docket on the internet at <https://>

Exhibit K

(May 6, 2020 Notice to Toppenish)

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**COMPLAINT AGAINST SBA AND
ADMINISTRATOR re PPP Funds**

1

DENTONS US LLP
601 South Figueroa Street, Suite 2500
Los Angeles, CA 90017-5704
Phone: (213) 623-9300
Fax: (213) 623-9924

BUSH KORNFIELD LL
LAW OFFICES
601 Union St., Suite 5000
Seattle, Washington 98101-2375
Telephone (206) 292-2110
Facsimile (206) 292-2404



May 6, 2020

Cary Rowan

502 W. 4TH AVE
TOPPENISH, WA 98948

RE: Your Application for a SBA Paycheck Protection Program (PPP) Loan

Dear Cary Rowan

Thank you for your application for a Small Business Administration (SBA) Paycheck Protection Program (PPP) loan. We regret to inform you that we are unable to approve your request because:

Borrower does not meet SBA eligibility criteria

If you have any questions regarding this notice please contact us at:

Banner Bank
10 S. First Avenue
PO Box 907
Walla Walla, WA 99362

800-272-9933 (Monday – Friday, 7am – 7pm Pacific Time)

Sincerely,

Banner Bank SBA Lending Team

NOTICE: The federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided that the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The federal agency that administers compliance with this law concerning this creditor is Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20006.

Loan Application # 10556
PPPAA-420

Banner Bank • PO Box 907 • Walla Walla, WA 99362 • 800-272-9933
• Equal Housing Lender • Member FDIC





Certificate of Completion

Envelope Id: 612138D9F97F485EB2B3B0795DE71D33	Status: Delivered
Subject: Important Information About Your PPP Loan Application	
Source Envelope:	
Document Pages: 1	Signatures: 0
Certificate Pages: 4	Initials: 0
AutoNav: Enabled	Envelope Originator:
Envelopeld Stamping: Enabled	Banner SBA PPP Loan Applications
Time Zone: (UTC-08:00) Pacific Time (US & Canada)	BannerSBAPPPLoanApplications@bannerbank.com
	IP Address: 12.129.12.97

Record Tracking

Status: Original	Holder: Banner SBA PPP Loan Applications	Location: DocuSign
5/6/2020 7:38:10 PM		
	BannerSBAPPPLoanApplications@bannerbank.com	

Signer Events

Cary Rowan	Signature	Timestamp
cary.rowan@astria.health		Sent: 5/6/2020 7:38:11 PM
Security Level: Email, Account Authentication (None)		Viewed: 5/7/2020 7:09:24 AM

Electronic Record and Signature Disclosure:
 Accepted: 5/7/2020 7:09:24 AM
 ID: aafbe7bb-799a-4eb0-ab8f-7bc2574f24dd

In Person Signer Events

Signature	Timestamp
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Editor Delivery Events

Status	Timestamp
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Agent Delivery Events

Status	Timestamp
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Intermediary Delivery Events

Status	Timestamp
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Certified Delivery Events

Status	Timestamp
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Carbon Copy Events

Status	Timestamp
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Witness Events

Signature	Timestamp
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Notary Events

Signature	Timestamp
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Envelope Summary Events

Status	Timestamps
Envelope Sent	Hashed/Encrypted
Certified Delivered	Security Checked
	5/6/2020 7:38:11 PM
	5/7/2020 7:09:24 AM

Payment Events

Status	Timestamps
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Electronic Record and Signature Disclosure

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From time to time, Banner Bank (we, us or Company) may be required by law to provide to you certain written notices or disclosures. Described below are the terms and conditions for providing to you such notices and disclosures electronically through the DocuSign system. Please read the information below carefully and thoroughly, and if you can access this information electronically to your satisfaction and agree to this Electronic Record and Signature Disclosure (ERSD), please confirm your agreement by selecting the check-box next to 'I agree to use electronic records and signatures' before clicking 'CONTINUE' within the DocuSign system.

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At any time, you may request from us a paper copy of any record provided or made available electronically to you by us. You will have the ability to download and print documents we send to you through the DocuSign system during and immediately after the signing session and, if you elect to create a DocuSign account, you may access the documents for a limited period of time (usually 30 days) after such documents are first sent to you. After such time, if you wish for us to send you paper copies of any such documents from our office to you, you will be charged a \$0.00 per-page fee. You may request delivery of such paper copies from us by following the procedure described below.

Withdrawing your consent

If you decide to receive notices and disclosures from us electronically, you may at any time change your mind and tell us that thereafter you want to receive required notices and disclosures only in paper format. How you must inform us of your decision to receive future notices and disclosure in paper format and withdraw your consent to receive notices and disclosures electronically is described below.

Consequences of changing your mind

If you elect to receive required notices and disclosures only in paper format, it will slow the speed at which we can complete certain steps in transactions with you and delivering services to you because we will need first to send the required notices or disclosures to you in paper format, and then wait until we receive back from you your acknowledgment of your receipt of such paper notices or disclosures. Further, you will no longer be able to use the DocuSign system to receive required notices and consents electronically from us or to sign electronically documents from us.

All notices and disclosures will be sent to you electronically

Unless you tell us otherwise in accordance with the procedures described herein, we will provide electronically to you through the DocuSign system all required notices, disclosures, authorizations, acknowledgements, and other documents that are required to be provided or made available to you during the course of our relationship with you. To reduce the chance of you inadvertently not receiving any notice or disclosure, we prefer to provide all of the required notices and disclosures to you by the same method and to the same address that you have given us. Thus, you can receive all the disclosures and notices electronically or in paper format through the paper mail delivery system. If you do not agree with this process, please let us know as described below. Please also see the paragraph immediately above that describes the consequences of your electing not to receive delivery of the notices and disclosures electronically from us.

How to contact Banner Bank:

You may contact us to let us know of your changes as to how we may contact you electronically, to request paper copies of certain information from us, and to withdraw your prior consent to receive notices and disclosures electronically as follows:

To contact us by email send messages to: bannerbank@bannerbank.com

To advise Banner Bank of your new email address

To let us know of a change in your email address where we should send notices and disclosures electronically to you, you must send an email message to us at bannerbank@bannerbank.com and in the body of such request you must state: your previous email address, your new email address. We do not require any other information from you to change your email address.

If you created a DocuSign account, you may update it with your new email address through your account preferences.

To request paper copies from Banner Bank

To request delivery from us of paper copies of the notices and disclosures previously provided by us to you electronically, you must send us an email to bannerbank@bannerbank.com and in the body of such request you must state your email address, full name, mailing address, and telephone number. We will bill you for any fees at that time, if any.

To withdraw your consent with Banner Bank

To inform us that you no longer wish to receive future notices and disclosures in electronic format you may:

i. decline to sign a document from within your signing session, and on the subsequent page, select the check-box indicating you wish to withdraw your consent, or you may;

ii. send us an email to bannerbank@bannerbank.com and in the body of such request you must state your email, full name, mailing address, and telephone number. We do not need any other information from you to withdraw consent.. The consequences of your withdrawing consent for online documents will be that transactions may take a longer time to process..

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The minimum system requirements for using the DocuSign system may change over time. The current system requirements are found here: <https://support.docusign.com/guides/signer-guide-signing-system-requirements>.

Acknowledging your access and consent to receive and sign documents electronically

To confirm to us that you can access this information electronically, which will be similar to other electronic notices and disclosures that we will provide to you, please confirm that you have read this ERSD, and (i) that you are able to print on paper or electronically save this ERSD for your future reference and access; or (ii) that you are able to email this ERSD to an email address where you will be able to print on paper or save it for your future reference and access. Further, if you consent to receiving notices and disclosures exclusively in electronic format as described herein, then select the check-box next to 'I agree to use electronic records and signatures' before clicking 'CONTINUE' within the DocuSign system.

By selecting the check-box next to 'I agree to use electronic records and signatures', you confirm that:

- You can access and read this Electronic Record and Signature Disclosure; and
- You can print on paper this Electronic Record and Signature Disclosure, or save or send this Electronic Record and Disclosure to a location where you can print it, for future reference and access; and
- Until or unless you notify Banner Bank as described above, you consent to receive exclusively through electronic means all notices, disclosures, authorizations, acknowledgements, and other documents that are required to be provided or made available to you by Banner Bank during the course of your relationship with Banner Bank.

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Washington, District of Columbia 20044
Telephone: (202) 307-1104

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

In Re:

ASTRIA HEALTH, et al.¹

Debtors and Debtors in Possession,

ASTRIA HEALTH, et al.,

Plaintiffs,

v.

Lead Case No. 19-01189-11

Adv. Proc. Case No. 20-80016-WLH

MOTION FOR MANDATORY
WITHDRAWAL OF REFERENCE

Hearing: July 23 at 6:30 p.m.
Without Oral Argument

¹ The Debtors, along with their case numbers, are as follows: Astria Health (19-01189-11), Glacier Canyon, LLC (19-01193-11), Kitchen and Bath Furnishings, LLC (19-01194-11), Oxbow Summit, LLC (19-01195-11), SHC Holdco, LLC (19-01196-11), SHC Medical Center - Toppenish (19-01190-11), SHC Medical Center - Yakima (19-01192-11), Sunnyside Community Hospital Association (19-01191-11), Sunnyside Community Hospital Home Medical Supply, LLC (19-01197-11), Sunnyside Home Health (19-01198-11), Sunnyside Professional Services, LLC (19-01199-11), Yakima Home Care Holdings, LLC (19-01201-11), and Yakima HMA Home Health, LLC (19-01200-11).

1 UNITED STATES SMALL
2 BUSINESS ADMINISTRATION
3 and JOVITA CARRANZA, in her
4 capacity as Administrator for the
United States Small Business
Administration,

5 Defendants.

6
7 **MOTION FOR MANDATORY WITHDRAWAL OF REFERENCE**

8
9 The United States of America (the “United States”), on behalf of Jovita
10 Carranza, in her capacity as Administrator for the U.S. Small Business Administration
11 (“SBA”), hereby moves (this “Motion”) to withdraw the reference of the above-
12 captioned adversary proceeding (“Adversary Proceeding”). This Motion is brought
13 pursuant to 28 U.S.C. § 157(d), Rule 5011 of the Federal Rules of Bankruptcy
14 Procedure, and Rule 5011-1 of the Local Bankruptcy Rules.

15
16
17 **INTRODUCTION**

18 Withdrawal of the reference here is mandatory under 28 U.S.C. § 157(d)
19 because Plaintiffs’ claims in the Adversary Proceeding require the Bankruptcy Court
20 to interpret new non-bankruptcy law—the Coronavirus Aid, Relief, and Economic
21 Stimulus (“CARES”) Act, Pub. L. 116-136, 134 Stat. 281, and the emergency rules
22 issued by the SBA as authorized by the CARES Act in section 1114. Plaintiffs’
23 claims relate to the Paycheck Protection Program (“PPP”), CARES Act § 1102, 15
24 U.S.C. § 636(a)(36), a \$659 billion loan guarantee program created under the CARES
25 Act that has extended hundreds of thousands of loans to small businesses and non-
26

27
28 MOTION FOR MANDATORY WITHDRAWAL OF REFERENCE - 2

1 profits across the nation over the past two months. Plaintiffs argue, among other
2 things, that the SBA violated the Administrative Procedures Act (“APA”), 5 U.S.C. §
3 701 *et seq.*, by exceeding its statutory authority, or acting arbitrarily or capriciously,
4 when it issued an emergency rule excluding bankrupt entities or entities with an owner
5 in bankruptcy from the PPP. ECF No. 1 at ¶¶ 87-97 (requesting the bankruptcy court
6 to set aside, under 5 U.S.C. §§ 706(2)(A) and (C) of the APA, the SBA’s rulemaking
7 “that is in excess of statutory jurisdiction... [and] that is arbitrary and capricious or an
8 abuse of discretion”).
9

11 The SBA addressed the bankruptcy exclusion in two separate agency rules.
12 Congress, through the CARES Act and Small Business Act, explicitly delegated
13 authority to the Administrator to issue those rules. Resolving the issues raised in the
14 Adversary Proceeding requires an interpretation—not merely an application—of the
15 newly enacted CARES Act, which necessitates withdrawal of the reference.
16
17

18 On June 3, 2020, in the Adversary Proceeding, after briefing and oral argument,
19 the Bankruptcy Court orally granted Plaintiff’s request for a preliminary injunction.
20 ECF No. 19. On June 10, 2020, the Bankruptcy Court entered an Order Granting
21 Preliminary Injunction, Denying Stay Pending Appeal, and Certifying Issues to the
22 Ninth Circuit Court of Appeals. ECF No. 22.
23
24

25 The Bankruptcy Court concluded that the Plaintiffs were likely to succeed on
26 the merits on its APA claims that the SBA exceeded its statutory authority to
27 implement the CARES Act PPP and that the SBA’s determination to exclude bankrupt
28
MOTION FOR MANDATORY WITHDRAWAL OF REFERENCE - 3

1 entities or entities with an owner in bankruptcy from participation in the PPP was
 2 arbitrary and capricious. ECF No. 22, Exhibit A, Tr. at 15:5-23:14.

3 The Court asserted that Plaintiff's APA claims were "core" and that the Court
 4 had authority to issue a final order because the "APA claim is ... a matter concerning
 5 the administration of this bankruptcy estate." *Id.*, Tr. at 12:9-12.

7 Contemporaneous with filing this Motion, the United States is filing a Notice of
 8 Appeal of the Bankruptcy Court's Order Granting Preliminary Injunction, Denying
 9 Stay Pending Appeal, and Certifying Issues to the Ninth Circuit Court of Appeals.
 10

11 **BACKGROUND**

12 **I. THE SMALL BUSINESS ADMINISTRATION**

13 Through the Small Business Act, 15 U.S.C. § 631 *et seq.*, Congress created the
 14 SBA to "aid, counsel, assist, and protect, insofar as is possible, the interests of small-
 15 business concerns," in order to preserve the system of free competitive enterprise that
 16 is "essential" to the economic well-being and security of the Nation. 15 U.S.C. §
 17 631(a). To promote that objective, Congress placed the SBA under the management of
 18 a single Administrator, *id.*, § 633(a), (b)(1), who is given "extraordinarily broad
 19 powers" under section 7(a) of the Act, 15 U.S.C. § 636(a), to provide a wide variety of
 20 technical, managerial, and financial assistance to small-business concerns. *SBA v.*
 21 *McClellan*, 364 U.S. 446, 447 (1960); *see generally* 15 U.S.C. § 636(a) (describing
 22 numerous varieties of general small-business loans the Administrator is "authorized"
 23 and "empowered" to make); 13 C.F.R. § 120.1. In the performance of these authorized
 24 MOTION FOR MANDATORY WITHDRAWAL OF REFERENCE - 4

functions, the Administrator is further empowered to “make such rules and regulations as [she] deems necessary to carry out the authority vested in [her],” and to “take any and all actions . . . [that she] determines . . . are necessary or desirable in making . . . loans.” 15 U.S.C. §§ 634(b)(6)–(7). SBA also has the power to establish general policies “which shall govern the granting and denial of applications for financial assistance by the Administration.” 15 U.S.C. § 633(a).

II. SECTION 7(a) LENDING

The section 7(a) loan program is the SBA’s primary program for providing financial assistance to small businesses. Under the terms of the Small Business Act, assistance under section 7(a) may take the form of loans or loan guarantees. 13 C.F.R. § 120.2(a); *see Valley Nat’l Bank v. Abdnor*, 918 F.2d 128, 129 (10th Cir. 1990); *Cal. Pac. Bank v. SBA*, 557 F.2d 218, 219 (9th Cir. 1977). In practice, the SBA ordinarily guarantees loans made by private lenders rather than disbursing funds directly to borrowers, *see United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 719 (1979), thus reducing risk for lenders and making it easier for them to access capital and for small business to obtain loans. <https://www.sba.gov/funding-programs/loans>.

III. SECTION 7(a) LOAN UNDERWRITING

Ordinarily, to qualify for an SBA general business loan an applicant must be an operating business organized for profit that is located in the United States, 13 C.F.R. § 120.100(a)–(c); meet the size standards for a “small” business set forth under the statute and SBA rules (usually stated in terms of number of employees, or average

annual receipts), *see* 15 U.S.C. § 632(a)(2); 13 C.F.R. § 120.100(d); 13 C.F.R. Part 121; and demonstrate that the desired credit is not available elsewhere on reasonable terms, 15 U.S.C. § 632(h); 13 C.F.R. §§ 120.100(e), 120.101. Additionally, the Small Business Act requires that “[a]ll loans made under this subsection *shall* be of such sound value or so secured as reasonably to assure repayment.” 15 U.S.C. § 636(a)(6) (emphasis added). Form 1919 (attached to the Miller Decl.) serves as the application for section 7(a) loans. It asks whether the applicant has “ever filed for bankruptcy protection.” *See also* Standard Operating Procedure 50 10 5(K) (Lender and Development Company Loan Programs) at 37 (allowing lenders to consider “past bankruptcy”). By regulation, requirements listed on Form 1919 and other official SBA forms comprise part of the “Loan program requirements.” 13 C.F.R. § 120.10. Lenders agree to abide by these requirements when joining the section 7(a) lending program. *Id.*; *see also* SBA Forms 3506 and 3507 (addressing new PPP lenders).

IV. THE CORONAVIRUS AID, RELIEF, & ECONOMIC STIMULUS (CARES) ACT

On March 27, 2020, the President signed into law the Coronavirus Aid, Relief, and Economic Stimulus (CARES) Act, Pub. L. 116-136, 134 Stat. 281, providing an unprecedented package of emergency economic assistance and other support to assist businesses and Americans coping with the enormous economic and public health crises triggered by the worldwide coronavirus (COVID-19) pandemic. *See* SBA, Interim Final Rule, “Business Loan Program Temporary Changes; Paycheck

1 Protection Program” (the First Interim Final Rule), 85 Fed. Reg. 20,811 (April 15,
2 2020). Section 1102 of the CARES Act established the PPP to assist eligible small
3 businesses experiencing economic hardship as a result of COVID-19 measures. *See id.*
4
5 Section 1102(a)(2) adds a new paragraph (36) to section 7(a) of the Small Business
6 Act, 15 U.S.C. § 636(a)(36), extending loans to eligible small businesses for certain
7 covered uses, including among other things payroll costs. CARES Act § 1102(a)(2);
8
9 15 U.S.C. § 636(a)(36)(F)(i).

10 Otherwise, the existing section 7(a) requirements and limitations remain
11 unaltered and govern PPP lending. The CARES Act provides, “*Except as otherwise*
12 *provided in this paragraph*, the [SBA] *may* guarantee [PPP] covered loans”—not
13 make loans directly, however—”under the same terms, conditions, and processes as a
14 loan made under this subsection,” *i.e.*, section 7(a). 15 U.S.C. § 636(a)(36)(B)
15
16 (emphasis added). The CARES Act then sets forth in extensive detail the precise ways
17 in which PPP covered loans differ from other section 7(a) loans by authorizing the
18 SBA to guarantee covered loans to particular types of businesses not previously
19 eligible for section 7(a) loans under the SBA’s rules. *Id.* § 636(a)(36)(D)–(R).
20
21 Specifically, it allows SBA to guarantee PPP loans to various nonprofit organizations,
22 independent contractors, and self-employed individuals, as well as to small business
23 concerns, *id.* § 636(a)(36)(D)(i), (ii); relaxes size limitations to allow businesses with
24 as many as 500 employees (or more, depending on the industry in which they operate)
25 to receive assistance, *id.* § 636(a)(36)(D)(i)(I); and (iii) selectively waives certain of
26
27
28 MOTION FOR MANDATORY WITHDRAWAL OF REFERENCE - 7

1 the SBA’s affiliation rules used to determine small business “size.” Notably, while
 2 expanding eligibility to those specified types of businesses, the CARES Act leaves
 3 unaltered the requirement that “[a]ll loans made under this subsection *shall* be of such
 4 sound value or so secured as reasonably to assure repayment.” 15 U.S.C. § 636(a)(6)
 5 (emphasis added).
 6

7 The CARES Act initially allocated \$349 billion to guarantee PPP loans.
 8 CARES Act § 1102(b)(1). On April 16, 2020, the SBA issued a notice that PPP was
 9 closed to new applications. Congress then passed the Paycheck Protection Program
 10 and Health Care Enhancement Act (CARES Act II) on April 24, 2020 to add \$310
 11 billion to the PPP. PL 116-139 § 101(a)(1).
 12
 13

14 **V. EMERGENCY RULEMAKING AUTHORITY**

15 The CARES Act authorizes the Administrator of the SBA to issue emergency
 16 regulations to implement the PPP more rapidly than it could under typical notice and
 17 comment requirements. CARES Act § 1114. The Administrator of the SBA posted
 18 her First Interim Final Rule on the SBA website on April 3, 2020, which was
 19 subsequently published in the Federal Register on April 15, 2020. 85 Fed. Reg.
 20 20,811. The First Interim Final Rule “streamlin[es] the requirements of the regular
 21 7(a) loan program.” *Id.* at 20,812. The rule states that lenders need not comply with
 22 case-by-case underwriting requirements of 13 C.F.R. § 120.150. *Id.* Instead, under a
 23 section titled “What Do Lenders Have to Do in Terms of Loan Underwriting,” it
 24 states: “Each lender’s underwriting obligation under the PPP is limited to [the
 25
 26
 27
 28

1 enumerated] items above and reviewing the ‘Paycheck Protection Application Form.’”

2 The Paycheck Protection Application Form itself requires the borrower to certify,
3 among other things, that it is “not presently involved in a bankruptcy.” SBA Form
4 2483.
5

6 On April 24, concurrent with Congress’ extension of additional PPP funding,
7 SBA posted a new interim final rule, which was subsequently published in the Federal
8 Register on April 28, 2020, entitled “Business Loan Program Temporary Changes;
9 Paycheck Protection Program –Requirements – Promissory Notes, Authorizations,
10 Affiliation, and Eligibility” (the Fourth Interim Final Rule). 85 Fed. Reg. 23,450. The
11 Fourth Interim Final Rule provides additional information regarding a number of
12 eligibility requirements. Section III(4) of the Fourth Interim Final Rule specifically
13 addresses applicants in bankruptcy. It provides:
14
15
16

17 *4. Eligibility of Businesses Presently Involved in Bankruptcy Proceeding.*

18 *Will I be approved for a PPP loan if my business is in bankruptcy?*

19 No. If the applicant or the owner of the applicant is the debtor in a
20 bankruptcy proceeding, either at the time it submits the application or at
21 any time before the loan is disbursed, the applicant is ineligible to receive
22 a PPP loan. . . .

23 . . .
24 The Administrator, in consultation with the Secretary, determined that
25 providing PPP loans to debtors in bankruptcy would present an
26 unacceptably high risk of an unauthorized use of funds or non-repayment
27 of unforgiven loans. In addition, the Bankruptcy Code does not require
28 any person to make a loan or a financial accommodation to a debtor in
bankruptcy. The Borrower Application Form for PPP loans (SBA Form
2483), which reflects this restriction in the form of a borrower certification,
is a loan program requirement.

MOTION FOR MANDATORY WITHDRAWAL OF REFERENCE - 9

1 Fourth Interim Final Rule. 85 Fed. Reg. at 23,451.

2
3 **VI. THE PAYCHECK PROTECTION FLEXIBILITY ACT OF 2020**

4 On June 5, 2020, the President signed into law the Paycheck Protection
5 Program Flexibility Act of 2020. *See* P.L. No. 116-142. The new act establishes a
6 minimum maturity of five years for PPP loans with a remaining balance after
7 forgiveness, § 2(a), extends the covered period for loans, § 3(a)–(b), alters certain
8 requirements for loan forgiveness for employers unable to rehire employees or
9 individuals similarly qualified, or unable to return to the same level of business as
10 prior to the COVID-19 outbreak, § 3(b)(7), requires that recipients use at least sixty
11 percent of the covered loan amount for payroll costs and up to forty percent for
12 payment of interest on covered mortgage obligations, rent, or utilities, to be eligible
13 for forgiveness, § 3(b)(8), revises the deferral period for PPP loans, § 3(c), and
14 eliminates a provision that rendered loan recipients with a PPP debt that is ultimately
15 forgiven ineligible to defer payroll tax payments. § 4. The Paycheck Protection
16 Flexibility Act of 2020 does not, however, alter the sound value requirement in 15
17 U.S.C. § 636(a)(6). Nor does it alter SBA Form 2483 excluding debtors in
18 bankruptcy.
19

20
21 **ARGUMENT**

22 District courts have original jurisdiction of “all civil proceedings arising under
23 title 11, or arising in or related to cases under title 11.” 28 U.S.C. § 1334(b). Each
24

1 district court may, however, “provide that any or all cases under title 11 and any or all
2 proceedings arising under title 11 or arising in or related to a case under title 11 shall
3 be referred to the bankruptcy judges for the district.” 28 U.S.C. § 157(a).

4 Pursuant to this authority, the United States District Court for the Eastern
5 District of Washington has referred all bankruptcy cases filed in the district to the
6 bankruptcy court. *See* LCivR 83.5(a) (Pursuant to 28 U.S.C. § 157(a), this Court
7 hereby refers to the bankruptcy judges of this district all cases under United States
8 Code Title 11, and all proceedings arising under Title 11 or arising in or related to
9 cases under Title 11).

10 However, 28 U.S.C. § 157(d) provides:

11 The district court may withdraw, in whole or in part, any case or
12 proceeding referred under this section, on its own motion or on
13 timely motion of any party, for cause shown. The district court shall,
14 on timely notice of a party, so withdraw a proceeding if the court
15 determines that resolution of the proceeding requires consideration
16 of both title 11 and other laws of the United States regulating
17 organizations or activities affecting interstate commerce.

18 28 U.S.C. § 157(d).

19 The United States’ motion, filed prior to the entry of the Bankruptcy Court’s
20 scheduling order in the Adversary Proceeding, is timely. *See* LBR 5011-1 (b) (Any
21 motion for withdrawal of reference in an adversary proceeding, in whole or in part,
22 shall be filed in the bankruptcy court no later than 14 days following the entry of the
23 scheduling order”).
24
25
26

1 Mandatory withdrawal of the reference is required here. “The purpose of §
 2 157(d) is to assure that an Article III judge decides issues calling for more than routine
 3 application of [federal laws] outside of the Bankruptcy Code.” *Ames Dep’t Stores, Inc.*
 4 *v. Lumbermens Mut. Cas. Co. (In re Ames Dep’t Stores, Inc.)*, 512 B.R. 736, 740
 5 (S.D.N.Y. 2014) (citation omitted) (alteration in original).

7 The mandatory withdrawal provision of § 157(d) “*mandates* withdrawal in
 8 cases requiring material consideration of non-bankruptcy federal law.” *Sec. Farms v.*
 9 *Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers*, 124 F.3d 999 at 1008
 10 (9th Cir. 1997) (emphasis in original). While “[t]he Ninth Circuit has not squarely
 11 addressed mandatory withdrawal,” other circuit courts “have held that ‘mandatory
 12 withdrawal is required only when [non-title 11] issues require the interpretation, as
 13 opposed to mere application, of the non-title 11 statute, or *when the court must*
 14 *undertake analysis of significant open and unresolved issues regarding the non-title*
 15 *11 law.’” In re Tamalpais Bancorp*, 451 B.R. 6, 8-9 (N.D. Cal. 2011) (citations
 16 omitted) (emphasis added). “Courts within the Ninth Circuit have largely adopted this
 17 approach.” *Id.* (citations omitted).

22 Here, the issues raised by Plaintiffs in the Adversary Proceeding require a court
 23 to determine whether the SBA exceeded its statutory authority under the newly-
 24 enacted CARES Act, or acted arbitrarily or capriciously, in excluding bankrupt
 25 entities or entities with an owner in bankruptcy from participation in the PPP.

27 Because the CARES Act was enacted less than three months ago, on March 27, 2020,

1 this complex issue of statutory interpretation of non-bankruptcy law is an issue of first
2 impression for courts nationwide. The CARES Act is a non-title 11 law and the
3 interpretation of it under the APA inarguably requires a court to undertake an analysis
4 of significant and unresolved issues of non-bankruptcy law. Accordingly, this issue
5 should be heard and resolved in the district court, and therefore, mandatory
6 withdrawal of the reference is required. *See In re Tamalpais Bancorp*, 451 B.R. at 9
7 (mandatory withdrawal is triggered when the bankruptcy court must “undertake
8 analysis of significant open and unresolved issues regarding the non-title 11 law”);
9 *One Longhorn Land I, L.P. v. Presley*, 529 B.R. 755, 759 (C.D. Cal. 2015) (“The
10 Ninth Circuit has suggested in dicta that mandatory withdrawal hinges ‘on the
11 presence of substantial and material questions of federal law.’”) citing *Sec. Farms*,
12 124 F.3d at 1008 n.4.

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17 Withdrawal is also required because the Bankruptcy Court has exceeded its
18 Constitutional authority. The Bankruptcy Court determined that that Plaintiffs’ APA
19 claims are “core” and that the Bankruptcy Court had authority to issue a final order
20 because the “APA claim is ... a matter concerning the administration of this
21 bankruptcy estate.” ECF No. 22, Exhibit A, Tr. at 12:9-12.

22
23 The distinction between core and non-core matters is fundamental to a
24 bankruptcy court's jurisdiction. The Ninth Circuit has defined a core proceeding as
25 one that “invokes a substantive right provided by title 11 or ... a proceeding that, by its
26 nature, could arise only in the context of a bankruptcy case.” *In re Ray*, 624 F.3d
27
28
MOTION FOR MANDATORY WITHDRAWAL OF REFERENCE - 13

1 1124, 1131 (9th Cir. 2010), quoting *Gruntz v. County of L.A. (In re Gruntz)*, 202 F.3d
2 1074, 1081 (9th Cir. 2000). A matter is core and “arises under” the Bankruptcy Code
3 if “if its existence depends on a substantive provision of bankruptcy law, that is, if it
4 involves a cause of action created or determined by a statutory provision of the
5 Bankruptcy Code” or “arises in” a case under the Bankruptcy Code if “it is an
6 administrative matter unique to the bankruptcy process that has no independent
7 existence outside of bankruptcy and could not be brought in another forum, but whose
8 cause of action is not expressly rooted in the Bankruptcy Code.” *In re Ray*, 624 F.3d
9 at 1131. In core proceedings, a bankruptcy judge “may enter appropriate orders and
10 judgments” subject to appellate review by the district court. 28 U.S.C. § 157(b)(1)).
11
12
13

14 On the other hand, matters are deemed “non-core” if they “do not depend on the
15 Bankruptcy Code for their existence and they could proceed in another court.”
16 *Dunmore v. United States*, 358 F.3d 1107, 1114 (9th Cir. 2004). In non-core
17 proceedings, the bankruptcy judge “shall submit proposed findings of fact and
18 conclusions of law to the district court, and any final order or judgment shall be
19 entered by the district judge after . . . reviewing de novo.” 28 U.S.C. § 157(c)(1)).
20
21

22 The Bankruptcy Court’s decision that Plaintiff’s APA claims are “core” cannot
23 be reconciled with this controlling authority. Plaintiff’s APA claims clearly do not
24 “invoke a substantive right created by the federal bankruptcy law”, nor do they
25 concern an “administrative matter unique to the bankruptcy process.” Moreover, the
26 claims are not ones that “could not exist outside of the bankruptcy.” Plaintiff’s APA
27 MOTION FOR MANDATORY WITHDRAWAL OF REFERENCE - 14
28

1 claims do not “invoke a substantive right created by the federal bankruptcy law”
2 because the cause of action for these claim is the APA, not anything in the Bankruptcy
3 Code. *See* 5 U.S.C. § 702; *see also In re Penobscot Valley Hosp.*, 2020 WL 3032939,
4 at *4 (Bankr. D. Me. June 3, 2020) (“the Debtor’s complaint [concerning a PPP loan]
5 ventures far beyond the confines of the Bankruptcy Code, asserting a claim under the
6 APA. . . this proceeding is not one arising in or arising under the Bankruptcy Code,
7 but rather is one related to a case under the Bankruptcy Code”); *Diocese of Rochester*
8 *v. U.S. Small Bus. Admin.*, 2020 WL 3071603, at *4 (W.D.N.Y. June 10, 2020) (“It is
9 not clear whether the Bankruptcy Court would have the authority to finally adjudicate
10 Plaintiffs’ claims under the APA. . . This lack of clarity supports withdrawing the
11 referral...”); *In re United Air Lines, Inc.*, 337 B.R. 904, 910 (N.D. Ill. 2006) (Debtors’
12 Title IV of ERISA claim “exists outside the Bankruptcy Code and can arise outside
13 the context of a bankruptcy case. . . Accordingly, the termination proceeding neither
14 invokes a substantive right provided by Title 11 nor, by its nature, could it arise only
15 in the context of a bankruptcy case.”). Further, Plaintiffs’ APA claims are in no way
16 “administrative matters unique to the bankruptcy process.” Finally, Plaintiff’s APA
17 claims could exist outside of bankruptcy because there can be no dispute that Plaintiff
18 could have filed its APA suit directly in the district court. 28 U.S.C. § 1331.
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MOTION FOR MANDATORY WITHDRAWAL OF REFERENCE - 15

CONCLUSION

For the foregoing reasons, the United States respectfully requests mandatory withdrawal of the reference for the Adversary Proceeding.

RESPECTFULLY SUBMITTED: June 23, 2020.

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8 UNITED STATES BANKRUPTCY COURT
9 EASTERN DISTRICT OF WASHINGTON

10 In Re:

11 ASTRIA HEALTH, et al¹

12 Debtors and Debtors in Possession,

13 ASTRIA HEALTH, et al.,
14 Plaintiffs,

15 v.

16 UNITED STATES SMALL
17 BUSINESS ADMINISTRATION
18 and JOVITA CARRANZA, in her
19 capacity as Administrator for the
20 United States Small Business
21 Administration,

22 Defendants.

Lead Case No. 19-01189-11

Adv. Proc. Case No. 20-80016-WLH

CERTIFICATE OF SERVICE

23 ¹ The Debtors, along with their case numbers, are as follows: Astria Health (19-01189-
24 11), Glacier Canyon, LLC (19-01193-11), Kitchen and Bath Furnishings, LLC (19-
25 01194-11), Oxbow Summit, LLC (19-01195-11), SHS Holdco, LLC (19-01196-11),
26 SHC Medical Center - Toppenish (19-01190-11), SHC Medical Center - Yakima
27 (19-01192-11), Sunnyside Community Hospital Association (19-01191-11),
28 Sunnyside Community Hospital Home Medical Supply, LLC (19- 01197-11),
Sunnyside Home Health (19-01198-11), Sunnyside Professional Services, LLC (19-
01199-11), Yakima Home Care Holdings, LLC (19-01201-11), and Yakima HMA
Home Health, LLC (19-01200-11).

CERTIFICATE OF SERVICE- 1

1
2 I hereby certify that on June 23, 2020, I electronically filed Defendant's Motion
3 for Mandatory Withdrawal of Reference with the Clerk of the Court using the
4 CM/ECF system, which will send notification of such filing to the following:

5 U.S. Trustee

6 Plaintiffs

7 And to the following non CM/ECF participants: n/a

8
9 s/Brian M. Donovan
Assistant United States Attorney

10
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CERTIFICATE OF SERVICE- 2

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 In Possession*

**UNITED STATES BANKRUPTCY COURT
 EASTERN DISTRICT OF WASHINGTON**

In re:

ASTRIA HEALTH, *et al.*,

Debtors and Debtors in
 Possession.¹

ASTRIA HEALTH, *et al.*,

Plaintiffs,

v.

Chapter 11
 Lead Case No. 19-01189-11
 Jointly Administered

**Adv. Proc. Case No. 20-80016-
 WLH**

**OPPOSITION TO MOTION FOR
 MANDATORY WITHDRAWAL
 OF REFERENCE**

¹ The Debtors, along with their case numbers, are as follows: Astria Health (19-01189-11), Glacier Canyon, LLC (19-01193-11), Kitchen and Bath Furnishings, LLC (19-01194-11), Oxbow Summit, LLC (19-01195-11), SHC Holdco, LLC (19-01196-11), SHC Medical Center - Toppenish (19-01190-11), SHC Medical Center - Yakima (19-01192-11), Sunnyside Community Hospital Association (19-01191-11), Sunnyside Community Hospital Home Medical Supply, LLC (19-01197-11), Sunnyside Home Health (19-01198-11), Sunnyside Professional Services, LLC (19-01199-11), Yakima Home Care Holdings, LLC (19-01201-11), and Yakima HMA Home Health, LLC (19-01200-11).

**OBJECTION TO MANDATORY
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1 UNITED STATES SMALL BUSINESS
 2 ADMINISTRATION and JOVITA
 3 CARRANZA, in her capacity as
 4 Administrator for the United States Small
 Business Administration,
 Defendants.

[Related Docket No. 26]

5 Debtor Astria Health (“Astria”), Debtor SHC Medical Center - Toppenish,
 6 doing business as Astria Toppenish Hospital (“Toppenish”), both Washington
 7 nonprofit corporations under § 501(c)(3) of title 26 of the United States Code, and
 8 Debtor Yakima HMA Home Health LLC doing business as Astria Home Health &
 9 Hospice-Yakima (“Astria Home Health”), also a Washington corporation, along with
 10 the above-referenced affiliated debtors (collectively, the “Debtors”), the debtors and
 11 debtors in possession in the above-captioned chapter 11 bankruptcy cases
 12 (collectively, the “Chapter 11 Cases”), hereby file this opposition (the “Opposition”)
 13 to the *Motion for Mandatory Withdrawal of Reference* [Docket No. 26] (the
 14 “Motion”) filed by Defendant United States Small Business Administration (the
 15 “SBA”) acting through Defendant Jovita Carranza in her capacity as the
 16 Administrator of the SBA (the “Administrator”, and together with the SBA, the
 17 “Defendants”), as follows:

21
**OBJECTION TO MANDATORY
 WITHDRAWAL OF REFERENCE**

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I.

INTRODUCTION

The Defendants' Motion should be denied because (a) it is a violation of the parties' agreement, and the Bankruptcy Court's order, to stay all litigation pending final resolution of any appeal (the "Standstill Agreement"), as memorialized in the *Stipulated [Proposed] Order* [Adv. Pro. Docket No. 25] (filed before the Defendants filed the Motion), and as approved by the Bankruptcy Court in the *Stipulated Order* (the "Standstill Order") [Adv. Pro. Docket No. 33]; (b) the underlying proceeding and issues are core issues in a bankruptcy proceeding; (c) mandatory withdrawal of the reference requires more than mere application of the non-bankruptcy law, while this adversary proceeding required nothing more than the mere application of the Administrative Procedures Act; (d) the claims are neither complex nor beyond the jurisdiction of the Bankruptcy Court; and (e) it would be highly inefficient, and a waste of judicial resources, to require the United States District Court for the Eastern District of Washington (the "District Court") to acquire the intimate familiarity with the facts that are at the heart of the underlying causes of action and that are necessary to adjudicate the adversary proceeding, when the matter may be resolved in the pending SBA appeal of the Bankruptcy Court's order granting a preliminary injunction. For all these reasons, as discussed more fully herein and on the record in the Adversary Proceeding, the Motion should be denied.

II.

BACKGROUND

A. General Background

The Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code, §§ 101 *et seq.* (the “Bankruptcy Code”)² on May 6, 2019 (the “Petition Date”) in the United States Bankruptcy Court for the Eastern District of Washington (the “Bankruptcy Court”). These Chapter 11 Cases are currently being jointly administered before the Bankruptcy Court. [Lead Docket No. 10].

Since the Petition Date, the Bankruptcy Court has considered more than 1,400 docket entries, adjudicated hundreds of disputes, and is considering multiple adversary proceedings. Moreover, the record developed in the Bankruptcy Court includes all facts central to resolving the above-captioned adversary proceeding (the “Adversary Proceeding”).

B. The SBA Adversary Proceeding

This Adversary Proceeding arises out of Banner Bank’s previous denial, at the direction of the SBA acting through the Administrator, of two of the Debtors’ applications for loans under the Paycheck Protection Program (“PPP”) because the applicants are debtors in bankruptcy, . Through the Adversary Proceeding, the

² All references to “§” herein are to sections of the Bankruptcy Code.

Debtors sought to have the SBA and the Administrator enjoined from their improper and unlawful administration of PPP, which Congress enacted and the President signed as part of the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”), Public Law 116-136.³ The CARES Act included stimulus funds designed to assist businesses, including for-profits and 501(c)(3) nonprofits, and to ensure that American workers continue to be paid despite the economic impact of the Novel Coronavirus (“Covid-19”) and social distancing measures. Section 1102 of the CARES Act establishes PPP as a convertible loan program under § 7(a) of the Small Business Act, codified in 15 U.S.C § 636. While nominally called a “loan,”⁴ PPP disbursements are treated as grants—and there are no repayment obligations—if, among other things, a certain percentage of PPP funds are used for payroll and wage expenses, interest on mortgages, rent, or utilities. Importantly, neither the CARES Act, the Small Business Act, nor any other applicable law or regulation prohibits the granting of PPP funds to bankruptcy debtors, with the exception of an SBA rule issued and published after the Debtors submitted their PPP applications.

³ A full text of the CARES Act can be found at <https://www.govtrack.us/congress/bills/116/hr748/text> (last visited on July 7, 2020).

⁴ The Debtors’ use of the term “loan” or “loans” herein is not intended to waive or diminish its contention that PPP is in reality a support/grant program.

1 Nevertheless, the Defendants denied the Debtors access to PPP disbursements on the
 2 sole basis that the Debtors are in bankruptcy, and in so doing exceeded their statutory
 3 authority and improperly, unfairly, arbitrarily, capriciously, and unlawfully
 4 discriminated against the Debtors—in violation of § 525(a) of the Bankruptcy Code
 5 and Administrative Procedure Act (the “APA”), 5 U.S.C. § 706.⁵

6 After notice and hearing, the Bankruptcy Court granted the Debtors’ request
 7 for an order requiring the Defendants and all agents, servants, employees, and any
 8 parties acting in concert with any of the foregoing (the “Restrained Parties”) to
 9 consider the Debtors’ PPP applications and any related forms, applications, or other
 10 documents⁶ without any consideration of the involvement of the Debtors or any
 11 owner of the Debtors in any bankruptcy. *Order Granting Preliminary Injunction,*
 12 *Denying Stay Pending Appeal, and Certifying Issues to the Ninth Circuit of Appeals*
 13 *[Adv. Proc. Docket No. 22]* (the “Preliminary Injunction Order”) on the grounds that
 14 the Defendants violated the § 706 of the APA.⁷ Contrary to the Defendants’

15
 16 ⁵ The Debtors’ allegations are set forth more fully in the Complaint [Adv. Pro. Docket
 17 No. 1].

18 ⁶ This includes a lender application.

19 ⁷ The Defendants appealed the Preliminary Injunction Order to the District Court.
 20 *See Notice of Appeal Under 28 U.S.C. §158(a)(1) and Statement of Election, Adv.*

1 assertions that the Debtors' claims "require the Bankruptcy Court to interpret new
2 non-bankruptcy law," the Bankruptcy Court merely applied the APA to the facts
3 before it.

4 Just before the Defendants were set to file their Answer to the Complaint, the
5 parties reached the Standstill Agreement, which would allow the parties to forego the
6 expense of litigation on the merits pending an appeal of the Preliminary Injunction
7 Order. However, within hours of filing the *Stipulated [Proposed] Order* [Adv. Pro.
8 Docket No. 25], the Defendants filed the Motion, needlessly increasing litigation
9 costs to the detriment of the Debtors. At no point during the parties' Standstill
10 Agreement discussions did the Defendants mention they were planning to file the
11 Motion. The Debtors agreed to a stay of all litigation pending the appeal, in good
12 faith and with the understanding that the Standstill Agreement applied to everything
13 other than the appeal itself. The Motion is not a part of the appeal, and is thus a
14 violation of the parties' agreement, and the Standstill Order.

15
16
17
18 Pro. Docket No. 28; *see also* App. Case No. 20-cv-03089. The Debtors cross-
19 appealed. Adv. Pro. Docket No. 34. As of the date of this filing, neither sides' brief
20 is yet due to be filed.

21
**OBJECTION TO MANDATORY
WITHDRAWAL OF REFERENCE**

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1 **III.**

2 **ARGUMENT**

3 **A. The Motion Should Be Denied Because It Violates the Bankruptcy Court's Order**

4

5 The Motion should be denied as it violates the terms of the Standstill

6 Agreement between the Defendants and the Debtors and, in turn, violates the

7 Standstill Order [Adv. Pro. Docket No. 33]. That agreement says: "The parties

8 hereby agree to stay this Adversary Proceeding pending the United States' appeal of

9 the Order Granting Preliminary Injunction. Such stay shall only apply to further

10 litigation of this Adversary Proceeding on the merits and does not stay the Order

11 Granting Preliminary Injunction." That language captures the Motion, which is

12 clearly violating the Standstill Agreement and Standstill Order to "stay the Adversary

13 Proceeding pending the United State' appeal." As such, the Defendants are in civil

14 contempt for ignoring the Standstill Order staying the Adversary Proceeding, when

15 there is no fair ground of doubt as to whether the Standstill Order barred the

16 Defendants from filing the Motion. *Taggart v. Lorenzen*, 139 S. Ct. 1795 (June 3,

17 2019) (A bankruptcy court may hold a creditor in civil contempt for attempting to

18 collect on a debt that has been discharged in bankruptcy "if there is *no fair ground of*

19 *doubt* as to whether the order barred the creditor's conduct."); *Suh v. Anderson (In re*

20 *Jeong)*, 2020 WL 1277575 (B.A.P. 9th Cir. Mar. 16, 2020) (Panel applied the

1 *Taggart* standard in upholding a bankruptcy court order granting a chapter 7 trustee's
 2 request for contempt sanctions for a willful violation of the stay.). Here the Debtors
 3 do not seek sanctions for violating the standstill agreement and the Bankruptcy Court
 4 order other than denial of the Motion and enforcement of the Standstill Agreement.

5 **B. The Proceeding Is Core**

6 The Adversary Proceeding raise two issues, both of which are core matters.
 7 The cause of action asserting relief under § 525 is a core proceeding because it asserts
 8 a right based expressly and solely on a Bankruptcy Code provision. More
 9 importantly, the cause of action related to the Administrative Procedures Act
 10 violation is also a core matter, because of the nature of the issue presented. Here the
 11 issue is whether the SBA could exclude debtors in bankruptcy from participation in
 12 the PPP. It is an issue that can only arise in the context of a bankruptcy case, because
 13 the exclusion would not apply outside of a bankruptcy case. Moreover, it could not
 14 have existed prepetition, as absent a bankruptcy case it would not exist, and the
 15 Debtors' rights are significantly affected as a result of the bankruptcy filing. Thus,
 16 this cause of action is core. *Kirk v. Hendon (In re Heinsohn)*, 247 B.R. 237 (E.D.
 17 Tenn. 2000) (proceeding is "core" if it invokes substantive right provided by title 11
 18 or if it is a proceeding that, by its nature, could arise only in the context of
 19 bankruptcy); *Houbigant, Inc. v. ACB Mercantile, Inc. (In re Houbigant, Inc.)*, 185
 20 B.R. 680 (S.D.N.Y. 1995) (proceeding is core if it invokes a substantive right
 21

provided by the Bankruptcy Code or by nature could arise only in the context of a bankruptcy case); *Hudgins v. Shah (In re Sys. Eng'g & Energy Mgmt. Assocs., Inc.)*, 252 B.R. 635 (Bankr. E.D. Va. 2000) (among factors that courts may consider in deciding whether claim is "core" are the following: (1) whether claim existed prepetition; (2) whether claim would continue to exist independent of provisions of title 11; and (3) whether parties' rights, obligations, or both are significantly affected as result of debtor's bankruptcy filing).

The Defendants mistakenly cite the Ninth Circuit as supporting their argument. *See* Motion at 13-14 (citing *In re Ray*, 624 F.3d 1124, 1131 (9th Cir. 2010) ("a core proceeding is one that 'invokes a substantive right provided by title 11 or ... a proceeding that, by its nature, could arise only in the context of a bankruptcy case,'")). The Defendants somehow insinuate that this Adversary Proceeding could arise in any context outside of bankruptcy. However, this logic is flawed as the Defendants unambiguously admit that they discriminated against the Debtors solely because of their status as debtors in bankruptcy. *See Defendants Brief in Opposition to Plaintiffs' Motion for Temporary Restraining Order (ECF No. 2) Request for Preliminary Injunction (ECF No. 1)* [Adv. Pro. Docket No. 14] at 15:13-14 ("Here, the status quo is that plaintiffs are excluded from the PPP program because they are in bankruptcy."). Moreover, the Debtors claims for violations of § 525(a) of the Bankruptcy Code can arise only in bankruptcy.

1 **C. Withdrawal of the Reference is Not Mandated**

2 Federal courts have “original and exclusive jurisdiction of all cases under title
3 11,” which they may refer to the Bankruptcy Court. *See* 28 U.S.C. §§ 157(a) and
4 1334(a). In select circumstances, though, the District Court must withdraw that
5 reference “if the court determines that resolution of the proceeding requires
6 consideration of both title 11 and other laws of the United States regulating
7 organizations or activities affecting interstate commerce.” *Id.* § 157(d); *see also Sec.*
8 *Farms v. Int’l Bhd. of Teamsters*, 124 F.3d 999, 1008 (9th Cir. 1997).

9 However, courts interpret this provision narrowly to prevent the very type of
10 forum shopping being pursued here by the Defendants. *See In re Temecula Valley*
11 *Bancorp, Inc.*, 523 B.R. 210, 214 (C.D. Cal. 2014) (citing *In re Vicars Ins. Agency,*
12 *Inc.*, 96 F.3d 949, 952 (7th Cir. 1996)); *Lucore v. Guild Mortg. Co.*, No. 12-CV-
13 1411-IEG WVG, 2012 WL 2921354, at *2 (S.D. Cal. July 16, 2012) (“Congress
14 intended for this language to be construed narrowly.”); *In re Roman Catholic Bishop*
15 *of San Diego*, No. 07-1355, 2007 WL 2406899 (S.D. Cal. Aug. 20, 2007) (“Congress
16 intended the mandatory withdrawal provision to be construed narrowly so as not to
17 create an ‘escape hatch’ by which most bankruptcy matters could easily be removed
18 to the district court.”); *see also Shurgrue v. Air Line Pilots Ass’n Intel (In re*
19 *Ionosphere Clubs, Inc.)*, 922 F.2d 984, 995 (2d Cir. 1990). Indeed, withdrawal is
20 rarely required, consistent with Congress’s clear intent behind enacting “a modern
21

1 bankruptcy system [that] places the basic rudiments of the bankruptcy process in the
 2 hands of an expert equitable tribunal.” *Granfinanciera, S.A. v. Nordberg*, 492 U.S.
 3 33, 94 (1989) (Blackmun, J., dissenting).

4 Given the high standard, a party seeking to withdraw the reference bears the
 5 burden of persuasion, and “must do more than merely suggest that novel issues of
 6 law could possibly arise in a bankruptcy proceeding.” *In re Tamalpais Bancorp*, 451
 7 B.R. 6, 8 (N.D. Cal. 2011); *see also Weinstein v. Kuhl*, No. 18-01351-HSG, 2018
 8 WL 4904901, at *3 (N.D. Cal. Oct. 9, 2018). As set forth below, the Defendants
 9 have not satisfied their burden, and the circumstances here do not warrant
 10 withdrawal.

11 To avoid forum shopping, a majority of courts have found that mandatory
 12 withdrawal is proper only where “substantial and material consideration of non-
 13 Bankruptcy Code federal statutes is necessary for the resolution of the proceeding.”
 14 *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 995 (2d Cir. 1990). In most courts,
 15 including most courts in the Ninth Circuit, this standard -- the substantial and material
 16 consideration of the non-bankruptcy statutes -- has been articulated as “mandatory
 17 withdrawal is required only when [non-title 11] issues require the interpretation, as
 18 opposed to mere application, of the non-title 11 statute, or when the court must
 19 undertake analysis of significant open and unresolved issues regarding the non-title
 20 11 law.” *Tamalpais Bancorp*, 451 B.R. at 8 (citing *In re Vicars Ins. Agency, Inc.*, 96

1 F.3d at 954 and collecting cases in the Ninth Circuit adopting this standard); *see also*
 2 *Smails v. City of Pittsburgh Sch. Dist.*, No. 15-1489, 2016 WL 110029, at *2 (M.D.
 3 Pa. Jan. 11, 2016); *In re Nortel Networks, Inc.*, 539 B.R. 704, 709 (D. Del. 2015);
 4 *One Longhorn Land I, L.P. v. Presley*, 529 B.R. 755, 759-60 (C.D. Cal. 2015); *In re*
 5 *IndyMacBancorp Inc.*, No. CV 11-03969-RGK, 2011 WL 2883012, at *2 (C.D. Cal.
 6 July 15, 2011); *United States v. Delfasco, Inc.*, 409 B.R. 704, 707 (D. Del. 2009); *In*
 7 *re G-I Holdings, Inc.*, 295 B.R. 222, 224 (D.N.J. 2003).

8 Here, the SBA argues that the withdrawal is required because the Bankruptcy
 9 Court would have to review the CARES Act or some other new and novel body of
 10 law. But that is a “red herring.” The Bankruptcy Court’s decision applies the
 11 Administrative Procedures Act, a law which was passed in 1946, more than 70 years
 12 ago, to establish uniform procedures for federal agencies to propose and establish
 13 regulations. *See, e.g., Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992) (the APA
 14 “sets forth the procedures by which federal agencies are accountable to the public
 15 and their actions subject to review by the courts”); *United States v. Morton Salt Co.*,
 16 338 U.S. 632, 644 (1950) (discussing legislative purpose of the APA); *Sequoia*
 17 *Orange Co. v. Yeutter*, 973 F.2d 752, 758 (9th Cir. 1992) (“The procedural safeguards
 18 of the APA help ensure that government agencies are accountable and their decisions
 19 are reasoned.”).

1 The standards governing the application of the APA are well established and
 2 understood and the application of them is clear, especially with regard to whether
 3 decisions are arbitrary and capricious. *See e.g., Dep't of Homeland Sec. v. Regents*
 4 *of the U. of Cal.*, 591 U. S. ____ (2020) (“The basic rule here is clear: An agency
 5 must defend its actions based on the reasons it gave when it acted. This is not the
 6 case for cutting corners to allow [the agency] to rely upon reasons absent from its
 7 original decision.”); *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*,
 8 463 U.S. 29, 43 (1983). . This is not a case requiring a novel interpretation of the
 9 APA or an interpretation of the CARES Act, but merely the application of the APA’s
 10 well established body of law and well recognized standards to the facts before the
 11 Bankruptcy Court. Here, the Bankruptcy Court correctly found that the
 12 administrative record is wholly lacking any substantive reasoning or explanation.
 13 Where the court is merely applying settled law, as the Bankruptcy Court was doing
 14 here with regard to the APA, withdrawal is not appropriate. *LTV Steel Co. v. Union*
 15 *Carbide Corp. (In re Chateaugay Corp.)*, 193 B.R. 669 (S.D.N.Y. 1996) (withdrawal
 16 of reference not required if consideration of non-Code law entails straightforward
 17 application of settled law to facts of particular case); *In re E & S Facilities, Inc.*, 181
 18 B.R. 369, 372 (S.D. Ind. 1995) (withdrawal requires either (1) complicated issues of
 19 first impression requiring significant interpretation of Federal law, or (2) substantial
 20 and material conflicts between the Bankruptcy Code and non-title 11 laws), *aff’d*, 96

**OBJECTION TO MANDATORY
 WITHDRAWAL OF REFERENCE**

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1 F.3d 949 (7th Cir. 1996); *In re Philadelphia Training Ctr. Corp.*, 155 B.R. 109 (E.D.
 2 Pa. 1993) (mandatory withdrawal not required where only routine application of
 3 established legal standards is required); *Am. Body Armor & Equip., Inc. v. Clark (In*
 4 *re Am. Body Armor & Equip., Inc.)*, 155 B.R. 588 (M.D. Fla. 1993) (mandatory
 5 withdrawal only for cases of first impression or where “substantial and material
 6 conflicts” exist between Bankruptcy Code and other Federal law); *Wittes v. Interco,*
 7 *Inc.*, 137 B.R. 328 (E.D. Mo. 1992) (where issues required no more than
 8 “straightforward application,” and not significant interpretation of ADEA,
 9 reference not withdrawn).

10 **D. Conclusion**

11 Based on the foregoing, the Motion should be denied because it violates the
 12 Bankruptcy Court’s Standstill Order, asks to withdraw the reference to deal with two
 13 core matters under the Bankruptcy Code, and fails to satisfy the requirements for
 14 mandatory withdrawal of the reference, because it merely presents the application of
 15 well settled legal precedent related to the APA to the facts of this case.
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 21

1 Dated: July 7, 2020

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By /s/ Sam J. Alberts

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

In Re:

ASTRIA HEALTH, et al.¹

Debtors and Debtors in Possession,

Lead Case No. 19-01189-11

Adv. Proc. Case No. 20-80016-WLH

REPLY IN SUPPORT OF MOTION
TO WITHDRAW THE REFERENCE

Hearing: June 23, 2020 at 6:30 p.m.
Without Oral Argument

ASTRIA HEALTH, et al.,

¹ The Debtors, along with their case numbers, are as follows: Astria Health (19-01189-11), Glacier Canyon, LLC (19-01193-11), Kitchen and Bath Furnishings, LLC (19-01194-11), Oxbow Summit, LLC (19-01195-11), SHC Holdco, LLC (19-01196-11), SHC Medical Center - Toppenish (19-01190-11), SHC Medical Center - Yakima (19-01192-11), Sunnyside Community Hospital Association (19-01191-11), Sunnyside Community Hospital Home Medical Supply, LLC (19-01197-11), Sunnyside Home Health (19-01198-11), Sunnyside Professional Services, LLC (19-01199-11), Yakima Home Care Holdings, LLC (19-01201-11), and Yakima HMA Home Health, LLC (19-01200-11).

1 are core because they uniquely arise in bankruptcy; (3) the Motion violates the
2 Bankruptcy Court's "Stipulated Order," (ECF No. 33); (4) the claims are not
3 complex; and (5) withdrawal is inefficient. ECF No. 35 at 3. None of these
4 arguments are persuasive.
5

6 First, most of the Opposition is simply irrelevant to the matter at hand. Only
7 Plaintiffs' first argument — that the Court does not need to interpret non-
8 bankruptcy law — is relevant to mandatory withdrawal under 28 U.S.C. § 157(d).
9 *See Sec. Farms v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers*,
10 124 F.3d 999, 1008 (9th Cir. 1997) (holding that section 157(d) "*mandates*
11 withdrawal in cases requiring material consideration of non-bankruptcy federal
12 law" (emphasis added)). If the Court rejects Plaintiffs' contention that adjudicating
13 the proceeding will not require interpreting non-bankruptcy law, then the Court
14 need not consider Plaintiffs' other arguments.
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17

18 Second, even if the Court does consider Plaintiffs' other arguments ((2), (4)
19 and (5) as noted above) as related to permissive, rather than mandatory withdrawal,
20 none of Plaintiffs' arguments are persuasive, as explained below.
21

22 Finally, the United States' motion asking that the District Court adjudicate
23 the merits of withdrawing the reference with respect to the Adversary Proceeding
24 is procedurally proper and not inconsistent with the standstill agreement made by
25 the parties and issued without alteration by the Bankruptcy Court.
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1. Adjudicating this Adversary Proceeding Requires Interpreting the CARES Act.

Plaintiffs agree that 28 U.S.C. § 157(d) mandates withdrawal when adjudicating the proceeding requires consideration of non-bankruptcy “laws of the United States regulating organizations or activities affecting interstate commerce.” Opposition at 11. Plaintiffs further agree that this standard is met when “[non-title 11] issues require the interpretation, as opposed to mere application, of the non-title 11 statute, or when the court must undertake analysis of significant open and unresolved issues regarding the non-title 11 law.” Opposition at 12 (quoting *In re Tamalpais Bancorp*, 451 B.R. 6, 8 (N.D. Cal. 2011)). However, Plaintiffs then mischaracterize the analysis the Court must undertake by asserting that this case does not require interpreting the CARES Act or analyzing unresolved issues regarding the CARES Act. *See* Opposition at 13.

This assertion is not correct. Plaintiffs’ Complaint pleads Administrative Procedure Act violations based on (a) the absence of any “law, regulation, or rule of any kind [that] disqualifies, or authorizes the SBA or the Administrator to disqualify[] bankruptcy debtors from participating in PPP,” and (b) that “SBA and the Administrator’s automatic disqualification of the Debtors runs completely counter to the mandate of PPP.” ECF No. 1 at ¶¶ 89, 100 (Counts IV and V). Resolving these claims *requires* the Court to interpret the CARES Act, because (1) the parties dispute whether the CARES Act authorizes SBA to promulgate

1 reasonable eligibility requirements for PPP applicants, and (2) the parties dispute
 2 whether the bankruptcy exclusion is a reasonable interpretation of the CARES Act.
 3 *Compare* Complaint Counts IV and V (above), with *Nat'l Cable & Telecomm'n's*
 4 *Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005) (“At the first step [of
 5 *Chevron* deference], we ask whether the statute’s plain terms directly address the
 6 precise question at issue. If the statute is ambiguous on the point, we defer at step
 7 two to the agency’s interpretation so long as the construction is a reasonable policy
 8 choice for the agency to make.” (cleaned up) (quoting *Chevron U.S.A. Inc. v.*
 9 *NRDC*, 467 U.S. 837, 843, 845 (1984))). Only by interpreting the CARES Act
 10 under *Chevron* can the Court determine whether Plaintiffs prevail on their APA
 11 claims. Thus, because Plaintiffs’ APA claims unquestionably require the Court to
 12 interpret non-title 11 law (the CARES Act), mandatory withdrawal is required.²
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18 ² “[M]andatory withdrawal is inappropriate where the asserted non-
 19 bankruptcy laws do not relate to interstate commerce.” *Tamalpais Bancorp.*, 451
 20 B.R. at 9. Here, the CARES Act, and specifically the PPP, unquestionably relates
 21 to interstate commerce – and Plaintiffs do not contest this point. The PPP is a
 22 nationwide federal lending program available to applicants throughout the United
 23 States. PPP loans, which are used by recipients to pay employees (who then use
 24 the money in a variety of ways), rent and for other purposes, are clearly items
 25 placed in the stream of interstate commerce. Moreover, to the extent that PPP
 26 loans allows business to continue operations and produce goods, both now and in
 27 the future, those goods are also items placed in the stream of interstate commerce.
 28 Thus, the PPP program, established and funded by the CARES Act and
 implemented by the SBA, which guarantees every PPP loan, unquestionably
 relates to interstate commerce.

1 Plaintiffs attempt to resist this result by asserting that the CARES Act was
 2 not relevant to the Bankruptcy Court's preliminary injunction decision. Opposition
 3 at 13. Even if this were true,³ it is irrelevant. In its Motion, the United States seeks
 4 withdrawal of the adversary proceeding, not review of the preliminary injunction
 5 decision (an appeal has been filed for that purpose). As discussed above, resolving
 6 this adversary proceeding requires interpreting the CARES Act in order to
 7 adjudicate Plaintiffs' APA claims. Thus, withdrawal is mandatory because the case
 8 "require[s] the interpretation, as opposed to mere application, of the" CARES Act
 9 and "analysis of significant open and unresolved issues regarding the" same. *See*
 10 *Tamalpais Bancorp*, 451 B.R. at 8.

14 **2. Plaintiffs' APA Claims Are Not Core.**

15 As explained above, mandatory withdrawal under 28 U.S.C. § 157(d) turns
 16 solely on whether the proceeding requires interpreting significant non-bankruptcy
 17 law. However, to the extent that the Court should otherwise permissively withdraw
 18

20 ³ It is not. The Bankruptcy Court's oral ruling granting the injunction relied
 21 on its conclusion that the "SBA appears to have (inaudible) an important aspect of
 22 the problem in so far as the CARES Act can make certification that" the loan is
 23 necessary to the recipient. ECF No. 22 at 26, Tr. 19:14-19. The Bankruptcy Court
 24 continued that the "SBA blunderbuss exclusion [of bankrupt entities] simply
 25 disregards . . . that there is a business that's in trouble, which is the 'problem' that
 26 motivated enactment of the CARES Act. The Court sees absolutely no
 27 consideration of this important aspect of the -- of the problem whatsoever." *Id.* at
 28 27, Tr 20:3-10. The Bankruptcy Court's statements demonstrate that it was
 interpreting both the text and the purpose of the CARES Act in granting an
 injunction based upon an alleged APA violation.

1 the reference because the Bankruptcy Court will exceed its jurisdiction by entering
2 final judgments on non-core claims, the United States will address the argument.

3 Plaintiffs agree that a claim is core only if “it invokes a substantive right
4 provided by the Bankruptcy Code or by nature could arise only in the context of a
5 bankruptcy case.” Opposition at 9–10 (citing *Houbigant, Inc. v. ACB Mercantile,*
6 *Inc. (In re Houbigant, Inc.)*, 185 B.R. 680 (S.D.N.Y. 1995)). Plaintiffs assert that
7 their claims are “core” within the meaning of 28 U.S.C. § 157. Opposition at 9.
8

9 However, Plaintiffs misapply this standard to the claims asserted in this case.
10

11 Plaintiffs do not purport to rely on “a substantive right provided by the
12 Bankruptcy Code” for its APA Claims.⁴ Instead, Plaintiffs argue that these claims
13 could have arisen only in the context of a bankruptcy case. Opposition at 10. But
14 that is simply untrue, as identical claims could have been and *have been* brought in
15 district court in other cases. *See, e.g., Tradeways, Ltd. v. U.S. Dep’t of the*
16 *Treasury*, No. CV ELH-20-1324, 2020 WL 3447767 (D. Md. June 24, 2020)
17 (denying preliminary injunction on 525 and APA claims); *Diocese of Rochester v.*
18 *SBA*, No. 6:20-CV-06243 EAW, 2020 WL 3071603 (W.D.N.Y. June 10, 2020)
19 (same in part and granting summary judgment to SBA in part). Nothing stopped
20
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23

24 ⁴ While the 11 U.S.C. § 525 claim is undoubtedly a bankruptcy claim,
25 Plaintiffs’ APA claims are not. And the Bankruptcy Court concluded that “PPP
26 loans are classified as just that, loans” and that “even if [a PPP loan] . . . is some
27 variety of grant, section 525(a) just doesn’t stretch far enough to encompass PPP
28 funding.” ECF No. 22 at 12 and 15, Tr. at 5:23-24, 8:19-22.

1 Plaintiffs from doing the same here.

2 Moreover, even granting Plaintiffs' premise, there is a fundamental
3 distinction between cases that *would not* have arisen but-for a bankruptcy, and
4 cases that *can only* arise in a bankruptcy within the meaning of 28 U.S.C. § 157.
5
6 As explained in the Motion, in the Ninth Circuit, the "arises in" aspect of core
7 proceedings requires the claim to be "an administrative matter unique to the
8 bankruptcy process that has no independent existence outside of bankruptcy and
9 could not be brought in another forum, but whose cause of action is not expressly
10 rooted in the Bankruptcy Code." *In re Ray*, 624 F.3d 1124, 1131 (9th Cir. 2010).
11
12 Nothing in the APA is "unique to the bankruptcy process," nor could these claims
13 have "not be[en] brought in another forum." *See id.* Plaintiffs' APA claims thus do
14 not arise in bankruptcy within the meaning of 28 U.S.C. § 157(b), and are not core
15 bankruptcy proceedings.
16
17

18 **3. Plaintiffs' Other Arguments Fail.**

19 Plaintiffs' remaining arguments are irrelevant because they do not relate to
20 28 U.S.C. § 157's mandatory withdrawal standard. It of no moment to the statute
21 whether the claims are "complex," withdrawal is "inefficient," or the Motion
22 contravenes the parties' standstill agreement. However, even considering these
23 arguments on their merits, they fare no better than Plaintiffs' lone argument that
24 does address the mandatory withdrawal standard.
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1 First, these claims are complex; more than 40 courts across the country are
2 handling identical claims and, even while reaching opposite conclusions, many
3 have made a point of noting that the cases are unusual and difficult to resolve.
4

5 Second, withdrawal is the most efficient litigation route here. “The purpose
6 of § 157(d) is to assure that an Article III judge decides issues calling for more
7 than routine application of [federal laws] outside of the Bankruptcy Code.” *Ames*
8 *Dep’t Stores, Inc. v. Lumbermens Mut. Cas. Co. (In re Ames Dep’t Stores, Inc.)*,
9 512 B.R. 736, 740 (S.D.N.Y. 2014) (citation omitted) (alteration in original). Were
10 the case to remain in Bankruptcy Court, it would require the District Court to
11 ultimately review the APA claims de novo, wasting judicial resources and stalling
12 final judgment.
13

14
15 Third, there is no violation of the Bankruptcy Court’s Stipulated Order, let
16 alone “clear and convincing evidence that a party ‘violated a specific and definite
17 order of the court’” as required for a contempt finding. *See Parsons v. Ryan*, 949
18 F.3d 443, 454 (9th Cir. 2020) (quoting *Stone v. City and Cty. of San Francisco*,
19 968 F.2d 850, 856 n.9 (9th Cir. 1992)). The Stipulated Order is very clear on its
20 scope, stating: “Such stay shall only apply to further litigation of this Adversary
21 Proceeding on the merits.” ECF No. 33 at 3. A motion to withdraw the reference is
22 a procedural vehicle for determining which court shall *decide the merits*, it has
23 nothing to do with the merits themselves. It is appropriate and efficient for the
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1 Court to determine where the merits shall be decided while the appeal is pending,
2 thus preventing needlessly duplicative litigation in the Bankruptcy Court. The
3 motion to withdraw thus furthers the purpose behind the Stipulated Order of
4 resolving this case as efficiently as possible, in addition to complying with its plain
5 terms. The United States would not have stipulated to such an order had this not
6 been the case.
7

8
9 The standstill agreement was agreed to by the parties and submitted to the
10 Bankruptcy Court on June 23, 2020. Later that day, the United States filed its
11 motion to withdraw the reference. On June 24, 2020, the parties participated in a
12 scheduling conference with the Bankruptcy Court. Two days later, on June 26,
13 2020, the Bankruptcy Court signed the standstill order without alteration. If
14 Plaintiffs believed that the pending motion to withdraw the reference would be
15 frozen by the standstill, then they should have attempted to address that during the
16 scheduling conference or prior to the entry of the standstill order by the
17 Bankruptcy Court. They did not.
18

19
20 Moreover, after Plaintiffs communicated to the United States that they
21 believed the standstill prevented the motion to withdraw from moving forward, the
22 United States offered to abandon the standstill and continue litigating in the
23 Adversary Proceeding. Plaintiffs did not respond to that offer.
24

25
26 //

CONCLUSION

The United States respectfully requests that this adversary proceeding be withdrawn to the District Court.

Respectfully Submitted: July 14, 2020

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July 17, 2020

VIA CM/ECF DOCKETING

Hon. Rosanna Malouf Peterson
U.S. District Court, Eastern District of Washington
P.O. Box 1493
Spokane, WA 99210

Re: Motion to Withdraw the Bankruptcy Reference of *Astria Health, et al. v. United States Small Business Administration, et al. (In re Astria Health, et al.)*, Adv. Proc. No. 20-80016-WLH (Bankr. E.D. Wash.)

Dear Judge Peterson:

I write pursuant to Local Bankruptcy Rule 5011-1(c) to provide comments regarding the government's motion to withdraw the bankruptcy reference filed in the above-referenced adversary proceeding. I do not urge a specific disposition of the motion, but hope to provide some context and perspective that may prove useful to your analysis of the issues.

Overview of the Action

This litigation addresses the Small Business Administration's decision to categorically exclude bankrupt entities from eligibility for the Paycheck Protection Program ("PPP") loans that Congress enacted as part of the Coronavirus Aid, Relief, and Economic Security or CARES Act. The plaintiffs, several debtors in pending complex chapter 11 cases, operate two rural hospitals and several healthcare clinics in the Yakima Valley, among other things. The debtors initiated this adversary proceeding against the SBA after their applications for PPP loans were rejected based solely on their status as debtors under title 11. The debtors challenge the SBA's bankruptcy exclusion on several grounds, including under the Bankruptcy Code and the Administrative Procedures Act. Because of certain time constraints, the debtors also sought an order enjoining rejection of the debtors' loan applications based on the bankruptcy exclusion.

On June 10, 2020, after briefing and oral argument, I granted the requested preliminary injunction and incorporated an oral ruling I read into the record on June 3, 2020. Both sides appealed the preliminary-injunction order. These appeals are pending before Your Honor as case numbers 20-cv-03089-RMP and 20-cv-03098-RMP. Simultaneous with its notice of appeal, the government filed the motion to withdraw the reference at issue here, which seeks to transfer all litigation (including discovery, pre-trial practice, and any trial) remaining after disposition of the pending appeals from this court to the District Court.

Statutory Framework

As you know, the Judicial Code invests federal district courts with jurisdiction over all bankruptcy cases, as well as disputes “arising in” or “related to” such cases, but permits district courts to order automatic and mandatory referral of all bankruptcy cases and all bankruptcy-related matters to the district’s bankruptcy judges (who are designated as “units” of the district court).¹ In this district, the bankruptcy reference tracks the statutory framework in Local Civil Rule 83.5(a). There is no disagreement that the dispute at issue here falls within the broad scope of federal bankruptcy jurisdiction and thus was properly referred to me in the first instance.

The government’s motion invokes Judicial Code section 157(d), a mechanism to potentially reallocate work between district judges and bankruptcy judges by providing two bases for the district court to withdraw its default bankruptcy reference, one “permissive” and the other “mandatory.” Under either, “[t]he burden of persuasion is on the party seeking withdrawal.”² The burden is allocated in this fashion because withdrawal of the reference is an “exception to the rule,” one not intended to provide an “escape hatch” out of bankruptcy courts.³ Rather, as the Court of Appeals for the Ninth Circuit has consistently recognized, the system designed by the Judicial Code promotes judicial economy by “making use of the bankruptcy court’s unique knowledge of Title 11 and familiarity with the actions before them.”⁴

Standards for Mandatory Withdrawal

The Court of Appeals for the Ninth Circuit has explained that mandatory withdrawal “hinge[s] on the presence of *substantial and material* questions of federal law.”⁵ District courts have concluded that the mere *presence* of nonbankruptcy issues is insufficient; rather, withdrawal is mandatory only if those issues “dominate” the bankruptcy issues.⁶ District courts have also concluded that the mandatory withdrawal analysis requires that “there at least must be a threshold level of showing” that detailed, substantive interpretation of nonbankruptcy federal law will be required and “that resolution of the claims begs for more than straight forward application of facts to well-established federal law.”⁷ Furthermore, the *possibility* that nonbankruptcy federal law may play some role in the litigation is insufficient; mandatory withdrawal applies only when substantial and material consideration of such law is *necessary* to resolve the proceeding.⁸ Based on these standards, I do not believe that this case presents any issues triggering this narrow exception to the general framework of the bankruptcy reference.

¹ See 28 U.S.C. §§ 151, 157(a), 1334.

² *FTC v. First Alliance Mortg. Co. (In re First Alliance Mortg. Co.)*, 282 B.R. 894, 902 (C.D. Cal. 2001).

³ See, e.g., *Official Comm. of Unsecured Creditors of Neuman Homes, Inc. v. Neumann (In re Neumann Homes, Inc.)*, 414 B.R. 383, 387 (N.D. Ill. 2009).

⁴ *Sigma Micro Corp. v. Healthcentral.com (In re Healthcentral.com)*, 504 F.3d 775, 787-88 (9th Cir. 2007).

⁵ *Sec. Farms v. Int’l Bd. of Teamsters*, 124 F.3d 999, 1008 n.4 (9th Cir. 1997) (emphasis added).

⁶ See, e.g., *Hawaiian Airlines, Inc. v. Mesa Air Grp., Inc.*, 355 B.R. 214, 222 (D. Haw. 2006).

⁷ See, e.g., *Siegel v. Caldera*, 2010 U.S. Dist. LEXIS 34355, at *11 (C.D. Cal. Mar. 19, 2010).

⁸ See, e.g., *In re Ionosphere Club, Inc.*, 103 B.R. 416, 418-19 (S.D.N.Y. 1989).

First, although the debtors assert claims under the APA (and I concluded when analyzing the injunctive factors that these claims have a high probability of success), final resolution of these claims on the merits will tread no novel legal ground nor involve resolution of any substantial and material legal questions. The standards and analytic framework for resolving the APA claims raised here are firmly established by robust, clear, and binding Supreme Court and Ninth Circuit precedent.⁹ Resolution of the litigation thus merely requires straightforward application of settled and well-developed legal standards to the specific facts presented here.

Second, to the extent a resolution necessitates considering aspects of the CARES Act, that consideration will almost certainly be ancillary to the primary issues presented (including whether the SBA engaged in a process of reasoned analysis and developed the type of record the APA requires) and not involve resolution of *substantial and material* questions of federal law. Only a handful of CARES Act provisions have any conceivable relevance to the issues presented here and the deciding court need not engage in substantial construction to resolve competing, outcome-determinative interpretations of that statute. To the extent analyzing a given sub-issue involves some incidental statutory construction, such task is susceptible to the simple application of well-established canons without addressing any material legal questions. Finally, to the extent any of the debtors' APA claims implicate the purpose of the CARES Act, I do not believe there is any material question or dispute about the Act's legislative purpose, which Congress evidently enacted as a prompt and forceful response to the economic impact of the COVID-19 pandemic. For these reasons, I see nothing triggering a mandatory withdrawal.

Withdrawal for "Cause"

One factor bearing on permissive withdrawal of the reference is whether the litigation is a "core" bankruptcy proceeding or otherwise within the scope of final bankruptcy adjudication. This factor is relevant but not determinative as district courts often conclude that principles of judicial economy favor leaving all bankruptcy-related matters with the bankruptcy court, even non-core proceedings, subject to review by an Article III judge.¹⁰

To the extent it is relevant to the present motion, the issues arising in this adversary proceeding are core. Judicial Code section 157(b)(2) provides a non-exclusive list of "core"

⁹ See, e.g., *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 207 L. Ed. 2d 353, 366-67, 369-77 (2020); *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Latino Issues Forum v. United States EPA*, 558 F.3d 936, 941 (9th Cir. 2009); *Ariz. Cattle Growers' Ass'n v. United States Fish & Wildlife, BLM*, 273 F.3d 1229, 1235-36 (9th Cir. 2001).

¹⁰ See, e.g., *In re Temecula Valley Bancorp, Inc.*, 523 B.R. 210, 223-24 (C.D. Cal. 2014); *Siegel v. FDIC (In re IndyMac Bancorp Inc.)*, 2011 U.S. Dist. LEXIS 78418, at *17-18 (C.D. Cal. July 15, 2011). Through the report and recommendation process used for non-core and *Stern* claims, the district court benefits from the bankruptcy court's specialized expertise with bankruptcy issues and context, as well as the bankruptcy court's greater familiarity with the case, all consistent with the traditional allocation of work between the two courts. See, e.g., *In re Healthcentral.com*, 504 F.3d at 787-88. In a ruling in harmony with a practical division of judicial responsibility, the Supreme Court held that de novo review by the district court, regardless of the precise process that is followed, eliminates any constitutional concerns associated with the non-Article-III status of bankruptcy judges. See *Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 35-40 (2014); see also, e.g., *Mastro v. Rigby*, 764 F.3d 1090, 1094-95 (9th Cir. 2014).

bankruptcy proceedings, which includes “matters concerning the administration of the estate.”¹¹ The debtors here intend to use the PPP funds to administer their bankruptcy estates under my supervision, including by paying front-line nurses’ wages and other costs of administration during the pendency of their bankruptcy cases. As such, the dispute about whether the debtors may participate in PPP funding is a “matter concerning” the administration of their estates and, hence, a “core” bankruptcy proceeding.

Beyond the specific classification under section 157(b)(2), this dispute also fits within the scope of “arising in” bankruptcy jurisdiction, which is a term of art that overlaps the core/non-core distinction. “Arising in” bankruptcy proceedings “are those that are not based on any right expressly created by title 11, but nevertheless, would not exist outside of the bankruptcy.”¹² That is the case here – the debtors’ challenge to the bankruptcy exclusion from PPP eligibility could have no conceivable existence outside of the bankruptcy context. If a non-bankrupt entity attempted to bring such a challenge, a court would necessarily dismiss the suit based on the plaintiff’s lack of injury and, therefore, lack of standing.¹³ The *only* party that could maintain a viable action challenging the bankruptcy exclusion is a debtor under title 11 actually denied access to PPP funding. The government correctly notes that APA-related actions *generally* can exist outside of the bankruptcy context but ignores that *the present action* could not; this litigation is solely about a bankruptcy exclusion and that specific dispute could never be litigated other than in the context of a bankruptcy case. The action therefore “arises in” a title 11 case.¹⁴

For similar reasons, there is no constitutional obstacle preventing the bankruptcy court from finally adjudicating this adversary proceeding (subject to the appellate process under Judicial Code section 158). In *Stern v. Marshall*, the Supreme Court made clear that bankruptcy judges may finally resolve disputes whenever “the action at issue stems from the bankruptcy itself.”¹⁵ This action inescapably stems from the Astria bankruptcy cases – had the plaintiffs not been debtors in bankruptcy, their PPP applications would not have been rejected on that basis and this litigation would not exist. Once again, this is not antitrust litigation, a state-law contract dispute, or a similar case that could arise or be prosecuted outside of the bankruptcy context – the dispute necessarily relies on a bankruptcy exclusion that only a debtor in bankruptcy has standing to challenge.

¹¹ 28 U.S.C. § 157(b)(2)(A).

¹² See, e.g., *Maitland v. Mitchell (In re Harris Pine Mills)*, 44 F.3d 1431, 1435 (9th Cir. 1995) (quoting *In re Wood*, 825 F.2d 90, 96-97 (5th Cir. 1987)).

¹³ See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-67 (1992).

¹⁴ The government suggests that this action could have been brought in “another forum” but misses the point of the “arising in” analysis. Cases discussing “another forum” refer to forums not reliant on bankruptcy jurisdiction over the action – such as a state court regarding a nonbankruptcy contract claim or a federal district court regarding an antitrust claim. The point of the “arising in” question is again whether the lawsuit could exist elsewhere absent the bankruptcy case or whether its genesis is the bankruptcy. Although the government mentions two other similar lawsuits filed in federal district courts in the first instance, those lawsuits presumably rested on bankruptcy jurisdiction under 28 U.S.C. § 1334 and it is not clear why the applicable district courts did not apply their standing orders of reference given the plain relationship to title 11 cases.

¹⁵ 564 U.S. 462, 499 (2011).

In sum, this litigation is statutorily “core,” is a civil proceeding “arising in” a bankruptcy case, and is an action stemming from the Astria bankruptcy itself. As such, it is a lawsuit over which a bankruptcy judge may properly exercise final adjudicatory authority under Judicial Code section 157 and the United States Constitution.¹⁶

Standstill Order

The debtors contend that the government’s withdrawal motion violates a stipulated order imposing a standstill on further proceedings pending resolution of the appeals before you. Because the government filed its motion before the hearing on the standstill order, it seems reasonable that the parties contemplated the government’s motion in discussing their stipulation. I do not know, however, if these discussions or considerations occurred. Regardless, the parties have sought no relief in the bankruptcy court relating to a possible violation of the standstill order. I do not intend to grant any relief that would infringe on your consideration of the withdrawal motion unless Your Honor refers a decision regarding the applicability of the standstill order back to my court. Otherwise, Your Honor might consider deferring argument or a decision regarding the withdrawal motion until after your resolution of the pending appeals.

Impact on the Underlying Cases

Local Bankruptcy Rule 5011-1(c) contemplates that my comments may address “the impact of the adversary proceeding upon the underlying case.” Although this dispute is of significant economic consequence for the Astria debtors and a favorable outcome will materially improve the chances of several rural hospitals and clinics successfully reorganizing, I do not believe the pendency of this litigation or any decision regarding the withdrawal motion (or the pending appeals) requires the underlying chapter 11 cases to be held in abeyance or otherwise delayed. The Astria debtors recently filed a chapter 11 plan and are working to prosecute that plan through a confirmation hearing scheduled in September 2020. I anticipate that this process will continue apace regardless of the activity in the adversary proceeding. Put differently, the underlying chapter 11 cases and this adversary proceeding can travel along their separate tracks.

* * *

I hope these comments are helpful during your consideration of the withdrawal motion. If there is anything further that I can provide to assist, I am happy to do so.

Sincerely,



Whitman L. Holt
United States Bankruptcy Judge

¹⁶ Other bankruptcy courts within the Ninth Circuit have reached a similar conclusion. *See, e.g., Vestavia Hills, Ltd. v. United States SBA (In re Vestavia Hills, Ltd.)*, 2020 Bankr. LEXIS 1713, at *12-13 (Bankr. S.D. Cal. June 26, 2020). I am not aware of any decision by a district court within the Ninth Circuit regarding this issue.