

**IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern District)**

**PROFILES, INC., *et al.*, on behalf of
themselves and all others similarly situated,**

PLAINTIFFS,

v.

**BANK OF AMERICA CORPORATION,
et al.,**

DEFENDANTS.

CIVIL ACTION NO. 20-CV-894 (SAG)

* * * * *

**MOTION FOR TEMPORARY RESTRAINING
ORDER AND PRELIMINARY INJUNCTION**

Plaintiffs, on behalf of themselves and all others similarly situated (“Plaintiffs”), by undersigned counsel, pursuant to Rule 65 of the Federal Rules of Civil Procedure, move for a temporary restraining order and preliminary injunction to enjoin Defendants Bank of America Corporation and Bank of America, N.A. (“BNA”) (collectively, “Defendants” or “BOA”) from imposing eligibility requirements other than those requirements set forth in section 1102 of the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) upon any business concern, nonprofit organization, veterans organization, or Tribal business concern applying for a loan with BOA under the Paycheck Protection Program (“PPP”), and that BOA be ordered to post within two (2) hours of the entry of the temporary restraining order and/or preliminary injunction a statement on its website and its public Twitter and Facebook accounts that the eligibility requirements enjoined herein are no longer in force and effect. As support for the relief requested

in this Motion, Plaintiffs incorporate by reference the accompanying Memorandum of Law as if fully set forth herein.

WHEREFORE, Plaintiffs respectfully request that the Court grant the foregoing Motion, enter the proposed Temporary Restraining Order and/or Preliminary Injunction, and enter such other and further relief that it deems just and appropriate.

Respectfully submitted,

/s/ M. Celeste Bruce

M. Celeste Bruce, Maryland Federal Bar No. 10710
Charles S. Fax, Maryland Federal Bar No. 2490
Rifkin Weiner Livingston LLC
7979 Old Georgetown Road, Suite 400
Bethesda, Maryland 20814
Telephone: (301) 951-0150
Telecopier: (301) 951-0172
Email: cbruce@rwillaw.com; cfax@rwillaw.com

Alan M. Rifkin, Maryland Federal Bar No. 11562
Liesel J. Schopler, Maryland Federal Bar No. 17280
Rifkin Weiner Livingston LLC
225 Duke of Gloucester Street
Annapolis, Maryland 21401
Telephone: (410) 269-5066
Telecopier: (410) 269-1235
Email: arifkin@rwillaw.com; lschopler@rwillaw.com

Barry L. Gogel, Maryland Federal Bar No. 25495
Rifkin Weiner Livingston LLC
2002 Clipper Park Road, Suite 108
Baltimore, Maryland 21211
Telephone: (410) 769-8080
Telecopier: (410) 769-8811
Email: bgogel@rwillaw.com

April 7, 2020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 7th day of April 2020, a true copy of the foregoing was

served upon:

Enu A. Mainigi
Beth A. Stewart
Williams & Connolly LLP
725 Twelfth Street NW
Washington, D.C. 20005
emainigi@wc.com
bstewart@wc.com

*Attorneys for Defendants, Bank of America
Corporation and Bank of America, N.A.*

/s/ M. Celeste Bruce
M. Celeste Bruce, Maryland Federal Bar No. 10710

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**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

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INTRODUCTION

With the outbreak of coronavirus disease 2019 (“COVID-19”), the People of the United States face the most severe national crisis of our time, which threatens the shutdown of thousands upon thousands of small businesses in this country and the collapse of our economy. In response to this unprecedented crisis impacting every American small business and the tens of millions of employees who depend on them, the federal government enacted the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) to enable America’s small businesses to keep their doors open and their employees employed by creating a Payroll Protection Program (“PPP”), which allows lenders to give federally guaranteed loans to protect payroll expenses for two months. The loan pool, however, is limited in size, and the PPP is run on a first-come-first-served basis.

In the midst of this national emergency, and instead of using this program to help small businesses, Bank of America Corporation and Bank of America, N.A. (collectively, “BOA”) privileged discriminatory policies of corporate greed over the needs of America’s small businesses by erecting barriers to prevent eligible businesses from accessing emergency PPP loans authorized by Congress under the CARES Act. In contravention of the requirements set forth in the legislation, BOA chose to prioritize its existing borrowing clients over its depository clients and other small businesses whose very existence is at stake in this litigation.

Absent a temporary restraining order and preliminary injunction, Plaintiffs will be effectively precluded from applying before the June 30, 2020 deadline for these “first-come, first-served” loans that are designed specifically to “provide relief to America’s small businesses expeditiously.” BOA’s unlawful barriers to entry must be removed immediately to prevent irreparable harm to the eligible businesses that the CARES Act was designed to save. Plaintiffs’

Motion should be granted and a temporary restraining order and preliminary injunction should issue.

STATEMENT OF FACTS

I. PPP Loans Are Designed Specifically to Provide Immediate, Emergency Assistance to Plaintiffs and Other Eligible Businesses.

On March 27, 2020, the President signed into law the CARES Act, H.R. 748, P.L. 116-136, “to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic.” Ex. A, 13 CFR Part 120, Interim Final Rule, Docket No. SBA-2020-0015, April 2, 2020 (the “Interim Final Rule”).¹ Among other purposes, the CARES Act was designed to provide “immediate assistance to individuals, families, and businesses affected by the COVID-19 emergency.” *Id.*, Interim Final Rule at 4.

The Small Business Administration (“SBA”) receives funding and authority through the CARES Act “to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID-19 emergency.” *Id.*, Interim Final Rule at 3. To accommodate for this SBA expansion, the CARES Act has authorized commitments to the SBA 7(a) loan program, as modified by the CARES Act, in the amount of \$349 billion. *See id.*, Interim Final Rule at 5.

Section 1102 of the CARES Act, entitled “Paycheck Protection Program,” authorizes participating lenders to make general business loans available to eligible recipients in order to cover payroll and other expenses. CARES Act § 1102(a)(2), (b)(1). The PPP loans are federally guaranteed up to a maximum amount of \$10 million, which can be conditionally forgivable, to encourage businesses to retain employees. *See* Ex. A, Interim Final Rule at 3-4. As part of the

¹ The Interim Final Rule is available at https://www.sba.gov/sites/default/files/2020-04/PPP--IFRN%20FINAL_0.pdf (last visited Apr. 4, 2020).

relief provided, the CARES Act expands the eligibility criteria for borrowers to qualify for loans that are available through the SBA by adding the PPP to the SBA's gamut of loan programs. CARES Act § 1102(a)(2). In particular, eligible individuals and entities include small businesses and eligible nonprofit organization, veterans organizations, and Tribal businesses described in the Small Business Act, as well as individuals who are self-employed or are independent contractors who meet program size standards. *See id.* § 1102(a)(2); Ex. A, Interim Final Rule at 5-6.

The "General Eligibility" section of the PPP Lender Application Form lists only two requirements for a PPP loan to be approved:

- 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.
- 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.

Ex. B, Lender Application Form – Paycheck Protection Program Loan Guarantee ("Form 2484") (last accessed Apr. 4, 2020).² These eligibility requirements are consistent with the plain language of section 1102(a)(2) of the CARES Act and section III(2)(a) of the Interim Final Rule. *See* Ex. A, Interim Final Rule at 5-6. There is no requirement in the law that the applicant must have an existing borrowing relationship with the lender, or that the applicant *not* have an existing

² This document can be accessed at <https://home.treasury.gov/system/files/136/PPP-Lender-Application-Form-Fillable.pdf>.

borrowing or credit relationship with another financial institution. The Interim Final Rule lists reasons why an applicant may be deemed “ineligible.” *See id.*, Interim Final Rule at 6-7; *see also* 13 C.F.R. § 120.110. A specific borrowing relationship with a lender (or lack thereof) appears nowhere in the law.

PPP loans are disbursed out of a limited and eroding fund to eligible businesses on a “first-come, first-served” basis. Ex. A, Interim Final Rule at 13. The Interim Final Rule instructs that “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.” *Id.*, Interim Final Rule at 3-4. Thus, Plaintiffs who do not meet BOA’s unlawful eligibility requirements cannot apply for these “first-come, first-served” loans unless the gating requirements are removed without further delay.

II. BOA Prevented Eligible Businesses From Applying for PPP Loans Under the CARES Act.

On the morning of April 3, 2020, BOA began accepting online applications for PPP loans, becoming the first major bank to do so. That same morning, BOA Chairman and CEO Brian Moynihan appeared on CNBC to tout BOA’s participation in the program and BOA’s claimed concern and interest for the welfare of small businesses in America.³ According to BOA’s Twitter account, as of 2:10 p.m., BOA had “received over 60,000 applications from small businesses, and those include more than \$6 billion in applications through [its] CashPro platform for business clients.” Bank of America News (@BofA_News), Twitter (Apr. 3, 2020, 2:10 p.m.),

³ *CNBC Transcript: Bank of America CEO Brian Moynihan Speaks with CNBC’s Jim Cramer on ‘Squawk on the Street’ Today*, CNBC, <https://www.cnbc.com/2020/04/03/cnbc-transcript-bank-of-america-ceo-brian-moynihan-speaks-with-cnbc-jim-cramer-on-squawk-on-the-street-today.html> (last visited Apr. 5, 2020). The Court may take judicial notice of public comments from BOA’s representatives. *See Christa McAuliffe Intermediate Sch. PTO, Inc. v. De Blasio*, 364 F. Supp. 3d 253, 263 (S.D.N.Y. 2019) (taking judicial notice of Mayor de Blasio’s statements on his official Twitter account and the contents of an interview with Chancellor Carranza on Fox 5 New York).

https://twitter.com/BofA_News/status/1246567296903966721.⁴ However, small businesses and public figures throughout the country began to take notice that BOA was imposing unlawful and arbitrary eligibility requirements that appear nowhere in the CARES Act, thus denying otherwise eligible businesses like Plaintiffs from submitting applications for PPP loans.

A. Eligible recipients were denied the opportunity to apply for PPP loans through BOA on April 3, 2020.

Among dozens of other entities who have contacted undersigned counsel regarding similar experiences with BOA’s eligibility requirements was Elite Security Group, LLC (“Elite”), a business that provides private security services to bars and other “non-essential businesses” in Maryland. *See* Ex. C, Affidavit of Brandon Burr ¶¶ 2, 8 (“Burr Affidavit”), Apr. 6, 2020.⁵ As a result of Governor Hogan’s recent orders, all but one of Elite’s clients have been forced to close, resulting in lost revenue to Elite in the amount of \$30,000 per month. *Id.*, Burr Aff. ¶ 4. Mr. Burr attempted to submit an application to BOA on Elite’s behalf on April 3, 2020, but learned that its application would not be accepted because Elite did not have a *borrowing* relationship with BOA—only a depository relationship. *See id.*, Burr Aff. ¶¶ 7, 8. Elite otherwise met the eligibility requirements in section 1102(a)(1) of the CARES Act. *See id.*, Burr Aff. ¶¶ 3-6.

As another example, Proline Products, Inc. (“Proline”) is a Connecticut-based sole proprietorship which sells automotive roof racks and related accessories. Ex. D, Affidavit of Greg Storm (“Storm Affidavit”) ¶¶ 2-3, Apr. 7, 2020. Faced with a severe drop in revenues and on the

⁴ The Court may also take judicial notice of tweets from BOA’s representatives. *See Unsworth v. Musk*, Case No. 19-mc-80224-JSC, 2019 U.S. Dist. LEXIS 186481, *11 (N.D. Cal. Oct. 28, 2019) (“The Court agrees that judicial notice is proper because the existence of the publicly-available articles and tweets cannot reasonably be questioned.”); *Alexander v. MGM Studios, Inc.*, Case No.: 17-3123-RSWL-KSx, 2017 U.S. Dist. LEXIS 214497, *9 (C.D. Cal. Aug. 14, 2017) (taking judicial notice of “Twitter account screenshots, as they contents are referred to throughout the Complaint, and they can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned”).

⁵ Elite is also willing to become a named plaintiff in this class action. *See id.*, Burr Aff. ¶ 13.

verge of closing its doors, Proline reached out to BOA, where it had conducted its business banking for the past 25 years. *See id.*, Storm Aff. ¶¶ 4, 7. BOA told Proline that its application would not be accepted due to the lack of a borrowing relationship with the bank. *Id.*, Storm Aff. ¶ 8. In particular, Proline was told that it did not meet BOA's eligibility criteria, and that it should apply elsewhere. *See id.*, Storm Aff. ¶¶ 8-9. Like Elite, Proline otherwise met the eligibility criteria in the CARES Act. *See id.*, Storm Aff. ¶¶ 2-4, 6.

B. BOA's unlawful eligibility requirements drew immediate criticism.

Shortly after BOA opened its portal to PPP loan applications, it became widely known that BOA implemented an application process that prioritized their existing borrowing clients and barred their depository clients and other small businesses from submitting an application for PPP funds. *See Cardin Statement on Launch of Paycheck Protection Program*, Cardin for Maryland (Apr. 3, 2020), <https://www.cardin.senate.gov/newsroom/press/release/cardin-statement-on-launch-of-paycheck-protection-program>; *see also* Marco Rubio (@marcorubio), Twitter (Apr. 3, 2020, 12:37 p.m.), <https://twitter.com/marcorubio/status/1246114718990979075>. Nothing in the CARES Act permits a lender from discriminating against a small business applicant based on its status as a borrower of that financial institution. *See* CARES Act § 1102(a)(1); Ex. A, Interim Final Rule at 5-7. Nothing in the law allows BOA to determine what small businesses can participate in the federal program based on that improper and unlawful criteria.

III. BOA's Revised Policy Also Does Not Comply With Federal Law.

On April 4, 2020, after the Class Action Complaint had been filed, BOA revised its policy by allowing depository-only clients to apply for PPP loans, but added a new unlawful requirement: that depository-only clients have no credit card or loan with any other financial institution. The new eligibility criteria are featured prominently on BOA's website:

The Paycheck Protection Program is a federal relief program established by Congress and implemented by the U.S. Treasury Department and the SBA with rules, requirements, protocols and processes that all participating banks, including Bank of America, must follow.

Small Business clients with a Small Business lending and Small Business checking relationship with Bank of America as of February 15, 2020 or a Small Business checking account opened no later than February 15, 2020 and do not have a business credit or borrowing relationship with another bank are eligible to apply for the Paycheck Protection Program through our bank. A client's preexisting lending relationship with us may include small business, commercial or corporate credit cards, conventional business loan or lease, business lines of credit, business auto loans, practice solutions loans, trade and asset-based loans.

Small Business owners who do not meet these criteria should contact their current business loan provider as soon as possible, if they plan to apply for the federal Paycheck Protection Program. This is the best and fastest method for applying for federal relief, based on the U.S. Treasury requirements and guidance.

Ex. E, Bank of America, *We're here for our small business clients* (printed Apr. 5, 2020) (emphasis added).⁶ Therefore, even though an applicant meets the eligibility requirements in the CARES Act, that applicant cannot apply for a PPP loan with BOA if it has "a business credit or borrowing relationship with another bank." *See id.* If Congress had wanted to impose such an eligibility requirement in the CARES Act, it certainly could have done so. It did not.

A. BOA is applying an unlawful "credit elsewhere" requirement that was expressly prohibited by the CARES Act.

In general, to apply for an SBA loan (not under the CARES Act), the applicant must certify "that the desired credit is unavailable to the applicant on reasonable terms and conditions from non-Federal, non-State, and non-local government sources without SBA assistance." 13 C.F.R. §

⁶ The Court "may take judicial notice of information publicly announced on a party's web site, so long as the web site's authenticity is not in dispute and 'it is capable of accurate and ready determination.'" *Jeandron v. Bd. of Regents of the Univ. Sys. of Md.*, 510 F. App'x 223, 227 (4th Cir. 2013) (quoting Fed. R. Evid. 201(b)).

120.101; *see also* 15 U.S.C. § 636(a)(1)(A). However, for “covered loans” under PPP, Congress expressly provided that, “[d]uring the covered period, the requirement that a small business concern is unable to obtain credit elsewhere . . . shall not apply to a covered loan.” CARES Act § 1102(a)(1) (to be codified at 15 U.S.C. § 636(a)(36)(I)). Contrary to the criteria set forth in the CARES Act and applicable SBA regulations, BOA is applying a “credit elsewhere” requirement to PPP loans by requiring every applicant to certify that they “do not have a business credit or borrowing relationship with another bank.” *Compare* CARES Act § 1102(a)(1), *with* Ex. E, Bank of America, *We’re here for our small business clients*. This arbitrary and unlawful eligibility criterion is tantamount to the “credit elsewhere” requirement that was expressly prohibited by section 1102(a)(1) of the CARES Act.

B. BOA is applying unlawful “ineligibility” criteria that are contrary to the express eligibility provisions in in the CARES Act.

As discussed *supra*, the sole eligibility requirements for an “eligible recipient” to apply for a “covered loan” are set forth in section 1102(a)(1) of the CARES Act. BOA has decided to institute its own “ineligibility” criterion—the applicant cannot “have a business credit or borrowing relationship with another bank”—which is contrary to the text and purpose of the CARES Act: “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” Ex. A, Interim Final Rule at 7-8. To that end, 13 C.F.R. § 120.110 lists nineteen (19) types of businesses that are ineligible for PPP loans. *See* 13 C.F.R. § 120.110(a)-(s). A particular customer relationship with BOA is not listed in the regulation or in the CARES Act. Nevertheless, BOA has determined that a small business cannot apply for a PPP loan through BOA if the applicant has “a business credit

or borrowing relationship with another bank.” Ex. E, Bank of America, *We’re here for our small business clients*.

In their recent letter to Secretary Steven T. Mnuchin, Senator Chris Van Hollen (D-MD) and Representative David Trone (MD-06) explained that the ineligibility criteria imposed by BOA are in direct conflict with the plain language and intent of the CARES Act and PPP:

Furthermore, we are hearing that Maryland constituents are facing difficulties obtaining loans through the PPP. **For example, some financial institutions have required that businesses have an existing line of credit or a credit card account in order to obtain a loan. Imposition of such requirements, which are outside the purpose of the program, are unnecessary at best and, in the case of some of our constituents, harmful to their ability to access the program.** We therefore ask that Treasury firmly prohibit lenders from imposing PPP loan requirements outside the scope of the CARES Act in the Department’s final rulemaking.

We have fought successfully to ensure this rescue package throws an economic lifeline to those who need it most by extending help to small and mid-sized businesses struggling to stay afloat. The Treasury Department’s guidelines must not undermine Congress’s intent for PPP, and we urge you to provide updated guidance that fully addresses and corrects the matters of concern outlined above.

Ex. F, Van Hollen & Trone Letter to Mnuchin, Apr. 6, 2020 (emphasis added). This ineligibility criterion imposed by BOA violates section 1102(a)(1) of the CARES Act and is unlawful.

C. BOA’s unlawful application requirements have caused immediate and irreparable harm to eligible businesses.

Shortly after 12:00 a.m. EDT on April 6, 2020, Elite attempted to apply for a PPP loan through Bank of America, and its owner now fears that the application will be rejected due to the fact it has a borrowing relationship with another bank. Ex. C, Burr Aff. ¶¶ 9-10. Although Elite qualifies as an eligible recipient under the CARES Act, it does not meet BOA’s arbitrary and unlawful eligibility criteria, and the future of its business is in jeopardy without the PPP loan funds. *See id.*, Burr Aff. ¶¶ 11-12. Proline had the same experience and was turned away from applying

for a PPP loan through BOA because it had company credit cards with Chase and American Express. *See* Ex. D, Storm Aff. ¶ 11. Like Elite, Proline fears it may close its doors for good without the ability to obtain a PPP loan. *See id.*, Storm Aff. ¶¶ 12-13.

As of 6:36 p.m. EDT on Saturday, April 4, BOA had already “received over 145K applications totaling \$30B through the @USTreasury Payment Protection Program.” Bank of America News (@BofA_News), Twitter (Apr. 4, 2020, 6:36 p.m.), https://twitter.com/BofA_News/status/1246567296903966721. The loan funds are disbursed on a “first-come, first-served” basis from a diminishing pool of funds. Given those realities, the opportunity for eligible recipients like Plaintiffs to apply through BOA under a future revised policy is dwindling each minute. For example, Wells Fargo Bank already reached its lending capacity and closed the PPP loan intake form. Wells Fargo (@WellsFargo), Twitter (Apr. 5, 2020, 10:01 p.m.), <https://twitter.com/WellsFargo/status/1246981234582081536>.

As a direct consequence of the unlawful eligibility requirements imposed by BOA, at least 145,000 (and likely tens of thousands more) applicants stand in line ahead of Plaintiffs for the “first-come, first-served” loans that are designed to “provide relief to America’s small businesses expeditiously.” Ex. C, Burr Aff. ¶ 11; Ex. D, Storm Aff. ¶ 12. Without an opportunity to apply for these PPP loans through immediate relief, Plaintiffs and other eligible businesses are unlikely to survive long enough to achieve any meaningful success at trial. *See* Ex. C, Burr Aff. ¶¶ 11-12; Ex. D, Storm Aff. ¶¶ 12-13. These businesses will be irreparably harmed as they will no longer exist unless BOA’s unlawful application requirements are removed immediately.

LEGAL STANDARD

“The purpose of a temporary restraining order (TRO) or a preliminary injunction is to ‘protect the status quo and to prevent irreparable harm during the pendency of a lawsuit, ultimately

to preserve the court’s ability to render a meaningful judgment on the merits.” *J.O.P. v. United States Dep’t of Homeland Security*, 409 F. Supp. 3d 367, 375 (D. Md. 2019) (quoting *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir. 2003)). “In order to receive a preliminary injunction, a plaintiff ‘must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.’” *WV Ass’n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (quoting *Winter v. Nat’l Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008)). “The substantive requirements for a TRO and a preliminary injunction are identical.” *J.O.P.*, 409 F. Supp. 3d at 376.

ARGUMENT

I. Plaintiffs are Likely to Succeed on the Merits of Their Claims That BOA Violated and Continues to Violate Federal Law.

As to the first factor, Plaintiffs need only demonstrate they are “likely to succeed at trial” as to one of the causes of action set forth in the Second Amended Class Action Complaint (“SAC”). *See Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017) (citing *Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013)); *Mayor of Balt. v. Azar*, 392 F. Supp. 3d 602, 613-14 (D. Md. 2019); *see also Bethel Ministries, Inc. v. Salmon*, Civil Case No.: SAG-19-01853, 2020 U.S. Dist. LEXIS 9789, *22 (D. Md. Jan. 21, 2020). Here, Plaintiffs have demonstrated that BOA has applied unlawful eligibility requirements that violate the CARES Act, and that Plaintiffs have suffered cognizable injury as a result. SAC ¶¶ 96-106; *see also* Ex. C, Burr Aff. ¶¶ 9-12; Ex. D, Storm Aff. ¶¶ 12-13.

A. *There is an implied cause of action in the CARES Act.*

As a preliminary matter, Plaintiffs have an implied cause of action against BOA in accordance with the “rights-creating” language in the CARES Act.⁷ “As a matter of black letter law, inferring a private right of action is a matter of statutory interpretation.” *Planned Parenthood S. Atl. v. Baker*, 941 F.3d 687, 694-95 (4th Cir. 2019). “The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.” *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). “To determine whether a statute creates a federal private right, [courts] look to the statutory text for ‘rights-creating’ language.” *Miller v. GE Capital Mortg. Servs., Inc.*, 124 F. App’x 152, 154 (4th Cir. 2005) (citing *Alexander*, 532 U.S. at 288). “‘Rights-creating language’ is language that ‘explicitly confer[s] a right directly on a class of persons that include[s] the plaintiff.’” *Id.* (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690 n.13 (1979)) (alterations in original).

In *Planned Parenthood*, the Fourth Circuit explained that “Congress’s use of the phrase ‘any individual’ is a prime example of the kind of ‘rights-creating’ language required to confer a personal right on a discrete class of persons” 941 F.3d at 697. There, the class of persons was Medicaid beneficiaries; here, the class is “any business concern.” To the point, Congress provided “any business concern” with the right under PPP to become eligible for a “covered loan” so long as the business meets the criteria set forth in section 1102(a)(1) of the CARES Act. *See* CARES Act § 1102(a)(1) (to be codified at 15 U.S.C. § 636(a)(36)(D)(i)). The purpose of granting “any business concern” the right to apply for PPP loans is to “provide relief to America’s small businesses expeditiously,” especially those “businesses affected by the coronavirus pandemic.” Ex. A, Interim Final Rule at 3, 5. To further ensure that “any business concern” has the right to

⁷ For this Court’s convenience, sections 1102 and 1109 of the CARES Act are attached as Exhibit G.

submit an application to BOA, Congress removed from PPP the “credit elsewhere” requirement that would ordinarily apply to SBA loans. *Id.* (to be codified at 15 U.S.C. § 636(a)(36)(I)). And, Congress mandated that any regulations issued by the Secretary of the Treasury “shall” contain “terms and conditions that, to the maximum extent practicable, are consistent with” the borrower eligibility criteria to be codified at 15 U.S.C. § 636(a)(36)(D)(i). *See* CARES Act § 1109(d)(2)(B)(i).

Senator Van Hollen and Representative Trone have recently explained that the unlawful eligibility criteria imposed by BOA “are outside the purpose of the program, are unnecessary at best and, in the case of some of our constituents, harmful to their ability to access the program.” Ex. F, Van Hollen & Trone Letter to Mnuchin. This is because Congress intended that “any business concern” shall have an enforceable right to apply for a PPP loan in accordance with the eligibility criteria set forth in section 1102 of the CARES Act—not arbitrary criteria imposed by the lender. *See Daniels v. Hous. Auth. of Prince George’s Cnty.*, 940 F. Supp. 2d 248, 266 (D. Md. 2013), *aff’d*, 550 F. App’x 138 (4th Cir. 2013) (finding that 42 U.S.C. § 1437(f) “create[d] a federal right to a properly calculated subsidy based upon the participant’s income,” and an implied right to have the local housing authority follow proper procedures and methods when verifying a participant’s income); *see also Rabin v. Wilson-Coker*, 362 F.3d 190, 201 (2d Cir. 2004) (finding that 42 U.S.C. § 1396r-6 created a private cause of action where the statutory language “reflect[ed] Congress’s intention to confer a right to TMA upon persons who meet the various eligibility requirements”); *Hensley v. Koller*, 722 F.3d 177, 182 (4th Cir. 2013) (finding that 42 U.S.C. § 673 created a private cause of action to enforce a “right to parental concurrence in subsidy readjustment determinations”); *Price v. City of Stockton*, 390 F.3d 1105, 1113-14 (9th Cir. 2004) (finding that 42 U.S.C. § 5304(d) created a private cause of action where the statute established an individual

right to “reasonable benefits,” the rights asserted were not vague or amorphous, and the statute was clearly mandatory). If a small business that has been denied the ability to submit an application cannot enforce that right immediately, then there will be no right to enforce. The PPP loan program under the CARES Act is open for a short window of time and has ever shrinking funds that when dissipated are gone for good.

B. BOA’s eligibility requirements are unlawful and violate section 1102 of the CARES Act.

For several reasons, Plaintiffs are likely to succeed on the merits of establishing that BOA’s unlawful gating requirements interfere with and prevent Plaintiffs from exercising their statutory right to apply for PPP loans under Section 1102 of the CARES Act.

BOA is refusing to apply the eligibility criteria set forth in the CARES Act and the Interim Final Rule, which list the sole requirements to apply for a PPP loan. *See* CARES Act § 1102(a)(2) (defining “eligible recipient” as “an individual or entity that is eligible to receive a covered loan”); Ex. A, Interim Final Rule at 5-6. The Interim Final Rule directs federally insured depository institutions to “follow their existing [Bank Secrecy Act] protocols when making PPP loans to either *new or existing customers* who are eligible borrowers under the PPP.” *Id.*, Interim Final Rule at 21-22 (emphasis added). In fact, the Administrator has determined there is a “likelihood that *many borrowers will be new clients of the lender.*” *Id.*, Interim Final Rule at 27 (emphasis added). The CARES Act was clearly intended to allow “new” clients of a lender to apply for PPP loans, provided the applicants otherwise met the statutory criteria. BOA has unlawfully foreclosed that ability to “new clients of the lender” as well as existing clients who do not meet BOA’s unlawful gating requirements.

Here, Plaintiffs meet the statutory criteria set forth in section 1102 of the CARES Act and are eligible recipients of covered loans under PPP. *See* Ex. C, Burr Aff. ¶¶ 3-6; Ex. D, Storm Aff.

¶¶ 2-4, 6. Plaintiffs do not, however, meet the unlawful criteria that has been arbitrarily established by BOA:

Small Business clients with a Small Business lending and Small Business checking relationship with Bank of America as of February 15, 2020 *or* a Small Business checking account opened no later than February 15, 2020 and do not have a business credit or borrowing relationship with another bank are eligible to apply for the Paycheck Protection Program through our bank.

Ex. E, Bank of America, *We're here for our small business clients*. Regardless of whether the applicant is an “eligible recipient” under the CARES Act, BOA refuses to accept the PPP loan application unless the business concern meets BOA’s self-imposed criteria described in Exhibit E. *See* Ex. C, Burr Aff. ¶¶ 9-11; Ex. D, Storm Aff. ¶¶ 10-11.

By imposing the requirement that an applicant “not have a business credit or borrowing relationship with another bank,” BOA is reviving the “credit elsewhere” requirement that was expressly excluded from the PPP loan program. *See* CARES Act § 1102(a)(1), to be codified at 15 U.S.C. § 636(a)(36)(I) (“During the covered period, the requirement that a small business concern is unable to obtain credit elsewhere . . . shall not apply to a covered loan.”). In doing so, BOA is violating sections 1102(a)(1) and 1109(d)(2)(B)(i) of the CARES Act by imposing eligibility requirements that are not set forth in the statute.

BOA is introducing “ineligibility” requirements to application for a PPP loan that are contrary to the provisions of the Interim Final Rule and 13 C.F.R. § 120.110, by requiring each applicant to certify that it does not have a business credit or borrowing relationship with another bank. *See* Ex. E, Bank of America, *We're here for our small business clients*. The CARES Act *does* require an applicant to certify that it “does not have an application pending for a loan under section 7(a) of the Small Business Act (15 U.S.C. 636(a)) for the same purpose,” *see* CARES Act

§ 1109(f)(1), but there is no requirement in the law that an applicant make the certification required by BOA.

In fact, nothing in the CARES Act or Interim Final Rule allows for the differentiation of a small business loan under the federal program between a bank's depository clients and their lending clients or that an applicant must be an existing client of BOA. Nothing in the law allows for BOA to determine who can participate in the federal program based on that improper and unlawful criteria. BOA is unlawfully denying access to PPP loans to small businesses that either do not have a lending relationship with BOA, or that have a borrowing relationship with another bank. *See* Ex. C, Burr Aff. ¶¶ 9-11; Ex. D, Storm Aff. ¶¶ 10-11. Such discriminatory actions are wholly inconsistent with the plain text of the CARES Act, and Plaintiffs will succeed in establishing that BOA has acted in violation of federal law.

II. Plaintiffs Will Suffer Irreparable Harm if BOA Continues to Prevent Eligible Businesses From Applying for PPP Loans.

Absent a temporary restraining order and preliminary injunction, the “first-come, first-served” PPP loans will not be available at the time of trial and thus any recovery for wrongs committed by BOA will be insufficient to save Plaintiffs. *See* Ex. A, Interim Final Rule at 3-4 (“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.”). Moreover, without an opportunity to apply for these PPP loans through BOA, Plaintiffs and other eligible businesses are unlikely to survive long enough to achieve any meaningful success at trial. *See* Ex. C, Burr Aff. ¶¶ 11-12; Ex. D, Storm Aff. ¶¶ 12-13. Plaintiffs—together with their employees and the communities in which they operate—will suffer immeasurable and irreparable harm without a preliminary injunction to remove the unlawful

barriers to entry that have been erected by BOA. *See* Ex. C, Burr Aff. ¶¶ 11-12; Ex. D, Storm Aff. ¶¶ 12-13.

“Generally, ‘irreparable injury is suffered when monetary damages are difficult to ascertain or are inadequate.’” *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 551 (4th Cir. 1994) (quoting *Danielson v. Local 275*, 479 F.2d 1033, 1037 (2d Cir. 1973)). “[W]hen the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor or the loss of goodwill, the irreparable injury prong is satisfied.” *Id.* (citing *Merrill-Lynch, Pearce, Fenner & Smith v. Bradley*, 756 F.2d 1048, 1055 (4th Cir. 1985)). More to the point, irreparable harm may exist “where the moving party’s business cannot survive absent a preliminary injunction” *Hughes Network Sys., Inc. v. Interdigital Commc’ns Corp.*, 17 F.3d 691, 694 (4th Cir. 1994) (citing *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984)). *See also Fed. Leasing, Inc. v. Underwriters at Lloyd’s*, 650 F.2d 495, 500 (4th Cir. 1981); *Drakes Bay Oyster Co. v. Salazar*, 921 F. Supp. 972, 994 (N.D. Cal. 2013), *aff’d*, 729 F.3d 967 (9th Cir. 2013) (collecting cases). “But each case for injunctive relief must be examined on its own facts.” *Brown v. Bimbo Foods Bakeries Distribution, LLC*, Action No. 2:16cv476, 2016 U.S. Dist. LEXIS 162742, *23 (E.D. Va. Sept. 13, 2016).

“Courts have ‘found irreparable harm where a party is threatened with the loss of a business,’ particularly when the ‘very viability’ of the business is at risk.” *N. Am. Soccer League, LLC v. United States Soccer Fed’n, Inc.*, 296 F. Supp. 3d 442, 457 (E.D.N.Y. 2017) (quoting *Tom Doherty Assocs, Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27, 37-38 (2d Cir. 1995)). *See also Steves & Sons, Inc. v. Jeld-Wen, Inc.*, 345 F. Supp. 3d 614, 653-54 (E.D. Va. 2018) (collecting cases for proposition that “permanent loss of a business constitutes irreparable injury”); *Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169, 1186 (2d Cir. 1995) (“Major disruption of a business can be as

harmful as its termination and thereby constitute irreparable injury.”); *John B. Hull, Inc. v. Waterbury Petroleum Prods., Inc.*, 588 F.2d 24, 28-29 (2d Cir. 1978) (“A threat to the continued existence of a business can constitute irreparable injury.”). As the Second Circuit explained in *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970), businessowners desire to continue operating their business, “not to live on the income from a damage award.” *Id.* at 1205 (quoted with approval in *Federal Leasing*, 650 F.2d at 500).

Here, with each passing minute that BOA unlawfully prioritizes its selected clientele over Plaintiffs in contravention of the eligibility requirements in the CARES Act, the PPP loan funds authorized by Congress continue to evaporate, rendering any prospect for relief at trial illusory at best. *See* Ex. A, Interim Final Rule at 3-4 (“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.”); *id.*, Interim Final Rule at 13 (acknowledging that PPP loans “must be made on or before June 30, 2020,” and are provided on a “first-come, first-served” basis); *see also* Ex. C, Burr Aff. ¶ 11; Ex. D, Storm Aff. ¶¶ 12-13. This fact in and of itself satisfies the “irreparable harm” standard. *See Mt. Valley Pipeline, LLC v. 6.56 Acres*, 915 F.3d 197, 218 (4th Cir. 2019) (explaining that a temporary delay in recovery which threatens a party’s very existence by “driving it out of business before litigation concludes” may qualify as irreparable harm) (citing *Federal Leasing*, 650 F.2d at 500); *Henderson ex rel. NLRB v. Bluefield Hosp. Co., LLC*, 208 F. Supp. 3d 763, 772 (S.D. W. Va. 2016) (finding irreparable harm “when the remedy will become unavailable unless a preliminary injunction is granted and the district court’s judgment, even if it is favorable, will remain unsatisfied”).

Further, absent removal of the unlawful barriers preventing eligible businesses from applying for PPP loans, businesses that lack access to loans under the CARES Act will be unable

to continue operations. *See* Ex. C, Burr Aff. ¶¶ 11-12; Ex. D, Storm Aff. ¶¶ 12-13. As such, Plaintiffs will suffer irreparable injury to their business operations absent injunctive relief. *See DeVito v. Rhode Island Solid Waste Mgmt. Corp.*, 770 F. Supp. 775, 778 (D.R.I. 1991), *aff'd*, 947 F.2d 1004 (1st Cir. 1991) (finding irreparable harm where the movant “experienced significant declines in gross revenue which . . . necessitated laying off some of its employees,” and “estimated that its business cannot continue to operate at current levels for more than six months”); *Salt Pond Assocs. v. United States Arm Corps. of Engineers*, 815 F. Supp. 766, 784-85 (D. Del. 1993) (finding irreparable harm where the moving party’s injuries “are not merely a loss of profits,” but also left the company facing “complete devastation” if the injunction did not issue); *Faison-Alexander Place III, LLC v. Best Buy Stores, L.P.*, No. 5:08-CV-354-H, 2008 U.S. Dist. LEXIS 125695, *6-7 (E.D.N.C. Aug. 8, 2008) (holding that “loss of its construction loan constitute[d] an irreparable harm to plaintiff” where the plaintiff’s lender refused to extend additional credit to the project).

III. The Balance of Equities Favors Plaintiffs, and the Public Interest Will be Served by Allowing Eligible Businesses to Apply for PPP Loans through BOA.

The remaining factors, *i.e.*, the balance of equities and the public interest, also weigh in favor of granting preliminary injunctive relief to Plaintiffs. Courts often consider these factors together. *See Di Biase*, 872 F.3d at 235-36; *Bethel Ministries*, 2020 U.S. Dist. LEXIS 9789, at *42.

With regard to the balance of equities, the “courts ‘must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.’” *Winter*, 555 U.S. at 24 (quoting *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987)). “The entire preliminary injunction inquiry, and particularly the requirement that the district court carefully balance the harms to the parties, is intended to ensure that the district court

‘chooses the course of action that will minimize the costs of being mistaken.’” *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 284 (4th Cir. 2002) (quoting *Am. Hospital Supply Corp. v. Hospital Prods. Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986)). Plaintiffs are simply demanding that they be permitted to apply for the PPP loans on equal footing with BOA’s existing lender clients and the other “eligible recipients” under federal law. BOA will suffer no cognizable or credible harm by accepting applications from businesses that are eligible under the statutory framework set forth in the CARES Act. On the other hand, as discussed *supra*, Plaintiffs are likely to be without a remedy at the time of trial and will suffer irreparable harm if a temporary restraining order and preliminary injunctive relief are not granted. *See* Ex. A, Interim Final Rule at 3-4, 13; *see also* Ex. C, Burr Aff. ¶¶ 11-12; Ex. D, Storm Aff. ¶¶ 12-13. Therefore, the balance of equities favors Plaintiffs. *See Mt. Valley Pipeline*, 915 F.3d at 218; *see also Int’l Brotherhood of Teamsters, Local Union No. 639 v. Airgas, Inc.*, 239 F. Supp. 3d 906, 916 (D. Md. 2017) (holding that the balance of equities favored the Union where “even if the Union were to prevail in arbitration, the return of any eliminated positions would not be feasible”).

Finally, enjoining BOA from unlawfully preventing eligible businesses from applying for PPP loans will further the public interest and intent of the CARES Act; that is, to “provide relief to America’s small businesses expeditiously” in an attempt to remedy the “dramatic decrease in economic activity nationwide.” Ex. A, Interim Final Rule at 3. The public has an interest in ensuring compliance with statutory requirements designed to protect the public health and welfare. *See Md. Dep’t of Human Resources v. United States Dep’t of Agriculture*, 617 F. Supp. 408, 416 (D. Md. 1985) (holding that the public had “an interest in the proper construction and implementation of the Food Stamp Act and the protect of those whom the Act was designed to assist”); *see also Hospira, Inc. v. Burwell*, Case No.: GJH-14-02662, 2014 U.S. Dist. LEXIS

115393, *12-13 (D. Md. Aug. 19, 2014) (holding that the public has an interest “in an agency’s compliance with its governing statute” which was designed “to protect the public health”).

Thus, these final two factors also weigh in favor of granting injunctive relief to Plaintiffs. *E.g., Ga. Voc. Rehab. Agency Bus. Enter. Program v. United States*, 354 F. Supp. 3d 690, 701 (E.D. Va. 2018) (holding that the balance of equities and public interest in granting a TRO favored the plaintiffs where they would “suffer the loss of major funds for programs that train blind vendors and [would] potentially cause the termination of employees, including those at the management level”).

IV. The Court Should Waive the Bond Requirement or, in the Alternative, Require the Posting of a Nominal Bond.

“The district court has discretion in fixing the amount for the security bond, and in circumstances where the risk of harm is remote, a nominal bond may suffice.” *Potomac Conf. Corp. v. Takoma Academy*, Civil Action No. DKC-13-1128, 2014 U.S. Dist. LEXIS 27123, *73 (D. Md. Mar. 4, 2014) (citing *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 n.3 (4th Cir. 1999)). “The amount of the bond . . . ordinarily depends on the gravity of the potential harm to the enjoined party.” *Hoechst Diafoil*, 174 F.3d at 421 n.3.

Plaintiffs’ likelihood of success on the merits and the absence of substantial risk of harm to BOA weigh in favor of waiving the bond requirement in these circumstances. *See Chase v. Town of Ocean City*, 825 F. Supp. 2d 599, 630 (D. Md. 2011); *see also Beck v. Hurwitz*, 380 F. Supp. 3d 479, 485 (M.D.N.C. 2019). Alternatively, Plaintiffs request that they be permitted to post a nominal bond for the temporary restraining order or preliminary injunction to take effect. *See Hassay v. Mayor of Ocean City*, 955 F. Supp. 2d 505, 527 (D. Md. 2013) (setting the bond amount at \$1.00 where “any costs suffered by defendants during the period of the preliminary injunction will be minimal or nonexistent”); *Potomac Conf.*, 2014 U.S. Dist. LEXIS 27123, at *74.

CONCLUSION

For each of the foregoing reasons, Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction should be granted and BOA should be enjoined from applying eligibility requirements other than those requirements set forth in section 1102 of the CARES Act to any applicant for a loan under the Paycheck Protection Program. Further, BOA should be ordered to issue a statement informing the general public that the eligibility requirements enjoined herewith are no longer in effect.

Respectfully submitted,

/s/ M. Celeste Bruce

M. Celeste Bruce, Maryland Federal Bar No. 10710
Charles S. Fax, Maryland Federal Bar No. 2490
Rifkin Weiner Livingston LLC
7979 Old Georgetown Road, Suite 400
Bethesda, Maryland 20814
Telephone: (301) 951-0150
Telecopier: (301) 951-0172
Email: cbruce@rwllaw.com; cfax@rwllaw.com

Alan M. Rifkin, Maryland Federal Bar No. 11562
Liesel J. Schopler, Maryland Federal Bar No. 17280
Rifkin Weiner Livingston LLC
225 Duke of Gloucester Street
Annapolis, Maryland 21401
Telephone: (410) 269-5066
Telecopier: (410) 269-1235
Email: arifkin@rwllaw.com; lschopler@rwlls.com

Barry L. Gogel, Maryland Federal Bar No. 25495
Rifkin Weiner Livingston LLC
2002 Clipper Park Road, Suite 108
Baltimore, Maryland 21211
Telephone: (410) 769-8080
Telecopier: (410) 769-8811
Email: bgogel@rwllaw.com

April 7, 2020

EXHIBIT A

SMALL BUSINESS ADMINISTRATION

[Docket No. SBA-2020-0015]

13 CFR Part 120

Business Loan Program Temporary Changes; Paycheck Protection Program

RIN 3245-AH34

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 [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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 [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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: 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) (P.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 [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]. 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 USC 632), and subject to SBA's affiliation rules under 13 CFR 121.301(f) unless specifically waived in the Act;
 - 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, 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, wage, 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 (Public Law 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 recommence 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 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 ($8 \text{ weeks} / 2.5 \text{ months} = 56 \text{ days} / 76 \text{ days} = 74 \text{ percent rounded up to } 75 \text{ percent}$). 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

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

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 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.

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 USC 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 C.F.R. 113.3-1h, which provides:

“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).

EO 12866 and EO 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 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 Ac. Ch.1. p.9.*

Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

Authority: 15 U.S.C. 636(a)(36); Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, Section 1114

Dated:

Jovita Carranza,
Administrator

EXHIBIT B



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: _____
	DBA: _____ Business Tax ID: _____
	Applicant Address: _____ City, State, Zip: _____
	Applicant Primary Contact: _____ Phone: () - _____

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 (If no, the loan cannot be approved)	
<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 (If no, the loan cannot be approved)	
<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 (If no, the loan cannot be approved)	
<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 (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)	
<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 C

AFFIDAVIT OF BRANDON BURR

I, Brandon Burr, do hereby solemnly affirm, under penalties of perjury, that the facts set forth below are true and correct and based upon personal knowledge:

1. I am over eighteen years of age and competent to testify.

2. I am the owner of Elite Security Group, LLC, (“Elite”), in Pasadena, Maryland, which does business as Elite Police Protection and provides private security services to bars and other non-essential businesses. Only one of our clients is an essential business.

3. Along with myself, Elite has approximately six other employees who, like me, are W-2 employees and one consultant.

4. Due to orders from the Governor of the State of Maryland all but one of Elite’s clients have been forced close as a result of the coronavirus disease 2019 (“COVID-19”), and Elite has lost approximately \$30,000 a month in revenue.

5. Though I was greatly concerned about this forced closure, I took comfort in the knowledge that the federal government has passed the Coronavirus Aid, Relief, and Economic Security Act, H.R. 748 (“CARES Act”), which promised loan programs to administer billions of dollars in federal funding to small businesses in a fair, equitable and uniform manner.

6. In particular, I had hoped that Elite could obtain a loan for two and one-half times Elite’s monthly payroll expenses through the Payroll Protection Program (“PPP”) of the CARES Act. Elite would use this money to fund payroll expenses, and, as I understand, such use would allow the loan to be forgiven under the CARES Act.

7. I had been informed that applications for the PPP loan would be made available on Friday, April 3, 2020, and I applied for a PPP loan for Elite as soon as possible on April 3, 2020.

8. On April 3, 2020, Bank of America would not accept Elite's application because Elite had no borrowing relationship with Bank of America, even though Elite has had a long deposit relationship with Bank of America.

9. After midnight on Monday, April 6, 2020, I learned that Bank of America had changed its requirements and was then accepting applications from business deposit and checking account customers who did not have a lending relationship with Bank of America; however, when I tried to apply for a PPP loan on April 6th on behalf of Elite, the website noted a requirement that Elite not have a lending relationship elsewhere. In order to make sure Elite's application be accepted by the computer, I checked that Elite did not have a lending relationship at another bank, though it has a loan with another bank that I do not believe is an SBA lender. I did this because Bank of America is Elite's primary business bank, and I do not believe that Elite cannot get a PPP loan elsewhere.

10. I am greatly concerned that Bank of America will reject Elite's PPP loan application based on Elite's other lending relationship.

11. Having been delayed and rejected by Bank of America, I fear that Elite will not be able to obtain a PPP loan anywhere, as I understand that the loan pool is limited, the loans are on a first-come, first-served basis, and my application may be too late anywhere else.

12. With a PPP loan, Elite would have continued to pay its employees and kept them employed. Now its future is in doubt.

13. I am willing on behalf of myself and/or for Elite to become a named plaintiff in the lawsuit against Bank of America.

Dated: April 6, 2020



Brandon Burr

EXHIBIT D

AFFIDAVIT OF GREG STORM

I, Greg Storm, do hereby solemnly affirm, under penalties of perjury, that the facts set forth below are true and correct and based upon personal knowledge:

1. I am over eighteen years of age and competent to testify.
2. I am the owner of Proline Products, Inc. (“Proline”), in Wallingford, Connecticut, which is an entity that sells automotive roof racks and related accessories.
3. I am the sole employee of Proline, and I am paid by W-2 wages.
4. Due the coronavirus disease 2019 (“COVID-19”), Proline has seen its revenues drop severely and is in the verge of closing its doors.
5. When I first learned of it, I took comfort in the knowledge that the federal government had just recently passed the Coronavirus Aid, Relief, and Economic Security Act, H.R. 748 (“CARES Act”), which promised loan programs to administer billions of dollars in federal funding to small businesses in a fair, equitable and uniform manner.
6. In particular, I had hoped that Proline could obtain a loan for two and one-half times its monthly payroll expenses through the Payroll Protection Program (“PPP”) of the CARES Act. Proline would use this money to fund payroll expenses, and, as I understand, such use would allow the loan to be forgiven under the CARES Act.
7. I had been informed that applications for the PPP loan would be made available on Friday, April 3, 2020, and, on that day, I contacted our SBA business bank, Bank of America, where Proline had conducted its banking business for the past 25 years. I was instructed to apply on the Bank of America.
8. On April 3, 2020, Bank of America would not accept Proline’s application because Proline had no borrowing relationship with Bank of America. After this rejection I contacted Jason

Rouleau, Proline's Bank of America customer representative, who told me that Proline did not qualify for Bank of America's PPP program.

9. Later in the afternoon the branch manager telephone me and told me to "go someplace else" so that we didn't miss out on the PPP loan program.

10. Over the weekend, I learned that Bank of America had changed its requirements and was then accepting applications from business deposit and checking account customers who did not have a lending relationship with Bank of America; however, when I tried to apply for a PPP loan on April 6th on behalf of Proline, the website noted a requirement that Proline may not have a lending relationship elsewhere. Proline has business credit cards with Chase and American Express.

11. In the morning of Monday, April 6, 2020, I called Bank of America and was told that, since Proline has a company credit card with Chase and Amex, it should apply for a loan through our credit card company, but not Bank of America.

12. Having been delayed and rejected by Bank of America, I fear that Proline will not be able to obtain a PPP loan anywhere, as I understand that the loan pool is limited, the loans are on a first-come, first-served basis, and my application may be too late anywhere else.

13. With a PPP loan, Proline would have continued to pay my wages and remained open. Now its future is in doubt.

14. I am willing on behalf of myself and/or for Proline to become a named plaintiff in the lawsuit against Bank of America.

Dated: April 7, 2020



Greg Storm

EXHIBIT E



SMALL BUSINESS RESOURCES

We're here for our small business clients

We stand ready to support you with the services, solutions, and resources you need to manage your business.

Over the past several weeks, Bank of America has been providing support to our customers and clients through our enhanced Client Assistance Program.

The Small Business Administration (SBA) and U.S. Treasury have released the **Paycheck Protection Program** guidelines. Our Small Business clients who may be eligible for financial relief can now apply online. **To be eligible, you must have a Small Business lending and Small Business checking relationship with Bank of America as of February 15, 2020 or a Small Business checking account opened no later than February 15, 2020 and do not have a business credit or borrowing relationship with another bank.** After you have reviewed the complete Bank of America eligibility requirements below and have gathered the necessary documents, you can apply below.

[Apply now](#)

Latest Paycheck Protection Program details

The **Paycheck Protection Program** is a federal relief program established by Congress and implemented by the U.S. Treasury Department and the SBA with rules, requirements, protocols and processes that all participating banks, including Bank of America, must follow.

Small Business clients with a Small Business lending and Small Business checking relationship with Bank of America as of February 15, 2020 or a Small Business checking account opened no later than February 15, 2020 and do not have a business credit or borrowing relationship with another bank are eligible to apply for the Paycheck Protection Program through our bank. A client's pre-existing lending relationship with us may include small business, commercial or

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corporate credit cards, conventional business loan or lease, business lines of credit, business auto loans, practice solutions loans, trade and asset-based loans.

Small Business owners who do not meet these criteria should contact their current business loan provider as soon as possible, if they plan to apply for the federal Paycheck Protection Program. This is the best and fastest method for applying for federal relief, based on the U.S. Treasury requirements and guidance.

All applications, information and correspondence about the Paycheck Protection Program at Bank of America will occur online and through email, including the application process, submission of required documents, and follow up correspondence.



ELIGIBLE CLIENTS

Application information

To apply for the Paycheck Protection Program, small business clients can [sign into Online Banking](#) and commercial banking clients can [sign into CashPro®](#).

You must have a Small Business lending and Small Business checking relationship with Bank of America as of February 15, 2020 or a Small Business checking account opened no later than February 15, 2020 and not have a business credit or borrowing relationship with another bank. A Business Credit Card, line of credit or loan may be the lending product used.

At Bank of America, the federal Paycheck Protection Program will be administered online only.

Clients must have a Business Online Banking account. If you do not currently have an online account, you must enroll in [Business Online Banking](#) as soon as possible.

After completing the application process, you will receive online confirmation of the submission.

Bank of America will process your application as soon as possible.

We will contact you with next steps and to collect any required documents. Do not proactively deliver or send documents to our Financial Centers or banking teams.

Information about your application status will NOT be available through our Financial Centers or Contact Centers – due to the nature of this loan process and the steps involved.

You will be notified of the status of your loan application through email communications.

Apply now



How you can prepare for the Paycheck Protection Program

Bank of America small business clients will need to [apply online](#). Ensure you can log in to your Business Online Banking account or enroll in [Business Online Banking](#) now.

It also may be helpful to gather the following business documents:

2019 Payroll – total payroll for full year 2019, by employee, as reported to the IRS

2019 Independent Contractor Costs – Listing of 1099's-MISC for 2019 independent contractors, by person, as reported to the IRS. (Note: Do NOT include 1099's for services)

Payroll report – as of February 15, 2020 or closest date after that date, by employee

Other information – required by the application is available at the [U.S. Treasury website](#)



Banking available whenever and wherever you are

For those clients facing financial hardship, additional assistance is available through our Client Assistance Program. A fast and easy way to submit a payment deferral request is to [sign into Online Banking](#) or by using Erica¹, our virtual financial assistant in our [Mobile Banking](#) app². We'll get started on your request right away and get back to you soon.

Our secure Online Banking and Mobile Banking app will allow you to bank anytime from virtually anywhere. When you're in the Mobile Banking app, Erica is always there

to help.

Leverage [Business Advantage 360](#)³ our innovative dashboard with graphs, insights and projections to help you manage your cash flow. You can also connect to apps like QuickBooks® Online, ADP® Payroll and Google Analytics for a complete view of your finances.

Request payment deferral



Small Business Community

Visit our Business Advantage Small Business Community⁴ for regularly updated ideas, solutions, peer and expert advice, insider tips, and industry knowledge to help manage your business during this challenging time.

Explore now



Convenient banking solutions

We provide banking solutions to help you manage your finances wherever most convenient for you. You can deposit checks without visiting a financial center through

Mobile Check Deposit⁵ and Remote Deposit Online⁶. And you can use Zelle^{®7}, a fast, safe and easy way for your business to send, request and receive money. Explore additional features, how-to videos, and more about [Mobile](#) and [Online Banking](#).

Not enrolled? [Get started now](#).

Additional resources available



Access capital

As you face ongoing challenges, the Small Business Administration offers disaster relief funding and other benefits.

Contact the SBA



Our Resource Site

Stay connected with information about how we continue to operate safely and effectively and assist all our clients and teammates.

Learn more

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- ¹ **ERICA:** The mobile feature, ERICA, is only available in the English language. The feature requires that you download the latest version of the Mobile Banking app and is only available for select mobile devices. Message and data rates may apply.
- ² **Mobile Banking:** Mobile Banking requires that you download the Mobile Banking app and is only available for select mobile devices. Message and data rates may apply.
- ³ **Business Advantage 360:** You must be enrolled in Online Banking or Mobile Banking to use the Business Advantage 360 tool and have an eligible Bank of America® small business deposit account. Mobile Banking requires that you download the Mobile Banking app and is only available for select mobile devices. Message and data rates may apply. Bank of America and/or its affiliates or service providers may receive compensation from third parties for clients' use of their services.

When you use Business Advantage 360 to access services or information from third parties ("Third-Party

Account Information), you will be subject to any terms and conditions established by those third parties, in addition to [Business Advantage 360 Terms and Conditions](#).

Bank of America, N.A. provides access to third-party websites and Third-Party Account Information only as a convenience, and is not responsible for, does not guarantee or endorse the services offered, and does not monitor or review such information for accuracy, completeness or otherwise. Information displayed through Business Advantage 360 may be more up-to-date when obtained directly from relevant third-party web sites. Neither Bank of America, its affiliates, nor their employees provide legal, accounting and tax advice.

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- 4 **Business Advantage Small Business Community:** Bank of America is not responsible for user posts and other user content appearing on this website and does not endorse or guarantee the perspectives, the advice, the users, the businesses, or the products or services sold by any users or businesses that appear on this website.
- 5 **Mobile Check Deposit:** Mobile Check Deposits are subject to verification and not available for immediate withdrawal. In the Mobile Banking app, select **Help & Support**, then **Mobile Check Deposit** for details, including funds availability, deposit limits, proper disposal of checks, restrictions and terms and conditions. Requires at least a 2-megapixel camera. Data connection required. Wireless carrier fees may apply.
- 6 **Remote Deposit Online:** Remote Deposit Online is subject to approval and availability in your area. A monthly service fee of \$15 will be assessed for this service. You must be enrolled in Online Banking to use the Remote Deposit Online service and have an open Bank of America small business deposit account to apply and be approved for enrollment in Remote Deposit Online, and fees will be billed to that account. In addition to monthly service fees, other bank fees associated with your checking account and/or for additional services may apply. See the [Business Schedule of Fees](#) available at bankofamerica.com/businessfeesataglance for details. Please also refer to the Deposit Agreement and Disclosures brochure for additional information.

Remote Deposit Online requires a two-year contractual agreement with a \$250 early termination fee if canceled after initial 30-day trial or prior to expiration of the two-year agreement period.

Internet access may be required. Internet service provider fees may apply.

You may only transmit checks using the service from a Bank-approved capture device that is located within the United States.

Zelle: To send to or receive money with a small business, a consumer must be enrolled with *Zelle* with a linked

domestic deposit account at a U.S. financial institution that offers *Zelle*. Small businesses are not able to enroll in the *Zelle* app with a debit card, and cannot send or receive payments from consumers enrolled in the *Zelle* app using a debit card.

Zelle should only be used to send money to friends, family or others you trust.

We recommend that you do not use *Zelle* to send money to those you do not know. Transfers require enrollment in the service and must be made from an eligible Bank of America consumer or business deposit account to a domestic bank account or consumer debit card. Recipients have 14 days to enroll to receive money or the transfer will be canceled. Transactions typically occur in minutes when the recipient's email address or U.S. mobile number is already enrolled with *Zelle*. We will send you an email alert with transaction details after you send money using *Zelle*. Dollar and frequency limits apply. See the [Online Banking Service Agreement](#) at bankofamerica.com/serviceagreement for further details. Payment requests to others not already enrolled in *Zelle* must be sent to an email address. Data connection required. Message and data rates may apply. Neither Bank of America nor *Zelle* offers a protection program for any authorized payments made with *Zelle*.

To receive money from a small business, a vendor must be enrolled with *Zelle* with a linked domestic deposit account at a U.S. financial institution that offers *Zelle*.

Zelle and the *Zelle* related marks are wholly owned by Early Warning Services, LLC, and are used herein under license.

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EXHIBIT F

United States Congress

April 6, 2020

The Honorable Steven T. Mnuchin
Secretary
United States Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Dear Secretary Mnuchin,

We write to you today regarding concerns voiced to us by small and mid-sized businesses across Maryland. These businesses have been forced to make tough decisions to lay off hundreds of employees, slash salaries, and adapt to new to-go and delivery dependent service operations as a result of the COVID-19 pandemic.

While the Coronavirus Aid, Relief, and Economic Security (CARES) Act established the Paycheck Protection Program (PPP) to provide critical emergency funding for these businesses, recent guidance from the Treasury Department seems to weaken the program, which is meant to serve as a lifeline to these small and mid-sized businesses and their employees. Below, we have outlined instances in which the Treasury Department's guidance could limit the effectiveness of PPP and, thereby, be misaligned with the intent of Congress.

- **Loan Term:** The Treasury Department's PPP interim final rule sets the maturity date of the loan for two years instead of the ten years provided for in the CARES Act. This sets an unrealistic timeline for businesses to find cash to service their loans, which is made even more difficult by having to do so while recovering from a national health and economic crisis.
- **Permitted Uses:** The CARES Act indicated that during the covered period, an eligible recipient may use loan proceeds of a PPP loan for the allowable uses of a loan made under Subsection 7(a) of the Small Business Act, which includes uses such as working capital. The Treasury Department's interim final rule indicates that the loan may only be used for payroll costs, interest on mortgage obligations, rent, and utilities. And the sample application published by Treasury includes a certification to this effect. As a result of the length of the COVID-19-related closures, small businesses need flexibility to use PPP loan proceeds for working capital to keep their businesses alive.
- **Forgiveness for Non-Payroll Spending:** The CARES Act specified that an eligible recipient shall be eligible for forgiveness of indebtedness on a covered loan for (1) "any payment of interest on a covered mortgage obligation," (2) "any payment on any covered rent obligation" and (3) "any covered utility payment." The Treasury Department's interim final rule indicates that forgiveness for non-payroll expenses would be capped at 25% of the forgiveness amount. The interim rule places additional restrictions on the borrower by requiring that 75% of the loan proceeds be used for payroll costs. This guidance is inconsistent with the PPP spending flexibility allowed under the CARES Act.

Furthermore, we are hearing that Maryland constituents are facing difficulties obtaining loans through the PPP. For example, some financial institutions have required that businesses have an existing line of credit or a credit card account in order to obtain a loan. Imposition of such requirements, which are outside the purpose of the program, are unnecessary at best and, in the case of some of our constituents, harmful to their ability to access the program. We therefore ask that Treasury firmly prohibit lenders from imposing PPP loan requirements outside the scope of the CARES Act in the Department's final rulemaking.

We have fought successfully to ensure this rescue package throws an economic lifeline to those who need it most by extending help to small and mid-sized businesses struggling to stay afloat. The Treasury Department's guidelines must not undermine Congress's intent for PPP, and we urge you to provide updated guidance that fully addresses and corrects the matters of concern outlined above.

As we continue to navigate this difficult time for our Nation, we must stay united in our resolve to eradicate this virus and the economic crisis it has created.

Sincerely,

/s/ Chris Van Hollen
United States Senator

/s/ David Trone
Member of Congress

EXHIBIT G

H. R. 748

One Hundred Sixteenth Congress
of the
United States of America

AT THE SECOND SESSION

*Began and held at the City of Washington on Friday,
the third day of January, two thousand and twenty*

An Act

To amend the Internal Revenue Code of 1986 to repeal the excise tax on high cost employer-sponsored health coverage.

*Be it enacted by the Senate and House of Representatives of
the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE.

This Act may be cited as the “Coronavirus Aid, Relief, and Economic Security Act” or the “CARES Act”.

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

- Sec. 1. Short title.
- Sec. 2. Table of contents.
- Sec. 3. References.

**DIVISION A—KEEPING WORKERS PAID AND EMPLOYED, HEALTH CARE
SYSTEM ENHANCEMENTS, AND ECONOMIC STABILIZATION**

TITLE I—KEEPING AMERICAN WORKERS PAID AND EMPLOYED ACT

- Sec. 1101. Definitions.
- Sec. 1102. Paycheck protection program.
- Sec. 1103. Entrepreneurial development.
- Sec. 1104. State trade expansion program.
- Sec. 1105. Waiver of matching funds requirement under the women’s business center program.
- Sec. 1106. Loan forgiveness.
- Sec. 1107. Direct appropriations.
- Sec. 1108. Minority business development agency.
- Sec. 1109. United States Treasury Program Management Authority.
- Sec. 1110. Emergency EIDL grants.
- Sec. 1111. Resources and services in languages other than English.
- Sec. 1112. Subsidy for certain loan payments.
- Sec. 1113. Bankruptcy.
- Sec. 1114. Emergency rulemaking authority.

**TITLE II—ASSISTANCE FOR AMERICAN WORKERS, FAMILIES, AND
BUSINESSES**

Subtitle A—Unemployment Insurance Provisions

- Sec. 2101. Short title.
- Sec. 2102. Pandemic Unemployment Assistance.
- Sec. 2103. Emergency unemployment relief for governmental entities and nonprofit organizations.
- Sec. 2104. Emergency increase in unemployment compensation benefits.
- Sec. 2105. Temporary full Federal funding of the first week of compensable regular unemployment for States with no waiting week.
- Sec. 2106. Emergency State staffing flexibility.
- Sec. 2107. Pandemic emergency unemployment compensation.
- Sec. 2108. Temporary financing of short-time compensation payments in States with programs in law.
- Sec. 2109. Temporary financing of short-time compensation agreements.

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- Sec. 2110. Grants for short-time compensation programs.
- Sec. 2111. Assistance and guidance in implementing programs.
- Sec. 2112. Waiver of the 7-day waiting period for benefits under the Railroad Unemployment Insurance Act.
- Sec. 2113. Enhanced benefits under the Railroad Unemployment Insurance Act.
- Sec. 2114. Extended unemployment benefits under the Railroad Unemployment Insurance Act.
- Sec. 2115. Funding for the DOL Office of Inspector General for oversight of unemployment provisions.
- Sec. 2116. Implementation.

Subtitle B—Rebates and Other Individual Provisions

- Sec. 2201. 2020 recovery rebates for individuals.
- Sec. 2202. Special rules for use of retirement funds.
- Sec. 2203. Temporary waiver of required minimum distribution rules for certain retirement plans and accounts.
- Sec. 2204. Allowance of partial above the line deduction for charitable contributions.
- Sec. 2205. Modification of limitations on charitable contributions during 2020.
- Sec. 2206. Exclusion for certain employer payments of student loans.

Subtitle C—Business Provisions

- Sec. 2301. Employee retention credit for employers subject to closure due to COVID-19.
- Sec. 2302. Delay of payment of employer payroll taxes.
- Sec. 2303. Modifications for net operating losses.
- Sec. 2304. Modification of limitation on losses for taxpayers other than corporations.
- Sec. 2305. Modification of credit for prior year minimum tax liability of corporations.
- Sec. 2306. Modifications of limitation on business interest.
- Sec. 2307. Technical amendments regarding qualified improvement property.
- Sec. 2308. Temporary exception from excise tax for alcohol used to produce hand sanitizer.

TITLE III—SUPPORTING AMERICA'S HEALTH CARE SYSTEM IN THE FIGHT AGAINST THE CORONAVIRUS

Subtitle A—Health Provisions

- Sec. 3001. Short title.

PART I—ADDRESSING SUPPLY SHORTAGES

SUBPART A—MEDICAL PRODUCT SUPPLIES

- Sec. 3101. National Academies report on America's medical product supply chain security.
- Sec. 3102. Requiring the strategic national stockpile to include certain types of medical supplies.
- Sec. 3103. Treatment of respiratory protective devices as covered countermeasures.

SUBPART B—MITIGATING EMERGENCY DRUG SHORTAGES

- Sec. 3111. Prioritize reviews of drug applications; incentives.
- Sec. 3112. Additional manufacturer reporting requirements in response to drug shortages.

SUBPART C—PREVENTING MEDICAL DEVICE SHORTAGES

- Sec. 3121. Discontinuance or interruption in the production of medical devices.

PART II—ACCESS TO HEALTH CARE FOR COVID-19 PATIENTS

SUBPART A—COVERAGE OF TESTING AND PREVENTIVE SERVICES

- Sec. 3201. Coverage of diagnostic testing for COVID-19.
- Sec. 3202. Pricing of diagnostic testing.
- Sec. 3203. Rapid coverage of preventive services and vaccines for coronavirus.

SUBPART B—SUPPORT FOR HEALTH CARE PROVIDERS

- Sec. 3211. Supplemental awards for health centers.
- Sec. 3212. Telehealth network and telehealth resource centers grant programs.
- Sec. 3213. Rural health care services outreach, rural health network development, and small health care provider quality improvement grant programs.

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- Sec. 3214. United States Public Health Service Modernization.
- Sec. 3215. Limitation on liability for volunteer health care professionals during COVID-19 emergency response.
- Sec. 3216. Flexibility for members of National Health Service Corps during emergency period.

SUBPART C—MISCELLANEOUS PROVISIONS

- Sec. 3221. Confidentiality and disclosure of records relating to substance use disorder.
- Sec. 3222. Nutrition services.
- Sec. 3223. Continuity of service and opportunities for participants in community service activities under title V of the Older Americans Act of 1965.
- Sec. 3224. Guidance on protected health information.
- Sec. 3225. Reauthorization of healthy start program.
- Sec. 3226. Importance of the blood supply.

PART III—INNOVATION

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- Sec. 3715. Providing home and community-based services in acute care hospitals.
- Sec. 3716. Clarification regarding uninsured individuals.
- Sec. 3717. Clarification regarding coverage of COVID-19 testing products.
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- Sec. 3801. Extension of the work geographic index floor under the Medicare program.
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- Sec. 3821. Extension of sexual risk avoidance education program.
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- Sec. 3831. Extension for community health centers, the National Health Service Corps, and teaching health centers that operate GME programs.
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- Sec. 3841. Prevention of duplicate appropriations for fiscal year 2020.

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- Sec. 3851. Regulation of certain nonprescription drugs that are marketed without an approved drug application.
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- Sec. 3855. Annual update to Congress on appropriate pediatric indication for certain OTC cough and cold drugs.

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Sec. 3856. Technical corrections.

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Sec. 3862. Fees relating to over-the-counter drugs.

TITLE IV—ECONOMIC STABILIZATION AND ASSISTANCE TO SEVERELY
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Subtitle A—Coronavirus Economic Stabilization Act of 2020

Sec. 4001. Short title.
Sec. 4002. Definitions.
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Sec. 4020. Congressional Oversight Commission.
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Sec. 4022. Foreclosure moratorium and consumer right to request forbearance.
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Subtitle B—Air Carrier Worker Support

Sec. 4111. Definitions.
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TITLE V—CORONAVIRUS RELIEF FUNDS

Sec. 5001. Coronavirus Relief Fund.

TITLE VI—MISCELLANEOUS PROVISIONS

Sec. 6001. COVID–19 borrowing authority for the United States Postal Service.
Sec. 6002. Emergency designation.

DIVISION B—EMERGENCY APPROPRIATIONS FOR CORONAVIRUS HEALTH
RESPONSE AND AGENCY OPERATIONS

SEC. 3. REFERENCES.

Except as expressly provided otherwise, any reference to “this Act” contained in any division of this Act shall be treated as referring only to the provisions of that division.

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**DIVISION A—KEEPING WORKERS PAID
AND EMPLOYED, HEALTH CARE SYS-
TEM ENHANCEMENTS, AND ECO-
NOMIC STABILIZATION**

**TITLE I—KEEPING AMERICAN
WORKERS PAID AND EMPLOYED ACT**

SEC. 1101. DEFINITIONS.

In this title—

(1) the terms “Administration” and “Administrator” mean the Small Business Administration and the Administrator thereof, respectively; and

(2) the term “small business concern” has the meaning given the term in section 3 of the Small Business Act (15 U.S.C. 636).

SEC. 1102. PAYCHECK PROTECTION PROGRAM.

(a) IN GENERAL.—Section 7(a) of the Small Business Act (15 U.S.C. 636(a)) is amended—

(1) in paragraph (2)—

(A) in subparagraph (A), in the matter preceding clause (i), by striking “and (E)” and inserting “(E), and (F)”; and

(B) by adding at the end the following:

“(F) PARTICIPATION IN THE PAYCHECK PROTECTION PROGRAM.—In an agreement to participate in a loan on a deferred basis under paragraph (36), the participation by the Administration shall be 100 percent.”; and

(2) by adding at the end the following:

“(36) PAYCHECK PROTECTION PROGRAM.—

“(A) DEFINITIONS.—In this paragraph—

“(i) the terms ‘appropriate Federal banking agency’ and ‘insured depository institution’ have the meanings given those terms in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813);

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

“(iii) the term ‘covered period’ means the period beginning on February 15, 2020 and ending on June 30, 2020;

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

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

“(vi) the term ‘insured credit union’ has the meaning given the term in section 101 of the Federal Credit Union Act (12 U.S.C. 1752);

“(vii) the term ‘nonprofit organization’ means an organization that is described in section 501(c)(3) of the Internal Revenue Code of 1986 and that is exempt from taxation under section 501(a) of such Code;

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“(viii) the term ‘payroll costs’—

“(I) means—

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

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

“(BB) payment of cash tip or equivalent;

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

“(DD) allowance for dismissal or separation;

“(EE) payment required for the provisions of group health care benefits, including insurance premiums;

“(FF) payment of any retirement benefit; or

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

“(bb) the sum of payments of any compensation to or income of a sole proprietor or independent contractor that is a wage, commission, income, net earnings from self-employment, or similar compensation and that is in an amount that is not more than \$100,000 in 1 year, as prorated for the covered period; and

“(II) shall not include—

“(aa) the compensation of an individual employee in excess of an annual salary of \$100,000, as prorated for the covered period;

“(bb) taxes imposed or withheld under chapters 21, 22, or 24 of the Internal Revenue Code of 1986 during the covered period;

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

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

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

“(ix) the term ‘veterans organization’ means an organization that is described in section 501(c)(19) of the Internal Revenue Code that is exempt from taxation under section 501(a) of such Code.

“(B) PAYCHECK PROTECTION LOANS.—Except as otherwise provided in this paragraph, the Administrator may guarantee covered loans under the same terms, conditions, and processes as a loan made under this subsection.

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“(C) REGISTRATION OF LOANS.—Not later than 15 days after the date on which a loan is made under this paragraph, the Administration shall register the loan using the TIN (as defined in section 7701 of the Internal Revenue Code of 1986) assigned to the borrower.

“(D) INCREASED ELIGIBILITY FOR CERTAIN SMALL BUSINESSES AND ORGANIZATIONS.—

“(i) IN GENERAL.—During the covered period, in addition to small business concerns, any business concern, nonprofit organization, veterans organization, or Tribal business concern described in section 31(b)(2)(C) shall be eligible to receive a covered loan if the business concern, nonprofit organization, veterans organization, or Tribal business concern employs not more than the greater of—

“(I) 500 employees; or

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

“(ii) INCLUSION OF SOLE PROPRIETORS, INDEPENDENT CONTRACTORS, AND ELIGIBLE SELF-EMPLOYED INDIVIDUALS.—

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

“(II) DOCUMENTATION.—An eligible self-employed individual, independent contractor, or sole proprietorship seeking a covered loan shall submit such documentation as is necessary to establish such individual as eligible, including payroll tax filings reported to the Internal Revenue Service, Forms 1099-MISC, and income and expenses from the sole proprietorship, as determined by the Administrator and the Secretary.

“(iii) BUSINESS CONCERNS WITH MORE THAN 1 PHYSICAL LOCATION.—During the covered period, any business concern that employs not more than 500 employees per physical location of the business concern and that is assigned a North American Industry Classification System code beginning with 72 at the time of disbursement shall be eligible to receive a covered loan.

“(iv) WAIVER OF AFFILIATION RULES.—During the covered period, the provisions applicable to affiliations under section 121.103 of title 13, Code of Federal Regulations, or any successor regulation, are waived with respect to eligibility for a covered loan for—

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

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

“(III) 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).

“(v) EMPLOYEE.—For purposes of determining whether a business concern, nonprofit organization, veterans organization, or Tribal business concern described in section 31(b)(2)(C) employs not more than 500 employees under clause (i)(I), the term ‘employee’ includes individuals employed on a full-time, part-time, or other basis.

“(vi) AFFILIATION.—The provisions applicable to affiliations under section 121.103 of title 13, Code of Federal Regulations, or any successor thereto, shall apply with respect to a nonprofit organization and a veterans organization in the same manner as with respect to a small business concern.

“(E) MAXIMUM LOAN AMOUNT.—During the covered period, with respect to a covered loan, the maximum loan amount shall be the lesser of—

“(i)(I) the sum of—

“(aa) the product obtained by multiplying—

“(AA) the average total monthly payments by the applicant for payroll costs incurred during the 1-year period before the date on which the loan is made, except that, in the case of an applicant that is seasonal employer, as determined by the Administrator, the average total monthly payments for payroll shall be for the 12-week period beginning February 15, 2019, or at the election of the eligible recipient, March 1, 2019, and ending June 30, 2019; by

“(BB) 2.5; and

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

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

“(aa) the product obtained by multiplying—

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

“(BB) 2.5; and

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

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“(ii) \$10,000,000.

“(F) ALLOWABLE USES OF COVERED LOANS.—

“(i) IN GENERAL.—During the covered period, an eligible recipient may, in addition to the allowable uses of a loan made under this subsection, use the proceeds of the covered loan for—

“(I) payroll costs;

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

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

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

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

“(VI) utilities; and

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

“(ii) DELEGATED AUTHORITY.—

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

“(II) CONSIDERATIONS.—In evaluating the eligibility of a borrower for a covered loan with the terms described in this paragraph, a lender shall consider whether the borrower—

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

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

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

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

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

“(v) NONRECOURSE.—Notwithstanding the waiver of the personal guarantee requirement or collateral under subparagraph (J), the Administrator shall have no recourse against any individual shareholder, member, or partner of an eligible recipient of a covered loan for nonpayment of any covered loan, except to

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the extent that such shareholder, member, or partner uses the covered loan proceeds for a purpose not authorized under clause (i).

“(G) BORROWER REQUIREMENTS.—

“(i) CERTIFICATION.—An eligible recipient applying for a covered loan shall make a good faith certification—

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

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

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

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

“(H) FEE WAIVER.—During the covered period, with respect to a covered loan—

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

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

“(I) CREDIT ELSEWHERE.—During the covered period, the requirement that a small business concern is unable to obtain credit elsewhere, as defined in section 3(h), shall not apply to a covered loan.

“(J) WAIVER OF PERSONAL GUARANTEE REQUIREMENT.—During the covered period, with respect to a covered loan—

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

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

“(K) MATURITY FOR LOANS WITH REMAINING BALANCE AFTER APPLICATION OF FORGIVENESS.—With respect to a covered loan that has a remaining balance after reduction based on the loan forgiveness amount under section 1106 of the CARES Act—

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

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

“(L) INTEREST RATE REQUIREMENTS.—A covered loan shall bear an interest rate not to exceed 4 percent.

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“(M) LOAN DEFERMENT.—

“(i) DEFINITION OF IMPACTED BORROWER.—

“(I) IN GENERAL.—In this subparagraph, the term ‘impacted borrower’ means an eligible recipient that—

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

and

“(bb) has an application for a covered loan that is approved or pending approval on or after the date of enactment of this paragraph.

“(II) PRESUMPTION.—For purposes of this subparagraph, an impacted borrower is presumed to have been adversely impacted by COVID-19.

“(ii) DEFERRAL.—During the covered period, the Administrator shall—

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

“(II) require lenders under this subsection to provide complete payment deferment relief for impacted borrowers with covered loans for a period of not less than 6 months, including payment of principal, interest, and fees, and not more than 1 year.

“(iii) SECONDARY MARKET.—During the covered period, with respect to a covered loan that is sold on the secondary market, if an investor declines to approve a deferral requested by a lender under clause (ii), the Administrator shall exercise the authority to purchase the loan so that the impacted borrower may receive a deferral for a period of not less than 6 months, including payment of principal, interest, and fees, and not more than 1 year.

“(iv) GUIDANCE.—Not later than 30 days after the date of enactment of this paragraph, the Administrator shall provide guidance to lenders under this paragraph on the deferment process described in this subparagraph.

“(N) SECONDARY MARKET SALES.—A covered loan shall be eligible to be sold in the secondary market consistent with this subsection. The Administrator may not collect any fee for any guarantee sold into the secondary market under this subparagraph.

“(O) REGULATORY CAPITAL REQUIREMENTS.—

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

“(ii) TEMPORARY RELIEF FROM TDR DISCLOSURES.—Notwithstanding any other provision of law, an insured depository institution or an insured credit union that modifies a covered loan in relation to COVID-19-related difficulties in a troubled debt restructuring on or after March 13, 2020, shall not be required to comply with the Financial Accounting Standards Board

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

“(P) REIMBURSEMENT FOR PROCESSING.—

“(i) IN GENERAL.—The Administrator shall reimburse a lender authorized to make a covered loan at a rate, based on the balance of the financing outstanding at the time of disbursement of the covered loan, of—

“(I) 5 percent for loans of not more than \$350,000;

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

“(III) 1 percent for loans of not less than \$2,000,000.

“(ii) FEE LIMITS.—An agent that assists an eligible recipient to prepare an application for a covered loan may not collect a fee in excess of the limits established by the Administrator.

“(iii) TIMING.—A reimbursement described in clause (i) shall be made not later than 5 days after the disbursement of the covered loan.

“(iv) SENSE OF THE SENATE.—It is the sense of the Senate that the Administrator should issue guidance to lenders and agents to ensure that the processing and disbursement of covered loans prioritizes small business concerns and entities in underserved and rural markets, including veterans and members of the military community, small business concerns owned and controlled by socially and economically disadvantaged individuals (as defined in section 8(d)(3)(C)), women, and businesses in operation for less than 2 years.

“(Q) DUPLICATION.—Nothing in this paragraph shall prohibit a recipient of an economic injury disaster loan made under subsection (b)(2) during the period beginning on January 31, 2020 and ending on the date on which covered loans are made available that is for a purpose other than paying payroll costs and other obligations described in subparagraph (F) from receiving assistance under this paragraph.

“(R) WAIVER OF PREPAYMENT PENALTY.—Notwithstanding any other provision of law, there shall be no prepayment penalty for any payment made on a covered loan.”

(b) COMMITMENTS FOR 7(A) LOANS.—During the period beginning on February 15, 2020 and ending on June 30, 2020—

(1) the amount authorized for commitments for general business loans authorized under section 7(a) of the Small Business Act (15 U.S.C. 636(a)), including loans made under paragraph (36) of such section, as added by subsection (a), shall be \$349,000,000,000; and

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(2) the amount authorized for commitments for such loans under the heading “BUSINESS LOANS PROGRAM ACCOUNT” under the heading “SMALL BUSINESS ADMINISTRATION” under title V of the Consolidated Appropriations Act, 2020 (Public Law 116–93; 133 Stat. 2475) shall not apply.

(c) EXPRESS LOANS.—

(1) IN GENERAL.—Section 7(a)(31)(D) of the Small Business Act (15 U.S.C. 636(a)(31)(D)) is amended by striking “\$350,000” and inserting “\$1,000,000”.

(2) PROSPECTIVE REPEAL.—Effective on January 1, 2021, section 7(a)(31)(D) of the Small Business Act (15 U.S.C. 636(a)(31)(D)) is amended by striking “\$1,000,000” and inserting “\$350,000”.

(d) EXCEPTION TO GUARANTEE FEE WAIVER FOR VETERANS.—Section 7(a)(31)(G) of the Small Business Act (15 U.S.C. 636(a)(31)(G)) is amended—

(1) by striking clause (ii); and

(2) by redesignating clause (iii) as clause (ii).

(e) INTERIM RULE.—On and after the date of enactment of this Act, the interim final rule published by the Administrator entitled “Express Loan Programs: Affiliation Standards” (85 Fed. Reg. 7622 (February 10, 2020)) is permanently rescinded and shall have no force or effect.

SEC. 1103. ENTREPRENEURIAL DEVELOPMENT.

(a) DEFINITIONS.—In this section—

(1) the term “covered small business concern” means a small business concern that has experienced, as a result of COVID–19—

(A) supply chain disruptions, including changes in—

(i) quantity and lead time, including the number of shipments of components and delays in shipments;

(ii) quality, including shortages in supply for quality control reasons; and

(iii) technology, including a compromised payment network;

(B) staffing challenges;

(C) a decrease in gross receipts or customers; or

(D) a closure;

(2) the term “resource partner” means—

(A) a small business development center; and

(B) a women’s business center;

(3) the term “small business development center” has the meaning given the term in section 3 of the Small Business Act (15 U.S.C. 632); and

(4) the term “women’s business center” means a women’s business center described in section 29 of the Small Business Act (15 U.S.C. 656).

(b) EDUCATION, TRAINING, AND ADVISING GRANTS.—

(1) IN GENERAL.—The Administration may provide financial assistance in the form of grants to resource partners to provide education, training, and advising to covered small business concerns.

(2) USE OF FUNDS.—Grants under this subsection shall be used for the education, training, and advising of covered small business concerns and their employees on—

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of enactment of this Act and ending on September 30, 2021, such a center decides not to collect fees because of the economic consequences of COVID–19, the center shall be considered to be in compliance with that agreement if—

(A) the center notifies the Agency with respect to that decision, which the center may provide through electronic mail; and

(B) the Agency, not later than 15 days after the date on which the center provides notice to the Agency under subparagraph (A)—

(i) confirms receipt of the notification under subparagraph (A); and

(ii) accepts the decision of the center.

(d) **REPORT.**—Not later than 6 months after the date of enactment of this Act, and annually thereafter, the Agency shall submit to the Committee on Small Business and Entrepreneurship and the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Small Business and the Committee on Energy and Commerce of the House of Representatives a report that describes—

(1) with respect to the period covered by the initial report—

(A) the programs and services developed and provided by the Agency, minority business centers, and minority chambers of commerce under subsection (b); and

(B) the initial efforts to provide those services under subsection (b); and

(2) with respect to subsequent years covered by the report—

(A) with respect to the grant program under subsection (b)—

(i) the efforts of the Agency, minority business centers, and minority chambers of commerce to develop services to assist minority business enterprises;

(ii) the challenges faced by owners of minority business enterprises in accessing services provided by the Agency, minority business centers, and minority chambers of commerce;

(iii) the number of unique minority business enterprises that were served by the Agency, minority business centers, or minority chambers of commerce; and

(iv) other relevant outcome performance data with respect to minority business enterprises, including the number of employees affected, the effect on sales, the disruptions of supply chains, and the efforts made by the Agency, minority business centers, and minority chambers of commerce to mitigate these effects .

(e) **AUTHORIZATION OF APPROPRIATIONS.**—There is authorized to be appropriated \$10,000,000 to carry out this section, to remain available until expended.

SEC. 1109. UNITED STATES TREASURY PROGRAM MANAGEMENT AUTHORITY.

(a) **DEFINITIONS.**—In this section—

(1) the terms “appropriate Federal banking agency” and “insured depository institution” have the meanings given those terms in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813);

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(2) the term “insured credit union” has the meaning given the term in section 101 of the Federal Credit Union Act (12 U.S.C. 1752); and

(3) the term “Secretary” means the Secretary of the Treasury.

(b) **AUTHORITY TO INCLUDE ADDITIONAL FINANCIAL INSTITUTIONS.**—The Department of the Treasury, in consultation with the Administrator, and the Chairman of the Farm Credit Administration shall establish criteria for insured depository institutions, insured credit unions, institutions of the Farm Credit System chartered under the Farm Credit Act of 1971 (12 U.S.C. 2001 et seq.), and other lenders that do not already participate in lending under programs of the Administration, to participate in the paycheck protection program to provide loans under this section until the date on which the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the Coronavirus Disease 2019 (COVID–19) expires.

(c) **SAFETY AND SOUNDNESS.**—An insured depository institution, insured credit union, institution of the Farm Credit System chartered under the Farm Credit Act of 1971 (12 U.S.C. 2001 et seq.), or other lender may only participate in the program established under this section if participation does not affect the safety and soundness of the institution or lender, as determined by the Secretary in consultation with the appropriate Federal banking agencies or the National Credit Union Administration Board, as applicable.

(d) **REGULATIONS FOR LENDERS AND LOANS.**—

(1) **IN GENERAL.**—The Secretary may issue regulations and guidance as necessary to carry out the purposes of this section, including to—

(A) allow additional lenders to originate loans under this section; and

(B) establish terms and conditions for loans under this section, including terms and conditions concerning compensation, underwriting standards, interest rates, and maturity.

(2) **REQUIREMENTS.**—The terms and conditions established under paragraph (1) shall provide for the following:

(A) A rate of interest that does not exceed the maximum permissible rate of interest available on a loan of comparable maturity under paragraph (36) of section 7(a) of the Small Business Act (15 U.S.C. 636(a)), as added by section 1102 of this Act.

(B) Terms and conditions that, to the maximum extent practicable, are consistent with the terms and conditions required under the following provisions of paragraph (36) of section 7(a) of the Small Business Act (15 U.S.C. 636(a)), as added by section 1102 of this Act:

(i) Subparagraph (D), pertaining to borrower eligibility.

(ii) Subparagraph (E), pertaining to the maximum loan amount.

(iii) Subparagraph (F)(i), pertaining to allowable uses of program loans.

(iv) Subparagraph (H), pertaining to fee waivers.

(v) Subparagraph (M), pertaining to loan deferment.

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(C) A guarantee percentage that, to the maximum extent practicable, is consistent with the guarantee percentage required under subparagraph (F) of section 7(a)(2) of the Small Business Act (15 U.S.C. 636(a)(2)), as added by section 1102 of this Act.

(D) Loan forgiveness under terms and conditions that, to the maximum extent practicable, is consistent with the terms and conditions for loan forgiveness under section 1106 of this Act.

(e) **ADDITIONAL REGULATIONS GENERALLY.**—The Secretary may issue regulations and guidance as necessary to carry out the purposes of this section, including to allow additional lenders to originate loans under this title and to establish terms and conditions such as compensation, underwriting standards, interest rates, and maturity for under this section.

(f) **CERTIFICATION.**—As a condition of receiving a loan under this section, a borrower shall certify under terms acceptable to the Secretary that the borrower—

(1) does not have an application pending for a loan under section 7(a) of the Small Business Act (15 U.S.C. 636(a)) for the same purpose; and

(2) has not received such a loan during the period beginning on February 15, 2020 and ending on December 31, 2020.

(g) **OPT-IN FOR SBA QUALIFIED LENDERS.**—Lenders qualified to participate as a lender under 7(a) of the Small Business Act (15 U.S.C. 636(a)) may elect to participate in the paycheck protection program under the criteria, terms, and conditions established under this section. Such participation shall not preclude the lenders from continuing participation as a lender under section 7(a) of the Small Business Act (15 U.S.C. 636(a)).

(h) **PROGRAM ADMINISTRATION.**—With guidance from the Secretary, the Administrator shall administer the program established under this section, including the making and purchasing of guarantees on loans under the program, until the date on which the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the Coronavirus Disease 2019 (COVID-19) expires.

(i) **CRIMINAL PENALTIES.**—A loan under this section shall be deemed to be a loan under the Small Business Act (15 U.S.C. 631 et seq.) for purposes of section 16 of such Act (15 U.S.C. 645).

SEC. 1110. EMERGENCY EIDL GRANTS.

(a) **DEFINITIONS.**—In this section—

(1) the term “covered period” means the period beginning on January 31, 2020 and ending on December 31, 2020; and

(2) the term “eligible entity” means—

(A) a business with not more than 500 employees;

(B) any individual who operates under a sole proprietorship, with or without employees, or as an independent contractor;

(C) a cooperative with not more than 500 employees;

(D) an ESOP (as defined in section 3 of the Small Business Act (15 U.S.C. 632)) with not more than 500 employees; or

**IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern District)**

**PROFILES, INC., *et al.*, on behalf of
themselves and all others similarly situated,** *

PLAINTIFFS, *

v. *

CIVIL ACTION NO. 20-CV-894 (SAG)

**BANK OF AMERICA CORPORATION,
et al.,** *

DEFENDANTS. *

* * * * *

TEMPORARY RESTRAINING ORDER

Upon consideration of the Motion for Temporary Restraining Order and Preliminary Injunction (the “TRO Motion”), the accompanying Memorandum of Law and Exhibits, as well as arguments offered by the parties, is ____:_____ a.m./p.m. on the ____ day of April 2020, hereby

ORDERED, for the reasons stated on the record and/or in the accompanying Memorandum Opinion, which reasons are hereby incorporated by reference, that the TRO Motion be, and the same hereby is, GRANTED; and it is further

ORDERED that, upon the posting of a nominal bond in the amount of \$_____, Bank of America Corporation and Bank of America, N.A., together with their officers, agents, servants, employees, and attorneys (collectively, “Bank of America”), are ENJOINED from imposing eligibility requirements other than those requirements set forth in section 1102 of the Coronavirus Aid, Relief, and Economic Security Act upon any business concern, nonprofit organization, veterans organization, or Tribal business concern applying for a loan with Bank of America under the Paycheck Protection Program; and it is further

ORDERED that Bank of America shall post within two (2) hours of the entry of this Temporary Restraining Order a statement on its website and its public Twitter and Facebook accounts that the eligibility requirements enjoined herein are no longer in force and effect; and it is further

ORDERED that this Temporary Restraining Order shall expire at ____:____ a.m/p.m. on the _____ day of _____ 2020, unless before that time this Court, for good cause, extends it for a like period or Bank of America consents to a longer extension; and it is further

ORDERED that the Court shall set the preliminary injunction hearing at the earliest possible time.

SO ORDERED.

STEPHANIE A. GALLAGHER
UNITED STATES DISTRICT JUDGE