

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN ASSOCIATION OF)	
POLITICAL CONSULTANTS)	
1775 Tysons Blvd, 5th Floor)	
McLean, VA 22102)	
)	
RIDDER/BRADEN, INC.)	
1600 Broadway, Suite 1600)	
Denver, CO 80202)	
)	
Plaintiffs,)	No. 1:20-cv-00970
)	
v.)	
)	
UNITED STATES)	
SMALL BUSINESS ADMINISTRATION,)	
409 3rd St, S.W.)	
Washington DC 20416)	
)	
-and-)	
)	
JOVITA CARRANZA)	
<i>In her Official Capacity as</i>)	
<i>Administrator of the</i>)	
<i>U.S. Small Business Administration</i>)	
409 3rd St, S.W.)	
Washington DC 20416)	
)	
Defendants.)	
)	

**FIRST AMENDED VERIFIED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs American Association of Political Consultants, on behalf of its members and Ridder/Braden, Inc., (collectively, “Plaintiffs”) bring this action for declaratory and injunctive relief, against the Small Business Administration (“SBA”) and Jovita Carranza,

in her official capacity as Administrator of the SBA, (collectively, “Defendants”) and complain as follows:

INTRODUCTION

1. In response to the devastating effect that government measures to combat the COVID-19 virus have had on the United States economy, the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) established the Paycheck Protection Program (“PPP”) Loans. These Loans, which are administered and guaranteed by the SBA, assist small businesses with expenses such as payroll, health insurance, and rent expenses during the COVID-19 emergency and permit some recipients to qualify for loan forgiveness. Due to SBA regulations, however, businesses primarily engaged in political or lobbying activities are ineligible for PPP loans (hereinafter the “Political Speech Prohibition”), despite the dire need for economic relief. 13 C.F.R. 120.110(r).

2. Denial of such important and valuable economic relief based on an otherwise eligible recipient’s political or civic involvement clearly violates free speech and equal protection. Specifically, the Political Speech Prohibition violates the First Amendment because it constitutes an unconstitutional condition on speech as well as a content-based speech ban. Excluding businesses primarily engaged in political speech activities from the PPP also deprives them of equal protection in violation of the Fifth Amendment because other similarly situated businesses are eligible for those loans. Such violations are made ever so much more egregious given the dire economic straits resulting from the COVID-19 measures prescribed by the government.

3. Accordingly, Plaintiffs bring an as-applied challenge against the SBA seeking declaratory and injunctive relief to prohibit the SBA from excluding Plaintiffs and other businesses primarily engaged in political and lobbying activity from PPP loans.

PARTIES

4. The American Association of Political Consultants (“AAPC”) is a trade association organized under 26 U.S.C. § 501(c)(6). AAPC’s address is 1775 Tysons Blvd, 5th Floor, McLean, VA 22102.

5. AAPC was founded in 1969 and is a multi-partisan organization consisting of political and public affairs professionals. AAPC has over 1,500 members making it the largest association of political and public affairs professionals. Members include political consultants, media consultants, pollsters, campaign managers, corporate public affairs officers, professors, fund-raisers, congressional staffers, vendors, and lobbyists.

6. AAPC’s membership includes individuals who engage in the political process at varying levels, ranging from local to national politics, and everything in-between. AAPC has its headquarters in McLean, Virginia. Many AAPC members are ineligible for PPP.

7. AAPC member GR Pro, LLC is a multi-member limited liability company incorporated in Oklahoma. Robinson Aff. at ¶¶ 2, 4 (attached as Exhibit D). GR Pro, LLC is located at 316 NW 61st Street, Oklahoma City, Oklahoma 73118. GR Pro, LLC is a full-service political consulting firm providing services to its clients at the federal, state, and local level. *Id.* at ¶ 3. GR Pro, LLC focuses its efforts at advancing its clients’ candidacies for office and ballot measures, and occasionally engages in lobbying. *Id.* GR Pro, LLC is a member of the AAPC. *Id.* at ¶ 6. GR Pro, LLC has already been forced to let go of a

portion of their independent contractors due to the economic turmoil created by COVID-19 measures. *Id.* at ¶ 8. Absent a PPP loan, GR Pro, LLC will suffer even greater financial hardship. *Id.* at ¶ 9. GR Pro, LLC intends to apply for a loan through PPP. *Id.* at ¶¶ 10, 15. GR Pro, LLC has not yet applied because it is ineligible due to the SBA's Political Speech Prohibition. *Id.* GR Pro, LLC is otherwise eligible to participate in PPP. *Id.* at ¶¶ 18-21.

8. AAPC member Karabell Industries, LLC ("Karabell Industries") is a political consulting firm in St Louis Missouri. Karabell Aff. at ¶¶ 2, 6 (attached as Exhibit F). Karabell Industries is located at 4147 West Pin Blvd., Suite 3, Saint Louis, Missouri 63108. Karabell Industries is a full-service political consulting and lobbying firm servicing its clients at the federal, state, and local levels. *Id.* at ¶ 3. As a result of the COVID-19 emergency, Karabell Industries has been forced to lay off some of its employees and reduced its work with independent contractors. *Id.* at ¶¶ 7-9. Because, absent a loan through the PPP, Karabell Industries would suffer even greater financial hardship it applied for a PPP loan through Busey Bank in St. Louis, Missouri. *Id.* at ¶¶ 10-11. On or about April 6, 2020, Karabell Industries was informed that it was ineligible for a PPP loan due to the SBA's Political Speech Prohibition. *Id.* at ¶¶ 12-13. But for the SBA's Political Speech Prohibition, Karabell Industries is eligible to obtain a PPP loan. *Id.* at ¶¶ 14-24.

9. Plaintiff Ridder\Braden, Inc. is a political consulting firm that occasionally engages in lobbying, in Denver, Colorado. Ridder Aff. at ¶¶ 2-3 (attached as Exhibit E). Ridder/Braden, Inc.'s address is 1600 Broadway, Suite 1600, Denver, CO 80202. Ridder\Braden, Inc., performs primarily general political consulting services and public opinion polling services to candidates and ballot measures at the federal, state, and local levels. *Id.* at ¶¶ 2-3, 5. In addition, a small amount of the firm's business is general public

affairs. One of its owners is currently a Colorado registered lobbyist for the Rocky Mountain Wolf Action Fund. *Id.* at ¶ 4. Ridder\Braden, Inc., focuses its business at advancing its clients' candidacies for office and ballot measures, and policy goals. Ridder\Braden, Inc. is also a member of the AAPC. *Id.* at ¶ 7. Ridder\Braden, Inc. has already been forced to reduce their use of independent contractors due to the economic turmoil created by COVID-19 measures. *Id.* at ¶ 9. Absent a PPP loan, Ridder\Braden, Inc. will suffer even greater financial hardship. *Id.* at ¶ 10. Ridder\Braden, Inc. intends to apply for a loan through PPP. *Id.* at ¶¶ 11, 16. Ridder\Braden, Inc. has not yet applied because it is ineligible due to the SBA's Political Speech Prohibition. *Id.* at ¶ 11. Ridder\Braden, Inc. is otherwise eligible to participate in PPP. *Id.* at ¶¶ 12-13, 19-22.

10. Defendant SBA is tasked with assisting and protecting the interests of small businesses by providing financial, contractual, and business development assistance, particularly when small businesses are victims of a disaster. 13 C.F.R. § 101.100. The SBA is located at 409 3rd St, S.W. Washington DC 20416. SBA is headed by an Administrator who is appointed by the President of the United States and confirmed by the United States Senate. 13 C.F.R. § 101.101(a). Importantly here, the SBA is vested with the authority to administer the PPP. 13 C.F.R. § 120.1 *et seq.*; CARES Act, Pub. L. No. 116-136, §1102, 1006 134 Stat. 281 (2020).; *see also* Interim Final Rule, *Business Loan Program Temporary Changes; Paycheck Protection Program*, Docket No. SBA-2020-0015 at 1 (Apr. 2, 2020) (attached as Exhibit A).

11. Defendant Jovita Carranza is the Administrator of the SBA. Ms. Carranza exercises "direction, authority, and control over SBA." Ms. Carranza both determines and

approves all of SBA's programs to provide aid and assistance to small businesses in the United States. 13 C.F.R. § 101.101(a)(1-2).

JURISDICTION

12. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 because this case presents a federal question. Defendants' action prohibiting businesses that primarily engaged in political and lobbying activity from receiving loans that the SBA oversees, violates the Free Speech Clause of the First Amendment and the Due Process Clause of the Fifth Amendment to the United States Constitution.

13. This Court also has jurisdiction pursuant to 15 U.S.C. § 634(b)(1) which vests jurisdiction in any United States District Court to adjudicate cases against the Administrator of the SBA.

14. Venue is appropriate in this Court pursuant to 28 U.S.C. § 1391(e)(1)(A) because the SBA has its headquarters in the District of Columbia. *See* 13 C.F.R. § 101.102 (establishing SBA's headquarters in Washington, D.C.).

FACTUAL ALLEGATIONS

15. As the night of an old decade turned to the dawn of a new decade, a novel virus began to circumnavigate the globe.

16. In the waning days of 2019, what is now known as the novel Coronavirus disease 2019 ("COVID-19") struck its first victims in the city of Wuhan, Hubei Province, China.¹

¹ *See* Covid-19 Data Visualization Center, *New Cases of COVID-19 in World Countries* (Apr. 11, 2020) available at <https://coronavirus.jhu.edu/data/new-cases>.

17. Then, in early January 2020 this mysterious, insidious, and pernicious virus surreptitiously slipped out of China and into Thailand and Japan, infecting more victims.²

18. On January 15, 2020 the World Health Organization (“WHO”) declared an outbreak of this novel virus and warned countries in Asia to be prepared to combat this virus. The WHO also identified this mysterious virus for the first time as COVID-19.³

19. Approximately, one week later, this insidious disease landed on American soil.⁴

20. Three days after that, COVID-19 struck Europe.⁵

21. On January 25, 2020, The WHO began sounding the alarm throughout the Mediterranean region. Four days later, The United Arab Emirates reported its first confirmed COVID-19 victims. Highlighting the insidious nature of this pernicious disease,

² See U.S. Department of Health and Human Services, *Public Health Screening to Begin at 3 U.S. Airports for 2019 Novel Coronavirus* (Jan. 17, 2020) available at <https://www.cdc.gov/media/releases/2020/p0117-coronavirus-screening.html>; see also World Health Organization, *WHO statement on novel coronavirus in Thailand* (Jan. 13, 2020) available at <https://www.who.int/news-room/detail/13-01-2020-who-statement-on-novel-coronavirus-in-thailand>.

³ See World Health Organization, *Coronavirus outbreak shows Asia needs to step up infection preparation* (Jan. 15, 2020) available at <https://www.who.int/westernpacific/news/commentaries/detail-hq/coronavirus-outbreak-shows-asia-needs-to-step-up-infection-preparation>; see also World Health Organization, *Mission Summary: WHO Field Visit to Wuhan, China 20-21 January 2020* (Jan. 22, 2020) available at <https://www.who.int/china/news/detail/22-01-2020-field-visit-wuhan-china-jan-2020>.

⁴ See *supra* n.1.

⁵ See World Health Organization, *WHO’s Eastern Mediterranean Region Scales Up Preparedness for Novel Coronavirus* (Jan. 27, 2020) available at <http://www.emro.who.int/media/news/whos-eastern-mediterranean-region-scales-up-preparedness-for-novel-coronavirus.html>.

the WHO identified that some victims of COVID-19 were asymptomatic, meaning the virus was capable of spreading stealthily.⁶

22. Approximately five days later Spain, Italy, and the United Kingdom reported their first COVID-19 victims.⁷

23. On February 24, 2020, with 35 Americans testing positive for COVID-19, President Trump requested that Congress appropriate \$1.25 billion in funds to prepare for a COVID-19 outbreak.⁸

24. By the beginning of March 2020, COVID-19 had expanded its reach throughout the world and infected 100,000 people.⁹

25. On March 11, 2020, as the number of COVID-19 cases worldwide surpassed 118,000, with victims in 114 countries, the WHO declared COVID-19 a global pandemic.¹⁰

26. Two days later, on March 13, 2020, after this insidious and pernicious virus had struck 2,224 Americans, President Trump declared a national emergency.¹¹

⁶ See World Health Organization, *WHO confirms first cases of novel coronavirus (2019-nCoV) in the Eastern Mediterranean Region* (Jan. 29, 2020) available at <http://www.emro.who.int/media/news/who-confirms-first-cases-of-novel-coronavirus-2019-ncov-in-the-eastern-mediterranean-region.html>.

⁷ See *supra* n.1.

⁸ See Derrick Taylor, *The Trump Administration Asks Congress for \$1.25 Billion For Coronavirus Response*, N.Y. Times (Apr. 7, 2020) available at <https://www.nytimes.com/article/coronavirus-timeline.html>.

⁹ See World Health Organization, *WHO Statement on Cases of COVID-19 Surpassing 100 000* (Mar. 7, 2020) available at <https://www.who.int/news-room/detail/07-03-2020-who-statement-on-cases-of-covid-19-surpassing-100-000>.

¹⁰ See World Health Organization, *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 - 11 March 2020*, available at <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

¹¹ See President Donald J. Trump, *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak* (Mar. 13, 2020)

27. Then, on March 17, 2020, President Trump declared that, for a period of 15 days, gatherings of 10 or more people would be discouraged.¹²

28. The White House in collaboration with the Centers for Disease Control and Prevention (“CDC”) published guidelines for how people should conduct themselves during the following 15 days. Included within these guidelines was the recommendation that, in areas where community spread of COVID-19 is present, “bars, restaurants, food courts, gyms, and other indoor and outdoor venues where groups of people congregate should be closed.” (attached as Exhibit C). Additionally, individuals should avoid discretionary travel, including shopping trips and social visits. *Id.*

29. The CDC has recommended that people maintain a safe social distance of *at least six feet*.¹³ This is because contact with a person within six feet can facilitate transmission of COVID-19.

30. State governments have issued orders requiring various businesses to close or substantially curtail operations.

available at <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>. See also Jordain Carney, *Coronavirus pushes GOP's Biden-Burisma probe to back burner*, The Hill (Mar. 29, 2020) <https://thehill.com/homenews/senate/489950-coronavirus-pushes-gops-biden-burisma-probe-to-back-burner>.

¹² See The White House, *The President's Coronavirus Guidelines for America: 15 Days to Slow the Spread*, available at https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf (last visited Mar. 19, 2020).

¹³ See Centers for Disease Control and Prevention, *Interim U.S. Guidance for Risk Assessment and Public Health Management of Healthcare Personnel with Potential Exposure in a Healthcare Setting to Patients with Coronavirus Disease (COVID-19)* (Mar. 7, 2020) available at <https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-risk-assesment-hcp.html>.

31. For example, on March 12, 2020 Governor Northam of the Commonwealth of Virginia declared a State of Emergency. In his “Declaration Of A State Of Emergency Due To Novel Coronavirus (Covid-19),” Governor Northam declared that COVID-19 is public health threat because it is a communicable disease.¹⁴ Four days later on Monday, March 16, 2020, Governor Northam issued a directive stating that restaurants, fitness centers, and theaters either had to reduce capacity to 10 people or close.¹⁵ On March 23, 2020, Governor Northam ordered all businesses to observe social-distancing practices and to not allow more than 10 people in the business at any one time. If that business could not adhere to those limitations, and it was not deemed an essential business, Governor Northam ordered the business closed. Governor Northam also encouraged businesses that could do so to telework as much as possible.¹⁶ Then, on March 30, Governor Northam issued a “stay at home order” for all Virginians.¹⁷

¹⁴ See Governor Ralph Northam, *Executive Order No. 51 (2020) DECLARATION OF A STATE OF EMERGENCY DUE TO NOVEL CORONAVIRUS (COVID-19)* (Mar. 12, 2020) available at [https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-51-Declaration-of-a-State-of-Emergency-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-51-Declaration-of-a-State-of-Emergency-Due-to-Novel-Coronavirus-(COVID-19).pdf).

¹⁵ See Governor Ralph Northam, *Governor Northam Announces New Measures to Combat COVID-19 and Support Impacted Virginians* (Mar. 17, 2020) available at <https://www.governor.virginia.gov/newsroom/all-releases/2020/march/headline-854487-en.html>.

¹⁶ See Governor Ralph Northam, *Executive Order No. 53, Temporary Restrictions on Restaurants, Recreational, Entertainment, Gatherings, Non-Essential Retail Businesses, and Closure of K-12 Schools Due to Novel Coronavirus (Covid-19)* (Mar. 23, 2020) available at [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-53-Temporary-Restrictions-Due-To-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-53-Temporary-Restrictions-Due-To-Novel-Coronavirus-(COVID-19).pdf).

¹⁷ See Governor Ralph Northam, *Executive Order No. 55, Temporary Stay at Home Order Due to Novel Coronavirus (Covid-19)* (Mar. 30, 2020) available at [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-(COVID-19).pdf).

32. Also on March 16, Mayor Muriel Bowser of the District of Columbia issued an order prohibiting all gatherings of 50 or more people. Mayor Bowser also ordered all restaurants, gyms, nightclubs, spas, and theatres to close.¹⁸ On March 24, 2020, Mayor Bowser ordered all non-essential business to close.¹⁹

33. Also on March 24, 2020, Governor J. Kevin Stitt of Oklahoma declared a state of emergency for Oklahoma and ordered all non-critical businesses to close.²⁰

34. The following day, on March 25, Governor Jared Polis of Colorado ordered all non-critical businesses to close.²¹ Governor Polis has ordered non-critical businesses to remain closed until April 26, 2020.²²

¹⁸ See Mayor Muriel Bowser, *Prohibition on Mass Gatherings During Public Health Emergency* (Mar. 16, 2020) available at <https://mayor.dc.gov/sites/default/files/dc/sites/mayoromb/publication/attachments/MO-Prohibition-on-Mass-Gatherings-During-Public-Health-Emergency.pdf>.

¹⁹ See Mayor Muriel Bowser, *Closure of Non-Essential Businesses and Prohibition on Large Gatherings During Public Health Emergency for the 2019 Novel Coronavirus (COVID-19)* (Mar. 24, 2020) available at https://coronavirus.dc.gov/sites/default/files/dc/sites/mayoromb/release_content/attachments/Mayor%27s%20Order%202020-053%20Closure%20of%20Non-Essential%20Businesses%20and%20Prohibiti....pdf.

²⁰ See Governor Kevin Stitt, *Fourth Amended Executive Order 2020-07* (Mar. 24, 2020) available at <https://www.sos.ok.gov/documents/executive/1919.pdf>.

²¹ See Governor Jared Polis, *Executive Order D 2020-17 Ordering Coloradans to Stay at Home Due to the Presence of COVID-19 in the State* (Mar. 25, 2020) available at https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20017%20Ordering%20Coloradans%20to%20Stay%20at%20Home_0.pdf.

²² See Governor Jared Polis, *Executive Order D 2020-24 Amending and Extending Executive Order D 2020 017 Ordering Coloradans to Stay at Home Due to the Presence of COVID-19* (Apr. 6, 2020) available at https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20024%20Amending%20and%20Extending%20Executive%20Order%20D%202020%20017%20Stay%20at%20Home%20Order_0.pdf.

35. As of April 13, 2020, this insidious and pernicious virus has infected 557,663 Americans and killed 22,116 Americans.²³

36. But COVID-19 is not just ravaging the health of Americans, it is also ravaging the Nation's economy.

37. On January 22, 2020, approximately the day that the first case of COVID-19 was reported in the United States, the Dow Jones Industrial Average closed at 29,186.27, and the unemployment rate was at 3.6 percent.²⁴

38. But by Friday April 3, 2020, 41 states and the District of Columbia had issued stay-at-home orders, meaning 316 million Americans have been ordered to stay at home and not go to work.²⁵

39. Accordingly, on Thursday, April 9, 2020, the Dow Jones Industrial Average had dropped to 23,719.37.²⁶ Furthermore, between March 19 and April 9, 2020, the number of Americans filing for unemployment increased to approximately seventeen million.²⁷

²³ See *supra* n.1.

²⁴ See Fred Imbert, *Stocks Close Little Changed, IBM Leads Tech Shares Higher*, CNBC (Jan. 24, 2020) available at <https://www.cnbc.com/2020/01/22/us-futures-point-to-higher-open.html>; see also U.S. Bureau of Labor and Statistics, *Unemployment Rate 2.0 Percent For College Grads, 3.8 Percent For High School Grads In January 2020* (Feb. 12, 2020) available at <https://www.bls.gov/opub/ted/2020/unemployment-rate-2-percent-for-college-grads-3-8-percent-for-high-school-grads-in-january-2020.htm>.

²⁵ See Sarah Mervosh, *Which States and Cities Have Told Residents to Stay at Home*, N.Y. Times (Apr. 7, 2020) available at <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>.

²⁶ See *Dow Jones Industrial Average*, Wall Street Journal, available at <https://www.wsj.com/market-data/quotes/index/DJIA/historical-prices> (last visited Apr. 11, 2020).

²⁷ See Jim Zarroli, *Jobs Carnage Mounts: 17 Million File For Unemployment In 3 Weeks*, National Public Radio (Apr. 9, 2020) available at <https://www.npr.org/sections/coronavirus-live-updates/2020/04/09/830216099/6-6-million-more-file-for-unemployment-as-coronavirus-keeps-economy-shut>.

40. On March 27, 2020, to provide a much-needed jolt to the American economy, which had been ravaged by COVID-19, President Trump and Congress collaborated to enact the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020). The purpose of the CARES Act was “to provide immediate assistance to individuals, families, and businesses affected by the COVID-19 emergency.” Ex. at 4.

41. Congress vested the SBA with authority “to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID-19 emergency.” Ex. A at 3.

42. Included in the Act is the PPP. Congress established this program to provide economic relief to small businesses nationwide adversely impacted under the COVID-19 Emergency Declaration issued by President Trump on March 13, 2020.”²⁸

43. The SBA stated that due to the various health emergencies declared across the Nation, including the stay-at-home orders state governments had ordered, “small businesses nationwide are experiencing economic hardship . . .” Ex. A at 2. The various measures, including safe distance mandates, are decreasing economic activity for a host of businesses. Ex. A at 3.

44. The SBA received from Congress \$349 billion to “guarantee loans under the [PPP] through June 30, 2020.” Congress’s intent with this program “is that SBA provide relief to America’s small businesses expeditiously.” Ex. A at 5. Small businesses

²⁸ See Administrator Jovita Carranza, *Business Loan Program Temporary Changes; Paycheck Protection Program* (Apr. 2, 2020).

are allowed to borrow up to \$10 million unless the business, using a payroll-based formula, arrives at a lower number. Ex. A at 8-9.

45. The SBA guarantees 100 percent of the loans provided through the PPP. Additionally, recipients *can qualify* for up to 100 percent loan forgiveness after applying for the forgiveness and the SBA approves the request. Ex. A at 3.

46. Loan recipients can use loans through the PPP to help pay the following costs:

- a. Payroll costs;
- b. costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;
- c. employee salaries, commissions, or similar compensations;
- d. payments of interest on any mortgage obligation (which shall not include any prepayment of or payment of principal on a mortgage obligation);
- e. rent (including rent under a lease agreement);
- f. utilities; and
- g. interest on any other debt obligations that were incurred before the covered period.

CARES Act, Pub. L. No. 116-136, §1102(a)(2)(F)(i), 134 Stat. 281 (2020).

47. Lenders can rely on certifications of borrowers to determine eligibility for loans under this program. Ex. A at 5.

48. The CARES Act proclaims that, “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 . . .” CARES Act, Pub. L. No. 116-136, §1102(a)(1)(B)(2)(D)(i), 134 Stat. 281 (2020).

49. To be eligible for this program, a business must:

- a. have 500 employees or less; and
- b. have a principal place of business is in the United States; or
- c. operate a business within a certain industry that meets the SBA’s size standards for that industry; and
- d. have been in operation on February 15, 2020 and had employees or independent contractors that the business was paying;

50. Entities that are eligible for PPP include sole proprietorships, Non-profit entities that are organized under 501(c)(3) of the Internal Revenue Code, tax-exempt veterans entities organized under 501(c)(19) of the Internal Revenue Code, and Tribal businesses organized under Section 31(b)(2)(C) of the Small Business Act. Ex. A at 5-6.

51. A small business is not eligible if it conducts illegal business under federal, state, or local law, employs nannies and/or housekeepers, an owner of 20 percent or more equity is incarcerated, on probation or parole, is subject to indictment, or was convicted of a felony within the last five years, or the business has obtained a federally guaranteed loan that is not currently delinquent or within the past seven years, the business has defaulted on the loan. Ex. A at 7.

52. Importantly for Plaintiffs, a small business is also not eligible for the PPP if it is identified in 13 C.F.R. § 120.110. Ex. A at 8.

53. Businesses that are identified in that section include, but are not limited to:
- a. Non-profit businesses;
 - b. Private clubs and businesses which limit the number of memberships for reasons other than capacity;
 - c. Businesses principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting;
 - d. Businesses that present live performances of a prurient sexual nature or derive “directly or indirectly more than *de minimis* gross revenue through the sale” of items of a prurient sexual nature; and
 - e. *Businesses primarily engaged in political or lobbying activities.*

13 C.F.R. § 120.110 (emphasis added).

54. However, Congress, through the CARES Act, superseded the SBA’s prohibition on certain non-profits receiving loans. *See* 13 C.F.R. § 120.110(a). Under the CARES Act, 501(c)(3)’s, veterans’ groups, and Tribal businesses are eligible to receive loans. Ex. A at 6.

55. Additionally, on Friday April 3, 2020, the SBA issued additional guidance concerning its prohibition on allowing loans to churches. (attached as Exhibit B). Exercising its authority “to modify existing loan programs and establish a new loan program,” the SBA exempted church organizations from the SBA’s affiliation rules that would otherwise make some churches too large to qualify for PPP or otherwise be prohibited from receiving loans. Ex. B at 6-7, 9. This exemption was necessitated under the Religious Freedom Restoration Act. *Id.* at 6.

56. Furthermore, the Administrator determined that the SBA did not have a compelling interest “in denying emergency assistance to faith-based organizations that are facing the same economic hardship to which the CARES Act responded and who would be eligible for PPP but for their faith-based organizational and associational decisions.” Ex. B at 8.

57. Accordingly, the Administrator has decided to exempt from application of SBA’s affiliation rules faith-based organizations that would otherwise be disqualified from participation in PPP because of affiliations that are a part of their religious exercise. Ex. B at 10.

58. But Plaintiff AAPC’s members and Plaintiff Ridder/Braden, Inc. here are still prohibited from receiving funds through the PPP due to the SBA’s regulatory prohibition on giving loans to entities whose “Businesses [are] primarily engaged in political or lobbying activities.” 13 C.F.R. 120.110(r).

59. Plaintiff AAPC has members who have applied for PPP loans, but have been denied those loans due to the SBA’s Political Speech Prohibition. *See, e.g., Karabell Aff.* at ¶¶ 11-13. Those Plaintiffs who have not applied for PPP loans, fully intend to apply but for the SBA’s Political Speech Prohibition codified at 13 C.F.R. § 120.110(r).

60. If Plaintiffs are unable to participate in PPP and the CARE Act’s other loans, Plaintiffs will be forced to abstain or substantially limit the exercise their constitutional right to freedom of speech, particularly speech in the height of political campaigns, and their right to petition government. Not only is this an injury to Plaintiffs, but it is an injury to society as a whole, because speakers will be forced out of the marketplace of ideas. *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

61. That Plaintiffs are still permitted to personally lobby, or speak in political campaigns, outside of their businesses does not address the harm that they suffer here. The SBA's speech activities ban, especially now during an economic crisis unprecedented since the Great Depression, deprives Plaintiffs of the most effective way to petition government and promote candidates for office, namely through speech on behalf of their clients. *See Autor v. Pritzker*, 740 F.3d 176, 183 (D.C. Cir. 2014).

STATEMENT OF APPLICABLE LAW

62. "Premised on a mistrust of governmental power," the First Amendment declares, under no uncertain terms, that "Congress shall make no law... abridging the freedom of speech." U.S. Const. amend. I; *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). The First Amendment prohibits any law that "stands against attempts to disfavor certain subjects or viewpoints." *Citizens United*, 558 U.S. at 340.

63. Speech about public issues "[i]s at the heart of the First Amendment's protection," and therefore, speech concerning salient issues is constitutionally enshrined because it is "the type of speech [that is] indispensable to decision making in a democracy." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776-77 (1978). *See also Eu v. San Francisco Cty. Democratic Central Comm.*, 489 U.S. 214, 223 (1989) ("The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.") (internal quotation omitted); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement

that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”).

64. Statutes that regulate activity based on the content of the speaker’s speech are presumptively unconstitutional. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). A regulation is content-based if it requires “enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred.” *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (internal quotation marks omitted).

65. When a statute imposes a regulation that is based on the content of the speaker’s speech, it is of no constitutional significance whether the statute is a complete prohibition or a limitation. The statute is still presumptively unconstitutional and subject to strict scrutiny. *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 510 (D.C. Cir. 2016) (citing and quoting *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 812 (2000)).

66. Furthermore, the government cannot grant benefits on the condition that you abandon your right to free speech and association. *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (“For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to “produce a result which [it] could not command directly.”).

67. Stated more succinctly, “[t]he Government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.” *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 214 (2013) (internal quotation marks omitted, alteration in the

original). “The First Amendment supplies a limit on Congress’ ability to place conditions on the receipt of funds.” *Id.*

68. For example, the First Amendment prohibits the provision of federal aid to a noncommercial radio station on the condition the radio station never editorialize. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 399-401 (1984).

69. The First Amendment also declares, in no uncertain terms that “Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend. I.

70. Lobbying and political activities are constitutionally protected activities under the First Amendment’s right to petition government. This constitutionally protected right to lobby endures even when the lobbyist receives compensation. *Autor*, 740 F.3d at 182; *Citizens United*, 558 U.S. at 339-40 (stating that political speech, especially in the height of political campaigns, is essential to decision-making in our constitutional republic).

71. In the analogous context of granting tax exempt status to entities, “the discriminatory denial of tax exemptions can impermissibly infringe free speech.” *Big Mama Rag v. United States*, 631 F.2d 1030, 1034 (D.C. Cir. 1980) (citing *Speiser v. Randall*, 357 U.S. 513, 518 (1958)).

CLAIM I

Violation of the Free Speech Clause of the First Amendment to the U.S. Constitution

72. Plaintiffs incorporate by reference paragraphs 1-71 as if fully restated herein.

73. Statutes that regulate activity based upon the content of the speaker’s speech are presumptively unconstitutional. *Reed*, 135 S. Ct. at 2226. A regulation is content-based

if it requires “enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred.” *McCullen*, 573 U.S. at 479 (internal quotation marks omitted).

74. When a statute imposes a regulation that is based on the content of the speaker’s speech, it is of no constitutional significance whether the statute is a complete prohibition or a limitation. The statute is still presumptively unconstitutional and subject to strict scrutiny. *Pursuing America’s Greatness*, 831 F.3d at 510.

75. Accordingly, statutes that act as a prohibition on non-candidate committees from using the name of a candidate in their official committee name is an unconstitutional content-based speech prohibition. *Pursuing America’s Greatness*, 831 F.3d at 510-11; *Pursuing America’s Greatness v. FEC*, 363 F. Supp. 3d 94 (D.D.C. 2019).

76. Similarly, statutes that prohibit robocalls that are “of a political nature including, but not limited to, calls relating to political campaigns” are an unconstitutional content-based speech prohibition. *Cahaly v. LaRosa*, 796 F.3d 399, 402-06 (4th Cir. 2015).

77. This is not the first time the SBA has enacted a content-based speech prohibition that a federal court has declared unconstitutional.

78. In 1983, plaintiffs brought a First Amendment challenge to an SBA regulation known as the “opinion molder rule.” *Mission Trace Invs., Ltd. v. SBA*, 622 F. Supp. 687, 688 (D. Colo. 1985) *rev. on other grounds sub. nom. Ascot Dinner Theatre, Ltd. v. Small Business Admin.*, 887 F.2d 1024 (10th Cir. 1989). Similar to the SBA’s current political and lobbying activity prohibition, the “opinion molder rule” stated the following:

Financial assistance will not be granted by SBA . . . if the applicant is engaged in the creation, origination, expression, dissemination, propagation, or distribution of ideas, values, thoughts, opinions or similar intellectual property, regardless of medium, form or content. Financial

assistance to such applicants is barred in order to avoid Government interference, or the appearance thereof, with the constitutionally protected freedoms of speech and press.

Mission Trace Invs., Ltd., 622 F. Supp. at 689 (quoting 13 C.F.R. § 120.2(d)(4)(1985).

79. After concluding that the “opinion molder rule” “completely deprives otherwise qualified applicants of all their potential SBA benefits solely because they engage in constitutionally protected activity[.]” *id.* at 696, the court turned then to analyze whether the “opinion molder rule” was an unconstitutional content-based speech prohibition.” *Id.*

80. The court concluded that the “opinion molder rule” constituted a content-based speech ban. *Id.* at 697 (“[T]he opinion molder rule discriminates against expression because of the content of that expression.”). The “opinion molder rule” constituted a content-based speech ban even though it banned an entire topic of speech without taking a position within that topic. *Id.* Furthermore, to enforce the “opinion molder rule,” the rule “requires the SBA to examine the content of a loan applicant’s speech.” *Id.*

81. Noting that the SBA’s “opinion molder rule” permits commercial advertising, the court ruled that the First Amendment does not permit favoritism between commercial speech and speech that promotes ideas. *Id.* at 699. The court concluded that “the opinion molder rule inhibits important media of public expression because of the content or viewpoints of the messages expressed.”

82. After balancing the interests under constitutional scrutiny, the court held that the “opinion molder rule” violated the First Amendment. *Id.* at 702. The court concluded that “[a]n agency established to promote economic well-being by assisting viable small businesses may not deny benefits to applicants solely because they engage in

constitutionally protected expression.” *Id.* The SBA did not challenge this holding on appeal and the Tenth Circuit did not review it. *Ascot Dinner Theatre*, 887 F.2d at 1026.

83. Now, making a similar mistake, the SBA has declared that its loans are not eligible for “[b]usinesses [that are] primarily engaged in political or lobbying activities.” 13 C.F.R. § 120.110(r).

84. The SBA’s Political Speech Prohibition constitutes a content-based speech ban because, to enforce it, the SBA must look to the content of Plaintiffs’ speech, here lobbying and political activities. *McCullen*, 573 U.S. at 479.

85. The SBA does not have a compelling interest to prohibit Plaintiffs’ otherwise eligible small businesses from obtaining loans under the PPP.

86. Furthermore, the SBA’s means—a complete prohibition—are not narrowly tailored. Less intrusive means other than a complete ban do exist. *Pursuing America’s Greatness*, 831 F.3d at 510; *League of Women Voters of Cal.*, 468 U.S. at 400-01 (stating that if the federal government granted federal dollars to non-commercial radio stations on the condition that the federal funds not be used for electioneering, but the radio station could use private funds for electioneering, such a grant system would be constitutional).

87. Accordingly, the SBA’s Political Speech Prohibition is an unconstitutional content-based speech prohibition.

CLAIM II
Violation of Unconstitutional Conditions Doctrine of the First Amendment to the U.S. Constitution

88. Plaintiffs incorporate by reference paragraphs 1-87 as if fully restated herein.

89. The First Amendment declares, under no uncertain terms that “Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend. I.

90. Lobbying and political speech are constitutionally protected activities under the First Amendment’s right to petition government. This constitutionally protected right to lobby endures even when the lobbyist receives compensation. *Autor*, 740 F.3d at 182.

91. Although the government has the authority to appropriate funds, Art. I, §8, cl. 1., the “First Amendment supplies a limit on Congress’ ability to place conditions on the receipt of funds.” *Agency for Int’l Dev.*, 570 U.S. at 214.

92. Accordingly, the government cannot grant benefits on the condition that a speaker abandon his or her right to free speech and association. *See, e.g., Perry*, 408 U.S. at 597.

93. Stated more succinctly, “[t]he Government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.” *Agency for Int’l Dev.*, 570 U.S. at 214 (internal quotation marks omitted, alteration in the original).

94. For example, the First Amendment prohibits the conditioning of a noncommercial radio station receiving *any* federal aid that the radio station must never editorialize. *League of Women Voters of Cal.*, 468 U.S. at 399-401.

95. Here, as a condition of receiving a loan through the PPP, administered by the SBA, Plaintiffs must not be “Businesses [that are] primarily engaged in political or lobbying activities.” 13 C.F.R. § 120.110(r).

96. But Plaintiffs are exercising their First Amendment rights by lobbying on behalf of clients and consulting on political speech made in the height of campaigns. But for exercising their constitutional rights, Plaintiffs are otherwise eligible to receive loans through the PPP.

97. The SBA does not provide Plaintiffs with any alternative means to obtain resources in light of government imposed economic shutdowns. Plaintiffs cannot restructure their corporate affairs in such a manner as to obtain these necessary funds because, in the final analysis, Plaintiffs' businesses are still primarily engaged in political and lobbying activity. *Regan v. Taxation With Representation*, 461 U.S. 540, 544 (1983) (holding that lobbying prohibition for entities organized under 501(c)(3) of the Tax Code is not an unconstitutional condition because the plaintiff could establish a dual corporate structure where plaintiff could receive tax-deductible contributions for its non-lobbying work activities and a separate entity for its lobbying activity).

98. The SBA cannot condition the grant of its loans through the PPP on the basis of Plaintiffs abandoning their constitutional right engaged in speech and petition related activities.

CLAIM III

Violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution

99. Plaintiffs incorporate by reference paragraphs 1-98 as if fully restated herein.

100. The Due Process Clause of the Fifth Amendment declares that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Included within the Fifth Amendment's Due Process Clause are the same equal

protection principles contained in the Fourteenth Amendment's Equal Protection Clause. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

101. "The injury in fact in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003).

102. SBA's PPP is available to all businesses, including 501(c)(3) nonprofits, veterans organizations, and faith based groups. But, the SBA prevents businesses that engage primarily in political or lobbying activity from obtaining these loans. 13 C.F.R. § 120.110(r).

103. Here, the SBA's Political Speech Prohibition treats differently those who are exercising their constitutional right to speak and petition government from those who are not. In fact, those who are exercising their constitutional right to speak and petition government are completely prohibited from obtaining these PPP loans. Other small businesses are not. This is an unconstitutional distinction prohibiting those who exercise fundamental constitutional rights from obtaining much needed loans while allowing those who do not exercise fundamental constitutional rights to obtain them. This violates the equal protection component of the Fifth Amendment's Due Process Clause. *Autor v. Blank*, 892 F. Supp. 2d 264, 273 (D.D.C. 2012) *rev.'d* 740 F.3d 176, 184 (2014) ("Because [Plaintiffs] have plausibly alleged that the ban denies them a benefit available to others on account of their exercise of a fundamental right, we must reverse the district court's dismissal of their equal protection claim as well.").

104. Like other small businesses that are coping with the economic impact of COVID-19, Plaintiffs are in dire need of an infusion of funds. They are otherwise eligible

for loans through the PPP. The SBA prohibits Plaintiffs from obtaining this necessary cash infusion because Plaintiffs exercise their fundamental constitutional rights. This violates the equal protection component of the Fifth Amendment.

105. “The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives.” *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101 (1972).

106. A complete prohibition of political consultants and lobbyists from being able to obtain loans is not narrowly tailored. *League of Women Voters of Cal.*, 468 U.S. at 399-401. The government does not have a legitimate interest during this global pandemic in preventing small businesses from obtaining much needed cash to cover payroll and health insurance for their employees just because these small businesses exercise fundamental constitutional rights.

PRAYER FOR RELIEF

A. Pursuant to 28 U.S.C. §§ 2201 and 2202, declare unconstitutional the Paycheck Protection Program’s Political Speech Prohibition contained in 13 C.F.R. § 120.110(r), as applied to Plaintiffs because the Political Speech Prohibition violates the First and Fifth Amendments to the U.S. Constitution.

B. Enjoin all Defendants, their agents, and assigns from enforcing the Paycheck Protection Program’s Political Speech Prohibition contained in 13 C.F.R. § 120.110(r) against all Plaintiffs.

C. Award Plaintiffs reasonable attorneys’ fees pursuant to the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d).

D. Award all other relief that this Court deems just and necessary.

Respectfully submitted, April 15, 2020

/s/ Jason Torchinsky

Jason Torchinsky (D.C. Bar No. 976033)

jtorchinsky@hvjt.law

Jonathan Lienhard (D.C. Bar No. 501845)

jlienhard@hvjt.law

Shawn Sheehy (Va Bar No. 82630)*

ssheehy@hvjt.law

HOLTZMAN VOGEL JOSEFIK TORCHINSKY PLLC

45 North Hill Drive, Suite 100

Warrenton, VA 20186

Phone: (540) 341-8808

Fax: (540) 341-8809

Counsel for Plaintiffs

**Pro Hac Vice Application Forthcoming*

*** Application for Admission to this Court Forthcoming*

Joseph E. Sandler (D.C. Bar No. 255919)

sandler@sandlerreiff.com

Sandler, Reiff, Lamb, Rosenstein & Birkenstock PC

1090 Vermont Ave., N.W. Suite 750

Washington, D.C. 20005

Telephone: 202 479 -1111

Fax: 202-479-1115

Counsel for Plaintiffs

VERIFICATION OF PLAINTIFF
(Pursuant to 28 U.S.C. § 1746)

I Alana Joyce, verify under the penalties of perjury under the laws of the United States of America that the foregoing factual allegations relating to the American Association of Political Consultants are within my personal knowledge and are to the best of my knowledge true, complete, and correct.

Executed on April 15, 2020

A handwritten signature in black ink, appearing to read "Alana Joyce", written in a cursive style. The signature is positioned above the printed name and title.

Alana Joyce
Executive Director of American Association of Political Consultants

CERTIFICATE OF SERVICE

I, Jason Torchinsky, hereby certify that on April 15, 2020, the foregoing has been filed via the CM/ECF system and by email to Emergency_Judge@dcd.uscourts.gov. By agreement of the parties, this filing was also sent via electronic mail and First Class Certified Mail to the Counsel for the Defendants listed below:

/s/ Jason Torchinsky
Jason Torchinsky

Chris Pilkerton
Eric Benderson
Office of General Counsel
U.S. Small Business Administration
409 3rd St, S.W.
Washington DC 20416
eric.benderson@sba.gov

David Morrell
Deputy Assistant Attorney General
Federal Programs Branch
Civil Division
U.S. Department of Justice
Washington, DC 20530
David.M.Morrell@usdoj.gov

James J. Gilligan
Special Litigation Counsel
Civil Division, Federal Programs Branch
U.S. Department of Justice
P.O. Box 883
Washington, D.C. 20044
Tel: 202-514-3358
James.Gilligan@usdoj.gov

Timothy J. Shea
United States Attorney
District of Columbia
555 4th St NW,
Washington, DC 20530
202-252-7566

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 dianna.seaborn@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

SMALL BUSINESS ADMINISTRATION

Docket No. SBA-2020-[]

13 CFR Part 121

Business Loan Program Temporary Changes; Paycheck Protection Program

RIN []

AGENCY: U. S. Small Business Administration.

ACTION: Interim Final Rule.

SUMMARY: On April 2, 2020, the U.S. Small Business Administration (SBA) issued an interim final rule (the Initial Rule) announcing the implementation of sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act). Section 1102 of the Act temporarily adds a new program, titled the “Paycheck Protection Program,” to the SBA’s 7(a) Loan Program. Section 1106 of the Act provides for forgiveness of up to the full principal amount of qualifying loans guaranteed under the Paycheck Protection Program. The Paycheck Protection Program and loan forgiveness are intended to provide economic relief to small businesses nationwide adversely impacted by the Coronavirus Disease 2019 (COVID-19). This interim final rule supplements the Initial Rule with additional guidance regarding the application of certain affiliate rules applicable to SBA’s implementation of sections 1102 and 1106 of the Act and requests public comment.

DATES: Effective Date: This interim final rule is effective [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-[] 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, tribal, and local public health measures that are being taken to minimize the public's exposure to the virus. These measures, some of which are government-mandated, are being implemented nationwide and include the closures of restaurants, bars, and gyms. In addition, based on the advice of public health officials, other measures, such as keeping a safe distance

from others or even stay-at-home orders, are being implemented, resulting in a dramatic decrease in economic activity as the public avoids malls, retail stores, and other businesses.

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act or the Act) (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. On April 2, 2020, SBA issued an interim final rule (the Initial Rule) announcing the implementation of sections 1102 and 1106 of the Act. A more detailed discussion of sections 1102 and 1106 of the Act is found in section III of the Initial Rule.

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

II. Comments and Immediate Effective Date

The intent of the Act is that SBA provide relief to America’s small businesses expeditiously. This intent, along with the dramatic decrease in economic activity nationwide, provides good cause for SBA to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act (5 U.S.C. 553(b)(3)(B)). Specifically, small businesses need to be informed on how to apply for a loan and the terms of the loan under section 1102 of the Act as soon as

possible because the last day to apply for and receive a loan is June 30, 2020. The immediate effective date of this interim final rule will benefit small businesses so that they can immediately apply for the loan with a better understanding of loan terms and conditions. This interim final rule is effective without advance notice and public comment because section 1114 of the Act authorizes SBA to issue regulations to implement Title 1 of the Act without regard to notice requirements. This rule is being issued to allow for immediate implementation of this program. Although this interim final rule is effective immediately, comments are solicited from interested members of the public on all aspects of the interim final rule. These comments must be submitted on or before [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. Affiliate Rules for Paycheck Protection Program

Overview

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

1. Affiliation Rules Generally

Are affiliates considered together for purposes of determining eligibility?

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

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

An entity generally is eligible for the PPP if it, combined with its affiliates, is a small business as defined in section 3 of the Small Business Act (15 U.S.C. 632), or (1) has 500 or fewer employees whose principal place of residence is in the United States or is a business that operates in a certain industry and meets applicable SBA employee-based size standards for that industry, and (2) is a tax-exempt nonprofit organization described in section 501(c)(3) of the Internal Revenue Code (IRC), a tax-exempt veterans organization described in section 501(c)(19) of the IRC, a Tribal business concern described in section 31(b)(2)(C) of the Small Business Act, or any other business concern. Prior to the Act, the nonprofit organizations listed above were not eligible for SBA Business Loan Programs under section 7(a) of the Small Business Act; only for-profit small business concerns were eligible. The Act made such nonprofit organizations not only eligible for the PPP, but also subjected them to SBA's affiliation rules. Specifically, section 1102 of the Act provides that the provisions applicable to

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

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

affiliations under 13 CFR 121.103 apply with respect to nonprofit organizations and veterans organizations in the same manner as with respect to small business concerns. However, the detailed affiliation standards contained in section 121.103 currently do not apply to PPP borrowers, because section 121.103(a)(8) provides that applicants in SBA's Business Loan Programs (which include the PPP) are subject to the affiliation rule contained in 13 CFR 121.301.

2. Faith-Based Organizations

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

A substantial burden under RFRA includes both government action that compels a person to violate his sincere religious beliefs or suffer a penalty, *see, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014), and the imposition of a substantial burden through "indirect" measures. *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717-18 (1981). Notably, the government imposes a substantial burden on religious exercise when it "conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief." *Id.* at 718. For example, in

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

SBA is aware of the existence of faith-based organizations that would qualify for relief under the CARES Act but for their affiliation with other entities as an aspect of their religious practice. Supreme Court precedent has long recognized that the organizational structure of faith-based entities may itself be a matter of significant religious concern and that faith-based organizations are therefore guaranteed the “power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). Moreover, an assessment of the extent to which questions concerning religious polity rest upon theological or other religious foundations presents particular difficulties, for the First Amendment “forbids civil courts” from “the interpretation of particular church doctrines and the importance of those doctrines to the religion.” *Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 450 (1969). A number of faith-based organizations understand their affiliation with other religious entities as a part of their exercise of religion, as a mandate given

the “hierarchical or connectional” structure of their church, *Jones v. Wolf*, 443 U.S. 595, 597 (1979), or as an expression of their sincere religious belief. *Cf.* 1 W. Cole Durham & Robert Smith, *Religious Organizations and the Law* § 8.19 (Westlaw rev. ed. 2017) (“Religious organizations, such as parishes or mission centers, normally tend to choose the civil-property-holding structures that most closely mirror their own ecclesiology or polity.”). Either affiliation decision falls within the definition of “religious exercise” that applies to RFRA, which “includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” *See* 42 U.S.C. 2000cc-5(7)(A); 2000bb-2(4) (“the term ‘exercise of religion’ means religious exercise, as defined in section 2000cc-5 of this title”).

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

The Administrator has also concluded that she does not have a compelling interest in denying emergency assistance to faith-based organizations that are facing the same economic hardship to which the CARES Act responded and who would be eligible for PPP but for their faith-based organizational and associational decisions. This conclusion is reinforced by the fact that the affiliation rules already contain numerous exemptions, *see generally* 13 C.F.R. 121.103(b), ranging from “[b]usiness concerns owned and controlled by Indian Tribes, Alaska Native Corporations, [and] Native Hawaiian Organizations,” *id.* 121.103(b)(2)(i) to “member shareholders of a small agricultural cooperative.” *Id.* 121.103(b)(7). In light of these exemptions, it is difficult to maintain that denying relief to these faith-based organizations is necessary to further a compelling government interest, let alone the least restrictive means of

doing so. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (“[A] law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited.”) (cleaned up); *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 433 (2006) (applying same principle under RFRA). SBA accordingly must exempt faith-based organizations that would otherwise be disqualified from the PPP based on features of those organizations’ affiliations that are a matter of sincere religious exercise as defined in 42 U.S.C. 2000bb-2.

This action is also supported by 15 U.S.C. 634(b)(6), which authorizes the Administrator to “make such rules and regulations as he deems necessary to carry out the authority vested in him by or pursuant to this chapter.” As relevant here, the CARES Act expanded eligibility for the covered loans during the covered period for nonprofit organizations that employ not more than 500 employees or, if applicable, the size standard in number of employees established by the Administrator for the industry in which the nonprofit organization operates. 15 U.S.C. 636(a)(36)(D)(i). That expansion posed unique concerns for the Administrator, who is tasked with applying the “provisions applicable to affiliations under section 121.103 of title 13, Code of Federal Regulations, or any successor thereto, . . . with respect to a nonprofit organization and a veterans organizations in the same manner as with respect to a small business concern.” *Id.* 636(a)(36)(D)(vi). Although these rules may easily be applied to faith-based organizations in many cases, their application to certain faith-based organizations presents significant challenges, in particular because of the large number of faith-based organizations who would now be eligible for the PPP but for their religious exercise.

As discussed above, carrying the affiliation rules over to all faith-based organizations without modification would raise concerns under RFRA. Moreover, application of the affiliation

rules, which, for example, provide for assessment of whether one faith-based organization “controls or has the power to control” another organization, 13 C.F.R. 121.103(a)(1), could involve SBA in questions of church governance concerning “the allocation of power within a (hierarchical) church so as to decide . . . religious law (governing church polity),” in violation of the First Amendment. *Serbian E. Orthodox Diocese for the U.S.A. & Canada v. Milivojevich*, 426 U.S. 696, 709 (1979) (internal quotation marks omitted)). Finally, affiliation rules developed in the context of for-profit enterprises present significant administrative difficulties where faith-based organizations are concerned. For example, “the notion of corporate subsidiarity or affiliation in civil law is entirely foreign to the polity of religious organizations,” and there is a significant risk that civil authorities will “mischaracterize or misinterpret the polity of a religious body.” 1 W. Cole Durham & Robert Smith, *Religious Organizations and the Law* §§ 8.19, 8.21 (discussing examples of judicial mischaracterizations). Consistent with these concerns, it is also notable that other areas of federal law approach issues analogous to affiliation differently for religious organizations. *See, e.g.*, 26 U.S.C. 512 (b)(12).

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

Accordingly, the SBA’s affiliation rules, including those set forth in 13 CFR part 121, do not apply to the relationship of any church, convention or association of churches, or other faith-based organization or entity to any other person, group, organization, or entity that is based on a sincere religious teaching or belief or otherwise constitutes a part of the exercise of religion.

This includes any relationship to a parent or subsidiary and other applicable aspects of organizational structure or form. A faith-based organization seeking loans under this program may rely on a reasonable, good faith interpretation in determining whether its relationship to any other person, group, organization, or entity is exempt from the affiliation rules under this provision, and SBA will not assess, and will not require participating lenders to assess, the reasonableness of the faith-based organization's determination.

3. Additional Information

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

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

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

Executive Orders 12866, 13563, and 13771

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

Executive Order 12988

SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth

in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. The rule has no preemptive or retroactive effect.

Executive Order 13132

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

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

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

List of subjects in 13 CFR part 121

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

For the reasons stated in the preamble, the Small Business Administration revises 13 CFR Part 121 as set forth below:

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

Authority: 15 U.S.C. 632, 634(b)(6), 636(a)(36); 662, and 694a(9), Pub. L. No. 116-136, Section 1114.

2. Revise § 121.103(b) by adding (b)(10) to read as follows:

§ 121.103 How does SBA determine affiliation?"

(b) ***

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

(ii) No specific process or filing is necessary to claim the benefit of this exemption. In applying for a loan under the PPP, a faith-based organization may make all necessary

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

3. Add Addendum A to part 121 to read as follows:

[Sample]

ADDENDUM A

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

Dated:

Jovita Carranza,
Administrator

EXHIBIT

C

THE PRESIDENT'S **CORONAVIRUS GUIDELINES** FOR AMERICA

15 DAYS TO SLOW THE SPREAD

Listen to and follow the directions of your **STATE AND LOCAL AUTHORITIES**.

IF YOU FEEL SICK, stay home. Do not go to work. Contact your medical provider.

IF YOUR CHILDREN ARE SICK, keep them at home. Do not send them to school. Contact your medical provider.

IF SOMEONE IN YOUR HOUSEHOLD HAS TESTED POSITIVE for the coronavirus, keep the entire household at home. Do not go to work. Do not go to school. Contact your medical provider.

IF YOU ARE AN OLDER PERSON, stay home and away from other people.

IF YOU ARE A PERSON WITH A SERIOUS UNDERLYING HEALTH CONDITION that can put you at increased risk (for example, a condition that impairs your lung or heart function or weakens your immune system), stay home and away from other people.



For more information, please visit
CORONAVIRUS.GOV

DO YOUR PART TO SLOW THE SPREAD OF THE CORONAVIRUS

Even if you are young, or otherwise healthy, you are at risk and your activities can increase the risk for others. It is critical that you do your part to slow the spread of the coronavirus.

Work or engage in schooling **FROM HOME** whenever possible.

IF YOU WORK IN A CRITICAL INFRASTRUCTURE INDUSTRY, as defined by the Department of Homeland Security, such as healthcare services and pharmaceutical and food supply, you have a special responsibility to maintain your normal work schedule. You and your employers should follow CDC guidance to protect your health at work.

AVOID SOCIAL GATHERINGS in groups of more than 10 people.

Avoid eating or drinking at bars, restaurants, and food courts — **USE DRIVE-THRU, PICKUP, OR DELIVERY OPTIONS.**

AVOID DISCRETIONARY TRAVEL, shopping trips, and social visits.

DO NOT VISIT nursing homes or retirement or long-term care facilities unless to provide critical assistance.

PRACTICE GOOD HYGIENE:

- *Wash your hands, especially after touching any frequently used item or surface.*
- *Avoid touching your face.*
- *Sneeze or cough into a tissue, or the inside of your elbow.*
- *Disinfect frequently used items and surfaces as much as possible.*

CORONAVIRUS.GOV

School operations can accelerate the spread of the coronavirus. Governors of states with evidence of community transmission should close schools in affected and surrounding areas. Governors should close schools in communities that are near areas of community transmission, even if those areas are in neighboring states. In addition, state and local officials should close schools where coronavirus has been identified in the population associated with the school. States and localities that close schools need to address childcare needs of critical responders, as well as the nutritional needs of children.

Older people are particularly at risk from the coronavirus. All states should follow Federal guidance and halt social visits to nursing homes and retirement and long-term care facilities.

In states with evidence of community transmission, bars, restaurants, food courts, gyms, and other indoor and outdoor venues where groups of people congregate should be closed.

EXHIBIT

D

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN ASSOCIATION OF
POLITICAL CONSULTANTS

Et al.

Plaintiffs,

v.

UNITED STATES
SMALL BUSINESS ADMINISTRATION,

-and-

JOVITA CARRANZA
*In her Official Capacity as
Administrator of the
U.S. Small Business Administration*

Defendant.

Civil Case No. _____

AFFIDAVIT OF KARMA ROBINSON

I, Karma Robinson, hereby make this declaration pursuant to 28 U.S.C. § 1746.

1. My name is Karma Robinson, I am above the age of eighteen, and I make the following declaration based upon my personal knowledge.
2. I am one of three self-employed owners at GR Pro, LLC, a political consulting firm that occasionally engages in lobbying, in Oklahoma City, Oklahoma.
3. GR Pro, LLC is a full service political consulting firm that occasionally engages in lobbying providing services to its clients at the federal, state, and local level.

- GR Pro, LLC focuses its efforts at advancing its clients' candidacies for office and ballot measures, and policy goals.
4. GR Pro, LLC is a multi-member limited liability company that is organized in Oklahoma.
 5. I serve as President of GR Pro, LLC.
 6. GR Pro, LLC is a member of the American Association of Political Consultants.
 7. GR Pro, LLC has three self-employed owners.
 8. GR Pro, LLC has two independent contractors. These two independent contractors have been let go due to the economic turmoil caused by the COVID-19 pandemic.
 9. Absent a loan through the Paycheck Protection Program, GR Pro, LLC will suffer as a business and will face financial hardship.
 10. GR Pro, LLC fully intends to apply for a loan through the SBA's Paycheck Protection Program. GR Pro, LLC has not yet applied because it is ineligible due to the SBA's prohibition on giving loans to businesses primarily engaged in political consulting. 13 C.F.R. § 120.110(r).
 11. But for the fact that GR Pro, LLC's business is primarily engaged in political consulting, GR Pro, LLC is otherwise eligible to obtain a loan through the SBA's Paycheck Protection Program.
 12. We have fewer than 500 employees.
 13. Our primary place of business is in Oklahoma City, Oklahoma, United States of America.
 14. GR Pro, LLC was in operation both on and before February 15, 2020. GR Pro,

LLC had independent contractors and self-employed owners that GR Pro, LLC was paying both on and before February 15, 2020.

15. As stated above, GR Pro, LLC intends to request a loan through the Paycheck Protection Program because the current economic uncertainty created by the COVID-19 pandemic makes our loan request necessary to continue GR Pro, LLC's day-to-day business affairs.
16. The money will be used to pay GR Pro, LLC's self-employed owners, independent contractors, lease payments, and utility payments.
17. To maintain operations at GR Pro, LLC, to pay the self-employed owners, and to continue paying our independent contractors, we intend to seek a loan of approximately \$40,000.
18. Other than that GR Pro, LLC's business is primarily engaged in political consulting and occasionally in lobbying activities, GR Pro, LLC is not otherwise ineligible to receive a loan through the Paycheck Protection Program through any of the other excluded businesses identified in 13 C.F.R. § 120.110.
19. GR Pro, LLC operates a legal and legitimate business.
20. None of the self-employed owners of GR Pro, LLC has been convicted of a felony within the past five years. Nor are any of the self-employed owners "presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction."
21. GR Pro, LLC, and none of the self-employed owners of GR Pro, LLC, have never sought or obtained a loan from the SBA or any other federal agency that is currently delinquent or has defaulted on the loan within the past seven years.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 9, 2020

A handwritten signature in black ink, appearing to read "Karma Robinson", is written over a horizontal line. The signature is cursive and stylized.

Karma Robinson
President, GR Pro, LLC

EXHIBIT

E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN ASSOCIATION OF
POLITICAL CONSULTANTS

Et. al.

Plaintiffs,

v.

UNITED STATES
SMALL BUSINESS ADMINISTRATION,

-and-

JOVITA CARRANZA
*In her Official Capacity as
Administrator of the
U.S. Small Business Administration*

Defendant.

Civil Case No. _____

AFFIDAVIT OF VICTOR F. RIDDER

I, Victor F. Ridder, hereby make this declaration pursuant to 28 U.S.C. § 1746.

1. My name is Victor F. Ridder, I am above the age of eighteen, and I make the following declaration based upon my personal knowledge.
2. I am one of two shareholders at Ridder\Braden, Inc., a political consulting firm that occasionally engages in lobbying, in Denver Colorado.
3. Ridder\Braden, Inc., is a political consulting firm that performs primarily general political consulting services and public opinion polling services to candidates and

ballot measures at the federal, state, and local levels. In addition, a small amount of the firm's business is general public affairs.

4. Through the firm, I am currently a registered lobbyist in Colorado for the Rocky Mountain Wolf Action Fund.
5. Ridder\Braden, Inc., focuses its business at advancing its clients' candidacies for office and ballot measures, and policy goals.
6. Ridder\Braden, Inc., corporation organized under the laws of Colorado.
7. Ridder\Braden, Inc., is a member of the American Association of Political Consultants.
8. Ridder\Braden, Inc., four employees (including the two shareholders).
9. Ridder\Braden, Inc., uses several independent contractors as subvendors. Our use of independent contractors has been dramatically reduced due to the economic turmoil caused by the COVID-19 pandemic.
10. Absent a loan through the Paycheck Protection Program, Ridder\Braden, Inc. will suffer as a business and will face financial hardship absent a loan to retain employees and maintain payroll.
11. Ridder\Braden, Inc., fully intends to apply for a loan through the SBA's Paycheck Protection Program. Ridder\Braden, Inc. has not yet applied because it is ineligible due to the SBA's prohibition on giving loans to businesses primarily engaged in political consulting. 13 C.F.R. § 120.110(r).
12. But for the fact that Ridder\Braden, Inc.'s business is primarily engaged in political consulting, Ridder\Braden, Inc. is otherwise eligible to obtain a loan through the SBA's Paycheck Protection Program.

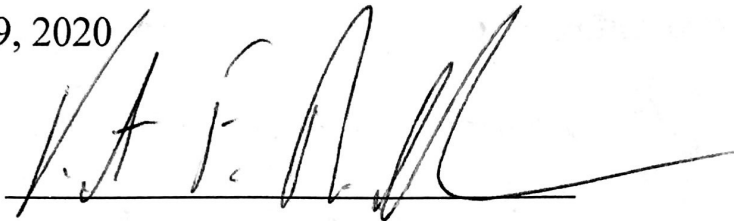
13. We have fewer than 500 employees.
14. Our primary place of business is in Denver, Colorado, United States of America.
15. Ridder\Braden, Inc. was in operation both on and before February 15, 2020.
Ridder\Braden, Inc. had independent contractors and self-employed owners that
Ridder\Braden, Inc. was paying both on and before February 15, 2020.
16. As stated above, Ridder\Braden, Inc. intends to request a loan through the
Paycheck Protection Program because the current economic uncertainty created
by the COVID-19 pandemic makes our loan request necessary to continue
Ridder\Braden, Inc.'s day-to-day business affairs.
17. The money will be used to pay Ridder\Braden, Inc. employees, independent
contractors, lease payments, and utility payments.
18. To maintain operations at Ridder\Braden, Inc. to pay the employees, and to
continue paying our independent contractor, we intend to seek a loan of
approximately \$68,750 reflecting an average monthly payroll of approximately
\$25,000 and rent and utilities of approximately \$2,250 per month .
19. Other than that Ridder\Braden, Inc. business is primarily engaged in political
consulting and occasionally in lobbying activities, Ridder\Braden, Inc. is not
otherwise ineligible to receive a loan through the Paycheck Protection Program
through any of the other excluded businesses identified in 13 C.F.R. § 120.110.
20. Ridder\Braden, Inc. operates a legal and legitimate business.
21. None of the self-employed owners of Ridder\Braden, Inc. has been convicted of a
felony within the past five years. Nor are any of the self-employed owners
“presently subject to an indictment, criminal information, arraignment, or other

means by which formal criminal charges are brought in any jurisdiction.”

22. Ridder\Braden, Inc. and none of the self-employed owners of Ridder\Braden, Inc. have never sought or obtained a loan from the SBA or any other federal agency that is currently delinquent or has defaulted on the loan within the past seven years.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 9, 2020

A handwritten signature in black ink, appearing to read 'V. F. Ridder', is written over a horizontal line. The signature is stylized and cursive.

Victor F. Ridder
Shareholder, Ridder\Braden, Inc.,

EXHIBIT

F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN ASSOCIATION OF)
POLITICAL CONSULTANTS)
)
)
Et al.)
) Civil Case No. _____
)
Plaintiffs,)
)
v.)
)
UNITED STATES)
SMALL BUSINESS ADMINISTRATION,)
)
-and-)
)
JOVITA CARRANZA)
In her Official Capacity as)
Administrator of the)
U.S. Small Business Administration)
)
Defendant.)

AFFIDAVIT OF ELI KARABELL

I, Eli Karabell, hereby make this declaration pursuant to 28 U.S.C. § 1746.

1. My name is Eli Karabell, I am above the age of eighteen, and I make the following declaration based upon my personal knowledge.
2. I am the majority owner at Karabell Industries, LLC, a political consulting firm in St. Louis, Missouri.
3. Karabell Industries, LLC is a full service political consulting and lobbying firm servicing its clients at the federal, state, and local level.

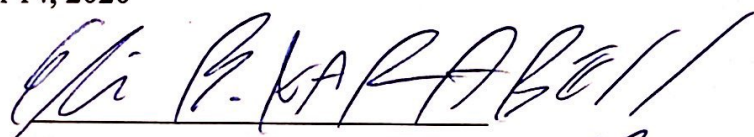
4. Karabell Industries, LLC is an LLC that is organized in Missouri.
5. I am the majority owner of Karabell Industries, LLC.
6. I am a member of the AAPC.
7. At the beginning of the COVID crisis, Karabell Industries, LLC had ten employees.
8. As a result of my own clients suspending their campaigns and operations, I have laid off three of my employees. I would rehire them if I successfully obtain an SBA loan.
9. Karabell Industries, LLC has several independent contractors. These several independent contractors have had their workload from my firm as a result of the COVID crisis.
10. Absent a loan through the Paycheck Protection Program, Karabell Industries, LLC will suffer as a business and will face financial hardship.
11. Karabell Industries, LLC applied for PPP loan through Busey Bank in St. Louis, Missouri.
12. On or about April 6, 2020, my banker verbally informed me that my business was ineligible for the PPP loan because of my firm's line of business.
13. Karabell Industries, LLC was rejected for a loan due to the SBA's prohibition on giving loans to businesses primarily engaged in political consulting. 13 C.F.R. § 120.110(r).
14. But for the fact that Karabell Industries, LLC business is primarily engaged in political consulting and lobbying, Karabell Industries, LLC is otherwise eligible to obtain a loan through the SBA's Paycheck Protection Program.

15. We have fewer than 500 employees.
16. Our primary place of business is in St. Louis, Missouri, United States of America.
17. Karabell Industries, LLC was in operation both on and before February 15, 2020.
Karabell Industries, LLC had ten employees and several independent contractors that Karabell Industries, LLC was paying both on and before February 15, 2020.
18. As stated above, Karabell Industries, LLC was applied for a loan through the Paycheck Protection Program because the current economic uncertainty created by the COVID-19 pandemic makes our loan request necessary to continue Karabell Industries, LLC day-to-day business affairs.
19. The money will be used to pay Karabell Industries, LLC's employees, independent contractors, lease payments, and utility payments.
20. To maintain operations at Karabell Industries, LLC, the employees we intend to seek a loan of approximately \$87,000.
21. Other than that Karabell Industries, LLC business is primarily engaged in political consulting, Karabell Industries, LLC is not otherwise ineligible to receive a loan through the Paycheck Protection Program through any of the other excluded businesses identified in 13 C.F.R. § 120.110.
22. Karabell Industries, LLC operates a legal and legitimate business.
23. I have not been convicted of a felony within the past five years. Nor are have am "presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction."
24. Karabell Industries, LLC and its owner (me) have never sought or obtained a loan from the SBA or any other federal agency that is currently delinquent or has

defaulted on the loan within the past seven years.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 14, 2020


Eli Karabell
Karabell Industries, LLC