



The “Small Business” Myth of the Paycheck Protection Program

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Congress responded to the pandemic-induced recession with the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act. A highly publicized feature of the Act was the Paycheck Protection Program (“PPP”). Congress presented the PPP’s forgivable loans as a lifeline for small businesses reeling from loss of revenue. When initial funding for the program was quickly exhausted, the media, politicians, and the public excoriated large corporations, such as Shake Shack and AutoNation, for having taken millions in PPP loans.

This paper argues that despite the universal condemnation, large corporations like these acted consistently with the intent of the PPP. Instead, the real blame falls on Congress for carelessly designing a program without a coherent policy objective. Although politicians characterized the PPP as a rescue program for small business, it was designed to assist a wide range of firms, with no preference for very small, disadvantaged, or economically troubled firms. The PPP was not limited to businesses that lacked other access to capital, and explicitly included hotel and restaurant chains and large franchise networks. Despite its generous terms and wide applicability, the PPP also contained arbitrary and confusing restrictions on how loan

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proceeds could be used. The misinformed condemnation of large companies obscured the fact that Congress had designed a flawed program with limited ability to help small businesses.

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INTRODUCTION

In March 2020, Congress created the Paycheck Protection Program (“PPP”) to help businesses weather the recession caused by the COVID-19 pandemic. When large corporations, including Shake Shack, Ruth’s Hospitality Group (the parent company of Ruth’s Chris Steakhouse) and AutoNation received millions of dollars from the PPP, the media and politicians accused the companies of abusing the program.¹ According to news outlets, the companies had taken money “meant to help small businesses”² by exploiting “a loophole.”³ Republican Senator Marco Rubio of Florida, one of the primary architects of the law, announced, “[t]here have been some people, some companies approved that I believe should not have been under the intent of the law.”⁴ Treasury Secretary Steven Mnuchin stated on Twitter that he was “glad to see” Shake Shack return its loan in response to the negative publicity.⁵

Despite the torrent of criticism, those corporations had done nothing illegal or unethical. Congress and the Treasury designed the PPP to benefit large businesses as well as small ones. It was clearly intended to assist a wide range of businesses, specifically including multinational hotel and restaurant chains. The story of the PPP is less a story of outrageous corporate malfeasance than one of normal business conduct

¹ See Jessica Silver-Greenberg, David Enrich, Jesse Drucker & Stacy Cowley, *Large, Troubled Companies Got Bailout Money in Small-Business Loan Program*, N.Y. TIMES (May 13, 2020), <https://www.nytimes.com/2020/04/26/business/coronavirus-small-business-loans-large-companies.html?searchResultPosition=9> [https://perma.cc/FS2U-UAHQ]; Zachary Warmbrodt, *Big Restaurant Chains Get Small Business Aid, Sparking Backlash*, POLITICO (Apr. 15, 2020, 3:59 PM EDT), <https://www.politico.com/news/2020/04/15/restaurant-chains-coronavirus-aid-188533?emci=fff76bc4-5482-ea11-a94c-00155d03b1e8&emdi=b1b6b3f6-5682-ea11-a94c-00155d03b1e8&ceid=3837099> [https://perma.cc/YJ2G-VGH6]. *Contra* David Dayen, *Small Businesses Realize Small Business Loans Aren’t Meant to Save Small Businesses*, AM. PROSPECT: UNSANITIZED (May 11, 2020), <https://prospect.org/coronavirus/unsanitized-small-business-loans-not-meant-to-save-small-businesses/> [https://perma.cc/UE5G-T3E8].

² Bill Chappell, *Shake Shack Returns \$10 Million Loan to U.S. Program for Small Businesses*, NPR (Apr. 20, 2020, 9:58 AM ET), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/20/838439215/shake-shack-returns-10-million-loan-to-u-s-program-for-small-businesses> [https://perma.cc/94KX-HGY2].

³ Greg Iacurci, *Here’s How Big Companies Used a Loophole to Get Paycheck Protection Program Loans*, CNBC (Apr. 21, 2020, 10:32 AM EDT), <https://www.cnbc.com/2020/04/20/how-shake-shack-potbelly-and-ruths-chris-got-small-business-loans.html> [https://perma.cc/TA4H-SJWA].

⁴ *Id.*

⁵ *Id.*

and an overly credulous media and public grappling with political ineptitude and hypocrisy.

I. THE CARES ACT AND THE PPP

The U.S. documented its first novel coronavirus case in January 2020.⁶ As we now know, the nation was slow to appreciate the devastating effects the virus would have on health and the economy. In early February, the Federal Reserve cautioned that the virus could impede economic growth, but also asserted that a recession was unlikely in the next year.⁷ The U.S. downplayed the risk of a domestic outbreak⁸ even as the virus spread through Asia and Europe, and the World Health Organization declared a worldwide pandemic.⁹ Stock markets plummeted on March 12; the Dow Jones Industrial Average lost 10%, its largest one-day percentage drop since 1987.¹⁰ The following day, President Trump declared a national emergency, unlocking federal funds to assist state and local governments.¹¹ By March 23, nine states

⁶ See Nick Schwellenbach, *The First 100 Days of the U.S. Government's COVID-19 Response*, POGO (May 6, 2020), <https://www.pogo.org/analysis/2020/05/the-first-100-days-of-the-u-s-governments-covid-19-response/#284143> [<https://perma.cc/K9N6-7F8X>].

⁷ See Howard Schneider & Lindsay Dunsmuir, *Fed Says Risks to Economy Easing, But Calls Out Coronavirus in Report to Congress*, REUTERS (Feb. 7, 2020, 8:11 AM), <https://www.reuters.com/article/us-usa-fed-report/fed-says-risks-to-economy-easing-but-calls-out-coronavirus-in-report-to-congress-idUSKBN20122X> [<https://perma.cc/R6SR-4JJ9>].

⁸ See U.S. DEP'T OF HEALTH & HUMAN SERVS., U.S. GOVERNMENT COVID-19 RESPONSE PLAN 2 (2020), <https://int.nyt.com/data/documenthelper/6819-covid-19-response-plan/d367f758bec47cad361f/optimized/full.pdf> [<https://perma.cc/BJE2-UJUW>] (stating that the "immediate risk of being exposed to the virus is thought to be low" as of March 11).

⁹ Tedros Adhanom Ghebreyesus, Director-General, World Health Org., WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> [<https://perma.cc/9HQF-RV7E>].

¹⁰ Pippa Stevens, Maggie Fitzgerald & Fred Imbert, *Stock Market Live Thursday: Dow Tanks 2,300 in Worst Day Since Black Monday, S&P 500 Bear Market*, CNBC (Mar. 12, 2020, 7:15 AM EDT), <https://www.cnbc.com/2020/03/12/stock-market-today-live.html> [<https://perma.cc/Y3BF-USYF>].

¹¹ Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 Fed. Reg. 15337, 15337 (Mar. 13, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-03-18/pdf/2020-05794.pdf> [<https://perma.cc/2GU9-S6TE>]; *President Trump Declares State of Emergency for COVID-19*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 25, 2020), <https://www.ncsl.org/ncsl-inde/publications-and-resources/president-trump-declares-state-of-emergency-for-covid-19.aspx> [<https://perma.cc/ZV9S-YPQQ>].

had lockdowns in place, virtually halting economic activity.¹² Over three million people had filed unemployment claims in the preceding week.¹³

Congress responded to the unfolding economic crisis by passing the hastily-assembled Coronavirus Aid, Relief, and Economic Security (“CARES”) Act, a \$2 trillion stimulus package, which became law on March 27.¹⁴ The 335-page bill included provisions to assist the U.S. economy through individual stimulus checks, expanded unemployment insurance benefits, support for specific industries, and the so-called Paycheck Protection Program.¹⁵ The PPP was one section of the Keeping American Workers Paid and Employed Act, which eventually became Title 1 of the CARES Act.¹⁶ The White House was deeply involved in the legislation, with Treasury Secretary Mnuchin serving as “the point man for President Trump.”¹⁷

The Federal Reserve had already extended significant relief to Wall Street, cutting its benchmark interest rate to zero, giving banks access to the discount window, and promising to buy at least \$700 billion in corporate bonds.¹⁸ The CARES Act appropriated an additional \$454 billion for the Fed’s existing broad-based lending authority “for the

¹² See Sarah Mervosh, Denise Lu & Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> [https://perma.cc/G4AW-M3AM].

¹³ Press Release, Dept. of Labor, Unemployment Insurance Weekly Claims (Mar. 26, 2020, 8:30 AM EDT), <https://www.dol.gov/sites/dolgov/files/OPA/newsreleases/ui-claims/20200510.pdf> [https://perma.cc/JYR4-XM94].

¹⁴ See 116 CONG. REC. H1732, 1864 (daily ed. Mar. 27, 2020), <https://www.congress.gov/116/crec/2020/03/27/CREC-2020-03-27-pt1-PgH1732.pdf> [https://perma.cc/F9MG-UP2N]; see also Erica Werner, Paul Kane & Mike DeBonis, *Trump Signs \$2 Trillion Coronavirus Bill into Law As Companies and Households Brace For More Economic Pain*, WASH. POST (Mar. 27, 2020, 5:44 PM PT), <https://www.washingtonpost.com/us-policy/2020/03/27/congress-coronavirus-house-vote/> [https://perma.cc/ELA3-RSVV].

¹⁵ See generally CARES Act, Pub. L. No. 116-136, 134 Stat. 286 (2020), <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf> [https://perma.cc/5XH7-MK4C].

¹⁶ See *id.*

¹⁷ 116 CONG. REC. H1732, 1849 (daily ed. Mar. 27, 2020) (statement of Rep. Brady), <https://www.congress.gov/116/crec/2020/03/27/CREC-2020-03-27-pt1-PgH1732.pdf> [https://perma.cc/F9MG-UP2N].

¹⁸ See Craig Torres & Rich Miller, *Fed Slashes Rates to Near Zero, Vows Massive Bond-Buying Program*, BLOOMBERG (Mar. 15, 2020, 2:00 PM), <https://www.bloomberg.com/news/articles/2020-03-15/fed-cuts-main-rate-to-near-zero-to-boost-assets-by-700-billion> [https://perma.cc/B8XV-MUA5].

purpose of providing liquidity to the financial system.”¹⁹ The Act encouraged (but did not require) the use of those funds to create a Fed facility offering non-forgivable loans to businesses and nonprofit organizations with between 500 and 10,000 employees.²⁰

Politicians declared that the PPP portion of the CARES Act, in contrast, would rescue small “mom & pop” businesses. The PPP provided \$349 billion to guarantee privately issued forgivable loans to businesses.²¹ Republican Senator Susan Collins of Maine, a member of the task force that proposed the program, told the Senate of the plight of small local businesses harmed by the pandemic, including a hair salon owned by her “good friend,” who also lost her part-time job as a bartender.²² According to Collins, passing the program would signal that “help is on the horizon for small businesses and their workers that would allow them to weather the current storm.”²³ The media duly repeated this characterization, using examples of local businesses with only a handful of employees, such as a confection shop in Alaska or a pet company in Brooklyn.²⁴

As soon as the PPP launched on April 3, businesses large and small entered a mad dash to secure loans. By April 15, the initial \$349 billion allocation was exhausted, and the Small Business Administration

¹⁹ CARES Act § 4003(b)(4); see Peter Conti-Brown, *Explaining the New Fed-Treasury Emergency Fund*, BROOKINGS (Apr. 3, 2020), <https://www.brookings.edu/research/explaining-the-new-fed-treasury-emergency-fund/> [https://perma.cc/AK3K-DUQQ].

²⁰ See CARES Act § 4003.

²¹ See Matthew J. Belvedere, *Sen. Marco Rubio Wants to Offer Small Businesses Money So They Can Keep Paying Their Employees*, CNBC (Mar. 18, 2020, 10:01 AM EDT), <https://www.cnbc.com/2020/03/18/sen-marco-rubio-wants-to-offer-small-businesses-money-for-payrolls.html> [https://perma.cc/5QQX-JNAX] (explaining that lenders around the country would offer loans that would be forgiven if the money was spent “solely to keep paying workers”).

²² 116 CONG. REC. S1895, 1897 (daily ed. Mar. 22, 2020) (statement of Sen. Collins), <https://www.congress.gov/116/crec/2020/03/22/CREC-2020-03-22-pt1-PgS1895-3.pdf> [https://perma.cc/5LCE-2WR6].

²³ *Id.*

²⁴ See, e.g., David Henry, Heather Timmons & Elizabeth Dilts Marshall, *U.S. Small Businesses Wait Impatiently for Government Aid That Could Be Slow to Come*, REUTERS (Apr. 1, 2020, 4:02 AM), <https://www.reuters.com/article/us-health-coronavirus-usa-lending/u-s-small-businesses-wait-impatiently-for-government-aid-that-could-be-slow-to-come-idUSKBN21J59D> [https://perma.cc/892R-M9VA]; Kate Rogers & Betsy Spring, *Small-Business Owners Face Tough Decisions as They Wait for Government Loans To Arrive*, CNBC (Mar. 30, 2020, 12:51 PM EDT), <https://www.cnbc.com/2020/03/30/small-businesses-make-tough-calls-while-waiting-on-government-loans.html> [https://perma.cc/W4PE-A742].

(“SBA”) stopped accepting applications.²⁵ Given the rapid depletion of funds, the characterization of the program as a “small business loan program” made the loans to large companies much more visible and insidious-looking.

II. DETAILS OF THE PPP

Since the CARES Act was passed quickly to address the COVID-19 outbreak, the bill did not go through the normal committee process. As a result, the legislative history record is limited. The PPP appears to have originated as the Keeping Workers Paid and Employed Act, a proposal drafted by a “Small Business Task Force” consisting of Marco Rubio, chair of the Senate Committee on Small Business and Entrepreneurship, and fellow Republican Senators Lamar Alexander and Susan Collins.²⁶ The task force’s proposal contained the basic framework of what would become the PPP: it would broaden the permitted uses of loans to include “payroll support, such as paid sick or medical leave, employee salaries, mortgage payments, and any other debt obligations,” and did not require businesses to show repayment ability to be eligible.²⁷ Unlike the bill as enacted, however, the proposal did not include loan forgiveness provisions.

Legislators acknowledged that the White House and Treasury Secretary Mnuchin in particular played an important role in the negotiations.²⁸ During House hearings on the bill, Republican Rep. Kevin Brady of Texas thanked “all of the Cabinet and the White House economic team,” and described Mnuchin as “the point man for

²⁵ MARIA KREISER, CONG. RESEARCH SERV., SMALL BUSINESSES AND COVID-19: RELIEF AND ASSISTANCE RESOURCES 1-2 (2020), <https://crsreports.congress.gov/product/pdf/IN/IN11301> [<https://perma.cc/2LZA-ZXF9>].

²⁶ Press Release, U.S. Sen. Marco Rubio, Small Business Task Force Unveils \$300 Billion Emergency Coronavirus Relief Package (Mar. 19, 2020), <https://www.rubio.senate.gov/public/index.cfm/2020/3/small-business-task-forces-unveils-300-billion-emergency-coronavirus-relief-package> [<https://perma.cc/S2HC-FFPP>]; see Erica Werner, *Rubio Went All-In on Small-Business Program That Has Become the Centerpiece of an Economic Revival Push*, WASH. POST (June 10, 2020, 3:00 AM), <https://www.washingtonpost.com/us-policy/2020/06/10/rubio-paycheck-protection-program-senate/> [<https://perma.cc/7YQ5-FJW2>].

²⁷ U.S. Sen. Marco Rubio, *Keeping Workers Paid and Employed Act: Section-by-Section*, https://www.rubio.senate.gov/public/_cache/files/e62711ab-07f8-4087-b157-5871cf9566f7/B77A8DFB5B3E83552EB0CAD69C8EF00D.final---keeping-workers-paid-and-employed-act-section-by-section-sbc-final.pdf (last visited October 20, 2020) [<https://perma.cc/R46X-MGDQ>].

²⁸ See 116 CONG. REC. H1732, 1849 (daily ed. Mar. 27, 2020) (statement of Rep. Brady), <https://www.congress.gov/116/crec/2020/03/27/CREC-2020-03-27-pt1-PgH1732.pdf> [<https://perma.cc/F9MG-UP2N>].

President Trump on these negotiations.”²⁹ Senator Schumer described an early version of the CARES Act as a “partisan bill” and a “corporate bailout.”³⁰

As a formal matter, the CARES Act created the PPP by amending Section 7(a) of the Small Business Act of 1953, which authorized the Small Business Administration’s primary loan guaranty program.³¹ Section 7(a) was created to encourage private lenders to make affordable loans to small businesses: “It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise.”³²

Like the existing § 7(a) program, the PPP provides funds to guarantee private loans to businesses. Its eligibility criteria are significantly broader, however, and it has much more favorable terms.³³ The loans are forgivable, and interest rates are set at 1% for a ten-year term with payments deferred for six months.³⁴ The PPP also removed requirements that borrowers personally guarantee the loan or provide collateral.³⁵ PPP funding is also orders of magnitude larger than the existing (non-forgivable) § 7(a) program, showing it was intended to serve a much larger pool. In response to the last recession, Congress provided a total of just \$1.5 billion in new funding in 2009 and 2010 for § 7(a) loans.³⁶ Just prior to the pandemic, during the fiscal year ending in 2019, the SBA authorized a total of \$23.2 billion in loans.³⁷ The PPP is almost thirty times as large. Congress initially appropriated

²⁹ *Id.*

³⁰ 116 CONG. REC. S1897, 1902 (daily ed. Mar. 22, 2020) (statement of Sen. Schumer), <https://www.congress.gov/116/crec/2020/03/22/CREC-2020-03-22-pt1-PgS1897-2.pdf> [<https://perma.cc/75XK-BQD8>].

³¹ See ROBERT JAY DIGLER, CONG. RESEARCH SERV., R41146, SMALL BUSINESS ADMINISTRATION 7(A) LOAN GUARANTY PROGRAM 1 (2020), <https://crsreports.congress.gov/product/pdf/R/R41146> [<https://perma.cc/63HQ-FL25>].

³² 15 U.S.C. § 631 (2018).

³³ See DIGLER, *supra* note 31, at 3-4.

³⁴ See Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811, 20813 (Apr. 15, 2020) (to be codified at 13 C.F.R. pt. 120), <https://www.govinfo.gov/content/pkg/FR-2020-04-15/pdf/2020-07672.pdf> [<https://perma.cc/M2BN-4P8G>].

³⁵ CARES Act, Pub. L. No. 116-136, § 1102(a)(2)(1)-(J), 134 Stat. 286 (2020), <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf> [<https://perma.cc/5XH7-MK4C>].

³⁶ DIGLER, *supra* note 31, at 27. Ironically, the amount of disbursed loans nonetheless decreased; the SBA attributes that to lenders’ stricter loan criteria and lack of demand because of borrowers’ inability to repay. See *id.*

³⁷ *Id.* at 17.

\$349 billion to be available through the PPP. When that amount quickly ran out, Congress passed a second bill, the Paycheck Protection Program and Health Care Enhancement Act,³⁸ authorizing \$310 billion in additional PPP funding and earmarking some of the funds for smaller lending institutions.³⁹ The SBA resumed accepting loan applications for the PPP on April 27 as a result of the funding increase.⁴⁰

Despite its name, the PPP is not limited to payroll expenses. The law expressly permits businesses to use loan proceeds for mortgage, rent, utilities and debt service on preexisting loans.⁴¹ Loans are forgivable in the amounts used for (1) payroll costs, (2) covered mortgage interest payments, (3) covered rent payments, and (4) covered utility payments.⁴² The forgivable amount “shall be reduced” based on any reduction in the average number of full-time equivalent employees or any reduction in salary and wages of more than 25% for employees making less than \$100,000 annually.⁴³ Borrowers were given the opportunity to avoid those loan forgiveness reductions by rehiring laid-off employees or reversing salary and wage cuts by June 30, 2020.⁴⁴ In order to receive loan forgiveness, borrowers were required to submit documentation of the number of full-time employees, pay rates, rent or mortgage payments, and any other records the SBA deemed necessary.⁴⁵

After the bill’s passage, however, the SBA added new conditions to loan forgiveness. The bill itself did not require any of the forgivable amount to be spent on payroll. The initial SBA guidance, however, issued only after the first round of loan applications had closed, allowed

³⁸ See generally Paycheck Protection Program and Health Care Enhancement Act, Pub. L. No. 116-139, 134 Stat. 620 (Apr. 24, 2020), <https://www.congress.gov/116/plaws/publ139/PLAW-116publ139.pdf> [<https://perma.cc/UHE8-93YH>].

³⁹ See *id.* The law set aside \$30 billion for loans issued by depository institutions with assets between \$10-50 billion and \$30 billion for loans issued by depository institutions with assets of less than \$10 billion. *Id.*

⁴⁰ ROBERT JAY DIGLER, BRUCE R. LINDSAY & SEAN LOWRY, CONG. RESEARCH SERV., R46284, COVID-19 RELIEF ASSISTANCE TO SMALL BUSINESSES: ISSUES AND POLICY OPTIONS 3 (2020), <https://crsreports.congress.gov/product/pdf/R/R46284> [<https://perma.cc/CZ2Q-PMNN>].

⁴¹ CARES Act, Pub. L. No. 116-136, § 1102(a)(2)(F)(i), 134 Stat. 286 (2020), <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf> [<https://perma.cc/5XH7-MK4C>].

⁴² *Id.* § 1106(b).

⁴³ *Id.* § 1106(d)(2)–(3); see also U.S. DEPT. OF TREASURY, PAYCHECK PROTECTION PROGRAM (PPP) INFORMATION SHEET: BORROWERS, <https://home.treasury.gov/system/files/136/PPP—Fact-Sheet.pdf> (last visited Oct. 21, 2020) [<https://perma.cc/FH3K-DEEJ>].

⁴⁴ CARES Act § 1106(d)(5)(B); see also U.S. DEPT. OF TREASURY, *supra* note 43.

⁴⁵ CARES Act § 1106(e).

only 25% of the forgivable loan amount to be used on nonpayroll costs.⁴⁶ Later, almost three months after the law went into effect, the SBA amended its guidance to allow 40% of the forgivable loan amount to be used for nonpayroll costs.⁴⁷ In July, Treasury Secretary Mnuchin suggested yet another change: that all loans under \$150,000 should be automatically forgiven.⁴⁸

III. PPP LOANS TO PUBLICLY TRADED CORPORATIONS

Shortly after the first round of PPP funding was depleted, news outlets reported that a number of large public companies had received loans.⁴⁹ Shake Shack received a \$10 million loan from JP Morgan Chase on April 10, while Ruth's Hospitality Group received two \$10 million loans from JP Morgan Chase on April 7.⁵⁰ Additional publicly traded restaurant chains, including Potbelly Corp. and Fiesta Restaurant Group, Inc. also received \$10 million loans each from JP Morgan Chase as part of the

⁴⁶ Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811, 20813-14 (Apr. 15, 2020) (to be codified at 13 C.F.R. pt. 120), <https://www.govinfo.gov/content/pkg/FR-2020-04-15/pdf/2020-07672.pdf> [<https://perma.cc/M2BN-4P8G>].

⁴⁷ Business Loan Program Temporary Changes; Paycheck Protection Program – Revisions to First Interim Final Rule, 85 Fed. Reg. 36308, 36311 (June 16, 2020) (to be codified at 13 C.F.R. pt. 120), <https://www.govinfo.gov/content/pkg/FR-2020-06-16/pdf/2020-12909.pdf> [<https://perma.cc/A2RE-6UDK>].

⁴⁸ Ryan Tracy, *Mnuchin Calls for Forgiving PPP Loans to Smallest Businesses*, WALL ST. J. (July 17, 2020, 2:06 PM EDT), <https://www.wsj.com/articles/mnuchin-suggests-automatic-forgiveness-of-paycheck-protection-program-loans-11595000522> [<https://perma.cc/CC25-WRW3>].

⁴⁹ See, e.g., Emily Flitter, *Loan Money Runs Out While Small-Business Owners Wait in Line*, N.Y. TIMES (Apr. 16, 2020), <https://www.nytimes.com/2020/04/16/business/coronavirus-sba-loans-out-of-money.html?searchResultPosition=3> [<https://perma.cc/4YXD-ZECJ>] (“Foreign businesses and even large restaurant chains . . . have managed to get loans, showing the uneven way in which the program has been carried out.”); Warmbrodt, *supra* note 1.

⁵⁰ U.S. SEC. AND EXCH. COMM’N, RUTH’S HOSPITALITY GROUP, INC., CURRENT REPORT (FORM 8-K) (Apr. 7, 2020), https://www.sec.gov/ix?doc=/Archives/edgar/data/1324272/000156459020016452/ruth-8k_20200407.htm [<https://perma.cc/8GDZ-UEQT>]; U.S. SEC. AND EXCH. COMM’N, SHAKE SHACK INC., CURRENT REPORT (FORM 8-K, EXHIBIT 99.1) (Apr. 17, 2020), https://www.sec.gov/Archives/edgar/data/1620533/000110465920047964/tm2016184d2_ex99-1.htm [<https://perma.cc/2FJ4-CWFE>].

PPP’s initial round of funding.⁵¹ These companies too were scolded in the media for taking “small business” money.⁵²

The loans secured by those restaurant chains were dwarfed by companies like Ashford Inc. and AutoNation. Nonetheless, even they were operating within the boundaries of the program at the time. Ashford Inc. manages both the Ashford Hospitality Trust and Braemer Hotels & Resorts Inc., which in turn operate luxury hotels and resorts nationwide.⁵³ Ashford Inc. applied for \$126 million in PPP loans⁵⁴ for its affiliates, securing roughly \$45.9 million.⁵⁵ AutoNation, a nationwide network of car dealerships, received upwards of \$77 million from the PPP.⁵⁶

⁵¹ U.S. SEC. AND EXCH. COMM’N, FIESTA RESTAURANT GROUP, INC., CURRENT REPORT (FORM 8-K) (Apr. 8, 2020), <https://www.sec.gov/Archives/edgar/data/1534992/000153499220000027/a8-k041420.htm> [<https://perma.cc/6798-V68Y>]; U.S. SEC. AND EXCH. COMM’N, POTBELLY CORP., CURRENT REPORT (FORM 8-K) (Apr. 10, 2020), <https://www.sec.gov/Archives/edgar/data/1195734/000119312520105245/d914203d8k.htm> [<https://perma.cc/43LN-KKHY>].

⁵² See, e.g., Kate Taylor, *Shake Shack Returned Its \$10 Million Coronavirus Stimulus Loan. Ruth’s Chris, Potbelly, and Other Chains Are Keeping More Than \$81 Million Meant for Struggling Small Businesses*, BUSINESS INSIDER (Apr. 20, 2020, 8:49 AM), <https://www.businessinsider.com/ruths-chris-potbelly-chains-tk-million-in-small-business-loans-2020-4> [<https://perma.cc/Q8RJ-FHTA>] (explaining how chain restaurants such as Potbelly and Taco Cabana, which is owned by Fiesta Restaurant Group, received PPP loans “intended to help small businesses”); Li Zhou, *Why Major Food and Hotel Chains Are Getting Stimulus Money Meant for Small Businesses*, VOX (Apr. 22, 2020, 4:40 PM EDT), <https://www.vox.com/2020/4/22/21229319/ruth-chris-shake-shack-potbelly-ppp-loans> [<https://perma.cc/C9RZ-CGKN>].

⁵³ Jeanna Smialek, Jim Tankersley & Alan Rappeport, *Luxury Hotel Company Is Biggest Beneficiary of Small-Business Funds*, N.Y. TIMES (Apr. 22, 2020), <https://www.nytimes.com/2020/04/22/business/economy/coronavirus-small-business-loans-real-estate-trusts.html?searchResultPosition=29> [<https://perma.cc/BY7Y-78B3>].

⁵⁴ ASHFORD INC., *Fact Sheet: Information About Our Participation in the Paycheck Protection Program (“PPP”) to Stabilize Our Businesses and Get Our Employees Back to Work*, https://www.ashfordinc.com/files/5649/PPP_Loans_Fact_Sheet.pdf?WT.ic_id=PPPLoans [<https://perma.cc/2XXG-GRAP>].

⁵⁵ See U.S. SEC. AND EXCH. COMM’N, ASHFORD HOSPITALITY TRUST, INC., CURRENT REPORT (FORM 8-K) (Apr. 15, 2020), <https://www.sec.gov/ix?doc=/Archives/edgar/data/1232582/000123258220000017/ahtppploans8-kv1.htm> [<https://perma.cc/3WEJ-C5WV>]; U.S. SEC. AND EXCH. COMM’N, BRAEMER HOTELS & RESORTS INC., CURRENT REPORT (FORM 8-K) (Apr. 15, 2020), <https://www.sec.gov/Archives/edgar/data/1574085/000157408520000013/bhrppploans8-kv1.htm> [<https://perma.cc/P5VE-VTAA>].

⁵⁶ Jonathan O’Connell, *AutoNation, a Retailer Worth Billions, Says It Received Nearly \$80 Million in SBA Funds*, WASH. POST (Apr. 24, 2020, 12:50 PM EDT), <https://www.washingtonpost.com/business/2020/04/24/autonation-an-auto-retailer-worth-billions-received-nearly-95-million-sba-funds/> [<https://perma.cc/VE3T-7SBR>].

IV. THE PURPOSE AND INTENT OF THE PPP

The common belief that these large corporations violated the PPP or somehow exploited inadvertent “loopholes”⁵⁷ in the legislation is demonstrably incorrect. Their loans were in fact well within the letter and apparent intent of Congress. The PPP not only offered more generous terms than the SBA’s existing § 7(a) loan program but was also open to a much broader range of businesses for a broader range of reasons. Although Senator Rubio claimed that large businesses had inappropriately received funds, he admitted at the same time that the PPP had been drafted to “cover as many people as possible.”⁵⁸

Using the SBA’s § 7(a) program as the backbone of the PPP had practical justifications. House Speaker Pelosi thanked Mnuchin for “facilitating this” by routing the loan program through the SBA and “through banks with the SBA imprimatur.”⁵⁹ Issuing loans through the same banks with experience issuing § 7(a) loans may have allowed faster disbursement than issuing them directly from the federal government.⁶⁰ The political appetite for an entirely government-run program as large as the PPP was also likely a barrier to direct lending. Senator Rubio put it bluntly saying, “what I like about the proposal too is that it isn’t a government interaction, we would be relying on our existing network of preferred lenders under this SBA program.”⁶¹

The PPP’s formal association with § 7(a) did nothing to limit the program to small businesses, however. Indeed, the Act incentivized banks to issue larger loans. For a loan under \$350,000, a bank would collect a 5% fee, whereas for loans above \$2 million it would collect a 1% fee.⁶² This fee structure gave banks larger rewards for making larger loans: 5% of \$350,000 is a mere \$17,500, whereas 1% of \$10 million is \$100,000.

⁵⁷ Iacurci, *supra* note 3.

⁵⁸ *Id.*

⁵⁹ 116 CONG. REC. H1732, 1847 (daily ed. Mar. 27, 2020) (statement of Rep. Pelosi), <https://www.congress.gov/116/crec/2020/03/27/CREC-2020-03-27-pt1-PgH1732.pdf> [<https://perma.cc/EB8C-XM7J>].

⁶⁰ See Alexander Sammon, *Everybody Hates the SBA*, AM. PROSPECT (May 21, 2020), <https://prospect.org/coronavirus/everybody-hates-the-sba/> [<https://perma.cc/6CMB-W8FC>].

⁶¹ Sen. Marco Rubio Explains His Plan to Help Small Businesses Hit by Coronavirus, CNBC: SQUAWK BOX (Mar. 18, 2020, 8:49 AM EDT), <https://www.cnbc.com/video/2020/03/18/sen-marco-rubio-explains-his-plan-to-help-small-businesses-hit-by-coronavirus.html> [<https://perma.cc/58RT-MG3U>].

⁶² CARES Act, Pub. L. No. 116-136, § 1102(a)(2)(36)(P)(i), 134 Stat. 286 (2020), <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf> [<https://perma.cc/FNY4-9U4Y>].

The law encouraged, but did not require, the SBA to pay special attention to underrepresented and disadvantaged business owners: “[i]t is the sense of the Senate [sic] that the Administrator should issue guidance to lenders and agents to ensure that the processing and disbursement of covered loans prioritizes small business concerns and entities in underserved and rural markets, including veterans and members of the military community, small business concerns owned and controlled by socially and economically disadvantaged individuals. . . , women, and businesses in operation for less than 2 years.”⁶³ The SBA Inspector General reported in May, however, that the SBA had failed to issue such guidance.⁶⁴

Even before the PPP, SBA loans were not limited to very small “mom and pop”-type businesses; the PPP, though, opened the door to even larger businesses. Section 7(a) loans are normally offered to “small business concerns,”⁶⁵ a term of art in the Small Business Act. The PPP had no such limitation. The “small business concerns” to which the existing 7(a) program is limited have to fall within maximum size limits set by the SBA.⁶⁶ These limits can be quite large. The maximum size varies widely depending on the type of business and, also depending on business type, may be measured by the number of employees (from 100 to 1500) or in dollar terms (annual receipts of \$1 million to \$41.5 million, or \$600 million in assets for banks and credit card companies).⁶⁷ Size calculations under § 7(a) normally include all of a business concern’s “foreign and domestic affiliates.”⁶⁸ Business

⁶³ *Id.* § 1102(a)(2)(36)(P)(iv).

⁶⁴ See U.S. SMALL BUS. ADMIN., OFFICE OF INSPECTOR GENERAL, REP. NO. 20-14, EXECUTIVE SUMMARY: SMALL BUSINESS ADMINISTRATION’S IMPLEMENTATION OF THE PAYCHECK PROTECTION PROGRAM REQUIREMENTS (2020), https://www.sba.gov/sites/default/files/2020-05/SBA_OIG_Report_20-14_508.pdf [<https://perma.cc/A9PC-9XDN>].

⁶⁵ 15 U.S.C. § 636(a) (2018).

⁶⁶ See *id.* § 632(a)(2).

⁶⁷ See U.S. SMALL BUS. ADMIN., TABLE OF SMALL BUSINESS SIZE STANDARDS MATCHED TO NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM CODES 1-43 (effective Aug. 19, 2019), https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%202019%2C%202019_Rev.pdf [<https://perma.cc/R3B9-XU3F>]. On the smallest end of the spectrum, the maximum size is \$1 million in annual receipts for some agricultural businesses, including rice, turkey, and goat production, and the maximum size is 100 employees for some businesses, including wholesale used auto parts, fuel dealers, and fresh fruit wholesalers. *Id.* at 2-3, 21, 24, 27. On the largest end, the maximum size is \$41.5 million for businesses including “Support Activities for Oil and Gas Operation,” software publishers, and movie theaters, while the maximum size is 1500 employees for businesses including gold mining and greeting card publishers. *Id.* at 4, 30.

⁶⁸ 13 C.F.R. §121.103(a)(6) (2020).

concerns are affiliated when “one controls or has the power to control the other, or a third party or parties controls or has the power to control both.”⁶⁹ Furthermore a “small business concern” must be “independently owned and operated and . . . not dominant in its field of operation.”⁷⁰

Like § 7(a), the PPP placed limits on maximum eligible size, but increased the maximum in many contexts. It was open not only to “small business concerns,” but to “any business concern, nonprofit, veteran’s organization, or Tribal business concern” that employs up to 500 employees or the number prescribed by the applicable SBA size standard, whichever is larger.⁷¹ For many industries, 500 employees is a considerable increase over the preexisting maximum size.⁷² Whatever the applicable maximum size, offering loans to “any business concern” means borrowers need not be independent or non-dominant, opening the door to “business concerns” owned or operated by large corporations. For the hotel and restaurant industries, Congressional intent is explicit: the PPP sets a size limit of 500 employees not for each “business concern,” but for each of a business concern’s *physical locations*.⁷³ To make this perfectly clear, the PPP also waived § 7(a)’s affiliation rules for hotel and restaurant chains.⁷⁴ Thus, under the PPP as passed by Congress, even the largest multinational hotel and restaurant chains (such as Shake Shack, Ruth’s Chris, and Ashford) would be eligible for loans for each of their corporate-owned or controlled locations.

Under normal § 7(a) rules, a franchise is not automatically considered an affiliate of the franchisor, but the control test for affiliation would

⁶⁹ *Id.* §121.103(a)(1).

⁷⁰ 15 U.S.C. § 632(a)(1) (2018).

⁷¹ CARES Act, Pub. L. No. 116-136, § 1102(a)(2)(D)(i), 134 Stat. 286 (2020), <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf> [<https://perma.cc/4DRK-VHQG>]; DIGLER ET AL., *supra* note 40, at 21, 35.

⁷² *See, e.g.*, U.S. SMALL BUS. ADMIN., *supra* note 67, at 21-25 (showing the wholesale trade sector with maximum size standards well below 500 employees).

⁷³ CARES Act § 1102(a)(2)(D)(iii) (“[A]ny business concern that employs not more than 500 employees per physical location of the business concern and that is assigned a North American Industry Classification System code beginning with 72 at the time of disbursement shall be eligible to receive a covered loan.”); *see also* U.S. SMALL BUS. ADMIN., PAYCHECK PROTECTION PROGRAM LOANS: FREQUENTLY ASKED QUESTIONS (FAQS), Question 24 (May 27, 2020), https://www.sba.gov/sites/default/files/2020-06/Paycheck-Protection-Program-Frequently-Asked-Questions_05_27_20-508.pdf [<https://perma.cc/9FS9-4S2J>] [hereinafter PPP FAQs].

⁷⁴ *See* CARES Act § 1102(a)(2)(D)(iv)(I) (stating that affiliation rules are waived for business concerns with the North American Industry Classification System code starting with 72, which includes hotels and restaurants).

still apply.⁷⁵ The PPP, however, waived § 7(a)’s affiliation rules for franchises.⁷⁶ This allowed franchises such as individual new-car dealerships (which are typically franchised by auto manufacturers) to qualify for PPP loans regardless of whether they were controlled by a larger ownership group.⁷⁷ AutoNation, which owns franchised new-car dealerships nationwide, properly used this exemption to apply for loans using the separate tax identification numbers of its individual dealerships, each of which met the 500 employee threshold.⁷⁸

The Small Business Act expressly recognizes “that ownership and control of productive capital is concentrated in the economy of the United States and certain groups, therefore, own and control little productive capital.”⁷⁹ Thus, under normal § 7(a) standards, small business concerns can receive loans only if they are “unable to obtain credit elsewhere.”⁸⁰ The PPP expressly waived this requirement⁸¹ and replaced it with a looser requirement that borrowers “make a good faith certification that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient.”⁸² The four-page PPP loan application form implemented this provision almost verbatim, requiring borrowers to initial next to a statement that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”⁸³

⁷⁵ See U.S. SMALL BUS. ADMIN., SMALL BUSINESS COMPLIANCE GUIDE SIZE AND AFFILIATION 5-6 (2014), https://www.sba.gov/sites/default/files/affiliation_ver_03.pdf [<https://perma.cc/DM7D-GMHJ>].

⁷⁶ CARES Act § 1102(a)(2)(D)(iv)(II).

⁷⁷ Aaron H. Jacoby, Russell P. Mcrory, Charles Gallaer, Justin A. Goldberg, George N. Koumbis, Daisy Sexton & Christopher T. Koenig, *The CARES Act: Considerations for Auto Dealerships During COVID-19 Pandemic*, ARENT FOX (Mar. 31, 2020), <https://www.arentfox.com/perspectives/managing-automotive-blog/the-cares-act-considerations-auto-dealerships-during-covid-19> [<https://perma.cc/S2DY-K5RM>].

⁷⁸ O’Connell, *supra* note 56; Inti Pacheco & Bob Davis, *At Least 13 Public Companies Give Back \$170 Million in Small-Business Stimulus Money. Others Say They’ll Keep It*, WALL ST. J. (Apr. 26, 2020, 6:01 PM EDT), <https://www.wsj.com/articles/a-dozen-public-companies-give-back-160-million-in-small-business-stimulus-money-others-say-theyll-keep-it-11587831790> [<https://perma.cc/UPA9-LW38>].

⁷⁹ 15 U.S.C. § 631(d)(2)(A)(i) (2018).

⁸⁰ *Id.* § 636(a)(1)(A)(i).

⁸¹ CARES Act § 1102(a)(2)(I) (“[T]he requirement that a small business concern is unable to obtain credit elsewhere . . . shall not apply to a covered loan.”).

⁸² *Id.* § 1102(a)(2)(G)(i)(I).

⁸³ U.S. SMALL BUS. ADMIN., OMB CONTROL NO. 3245-0407, PAYCHECK PROTECTION PROGRAM: BORROWER APPLICATION FORM, SBA FORM 2483 (Apr. 2, 2020), <https://www.sba.gov/sites/default/files/2020-04/PPP%20Borrower%20Application%20Form.pdf> [<https://perma.cc/Y7E8-MBKW>] [hereinafter SBA FORM 2483].

The legislation gave no definitions or guidance on how to interpret the certification of necessity, and the SBA's initial guidance did not add any clarity. On April 8, the SBA published a Frequently Asked Questions ("FAQ") document about the PPP without any explanation of the certification provision.⁸⁴ Likewise, the first "Interim Final Rule" published on April 15 simply repeated the certification language used on the PPP loan application form without any additional clarification.⁸⁵

In testimony before the Senate, Mnuchin later stated that the bill's drafters had considered including a "revenue test" in the PPP that would have given loan forgiveness only to companies that saw a reduction in revenue over the loan period.⁸⁶ The test was ultimately scrapped in favor of the certification of "necessity," however.⁸⁷ Secretary Mnuchin went on to say that he had expected the certification requirement to prompt borrowers to "self-select appropriately."⁸⁸ Senator Rubio also defended the absence of a revenue test, claiming that additional paperwork requirements would have "disproportionately benefited more sophisticated businesses."⁸⁹ Even as he justified the absence of a revenue test, Rubio made the baffling claim that the PPP nonetheless contained the unwritten equivalent: if loan recipients were "making the same revenue as ever," he claimed, "then you get in trouble for abusing the program."⁹⁰ Such an objective retrospective revenue test was not only unsupported by the language of the statute and rules, but also incompatible with the "good faith" standard in the certification.

The SBA issued relevant guidance only after the media backlash against public companies like Shake Shack and AutoNation, several

⁸⁴ U.S. SMALL BUS. ADMIN., PAYCHECK PROTECTION PROGRAM LOANS: FREQUENTLY ASKED QUESTIONS (FAQs) (Apr. 8, 2020), [https://www.sba.gov/sites/default/files/2020-04/Final PPP FAQs for Lenders and Borrowers 4-8-20_0.pdf](https://www.sba.gov/sites/default/files/2020-04/Final%20PPP%20FAQs%20for%20Lenders%20and%20Borrowers%204-8-20_0.pdf) [<https://perma.cc/YC8D-BZFK>].

⁸⁵ Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811 (Apr. 15, 2020) (to be codified at 13 C.F.R. pt. 120), <https://www.govinfo.gov/content/pkg/FR-2020-04-15/pdf/2020-07672.pdf> [<https://perma.cc/VFJ8-JAUF>].

⁸⁶ *Treasury Secretary and Small Business Administrator Testimony on CARES Act*, C-SPAN at 1:29:13 (June 10, 2020), <https://www.c-span.org/video/?472837-1/treasury-secretary-small-business-administrator-testimony-cares-act> [<https://perma.cc/AY8T-BNAW>].

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Nicholas Ballasy, *Rubio Explains Why a Business Isn't Required to Prove It's Losing Money to Qualify for a PPP Loan*, JUSTTHENEWS, <https://justthenews.com/government/congress/rubio-explains-why-business-isnt-required-prove-its-losing-money-qualify-ppp> (last updated Apr. 21, 2020) [<https://perma.cc/CHE8-FVEM>].

⁹⁰ *Id.*

days after the initial round of PPP funding had run out and before Congress had authorized a second round.⁹¹ In an updated FAQ page on April 23, SBA encouraged borrowers to look carefully at the first section of the certification related to the necessity of the loan.⁹² The FAQ clarified further that “borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business.”⁹³ It went on to say that “it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification.”⁹⁴

Those statements are difficult to reconcile with the certification language in the statute and on the loan application form.⁹⁵ The PPP’s express waiver of the “unable to obtain credit elsewhere requirement”⁹⁶ clearly implied that illiquidity was not a prerequisite, and the “good faith” language lowered the standard of proof for necessity. Every business was (and remains) subject to “the uncertainty of current economic conditions.”⁹⁷ The loan only had to be “necessary to support . . . ongoing operations,”⁹⁸ not to avoid closing or laying off workers; that language seems to permit well-endowed businesses to use loans for payroll and mortgages in order to free up capital to “support” any other uses related to “ongoing operations.”

Despite the permissive statutory language, the Administration announced plans to root out supposedly improperly obtained loans based on its stricter *post hoc* standards. (When Congress added \$310

⁹¹ See Benjamin Siegel, *After Shake Shack Controversy, Treasury Says Public Companies Should Repay Loans*, ABC NEWS (Apr. 24, 2020, 2:11 AM), <https://abcnews.go.com/Business/treasury-pushes-public-companies-return-small-business-loans/story?id=70317715> [https://perma.cc/89R3-XCPS].

⁹² See U.S. SMALL BUS. ADMIN., PPP FAQs, *supra* note 73, at Question 31.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See CARES Act, Pub. L. No. 116-136, § 1102(a)(2)(G)(i)(I), 134 Stat. 286 (2020), <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf> [https://perma.cc/YX2M-BEJ8]; U.S. SMALL BUS. ADMIN., SBA FORM 2483, *supra* note 83.

⁹⁶ CARES Act § 1102(a)(2)(I).

⁹⁷ *Id.* § 1102(a)(2)(G)(i)(I).

⁹⁸ U.S. SMALL BUS. ADMIN., SBA FORM 2483, *supra* note 83.

million in additional PPP funding on April 24⁹⁹ it did not add to or clarify the terms of the PPP.) Mnuchin and SBA Administrator Jovita Carranza jointly declared that the SBA “will review all loans in excess of \$2 million, in addition to other loans as appropriate, following the lender’s submission of the borrower’s loan forgiveness application.”¹⁰⁰ Borrowers who received loans in excess of \$2 million could be denied loan forgiveness if found to have made the certification of necessity without an adequate basis.¹⁰¹ The SBA issued guidance that it could review borrower eligibility, loan amounts and use of money, and loan forgiveness amounts for any PPP loan.¹⁰² The guidance stated that the SBA could seek repayment of the loan, or other remedies, if the SBA found a borrower ineligible for PPP funding.¹⁰³ The SBA later clarified on May 13 that any borrower who received a loan of less than \$2 million would be automatically presumed to have made the loan request in good faith.¹⁰⁴

A television interviewer asked Treasury Secretary Mnuchin on April 28 about large companies receiving PPP loans. He replied, “I think it was inappropriate for most of these companies to take the loans. It was clear there was a certification. We don’t think they ever should have been allowed to.”¹⁰⁵ Later in the interview he asserted that “the rules

⁹⁹ See Paycheck Protection Program and Health Care Enhancement Act, Pub. L. No. 116-139, 134 Stat. 620 (Apr. 24, 2020), <https://www.congress.gov/116/plaws/publ139/PLAW-116publ139.pdf> [<https://perma.cc/J987-KPZF>].

¹⁰⁰ Press Release, U.S. Dept. of the Treasury, Joint Statement by Secretary Steven T. Mnuchin and Administrator Jovita Carranza on the Review Procedure for Paycheck Protection Program Loans (Apr. 28, 2020), <https://home.treasury.gov/news/press-releases/sm991> [<https://perma.cc/6FHC-73LV>].

¹⁰¹ See Business Loan Program Temporary Changes; Paycheck Protection Program – SBA Loan Review Procedures and Related Borrower and Lender Responsibilities, 85 Fed. Reg. 33010, 33012 (June 1, 2020) (to be codified at 13 C.F.R. pt. 120), <https://www.govinfo.gov/content/pkg/FR-2020-06-01/pdf/2020-11533.pdf> [<https://perma.cc/AB7A-JMVJ>]; U.S. SMALL BUS. ADMIN., PPP FAQs, *supra* note 73, at Question 39.

¹⁰² Business Loan Program Temporary Changes; Paycheck Protection Program – SBA Loan Review Procedures and Related Borrower and Lender Responsibilities, 85 Fed. Reg. at 33012.

¹⁰³ *Id.*

¹⁰⁴ Business Loan Program Temporary Changes; Paycheck Protection Program – Second Extension of Limited Safe Harbor With Respect to Certification Concerning Need for PPP Loan and Lender Reporting, 85 Fed. Reg. 31357, 31358 (May 26, 2020) (to be codified at 13 C.F.R. pt. 120), <https://www.govinfo.gov/content/pkg/FR-2020-05-26/pdf/2020-11292.pdf> [<https://perma.cc/9ZB3-F2NQ>].

¹⁰⁵ CNBC Transcript: Treasury Secretary Steven Mnuchin Speaks to CNBC’s “Squawk Box” Today, CNBC (Apr. 28, 2020, 3:56 PM EDT), <https://www.cnbc.com/2020/04/28/cnbc-transcript-treasury-secretary-steven-mnuchin-speaks-to-cnbc-squawk-box-today.html> [<https://perma.cc/SK52-HAPQ>].

were very clear . . . This was a program designed for small businesses, it was not a program designed for public companies that had liquidity. Again, the certification was very clear in saying that if people had other sources of liquidity, they could not take this loan.”¹⁰⁶ As the foregoing discussion shows, Mnuchin blatantly misrepresented “the rules” for PPP loans.

Furthermore, despite Mnuchin’s critical tone in the TV interview, an updated “Interim Final Rule”¹⁰⁷ went into effect the same day that treated certifications of necessity by large liquid companies as understandable and harmless error. The Rule included a “safe harbor” provision allowing any business that secured a PPP loan prior to that date the ability to repay the loan by May 7 and be deemed to have made the certification in good faith.¹⁰⁸ The rule went on to say that this provision was necessary given that some borrowers may have received loans based on a “misunderstanding or misapplication of the required certification standard.”¹⁰⁹ The deadline for businesses to repay the loan(s) without penalty was subsequently extended from May 7 to May 14 and then again to May 18.¹¹⁰

In addition to prompting further guidance, the public backlash has also led to increased transparency regarding loan recipients. Secretary Mnuchin was originally against disclosing loan recipient information, claiming in Senate testimony that loan recipients and amounts are “proprietary information.”¹¹¹ On July 6, however, the SBA released businesses names, loan amounts, and other information for loans

¹⁰⁶ *Id.*

¹⁰⁷ Business Loan Program Temporary Changes; Paycheck Protection Program – Requirements – Promissory Notes, Authorizations, Affiliation, and Eligibility, 85 Fed. Reg. 23450 (Apr. 28, 2020) (to be codified at 13 C.F.R. pt. 120 & 121), <https://www.govinfo.gov/content/pkg/FR-2020-04-28/pdf/2020-09098.pdf> [<https://perma.cc/V4GH-KE8V>].

¹⁰⁸ *Id.* at 23451.

¹⁰⁹ *Id.* at 23452.

¹¹⁰ Business Loan Program Temporary Changes; Paycheck Protection Program – Second Extension of Limited Safe Harbor With Respect to Certification Concerning Need for PPP Loan and Lender Reporting, 85 Fed. Reg. 31357, 31358 (May 26, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-05-26/pdf/2020-11292.pdf> [<https://perma.cc/35RP-SFY9>].

¹¹¹ *Treasury Secretary and Small Business Administrator Testimony on CARES Act*, *supra* note 86, at 1:24:30; Associated Press, *Treasury Secretary Steven Mnuchin Refuses to Disclose Recipients of Coronavirus Aid*, L.A. TIMES (June 14, 2020, 11:07 PM PT), <https://www.latimes.com/world-nation/story/2020-06-14/treasury-chief-refusing-to-disclose-recipients-of-virus-aid> [<https://perma.cc/4Q6E-XTGU>].

between \$150,000 and \$10 million.¹¹² Upon release of the data, both the SBA and Treasury boasted about the success of the PPP in helping small businesses and their employees.¹¹³ Yet, industry reports suggest that many of the “small businesses” that received PPP money will soon be out of funds and are planning to lay off workers.¹¹⁴ Further, the information made public appears to be riddled with errors, making it difficult to form a clear picture of where and how the funds were ultimately spent.¹¹⁵

CONCLUSION

The press quickly condemned large companies for taking PPP loans even though their actions were consistent with the clear intent of Congress and the Administration. The backlash resulted in tighter eligibility guidelines for the second round of PPP funding, but, as noted above, the second round went largely unclaimed.¹¹⁶ Moreover, large corporations shouldered blame that should have been leveled at lawmakers, and at the media itself for failing to scrutinize the design of the PPP. Congress had clearly intended to make PPP funds available to them, and it was only apparent in retrospect that truly small enterprises were being shut out. It would be odd to expect corporations to refuse such a gift. Most media outlets uncritically accepted lawmakers’ portrayal of the PPP as a small-business rescue program; thus the criticism of corporations provided cover for the confused design of the program.

If the PPP had truly been designed for small businesses, the criticism of large corporations would be justified. If the PPP had truly been designed to help workers, the conduct of large corporations would be

¹¹² Press Release, Dept. of Treasury, SBA and Treasury Announce Release of Paycheck Protection Program Loan Data (July 6, 2020), <https://home.treasury.gov/news/press-releases/sm1052> [<https://perma.cc/N4CG-QHVZ>].

¹¹³ *Id.*

¹¹⁴ Sylvan Lane, *Goldman Sachs: More Than 80 Percent of Small Firms That Got PPP Loans Say That They Will Run Out of Money by August*, HILL (July 14, 2020, 11:57 AM EDT), <https://thehill.com/policy/finance/507236-more-than-80-percent-of-ppp-loan-recipients-will-run-out-of-money-by-august> [<https://perma.cc/9B6S-NB5B>]; Mark Niquette, *One in Five U.S. Small Firms Plan Layoffs After Using PPP Loan*, BLOOMBERG LAW (July 10, 2020, 9:35 AM), https://www.bloomberglaw.com/document/XC1NN9V0000000?udv_expired=true [<https://perma.cc/72GZ-AK5D>].

¹¹⁵ Mark Niquette, Matt Townsend & Hannah Levitt, *PPP Loan Data Errors Raise Questions About Relief Effectiveness*, L.A. TIMES (July 13, 2020, 5:09 PM PT), <https://www.latimes.com/business/story/2020-07-13/ppp-data-errors-coronavirus> [<https://perma.cc/AQ45-2ST5>].

¹¹⁶ Dayen, *supra* note 1.

more understandable, though it would raise the question of whether direct benefits to individuals would have been a wiser policy. This reveals the real problem: the PPP lacked a coherent policy goal. Its multiple functions resulted in contradiction both within the program and in relation to other policies. It claimed to assist small businesses while welcoming large businesses. It claimed to be a rescue program for business but directed businesses to pass most of the funds on to workers.¹¹⁷ Although it was supposedly intended to help businesses stay afloat, forgivable loans were available only for payroll and basic overhead, and the SBA issued after-the-fact, shifting requirements regarding payroll spending. Forgivable loan proceeds could not be used for other business debts and expenses, such as converting to an online or otherwise pandemic-friendly business model.¹¹⁸ Indeed, the smallest family-owned businesses have no use for “paycheck protection,” as they are run by unsalaried owners with few or no employees on payroll.¹¹⁹ Furthermore, PPP funds, structured to encourage hiring workers, became available only after businesses had shut down and other laws impeded hiring: states issued lockdown orders and Congress increased unemployment benefits to exceed the salaries of many low-wage jobs.¹²⁰ Demand for the second round of funding declined precipitously, perhaps due to the restrictions on permitted uses, Shake Shack’s bad publicity experience, or simply because many small businesses had already failed.¹²¹ According to the SBA, over \$133 billion in PPP funds remained unclaimed as of August 8 when the program stopped accepting new loan applications.¹²²

¹¹⁷ In contrast, many other countries replaced workers’ lost pay with direct payments. See Matt Apuzzo & Monika Pronczuk, *COVID-19’s Economic Pain Is Universal. But Relief? Depends on Where You Live*, N.Y. TIMES, <https://www.nytimes.com/2020/03/23/world/europe/coronavirus-economic-relief-wages.html> (last updated Apr. 5, 2020) [<https://perma.cc/A8U5-NRDV>].

¹¹⁸ See Emily Stewart, *The PPP Worked How It Was Supposed To. That’s The Problem*, VOX (July 13, 2020, 8:00 AM EDT), <https://www.vox.com/recode/2020/7/13/21320179/ppp-loans-sba-paycheck-protection-program-polling-kanye-west> [<https://perma.cc/HZ88-XEQF>].

¹¹⁹ *Id.*

¹²⁰ See Dayen, *supra* note 1.

¹²¹ See *id.* (“[A]s word traveled that 75 percent of the loan had to go to payroll, businesses with high rent or a lot of fixed expenses realized PPP would not assist their survival.”).

¹²² U.S. SMALL BUS. ADMIN., PAYCHECK PROTECTION PROGRAM (PPP) REPORT: APPROVALS THROUGH 08/08/2020 at 9 (2020), <https://home.treasury.gov/system/files/136/SBA-Paycheck-Protection-Program-Loan-Report-Round2.pdf> [<https://perma.cc/8LGW-CDSX>].