



## Bankruptcy Debtor Eligibility for Federal Coronavirus Aid under the CARES Act

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### Introduction

In March of 2020, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”) to provide assistance to individuals and businesses affected by the Covid-19 pandemic.<sup>1</sup> The Paycheck Protection Program (the “PPP”) was established under section 7(a)(36) of the Small Business Act to provide economic relief in the form of loans to small businesses negatively impacted by Covid-19.<sup>2</sup> The CARES Act tasks the Small Business Administration (the “SBA”) with administering the PPP loans.<sup>3</sup>

The PPP application form provides that a loan will not be approved if an applicant is “presently involved in any bankruptcy.”<sup>4</sup> However, debtors sued the SBA over this bankruptcy exclusion, resulting in conflicting decisions by the courts. The Consolidated Appropriations Act, enacted December 27, 2020, permitted some debtors to be eligible for PPP loans so long as the

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<sup>1</sup> See Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act, 13 C.F.R. Part 113, 120, 121 (2021).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See SBA Form 2483 (Feb. 17, 2021).

SBA provides written approval.<sup>5</sup> On April 6, 2021, the SBA clarified that debtor-applicants may be eligible for PPP loans under certain circumstances.<sup>6</sup>

This article examines whether a debtor may receive a PPP loan under the CARES Act. Part I focuses on the legal arguments on both sides of the issue and how the resulting decisions varied among courts. Part II examines the SBA's early position on the eligibility of debtors to receive PPP loans. Part III describes the Consolidated Appropriations Act of 2021, through which the SBA further maintained its earlier position. Part IV describes the SBA's shift in its position weeks before the deadline to apply for the PPP.

## **I. Analysis of Circuit, District, and Bankruptcy Court Decisions**

Litigation over the bankruptcy exclusion primarily focused on one or both of the following sub-issues: (1) whether the SBA had the power to make the exclusion in the first place under the Administrative Procedure Act (the "APA") and (2) whether the exclusion of debtors violated section 525(a) of title 11 of the United States Code (the "Bankruptcy Code"). Circuit, District, and bankruptcy courts are all split on these issues.

### **A. The Administrative Procedure Act allows courts to set aside the actions of an agency.**

The APA provides for judicial review of the actions of an agency. Under Section 706 of the APA, a reviewing court shall "hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . [or] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."<sup>7</sup> Using a two-part analytical framework articulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense*

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<sup>5</sup> Consolidated Appropriations Act, H.R. 133, 116th Cong. (2020).

<sup>6</sup> See Office of Capital Access, *Paycheck Protection Program Loans: Frequently Asked Questions (FAQ)*, FAQ for PPP Borrowers and Lenders (April 6, 2021), <https://www.sba.gov/sites/default/files/2021-04/PPP%20FAQs%204.6.21%20FINAL-508.pdf>.

<sup>7</sup> See 5 U.S.C. § 706 (2018).

*Council*, courts reviewing the SBA’s statutory authority to exclude debtors typically analyze (1) whether the CARES Act is silent on the issue and, if so, (2) whether the SBA’s bankruptcy exclusion is based on a permissible construction of the CARES Act.<sup>8</sup> Courts reviewing whether the bankruptcy exclusion is arbitrary and capricious will consider if, in making the exclusion, the SBA: (1) relied on factors that Congress did not intend it to consider, (2) failed to consider an important aspect of the problem, (3) offered an explanation for its decision that runs counter to the evidence before the agency, or (4) the exclusion is implausible.<sup>9</sup>

- i. *Some courts have found against the debtor in holding that the SBA’s bankruptcy exclusion was not unlawful under the APA.*

Courts finding that the bankruptcy exclusion was not unlawful under the APA did so on the grounds that the exclusion was a permissible exercise of the SBA’s statutory rulemaking authority.<sup>10</sup> In *In re Gateway Radiology Consultants, P.A.*, the United States Court of Appeals for the Eleventh Circuit vacated a bankruptcy court’s order approving the debtor’s motion to borrow PPP funds and enjoining the SBA from enforcing the bankruptcy exclusion.<sup>11</sup> The Eleventh Circuit concluded that the bankruptcy exclusion was a reasonable interpretation of the CARES Act and was not arbitrary and capricious.<sup>12</sup>

Using the two-step analysis, the Eleventh Circuit first found that the CARES Act was silent as to whether debtors may receive PPP loans, and that there was good reason to believe Congress intended to delegate authority to the SBA to address the issue.<sup>13</sup> According to the

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<sup>8</sup> See *Chevron, U.S.A., Inc., v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984); *Diocese of Rochester v. U.S. Small Bus. Admin.*, 466 F.Supp.3d 363, 374 (W.D.N.Y. 2020).

<sup>9</sup> *USF Fed. Credit Union v. Gateway Radiology Consultants, P.A. (In re Gateway Radiology Consultants, P.A.)*, 983 F.3d 1239, 1262 (11th Cir. 2020).

<sup>10</sup> See *In re Gateway Radiology Consultants, P.A.*, 983 F.3d at 1260–1262; *Diocese of Rochester*, 466 F.Supp.3d at 374–378; *Penobscot Valley Hosp. v. Carranza (In re Penobscot Valley Hosp.)*, No. 20-1005, 2020 WL 3032939 at \*5, \*7–10 (Bankr. D. Me. June 3, 2020).

<sup>11</sup> *Id.* at 1247.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

court, Congress showed an intent to delegate this authority by placing the PPP within section 7(a) of the Small Business Act, which subjects loans to the requirement that they be “of such sound value or so secured as reasonably to assure repayment[.]”<sup>14</sup> Next, the CARES Act expressly gives the SBA “emergency rulemaking authority” to “issue regulations” to carry out the PPP and provides that the SBA “may guarantee covered loans under the same terms, conditions, and processes” as section 7(a).<sup>15</sup> The court reasoned that the use of the permissive word “may” gave the SBA discretionary authority.<sup>16</sup> According to the court, these considerations all showed that there was at least an implicit delegation of authority to the SBA to determine how to apply the sound value requirement to the PPP, including through the use of eligibility requirements.<sup>17</sup>

Moving to the next step of the analysis, the Eleventh Circuit concluded that the SBA’s interpretation of the CARES Act was a reasonable interpretation that it must defer to.<sup>18</sup> In assessing the reasonableness of the interpretation, the court considered the fact that, due to the economic crisis brought on by the pandemic, the SBA only had fifteen days to issue rules, which is “practically warp speed for regulatory action.”<sup>19</sup> Despite the purpose of the PPP being to aid distressed small businesses, Congress still placed the PPP within section 7(a), making it subject to the sound value requirement, and then left the SBA to accommodate these “manifestly competing interests.”<sup>20</sup> The SBA then accommodated these competing interests by implementing a “simple bright-line proxy based on bankruptcy status.”<sup>21</sup> Thus, the court concluded that the

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<sup>14</sup> *Id.* at 1248, 1256–1257.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1261–1262.

<sup>19</sup> *Id.* at 1262.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

SBA's interpretation of the CARES Act was reasonable given the circumstances and urgency with which it needed to act in response to Covid-19.<sup>22</sup>

The Eleventh Circuit also found that the bankruptcy exclusion was not arbitrary and capricious under the APA.<sup>23</sup> In its interim final rule ("IFR") issued April 28, 2020, the SBA explained that it excluded debtors from PPP eligibility because they "would present an unacceptably high risk of an unauthorized use of funds or non-repayment of unforgiven loans."<sup>24</sup> According to the court, the fact that the SBA "fashioned its consideration of bankruptcy status into a streamlined and bright-line rule" to expedite the administering of PPP loans was "not implausible, irrational, or the product of arbitrary and capricious decision making."<sup>25</sup> Nor did the SBA rely on factors that Congress did not intend it to consider when it relied on the risk of unauthorized use of funds and the risk of non-repayment.<sup>26</sup> Rather, unauthorized use and risk of non-repayment were relevant factors because Congress had defined specific allowable uses for the PPP loans, as well as specific costs for which forgiveness of the PPP loans would be available. Further, Congress subjected the PPP to the sound value requirement of § 7(a), which was implemented by "creditworthiness regulations."<sup>27</sup>

- ii. *Other courts have found in favor of the debtor in holding that the bankruptcy exclusion was unlawful under the APA.*

Courts finding that the bankruptcy exclusion was unlawful under the APA did so on the grounds that the exclusion was arbitrary and capricious.<sup>28</sup> In *Alaska Urological*, the District Court of Alaska held that the bankruptcy exclusion was unlawful because it was arbitrary and

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 1263.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 1264.

<sup>27</sup> *Id.*

<sup>28</sup> See *Alaska Urological Inst., P.C. v. U.S. Small Bus. Admin.*, 619 B.R. 689, 710 (D. Alaska 2020).

capricious.<sup>29</sup> First, the court held that the SBA failed to consider important aspects of the problem by not considering the “protections afforded by the bankruptcy process.”<sup>30</sup> These protections include the requirement that a chapter 11 debtor give notice to interested parties when it intends to borrow money outside the ordinary course of business, the bankruptcy court’s ability to restrict the use of the loan proceeds, and the requirement that debtors must file monthly operating reports detailing the use of the funds.<sup>31</sup> As a result, the court concluded that debtors are “more closely monitored in the use of their funds than other businesses,” which made the SBA’s argument that debtors are “unusually high risk” unpersuasive.<sup>32</sup>

Next, the court held that the SBA, in making the bankruptcy exclusion, relied on a factor that Congress did not intend it to.<sup>33</sup> According to the court, the SBA’s explanation that debtors present an “unusually high risk” of non-repayment amounted to reliance on the collectability of the PPP loans in its decision to exclude debtors.<sup>34</sup> The court reasoned that despite the sound value requirement, the PPP loans were intended to be forgiven, and therefore Congress was not concerned with the risk of non-repayment.<sup>35</sup> Since there was no expectation that the borrowers would pay back the PPP loans, the court concluded that collectability of the loans was not a factor Congress intended the SBA to rely on.<sup>36</sup>

Lastly, the court found that the SBA’s explanation for the bankruptcy exclusion given in its fourth IFR was implausible because it was merely a conclusory statement not justified by facts or citations.<sup>37</sup> Since the SBA provided no evidence that debtors were likely to misuse or not

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<sup>29</sup> *Id.* at 710.

<sup>30</sup> *Id.* at 709.

<sup>31</sup> *Id.* at 708.

<sup>32</sup> *Id.* at 708–709.

<sup>33</sup> *Id.* at 709.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

repay funds, and the bankruptcy process makes these concerns less likely, there was “no rational connection between the facts found and the choice made.”<sup>38</sup> For these reasons, the court concluded that the decision to exclude debtors from the PPP was arbitrary and capricious.<sup>39</sup>

**B. Section 525(a) of the Bankruptcy Code prohibits discrimination against a person solely because that person is or has been a debtor.**

Another heavily litigated issue is whether the bankruptcy exclusion violates section 525(a) of the Bankruptcy Code.<sup>40</sup> Section 525(a) states:

[A] governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment against, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title[.]<sup>41</sup>

The federal government may discriminate against bankruptcy debtors so long as the discrimination does not violate section 525.<sup>42</sup> To establish a violation of section 525(a), a plaintiff must show that (1) the SBA is a governmental unit, (2) the PPP loan is an item covered by the statute, and (3) the SBA discriminated against the plaintiff solely because of the plaintiff’s status as a debtor.<sup>43</sup> Here, whether or not the bankruptcy exclusion violated section 525(a) hinged on whether the PPP was considered an “other similar grant” covered by the statute.

- i. *Courts holding in favor of the SBA have held that the PPP is not an “other similar grant.”*

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *See In re Springfield Hosp., Inc.*, 618 B.R. 70, 81–84 (Bankr. D. Vt. 2020) (discussing 34 different court decisions on the 525(a) issue).

<sup>41</sup> 11 U.S.C. § 525(a) (2018).

<sup>42</sup> *See Penobscot Valley Hosp. v. Carranza (In re Penobscot Valley Hosp.)*, No. 20-1005, 2020 WL 3032939 at \*5, \*10 (Bankr. D. Me. June 3, 2020).

<sup>43</sup> *See Ayes v. U.S. Dep’t of Vet. Affairs*, 473 F.3d 104, 107 (4th Cir. 2006).

Courts holding in favor of the SBA on this issue have held that the PPP is not an “other similar grant” within the meaning of section 525(a) of the Bankruptcy Code.<sup>44</sup> In *Tradeways*, the District Court of Maryland concluded that the debtor could not demonstrate success on the merits of its section 525(a) claim.<sup>45</sup> In its reasoning, the court considered the text of the CARES Act, which refers to the PPP as a loan and wherein the word “loan” appears 75 times.<sup>46</sup> The court also considered the statutory context of the CARES Act, in that Congress made the PPP a subsection to 15 U.S.C. section 636(a), which is concerned with the Administrator’s authority to make loans to small businesses and sets out the statutory scheme for disaster loans, loans to handicapped persons, loans for small businesses in low-income areas, and microloans.<sup>47</sup> In rejecting the debtor’s argument that the PPP was a grant because of its “generous forgiveness terms” the court pointed out that “the fact that the PPP proceeds are forgivable does not make the money an outright gift” because the CARES Act places certain restrictions on the borrowers to be eligible for forgiveness.<sup>48</sup>

Even if the PPP were a grant “masquerading” as a loan, the District Court of Maryland did not consider it a grant “similar” to a “license, permit, charter, [or] franchise.”<sup>49</sup> Relying on *Ayes*, the court construed section 525(a) narrowly, reasoning that the word “similar” in the statute “limits the universe” of covered grants so that only grants bearing a “family resemblance” to licenses, permits, charters, and franchises are protected.<sup>50</sup> The court reasoned that the interests

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<sup>44</sup> See *Tradeways, Ltd. v. U.S. Dep’t of Treasury*, No. 20-1324, 2020 WL 3447767 at \*19 (D. Md. June 24, 2020) (PPP is a loan); *Diocese of Rochester v. U.S. Small Bus. Admin.*, 466 F.Supp.3d 363, 380 (W.D.N.Y. 2020) (PPP is a loan); *iThrive Health, LLC v. Carranza (In re iThrive Health, LLC)*, 623 B.R. 392, 402 (Bankr. Md. 2020) (PPP is not a grant similar to a license, permit, charter, or franchise).

<sup>45</sup> 2020 WL 3447767 at \*17.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* (explaining that the CARES Act provides that the amount of the loan forgiven can be reduced if the borrower decreases an employee’s salary by more than twenty-five percent, the borrower must spend at least sixty percent on payroll costs to be eligible for forgiveness, and borrowers must sign a promissory note).

<sup>49</sup> *Id.* at 18.

<sup>50</sup> *Id.*

enumerated in section 525(a) all implicate the government's role as a gatekeeper in that the denial of a government authorization in those contexts completely forecloses the individual from a certain opportunity.<sup>51</sup> Here, the SBA's denial of a PPP loan does not "completely foreclose" a debtor's opportunity to receive other sources of capital, so the PPP does not implicate section 525(a).<sup>52</sup>

- ii. *Courts holding in favor of the debtor have found that the PPP is an "other similar grant" covered by the statute.*

In contrast, multiple bankruptcy courts found the bankruptcy exclusion to be discriminatory under section 525(a) on the grounds that PPP loans are an "other similar grant."<sup>53</sup> In *In re Organic Power LLC*, the Puerto Rico bankruptcy court concluded that the bankruptcy exclusion violated section 525(a) because despite being called a "loan" the PPP should be treated as a grant program.<sup>54</sup> The court reasoned that the requirements set forth in the CARES Act did not include creditworthiness; rather, due to Covid-19, financial distress and inability to pay were presumed.<sup>55</sup> Further, the PPP money was appropriated for the SBA to pay back, not the borrowers.<sup>56</sup> Absent a requirement or expectation that the PPP money be repaid by the borrowers, the court concluded that the PPP had to be characterized as a grant.<sup>57</sup>

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<sup>51</sup> *Id.* at 18–19. (explaining that, for example, a government entity's refusal to issue a commercial real estate license, medical license, or building permit would completely foreclose the borrower from those opportunities).

<sup>52</sup> *Id.* at 19. (explaining that the plaintiff could still seek a traditional loan from a bank).

<sup>53</sup> See *In re Springfield Hosp., Inc.*, 618 B.R. 70, 80–81 (Bankr. D. Vt. 2020); *Organic Power LLC v. Small Bus. Admin.* (*In re Organic Power LLC*), 619 B.R. 540, 547 (Bankr. D. P.R. 2020); *Roman Catholic Church of the Archdiocese of Santa Fe v. U.S. Small Bus. Admin.* (*In re Roman Catholic Church of Archdiocese of Santa Fe*), 615 B.R. 644, 657 (Bankr. D. N.M. 2020).

<sup>54</sup> See 619 B.R. at 548.

<sup>55</sup> *Id.* (reasoning that repayment cannot possibly be a significant part of the program because "an attempt to collect even a fraction of the 4,907, 655 PPP loans made to distressed small businesses would be an act of folly.").

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

In addressing the issue of whether the PPP was a “similar” grant, the *Organic Power* court chose to read section 525(a) broadly so that the word “similar” in the statute would not make “license, permit, charter, or other franchise” an exhaustive list of protected items.<sup>58</sup> Unlike the *Tradeways* court, the *Organic Power* court declined to follow *Ayes*’s narrow interpretation of section 525(a) and instead relied on the Second Circuit’s analysis in *Stoltz v. Brattleboro Housing Authority*, which held that the enumerated items in the statute were illustrative rather than exhaustive.<sup>59</sup> The court reasoned that the common qualities of the items enumerated in section 525(a) were that they could only be obtained from the private sector and were “essential to a debtor’s fresh start.”<sup>60</sup> The PPP loans, the court reasoned, are only administered by the SBA, offer benefits that cannot be obtained from the private sector, and would provide small businesses with access to capital in order to pursue economic betterment.<sup>61</sup> Accordingly, the court held that the PPP was an “other similar grant” within section 525(a).<sup>62</sup>

## II. The SBA’s Early Position

The SBA has issued several IFRs since the enactment of the CARES Act. However, it did not expressly address excluding debtors from PPP loan eligibility until its fourth IFR issued on April 28, 2020.<sup>63</sup> This IFR referenced the application form and expressly stated that debtors were ineligible to participate in the PPP.<sup>64</sup> In its IFR effective January 6, 2021, the SBA again expressly addressed bankruptcy.<sup>65</sup> The rule stated that if an applicant is a debtor at the time of

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 550.

<sup>60</sup> *Id.* at 549 (quoting *Stoltz v. Brattleboro Hous. Auth. (In re Stoltz)*, 315 F.3d 80, 90 (2d Cir. 2002)).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 550.

<sup>63</sup> 85 Fed. Reg. 23,450 (April 28, 2020).

<sup>64</sup> *Id.*

<sup>65</sup> 13 C.F.R. Part 113, 120, 121.

application or before a loan is disbursed, the applicant is ineligible, and if the applicant becomes a debtor after submitting an application, it must notify the lender and request that the application be canceled.<sup>66</sup> The rule also referred to the PPP application form, stating that “[t]he Borrower Application Form for PPP loans (SBA Form 2483), which reflects this restriction in the form of a borrower certification, is a loan requirement.<sup>67</sup>” On March 13, 2021, the SBA stated in a Frequently Asked Questions (“FAQ”) document that borrowers who received PPP loans and then later filed for bankruptcy were not eligible for a second round of funding.<sup>68</sup> Thus, the SBA appeared to be maintaining its position that debtors were ineligible for PPP loans.

### **III. The Consolidated Appropriations Act**

On December 27, 2020, Congress passed the Consolidated Appropriations Act (“CAA”), which makes appropriations for the upcoming fiscal year to provide Covid-19 emergency response and relief.<sup>69</sup> The CAA temporarily amended sections 525 and 364 of the Bankruptcy Code.<sup>70</sup> The amendment to section 525 sunsets one year after the date of enactment (December 27, 2021), and the amendment to section 364 sunsets two years after the date of enactment (December 27, 2022).<sup>71</sup> Neither section’s amendment addresses the category of debtors or the section of the CARES Act relevant to the bankruptcy exclusion litigation.

Section 525 was amended to add a provision stating that debtors may not be denied relief under certain provisions of the CARES Act because that person is or has been a debtor under the

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Office of Capital Access, *Paycheck Protection Program Loans: Frequently Asked Questions (FAQ)*, FAQ for PPP Borrowers and Lenders (March 12, 2021), <https://www.sba.gov/sites/default/files/2021-03/PPP%20FAQs%203.12.21%20FINAL-508.pdf>.

<sup>69</sup> See Consolidated Appropriations Act, H.R. 133, 116th Cong. (2020).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

Bankruptcy Code.<sup>72</sup> However, the applicable provisions of the CARES Act referenced are foreclosure moratorium, forbearance of residential mortgage loan payments, and the moratorium on eviction filings.<sup>73</sup> The amendment notably does not apply to the section of the CARES Act addressing PPP loans.

Section 364 was amended to add that a bankruptcy court may, “after notice and a hearing . . . authorize a debtor in possession . . . under section 1183, 1184, 1203, 1204, or 1304 of [the Bankruptcy Code] to obtain a loan” under the PPP.<sup>74</sup> This amendment takes effect “on the date on which the Administrator submits to the Director of the Executive Office for United States Trustees a written determination that, subject to satisfying any other eligibility requirements,” any debtor under the above-referenced sections would be eligible for the loan.<sup>75</sup> This amendment applies only after the SBA’s approval of the rule change, and only to debtors filing under the Small Business Reorganization Act of chapter 11, farmers and fishermen under chapter 12, and self-employed individuals under chapter 13.<sup>76</sup> Ordinary chapter 11 debtors are not mentioned. As of the date of the publication of this article, the SBA has not made such written determination.

#### **IV. The SBA’s Last Minute Policy Reversal**

On April 6, 2021, the SBA issued additional guidance via another FAQ document.<sup>77</sup> Just seven weeks before the May 31 deadline to apply for a PPP loan, the SBA seemingly reversed its prior stance on debtor eligibility.<sup>78</sup> FAQ 67 clarified the meaning of “presently involved in any

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<sup>72</sup> See H.R. 133 (“Any person may not be denied relief under section 4022 through 4024 of the CARES Act (15 U.S.C. 9056, 9057, 9058) because the person is or has been a debtor under this title.”).

<sup>73</sup> See 15 U.S.C. §§ 9056, 9057, 9058 (2018).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See Ronald A. Spinner, Thomas G. Appleman, & Steven A. Roach, *Congress Permits SBA to Make PPP Loans to Debtors in Bankruptcy, SBA Says “No”*, 11 NAT. L. REV. 15 (2021).

<sup>77</sup> See Office of Capital Access, *Paycheck Protection Program Loans: Frequently Asked Questions (FAQ)*, FAQ for PPP Borrowers and Lenders (April 6, 2021), <https://www.sba.gov/sites/default/files/2021-04/PPP%20FAQs%204.6.21%20FINAL-508.pdf>.

<sup>78</sup> *Id.*

bankruptcy” for purposes of PPP eligibility.<sup>79</sup> According to the SBA, a Chapter 7 debtor is “presently involved in any bankruptcy” until a bankruptcy court has entered a discharge order in the case. A Chapter 11, 12, or 13 debtor is “presently involved in any bankruptcy” until a bankruptcy court has entered an order confirming the debtor’s plan of reorganization.<sup>80</sup> If a bankruptcy court has issued an order dismissing the case, that debtor is no longer considered to be “presently involved in any bankruptcy” regardless of chapter.<sup>81</sup> This clarification was extremely consequential for debtors because the entry of the confirmation of a reorganization plan is typically not immediately followed by the dismissal of the bankruptcy case.<sup>82</sup> As a result, some debtors were now eligible for PPP loans despite technically still remaining in bankruptcy.<sup>83</sup> As of the date of the publication of this article, at least one of the Chapter 11 debtors discussed herein that had previously been denied a PPP loan has since been approved for a loan following the issuance of FAQ 67.<sup>84</sup>

## Conclusion

Courts have reached conflicting conclusions as to whether the SBA may permissibly exclude debtors from eligibility for PPP loans based on analyses of the same APA and section 525(a) issues. Until April 2021, the SBA appeared to be maintaining the position that debtors were ineligible for PPP loans. The Consolidated Appropriations Act’s amendments to the Bankruptcy Code did not address all types of debtors and still left the final determination as to

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> See Kyle J. Tum Suden, Aaron Gavant, & Sean T. Scott, *Too Little Too Late? After Much Debate, SBA Allows Debtors to Access PPP Loans – But Only on a Limited Basis*, REAL BANKRUPTCY INTEL BLOG, (May 3, 2021), <https://www.realbankruptcyintel.com/2021/05/too-little-too-late-after-much-debate-sba-allows-debtors-to-access-ppp-loans-but-only-on-a-limited-basis/>.

<sup>83</sup> *Id.*

<sup>84</sup> See Moiz Syed & Derek Willis, *Tracking PPP: Search Every Company Approved for Federal Loans*, PROPUBLICA, (July 7, 2020 (updated June 5, 2021)), <https://projects.propublica.org/coronavirus/bailouts/> (Tradeways, Ltd. was approved for a loan on May 20, 2021).

whether those debtors may receive PPP in the hands of the SBA. Given the SBA's earlier position that debtors were ineligible, such discretion seemed to trump prior cases that held in favor of the debtor. However, the SBA's guidance set forth in its April 2021 FAQ document opened the door to allow debtors with discharge orders, confirmed reorganization plans, or dismissed bankruptcy cases access to PPP loans at the eleventh hour.