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ABSTRACT

The Paycheck Protection Program is an over-$500 billion U.S. federal pandemic relief program that has benefited firms of many sizes despite its "small business" political headline. Other work on emergency funds has considered issues of Congressional and judicial oversight. But existing work does not consider the emergency fund power struggle between, on the one hand, fourth-branch administrators; and, on the other hand, fifth-branch private actors, such as market participants, gatekeeper banks, and the media. This Article fills that gap.

This Article argues that private actors' incentives did not align with the PPP's goals or statutory text. The PPP statute included the concept of addressing need. In contrast the market produces the result that the strongest and best-resourced applicants will win. Therefore, Treasury and the SBA should have administered the PPP to produce priority distribution of emergency funds to those applicants more in need.

Allocating emergency funds administratively (rather than letting the market allocate) requires solving an information constraint, as to which the paper proposes distribution through a process that draws on a descending-price auction mechanism. It requires solving a time constraint, as to which the paper proposes back-end adjustments to initial, stricter rules. And it requires leveraging fairly slender discretionary provisions in the statute, as to which the paper proposes a safe-harbor enforcement mechanism to navigate applicable administrative law.

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INTRODUCTION

Government administrators play a central role in responding to emergencies. This is so even though bureaucrats generally do not have the power to declare an emergency. That power generally lies with the legislative or executive branch. But bureaucrats fill the boots on the ground and control all-important details of emergency policy. So it was with the Paycheck Protection Program in 2020.

The Paycheck Protection Program, or PPP, was part of 2020's federal pandemic relief legislation, administered by Treasury and the Small Business Administration (SBA). The program was a key part of a Congressional effort to pump liquidity into the U.S. economy in the spring and summer of 2020.[1] It granted over $500 billion in federal funds over five months, in the form of forgivable federal loans to businesses, guaranteed (in other words, paid) by the federal government and offered through private financial institution intermediaries. The recipients of the grants were businesses with 500 employees or fewer who certified "that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient."[2] Applicants received up to 2.5 times monthly payroll, with a $10 million maximum.[3] The loans carried a 1% interest rate and required no collateral or personal guarantees.[4] They were forgiven if spent on permitted expenses such as payroll, rent and utilities.[5]

Existing reviews of the PPP generally cast Treasury and the SBA as weak players in the story of the PPP. Instead, banks, the media and Congress receive star billing. Some have written that a program like the PPP needs existing financial institutions in order to function, and should support online as well as traditional lenders to encourage on-lending to small business.[6] Others have criticized bank incentives that meant that funds were improperly allocated to "relationship borrowers."[7] Some analysis focuses on the media, for instance arguing that coverage exploited the program's vagueness to "enable a populist narrative" that criticized larger and/or publicly traded PPP applicants.[8] Some comments offer advice to Congress, for instance encouraging it to expand

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1 See Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136 § 1102, 134 Stat. 287 (March 27, 2020) (codified at 15 U.S.C. § 636(a)(36)).

2 15 U.S.C. § 636(a)(36)(G)(i)(I).

3 See 15 U.S.C. § 636(a)(36)(E) (defining maximum loan amount).

4 See U.S. Small Business Administration, Interim Final Rule, Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811 (April 15, 2020) (setting interest rate at 100 basis points).

5 See 15 U.S.C. § 636(a)(36)(F) (defining allowable use of covered loans).

6 See, e.g., Todd Baker & Kathryn Judge, How to Help Small Businesses Survive COVID-19, Columbia Law & Economics Working Paper No. 620, Apr. 10, 2020, available at https://ssrn.com/abstract=3571460.

7 See, e.g., Dan Amiram & Daniel Rabetti, The Relevance of Relationship Lending in Times of Crisis, working paper (Nov. 4, 2020), available at https://ssrn.com/abstract=3701587 (finding correlation between banking relationship and successful PPP application, and stronger correlation for lending relationship than for borrowing relationship).

8 Ilya Beylin, The Ignominious Life of the Paycheck Protection Program, available at https://ssrn.com/abstract=3661005; see also Thomas W. Joo & Alex Wheeler, The "Small Business" Myth

the PPP,[9] or replace at least part of the program with direct public grants;[10] or imitate the automatic and direct subsidy programs crafted in Europe, Australia and elsewhere.[11]

This Article focuses instead on Treasury and SBA. Their role in the PPP has been the subject of only sparse academic commentary.[12] This paper considers these agency bureaucrats as central protagonists in the story of the PPP. It argues that the administration of an emergency government fund like the PPP requires a choice between regulation and deregulation, and that bureaucrats often make that choice.

This contrasts with an assumption in existing literature that the emergent nature of the PPP prevented effective government regulation. As one paper claims, "the social planner trades off the speed of loan delivery with the effectiveness of loan targeting."[13] This Article respectfully disagrees. Government can target emergency money immediately, without information, and in the presence of a vague statute. Relevant tactics were used in rudimentary form in the PPP and could also be used in other emergency fund situations, including the many pandemic relief funds administered by national governments, subnational governments and nonprofit organizations.

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of the Paycheck Protection Program, 54 U.C. Davis L. Rev. Online 21, 40 (2020) ("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").

9 Cf. Glenn Hubbard & Michael R. Strain, Has the Paycheck Protection Program Succeeded? IZA Institute of Labor Economics Discussion Paper No. 13808, Oct. 2020, available at https://ssrn.com/abstract=3718188 (arguing for a $1 trillion PPP).

10 See, e.g., Charles M. Kahn & Wolf Wagner, Liquidity Provision During a Pandemic, working paper at 3-5, available at http://ssrn.com/abstract=3590933 (reviewing arguments for public grants to fund firms through temporary disruptions despite the "information advantage" of lending through the banking system).

11 Steven Hamilton, A Tale of Two Wage Subsidies: The American and Australian Fiscal Responses to COVID-19, 73 Nat'l Tax J. 829, 843 (2020) (recommending building IRS infrastructure capable of "switch[ing] business tax withholding … into reverse").

12 See Michael Barr, Howell Jackson & Margaret Tahyar, The Financial Response to the COVID-19 Pandemic, August 1, 2020, supplement to Michael S. Barr, Howell E. Jackson & Margaret E. Tahyar, Financial Regulation Law and Policy (2018) 7-8 (commenting on "significant regulatory confusion and administrative disarray," "constantly shifting regulatory goalposts," "opportunities to game the system or engage in outright fraud," and failing government computer systems and suggesting that "the United States could have created a better and less complex system for channeling funds to small businesses"); William A. Birdthistle & Joshua Silver, Funding Crises: An Empirical Study of the Paycheck Protection Program, 21, __, available at http://ssrn.com/abstract=3728954 (presenting empirical study indicating that first-wave PPP loans were not disbursed disproportionately to Trump supporters, to states with higher COVID-19 impact or to states more exposed to unemployment risk and that instead government regulation was absent and small business owners' application success tied to the knowledge and information embedded in their social and business networks) (citing Mark Granovetter, Economic Action and Social Structure, 91 Am. J. Sociology 481 (1985)).

13 Alexander W. Bartik et al., The Targeting and Impact of Paycheck Protection Loans to Small Businesses, NBER Working Paper 27623 (July 2020) at 1.

Since the key choice of emergency fund bureaucrat protagonists is between regulation and deregulation, it is important to define these terms as used here. "Regulation" means that government administrators seek to determine or control the allocation of emergency funds. "Deregulation" means that administrators allow nongovernmental actors to determine how it is implemented. Regulation chooses the "fourth branch" of government – an agency – to allocate emergency money. Deregulation allows private actors – sometimes labeled the "fifth branch" – to do the same.[14]

Deregulation, or agency inaction, means that forces outside the government will allocate emergency money. The privately motivated choices of regulated parties and gatekeepers, together with other nongovernmental forces such as media coverage, determine the result. Applicants for funds organize priorities themselves. Resources tend to go to the strongest, cleverest and best-connected among applicants – that is, to those who are already most likely to succeed.

Allowing private actors to allocate funds means that able private applicants can quickly claim funds. This private ordering approach arguably minimizes economic distortion. But this is not the typical goal of emergency money policy. For emergency money policy, the market's survival-of-the-fittest approach to allocating emergency funds is flawed.

The market's approach is flawed because emergency money is also intended for those that need it most to weather a crisis. The statute conveys that the PPP's target audience was intermediate. The ideal PPP applicant was well-resourced enough to navigate the PPP application process, but weak enough that the PPP grant is "necessary" to its survival. Because the PPP was not meant simply for the strongest firms, its purpose conflicts with the commitment of private actors to help themselves first and with the survival-of-the-fittest results produced by the fifth branch.

The PPP story also shows that other fifth-branch nongovernmental forces, such as media criticism, can modify the survival-of-the-fittest result. Media attention and public criticism may most strongly discourage applicants who value their reputations most strongly, or applicants whose firms are well-known and therefore make for salient news stories. This can produce a perverse clientele effect in which applicants who value legal compliance more will be less likely to seek emergency funds.

These disadvantages of fifth-branch administration, meaning control of allocation by private actors, suggest the advantages of government regulation in the case of an emergency fund like the PPP. More regulation may not always be the right answer for emergency money. For instance, when

[14] See Harold I. Abramson, A Fifth Branch of Government: The Private Regulators and Their Constitutionality, 16 Hastings Const. L. Q. 165, 168 (1989) (describing "private regulators" as a fifth branch of government); id. at 183-85 (including as fifth-branch categories not only "formally deputized private regulators" but also organizations with some government connections and also "purely private actors" "having no formal connection with the government.")

the Fed reduces a benchmark interest rate to encourage lending, it does not require to on-lend on certain terms or to certain borrowers. But other emergency money programs have featured administrative control of the allocation of funds. For instance, in 2008 the U.S. Treasury employed "regulation by deal" and deployed $125 billion in TARP funds to purchase equity in financial institutions based on a stretched reading of the statute.[15]

Emergency fund stories may not always come out the same way, but they share a hallmark choice between deregulation and regulation. The story of the PPP shows federal agencies grappling with this choice. It features an initial, first-wave deregulation choice followed by increasing regulation in the second wave of the program. It illustrates irreducible pressures of emergency administration: vague instructions, limited information and limited time. It provides lessons for the design of sophisticated tactics to allocate emergency money with limited instructions, information and time; and given applicable administrative law constraints.

Part I of this Article tells the story of the PPP's enactment, including bipartisan support for the idea and drafting controlled by the Republican leadership in the Senate. Part I also explains the content of the statute. It describes some crisply drafted provisions – like those explaining applicant eligibility, loan size, and payroll requirements. It also describes some vague provisions – such as the hardship certification, the authorization that the SBA "may" guarantee loans, and a sense of the Senate provision about prioritizing certain lenders.

Part II describes how the PPP worked out on the ground. Deregulation marked its first wave. Regulation marked its second wave.

The PPP's first wave connects to a two-week free-for-all stage starting in late March 2020 and then a "Shake Shacked" media attention stage in April 2020. In this first-wave phase, the Treasury and SBA did little to control who would receive the allocated funds. The second wave connects to guidance announced in late April and May 2020, and the later stage of seeking loan forgiveness. In this second wave, Treasury and SBA intervened and influenced applications, notably by discouraging applications for loans in excess of $2 million and/or from public firms.

Part III explains how the Treasury and SBA could have regulated PPP fund allocations within applicable information and time constraints. It explains that emergency fund legislation will often couple vague statutory instructions and administrative discretion. It sketches an approach for fund allocation based on a descending-price auction mechanism and the tool of enforcement safe harbors. Part III further explains how regulators could have planned for back-end adjustments.

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[15] Steven M. Davidoff & David Zaring, Regulation By Deal: The Government's Response to the Financial Crisis, 61 Admin. L. Rev. 463 (2009).

Part III also briefly considers administrative law constraints. It notes the checks provided by the Congressional oversight, executive supervision and judicial review. These checks may be imperfect. But they are more available to monitor fourth-branch bureaucrats compared to fifth-branch private actors.

I. THE STORY OF THE STATUTE

On March 27, 2020 as part of the CARES Act, Congress created the PPP, placed it under the administrative auspices of the Treasury and the Small Business Administration, and funded the PPP with $349 billion.[16] The program emerged from a collaboration among Senators Mark Rubio and Susan Collins, several other members of Congress, and the Treasury.[17] On March 18 Collins and Rubio had described at a press conference a $300 billion program that would fund "small businesses" that otherwise would close and payroll for employees who would otherwise be laid off, for instance in the hospitality industry.[18] Also on March 18, Treasury had released a proposal described "Small Business Interruption Loans." This followed the lines of the Collins and Rubio description, with the change that "eligible borrowers" were described not based on the SBA's existing regulations, as Rubio had suggested, but rather as "Employers with 500 employees or less (phased out)."[19] The 500-employee cutoff stuck.[20]

PPP loans are nonrecourse[21] and require no collateral or guarantee.[22] Their interest rate is capped at 1%.[23] They can be made in an amount up to 2.5 times average monthly payroll, with a cap

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16 See Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136 § 1102 ff., 134 Stat. 281, 287 (March 27, 2020) (codified at 15 U.S.C. § 636(a)(36)).

17 See Paul Kane, Unlikely Group in Congress Unifies to Provide Lifeline to Small Businesses Caught in Economic Free Fall, Wash. Post, March 21, 2020, available at https://www.washingtonpost.com/powerpost/unlikely-group-in-congress-unifies-to-provide-lifeline-to-small-businesses-caught-in-economic-free-fall/2020/03/21/c6ad2704-6b8b-11ea-abef-020f086a3fab_story.html (reporting that Republicans Rubio (D-Florida), chair of the Senate Small Business and Entrepreneurship Committee and Collins (R-Maine), together with Ben Cardin (D-Maryland) and Democrat Nydia M. Velázquez (D-New York), chair of the House Small Business Committee, had been working on $50 billion bipartisan plan for a month).

18 C-Span, Senators Rubio and Collins News Conference, March 18, 2020, available at https://www.c-span.org/video/?470464-1/senators-rubio-collins-hold-news-conference.

19 Department of the Treasury, Stage Three Proposal: Key Terms, March 18, 2020, available at http://static.c-spanvideo.org/files/pressCenter/Treasury-Stage-3-Proposal.pdf.

20 15 U.S.C. § 636(a)(D). A more generous rule as to size was provided for restaurants, hotels and other hospitality businesses. See infra note 28.

21 See 15 U.S.C. § 636(a)(36)(F)(v) (providing for no recourse).

22 See 15 U.S.C. § 636(a)(36)(J) (waiving guarantee requirement).

23 The statute provided for an interest rate of up to 4%. 15 U.S.C. § 636(a)(36)(L). Administrative guidance set the rate at 1%. See Small Business Administration, Business Loan Program Temporary Changes; Paycheck Protection Program, Interim Final Rule, 86 Fed. Reg. 3692, 3703 (Jan. 14, 2021) (hereinafter Consolidated

of $10 million.[24] Successful applicants can use PPP funds to pay employee compensation and benefits, rent, utilities and interest.[25] And – in the most generous element of the program – loans are forgiven if funds are used for approved purposes, most prominently payroll, within the "covered period," originally defined as an 8-week period starting on the date the loan was issued.[26] This period was originally defined as the PPP funding is thus often interchangeable referred to either as "loans" or as "grants."

PPP applicants had to meet eligibility requirements, of which two are particularly important. First, they had to meet specific size requirements. Generally speaking, applicants could have no more than 500 employees,[27] or, if a hospitality business, not more than 500 employees per physical location.[28] These requirements limited the size of a business, but did not align with the usual SBA size limitations.[29] Second, PPP applicants had to certify "that the uncertainty of current economic

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Borrower and Lender January 2021 Rules)).

[24] 15 U.S.C. § 636(a)(36)(E) (setting maximum loan amount).

[25] 15 U.S.C. § 636(a)(36)(F) (describing permitted uses of funds); see also Small Business Administration, Business Loan Program Temporary Changes; Paycheck Protection Program – Loan Forgiveness Requirements and Loan Review Procedures as Amended by Economic Aid Act, 86 Fed. Reg. ___ (Feb. 5, 2021) (hereinafter Consolidated Forgiveness February 2021 Rules) (Part IV.3 & IV.4) (describing payroll and other costs eligible for loan forgiveness)

[26] See Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136 § 1106., 134 Stat. 281, 287 (March 27, 2020) (outlining forgiveness terms including 8-week "covered period," availability for payroll and other costs, reduction in forgiveness amount if number of employees were reduced, and documentation requirements); see also Consolidated Forgiveness February 2021 Rules, 86 Fed. Reg. ___ (Part IV.5 & IV.6) (describing reductions to forgiveness amount rules and documentation requirements)

[27] 15 U.S.C. § 636(a)(36)(D) ("During the covered period, in addition to small business concerns ... any business concern shall be eligible to receive a covered loan if the business concern employs not more than... 500 employees.).

[28] The hospitality industry rule applied the 500-employee rule on a per-location basis, rather than on a per-entity basis. The rule was applicable to firms with NAICS industry code starting with 72, covering accommodation and food services. There are about 900,000 such businesses in the U.S., of which 650,000 are restaurants and 120,000 are hotels and other traveler accommodations. See NAICS Association, Six Digit NAICS Codes and Titles, available at https://www.naics.com/six-digit-naics/?code=72 (last visited February 5, 2021). In addition, usually-applicable affiliation rules, see 13 C.F.R. § 121.103, were waived for such hospitality businesses and for franchisees. So, for example, this meant that when a restaurant calculated how many employees it had per location, it was not required to include employees of a firm that would typically be deemed to control it within the meaning of 13 C.F.R. § 121.103. The restaurant could exclude, for instance, employees typically attributable to it because of private equity ownership, or employees typically attributable to it because of franchisor control of franchisee operations. See Thomas W. Joo & Alex Wheeler, The "Small Business" Myth of the Paycheck Protection Program, 54 U.C. Davis L. Rev. Online 21, 35 (2020) (noting that the franchise affiliation waiver also applied to car dealerships).

[29] The statutory text diverges from both intuitive understandings of "small business" and previous legal definitions such as the SBA's table of size standards based on revenue, number of employees and industry code. https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf. See, e.g., Robert A. Peterson,

conditions makes necessary the loan request to support the ongoing operations of the eligible recipient."[30] The statute waived the usual SBA loan prerequisite that an applicant be unable to obtain "credit elsewhere."[31]

The PPP presents the tension that the program had a "small business" headline, but the statutory eligibility requirement embraced larger businesses than that headline might intuitively suggest. Some statutory elements support the small business headline, but they are less precise than the 500-employee eligibility rules. One provision offers the "sense of the Senate" that priority should be given to "small business concerns and entities in underserved and rural markets."[32] In addition, the structure of the CARES Act suggests that smaller businesses were the PPP's audience. This is because other parts of the CARES Act separately provided direct relief to individuals, through increased unemployment benefits and $___ stimulus payments. The CARES Act also helped larger businesses who were in hard-hit sectors (e.g., airlines) or could issue public debt that would be eligible for Fed bond-buying programs. Charging the federal Small Business Administration with the administration of the CARES Act might suggest that small businesses should be prioritized.[33] And legislator statements also suggest a preference for small business.[34]

Nothing in the statute requires preference to be given to smaller businesses among those eligible. But Treasury and the SBA did have the lever of the so-called "hardship certification" applicants were required to make "in good faith." Applicants had to certify "that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient."[35] With the single regulatory lever of the hardship or necessity certification, and

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Gerald Albaum & George Kozmetsky, The Public's Definition of Small Business, Journal of Small Business Management, July 1986 (reporting survey results); Mirit Eyal-Cohen, Legal Mirrors of Entrepreneurship, 55 B.C. L. Rev. 719 (2014) (reviewing uncertainty about small business definition and its relationship to entrepreneurship, especially in tax law).

[30] 15 U.S.C. § 636(a)(G)(i)(I). Other certifications required that the funds would be used for payroll and other authorized purposes and that the loan would not duplicate another application.

[31] 15 U.S.C. § 636(a)(36)(I). The usually applicable provision reads: "The Administrator has the authority to direct, and conduct oversight for, the methods by which lenders determine whether a borrower is able to obtain credit elsewhere. No financial assistance shall be extended pursuant to this subsection if the applicant can obtain credit elsewhere." 15 U.S.C. § 636(a)(1)(A)(i). "Credit elsewhere" typically requires an evaluation of private market conditions and the availability of conventional loans on reasonable terms. 15 U.S.C. § 636(h).

[32] 15 U.S.C. § 636(a)(P)(iv).

[33] The language of the primary operative small business lending section suggests that the SBA has discretion in operating the program. See 15 U.S.C. § 636(a) (flush language) ("The Administration is empowered to the extent and in such amounts as provided in advance in appropriation Acts to make loans ... to any qualified small business concern ... for purposes of this chapter.").

[34] For instance, the initial remarks made by Senator Rubio and Senator Collins about the purpose of the program, before public criticism of larger PPP recipients in the first wave, state a statutory purpose of assisting small business. See supra note 18 (describing March 18 2020 press conference).

[35] 15 U.S.C. § 636(a)(G)(i)(I).

their discretionary ability to enforce it, Treasury and SBA eventually demonstrated that they could organize applicants and preference some above others.

However, they did not do this right away. In the first wave of spring funding, in late March and early April, administrators did not make use of this available regulatory lever. Instead, applicants' technical or formalist approach to interpreting the so-called "hardship certification" produced an expansive interpretation, under which larger firms, better-resourced firms and firms perhaps less hard-hit by the pandemic emergency qualified for PPP assistance.[36]

The first wave of PPP funding was quickly exhausted. Congress then increased its appropriation from $349 billion to $659 billion.[37] This gave Treasury and the SBA another shot. In the second wave of 2020 funding, from April through August, administrators did use the hardship certification as a regulatory lever. Their guidance did not take the form of a strict prohibition, but rather used the approach of threatening sure-shipwreck enforcement or promising safe-harbor immunity from enforcement. But even though the guidance was not a strict prohibition, it was effective, in that it produced the result that additional loans were not extended to public companies or in amounts in excess of $2 million.[38]

Additional items of PPP legislation were enacted in June and July 2020. In June, the key changes were in the forgiveness portions of the statute. The time allowed to spend PPP grants on eligible expenses was extended from 8 weeks to 24 weeks, the withdrawal of forgiveness for workforce reduction was relaxed in the event workforce reduction was related to "worker or customer safety requirement(s) related to COVID-19" and at least 60 percent of funds were required to be spent on payroll costs rather than other allowed expenses.[39]

In July, the statutory amendment extended the appropriation time frame. Under the March and April statutes, applications had to be submitted by June 30, 2020.[40] The July 4 amendment extended the application date to August 8, 2020.[41]

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[36] See infra Part II.A.

[37] Paycheck Protection Program and Health Care Enhancement Act, Pub. L. 116-139, 134 Stat. 620 (Apr. 24, 2020) § 101(a).

[38] See infra Part II.B.

[39] Paycheck Protection Program Flexibility Act of 2020, Pub. L. 116-142, 134 Stat. 641 § 3 (June 5, 2020), (codified at 15 U.S.C. § 9005).

[40] See CARES Act, 134 Stat. at 293, § 1102(b) (providing appropriation for period February 15, 2020 to June 30, 2020); Paycheck Protection Program and Health Care Enhancement Act, 134 Stat. at § 101(a) (increasing appropriation dollar amount but making no change to appropriation time period).

[41] An Act to Extend the Authority for Commitments to the Paycheck Protection Program, 134 Stat. 660, § 1 (extending appropriation period to August 8, 2020).

In December 2020, Congress funded the PPP for a third time, with $284 billion.[42] This time, its instructions were more restrictive and exact.[43] Applicants had to employ not more than 300 employees[44] and show at least a 25% reduction in gross receipts in one quarter in 2020 compared to the same quarter in 2019.[45] The loan amount was based on 2.5 times average monthly payroll and 3.5 times for hospitality firm, and its ts maximum was reduced from $10 million to $2 million.[46] The terms of loan forgiveness are more carefully specified, and include permission for additional expenses such as a "covered worker protection expenditure."[47]

The December 2020 iteration of the PPP also more exactly stated how the Treasury and SBA should allocate funds. It provides specific allocations for community financial institutions, banks with assets less than $10 billion, certain small applicants, and new applicants.[48] A related provision provides specific support for shuttered performance venues.[49] And another provision instructs the SBA to issue guidance "addressing barriers to accessing capital" for certain groups.[50]

By December 2020, Congress had made some decisions about how the PPP should be administered. Its instructions were more specific. But in the initial iterations of the PPP, much less was said by the legislature. The first and second waves of the PPP, from late March through August of 2020, illustrate especially sharply the key decisions that administrators make when it comes to distributing emergency money.

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[42] Consolidated Appropriations Act, 2021, Pub. L. ____, __ Stat. ___, § 232(d).

[43] See Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, Title III of Consolidated Appropriations Act, 2021], Pub. L. ____, ___ Stat. ___ § 301 ff. codified at 15 U.S.C. 636(a)(37).

[44] 15 U.S.C. 636(a)(37)(A)(iv)(I)(aa). The hospitality business physical-location rule and the rule waiving affiliation rules for some businesses remained unchanged.

[45] 15 U.S.C. 636(a)(37)(A)(iv)(I)(bb) (also providing rules applicable to entities not in business for all of 2019).

[46] 15 U.S.C. § 636(a)(37)(C)(i).

[47] 15 U.S.C. § 636(a)(37)(J)(iii).

[48] Consolidated Appropriations Act, 2021, Pub. L. ____, __ Stat. ___, § 232 (providing appropriations of $15 billion made by community financial institutions, $15 billion by banks with assets less than $10 billion. Also, $15 billion for first-time borrowers with no more than 10 employees or for applicants requesting an amount not more than $250,000 and located in low-income or moderate-income neighborhood; $25 billion for second-draw applicants who meet similar criteria.

[49] See Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, Title III of Consolidated Appropriations Act, 2021], Pub. L. ____, ___ Stat. ___ § 324, codified at 15 U.S.C. 636(a)(37).

[50] "Not later than 10 days after the date of enactment of this paragraph, the Administrator shall issue guidance addressing barriers to accessing capital for minority, underserved, veteran, and women-owned business concerned for the purpose of ensuring equitable access to covered loans." 15 U.S.C. § 636(a)(37)(M).

II. THE FIRST AND SECOND PPP WAVES

A. The First Wave: Deregulation and the First $349 Billion

1. Free-for-all, March 2020

Initially, the PPP was a free-for-all -- a "competition ... open to all comers and usually with no rules" and alternatively as a "chaotic situation ... lacking rules or structure."[51] The story of the PPP's first wave shows what happens when when well-resourced regulated parties are incentivized to take advantage of a law and face relatively few constraints. The constraints they did face came first from the private sector, via the media, not from government guidance.

The PPP statute did not give clear instructions to Treasury and the SBA about how to allocate the limited funds provided for the program. The statutory text can be read to throw the door open to any eligible applicant on a first-come, first serve basis, even though it was billed as a program to help small businesses maintain employment. As explained above, the main factor limiting applications was a high 500-employee maximum, and this was relaxed for hospitality businesses. This metric did not explain how to allocate funds if the program were oversubscribed.

For the first wave of funding, in March and early April, Treasury and the SBA did little to administer the PPP. Instead the PPP was a story driven by applicants, not by bureaucrats. Indeed key pieces of early guidance was an example of deregulation, rather than regulation. For instance, in early April, Treasury and the SBA offered the following question and answer in posted guidance: "Is the PPP 'first come, first served'?" "Yes."[52]

The $349 billion was exhausted within two weeks.[53] The first-come, first-served rule favored well-resourced and well-connected applicants. Larger loans made to banks' pre-existing customers predominated in this first wave of the program. The growing literature that empirically studies the PPP consistently finds that banking relationships predict whether an applicant applied for and received a PPP grant in the first wave.

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51 Merriam-Webster

52 Small Business Administration, Business Loan Program Temporary Changes: Paycheck Protection Program, 85 Fed. Reg. 20811, 20813 (April. 15, 2020) (promulgating the PPP's first interim final rule based on previously posted guidance).

53 See Congressional Research Service, SBA Paycheck Protection Program (PPP) Loan Forgiveness: In Brief 1 (Oct. 15, 2020) (reporting that lending began on April 3 and ended on April 16).

One study considers public firms that received PPP grants and finds that firms that also disclose banking relationships in their filings received larger grants and received them more quickly.[54] A lending relationship in particular correlates with faster receipt of funds, which the authors suggest means that banks might be concerned about default risk, which a PPP grant could alleviate.[55] Another study finds, based on a study of both public and nonpublic grantees, that larger firms were more likely to be funded in the early stages of the PPP, that this is inconsistent "with the hypothesis that firms with more immediate credit demands get funds first," and that the effect is more pronounced for larger banks, which suggests that a "concierge" incentive prompted larger banks to take care of their larger customers first.[56] Other work corroborates the idea that pre-existing loans with an intermediary bank predicted application success, perhaps because PPP funds would make it more likely that borrowers would pay back they money they owed to the bank.[57] Another study organized observations geographically and found that a higher density of SBA bank member offices produced more PPP loans.[58]

Available data also suggests that smaller firms tended to have a more acute need for funds. There is variation in firms' cash needs.[59] For instance, one study shows that for firms with 1-49

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[54] See Dan Amiram & Daniel Rabetti, The Relevance of Relationship Lending in Times of Crisis, working paper (Nov. 4, 2020), available at https://ssrn.com/abstract=3701587, 10-12 and Table 3 (finding coefficients of .2 to .3 for the existence of a relationship and coefficients of .6 to .7 for workforce size).

[55] See Amiram & Rabetti 12-14 and Table 5 (finding stronger correlation for lending relationships than for deposit relationships).

[56] Tetyana Balyuk, Nagpurnarand Prabhala & Manju Puri, Indirect Costs of Government Aid and Intermediary Supply Effects: Lessons from the Paycheck Protection Program, working paper (Nov. 2, 2020), available at https://ssrn.com/abstract=3717259 (e.g. Table XIV, showing that in the first wave, the presence of a Big-10 bank correlated strongly with PPP loan size and with firm size for successful applicants).

[57] Alexander W. Bartik et al., The Targeting and Impact of Paycheck Protection Loans to Small Businesses, NBER Working Paper 27623 (July 2020) at 21 & Table 2 (associating pre-existing loan with 4.4 percentage point increase in probability of approval and pre-existing relationship with loan officer with 6 percentage point increase). See also Gabriel Chodorow-Reich Olivier Darmouni Stephan Luck Matthew Plosser, Bank Liquidity Provision across the Firm Size Distribution, Federal Reserve Bank of NY Staff Reports no. 942 October 2020. "SME recipients of PPP loans reduced their non-PPP borrowing in 2020:Q2 by between 53 and 125 percent of the amount of their PPP funds."

[58] Santiago Barraza, Martin A. Rossi, Timothy J. Yeager, The Short-Term Effect of the Paycheck Protection Program on Unemployment, working paper August 2020, available at https://ssrn.com/abstract=3667431 (Table 3). Also finding higher density of SBA bank member offices correlates with lower unemployment, by about 1.4 percentage points, in April 2020

[59] Survey of businesses with 500 employees or fewer between March 27 and April 4: 45% closed, with substantial variation – 86% personal services, 70% arts and entertainment, 53% non-grocery retailers, 32% construction, 19% banking/finance. About 25%: less than one month of cash on hand. About 50%: one or two months of cash on hand. If greater than $10,000 in monthly expenses, median firm typically less than 15 days of cash on hand. Alexander W. Bartik, Marianne Bertrand, Zoe Cullen, Edward L. Glaeser, Michael Lucac, and Christopher Stanton, The Impact of COVID-19 on Small Business Outcomes and Expectations, 117 Proceedings of the National Academy of Sciences 17656, July 28, 2020.

employees, 15% were shut down as of mid-April, compared to 5% for firms with 50-499 employees.[60] Nevertheless, smaller firms were less likely to successfully apply for PPP funding in the first wave of the program. One study based on daily surveys of businesspeople from March 28-May 16 explains:

> The smallest businesses were slower to become aware of government programs....[T]he smallest firms were less likely to apply for the PPP and, conditional on applying, they applied later, waited longer for their application to be approved, and were less likely to get approval.[61]

Government data confirms that loan size under the PPP was noticeably larger for loan approvals made during the first two weeks of the program. During this period, almost 46.6% of loans exceeded $1 million and the average loan size was $239,000. In contrast, for the spring and summer PPP program overall, 34.1% of loans exceeded $1 million and the average loan size was $101,000.

Table 1, PPP Funding By Loan Size

Approvals through[62]	Average approximate loan size	$150K and under	>$150K - $350K	>$350K - $1M	>$1M - $2M	>$2M- $5M	>$5M
April 13, 2020[63]	$239,000	15.0%	14.4%	24.0%	17.5%	19.9%	9.2%
May 30, 2020[64]	$114,000	26.4%	16.2%	21.9%	14.3%	14.5%	6.7%

60 Tomaz Cajner, Leland D. Crane, Ryan A. Decker, John Grigsby, Adrian Hamins-Puertolas, Erik Hurst, Christopher Kurz, and Ahu Yildirmaz, The U.S. Labor Market During the Beginning of the Pandemic Recession, Becker Friedman Institute Working Paper No. 2020-58, July 2020, available at http://ssrn.com/abstract=3595452. at 19.

61 John Eric Humphries, Christopher A. Neilson & Gabriel Ulyssea, Information Frictions and Access to the Paycheck Protection Program (July 28 2020 working paper available at https://ssrn.com/abstract=3667636) at 3 (reporting that firms with 0 to 4.5 FTE were 23 percentage points less likely to apply for PPP loans and that when they did apply they applied two days later and were 27 percentage points less likely to have received approval).

62 Cumulative totals.

63 SBA, PPP Report, Approvals Through 4/13/2020, available lat https://www.sba.gov/sites/default/files/2020-04/PPP%20Report%20SBA%204.14.20%20%20-%20%20Read-Only.pdf

64 SBA, PPP Report, Approvals Through 05/302020, available at https://www.sba.gov/sites/default/files/2020-06/PPP_Report_200530-508.pdf

June 30, 2020[65]	$107,000	27.2%	16.2%	21.8%	14.1%	14.2%	6.5%
August 8, 2020[66]	$101,000	28.2%	16.1%	21.6%	14.1%	13.7%	6.3%

2. Theorizing the free-for-all: technical compliance and gatekeepers

This results of the free-for-all were not surprising. At least two strands of compliance scholarship predict the outcome that the best-resourced and best-connected applicants would prevail. One strand involves technical compliance. The second strand involves gatekeepers.

Technical compliance, or formalism,[67] explains how the best-resourced and best-connected regulated parties initially "won" the PPP game. The PPP may have been publicized as a program to help small businesses, but the law was not written that way.[68] The text of the statute describes eligible borrowers expansively. The 500-employee cap is generous, and not accompanied by other strictures such as total assets or revenues which can also be used to describe small businesses.[69] And even this cap is relaxed, and only applied on a per-location basis, for hospitality firms such as restaurant and hotel chains.

When restaurant companies like Shake Shack and Potbelly and hotel companies like the Ashford applied for PPP grants, they likely considered themselves within the lines drawn by the law. They focused on the statutory text, not on the placement of the law under the auspices of the SBA or on the sense of the Senate provision that encouraged preference for smaller applicants. Many hospitality and restaurant companies plainly met the descriptive requirements for eligible borrowers, so long as no particular location employed more than 500 employees – which few hotel or restaurant locations do. One paper estimates that about half of public firms were eligible to apply for PPP funding.[70]

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65 SBA, PPP Report, Approvals Through 06/30/2020, available at https://home.treasury.gov/system/files/136/PPP-Results-Sunday.pdf

66 SBA, PPP Report, Approvals Through 08/08/2020, available at https://home.treasury.gov/system/files/136/SBA-Paycheck-Protection-Program-Loan-Report-Round2.pdf

67 See, e.g., David Weisbach, Formalism in the Tax Law, 66 U. Chi. L. Rev. 860 (1990 (arguing that "taxpayers have been able to manipulate the rules endlessly to produce results clearly not anticipated by the drafters").

68 See Thomas W. Joo & Alex Wheeler, The "Small Business" Myth of the Paycheck Protection Program, 54 U.C. Davis L. Rev. Online 21 (2020) (explaining how the statutory language departed from the small business publicity of the PPP).

69 The SBA's usual table of size standards is based on revenue, number of employees and industry code. https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.

70 Anna Cororton & Samuel Rosen, Public Firm Borrowers of the US Paycheck Protection Program, working paper (July 15, 2020), available at https://ssrn.com/abstract=3590913.

But what about certifying hardship – "that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient?"[71] Many larger firms, including hotel and restaurant applicants, might colorably make this claim, too, so long as they could certify the truth of a logical syllogism like this one: If we obtain a PPP loan, we will keep more employees on payroll. If we do not obtain a PPP loan, we will dismiss these employees. Under this framework, a PPP loan is a required or logical prerequisite to maintaining "ongoing operations."[72]

Gatekeeper theory further explains how certain concerns "won" in the first wave of the PPP. Applying to the PPP required a bank, since financial institutions were designated as the entities who would receive, process and submit applications to the SBA. This kind of market intermediary is a gatekeeper, who can be enlisted to restrict or police the granting of the benefits.[73]

But if the gatekeeper is not so enlisted, the gatekeeper's incentives are to further its own interests, and the interests of its clients. And the administration of the PPP did not enlist gatekeepers to help enforce the program or implement the components of the program intended to mitigate hardship and necessity. Instead guidance released on April 3 provided that intermediary "lenders may rely on borrower representations"[74] except for "minimal review of calculations based on a payroll report by a recognized third-party payroll processor."[75] Under guidance published by the SBA, then, financial institutions were not responsible if their clients falsely or, more likely, aggressively, made a hardship representation.

There were no instructions from Treasury and the SBA about whether or how to prioritize applications. Meanwhile, banks' systems were not up to the task of processing the sheer number of

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[71] 15 U.S.C. § 636(a)(G)(i)(I).

[72] A testimony of one business owner's thought process before applying for a $3.4 million loan is offered by Pete Vegas, PPP Loan Terms Amount to Legalized Fraud, Wall St. J., April 20, 2020, available at https://www.wsj.com/articles/ppp-loan-terms-amount-to-legalized-fraud-11587422730.

[73] See Reinier H. Kraakman, Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy, 2 J. L. Econ. & Org. 53 (1986); see also John C. Coffee, Jr., Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms, 84 B.U. L. Rev. 301 (2004) (examining gatekeeper failure in Enron scandal); Andrew F. Tuch, Multiple Gatekeepers, 96 Va. L. Rev. 1583 (2010) (defining a gatekeeper as a "potentially powerful ... outside[r] .. who can monitor for, and attempt to veto," "illegal conduct").

[74] Paycheck Protection Program Loans, FAQs, Q&A 1 (published April 3, 2020), available at https://www.sba.gov/sites/default/files/2020-08/Final%20PPP%20FAQs%20%28August%2011%2C%202020%29-508.pdf (updated as of August 11, 2020).

[75] Treasury and SBA, Paycheck Protection Loans Frequently Asked Questions, FAQ 1 (published April 3, 2020) ("Providing an accurate calculation of payroll costs is the responsibility of the borrower. ... [L]enders may rely on borrower representations, including with respect to amounts required to be excluded from payroll costs.").

applications.[76] In addition to the limited resource of finite Congressional appropriation, there was the limited resource of finite bank capacity to accept applications for the program. Not surprisingly, "whether a firm made the cut [of receiving aid under the first PPP wave] often came down to how and where it banked."[77] Firms with closer banking relationships, whether with large commercial banks or smaller community banks, had a better chance of persuading a banker to process an application.

Whether gatekeeper financial institutions breached common law or state law when they implemented the PPP is a matter of ongoing controversy. A number of lawsuits have so charged, under theories including fraud, breach of fiduciary duty, breach of contract, and violations of state unfair competition law. One complaint contends that "Defendant knowingly and negligently chose to accept federal money to process PPP loans while knowing it ... did not have sufficient infrastructure in place to handle the applications submitted." [78] The idea appears to be that banks should have refused to process any loans before building sufficient infrastructure to handle all applications. The underlying theory of the case recognizes that the emergency fund setup presents the task prioritizing and allocating grants. In the first two weeks of the program, when the first $349 billion was disbursed, the government, or fourth branch, did not set priorities. So private parties – the fifth branch – did.

3. "Shake shacked": April 2020

What happened next is less theorized in the academic literature.[79] It involved another fifth-branch development – this time, from the media. The press discovered that the PPP had "allowed

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[76] Ruth Simon, Peter Rudegeair & Amara Omeokwe, The Rush for $350 Billion in Small-Business Loans Starts Friday. Banks Have Questions., Wall St. J. April 2, 2020, available at https://www.wsj.com/articles/the-rush-for-350-billion-in-small-business-loans-starts-friday-banks-have-questions-11585828455.

[77] Ruth Simon and Peter Rudegeair, In Race for Small-Business Loans, Winning Hinged on Where Firms Bank, Wall St. J., April 20, 2020, available at https://www.wsj.com/articles/in-race-for-small-business-loans-winning-hinged-on-where-firms-bank-11587410421.

[78] Plaintiff's Original Petition filed in District Court of Harris Country, Texas, DNM Contracting Inc. v. Wells Fargo Bank N.A., Case 4:20-cv-01790 (S.D. Tex.) (alleging that alleges that a defendant bank "made misrepresentations to many small business owners that they would assist them with their PPP loan applications and submit them for approval. Unbeknownst to Class Members, Defendant chose to prioritize select customers and "bigger businesses" for approval to the detriment of Class Members."). This case was submitted to arbitration in December 2020. See Katie Buehler, Wells Fargo Gets Contractor's PPP Claims Sent to Arbitration, Law360, Dec. 18, 2020. See also, e.g., Class Action Complaint, BSJA, Inc. v. Wells Fargo, Case 2:20-cv-03588 (N.D. Cal.).

[79] Some scholars have examined the interaction of media coverage and law in certain circumstances. See, e.g., Rory van Loo, Regulatory Monitors: Policing Firms in the Compliance Era, 119 Colum. L. Rev. 369, 422-23 (2019) (arguing that the "external accountability" mechanism of "public disclosures" can help limit the actions of front-line regulatory monitors, including through public attention and media coverage).

big chains like Shake Shack, Potbelly and Ruth's Chris Steak House to get tens of millions of dollars while many smaller restaurants walked away with nothing."[80] Politicians with connections to beneficiaries like auto dealerships risked adverse publicity.[81] Shake Shake gave back its $10 million loan.[82] Gatekeeper advisors began to warn firms to take the program's "hardship" certification more seriously and consider the possible adverse publicity consequences of being "Shake Shacked."[83] Some eligible firms didn't apply for or accept PPP forgivable loans because of these concerns. Thus another private-actor factor – media attention – affected patterns of compliance with the law.

Often, the familiar pattern of well-resourced groups taking advantage of regulatory guidance goes unnoticed. In contrast, people noticed what happened with the PPP program's first, $349 million wave. They noticed that it was exhausted within a few weeks. And they noticed that forgivable loans went disproportionately to larger businesses..

This "Shake Shacked" phase is perhaps the most atypical feature of the PPP story. Its media attention meant that some successful applicants had to accept public criticism along with their PPP loan money. This is somewhat unusual. Aggressive interpretation of technical provisions of law often goes unnoticed. Interest group theory acknowledges that it is possible for interest groups to achieve good results in part because no one else is looking.[84]

But in this case, in contrast, standard interest group operating procedure was exposed to public view. Lists of public companies who successfully applied were widely available. It was clear that the PPP had "allowed big chains like Shake Shack, Potbelly and Ruth's Chris Steak House to get tens of millions of dollars while many smaller restaurants walked away with nothing."[85] Politicians

[80] David Yaffe-Bellamy, 'The Big Guys Get Bailed Out': Restaurants Vie for Relief Funds, N.Y. Times, April 20, 2020, available at https://www.nytimes.com/2020/04/20/business/shake-shack-returning-loan-ppp-coronavirus.html.

[81] Ledyard King & Nicholas Wu, Auto Dealers, Restaurants With Ties to Lawmakers Were Among the Firms That Got PPP Loans: Treasury/SBA Data, USA Today, July 7, 2020, available at https://www.usatoday.com/story/news/politics/2020/07/06/ppp-loans-firms-tied-lawmakers-among-those-getting-pandemic-aid/5382594002/.

[82] Heather Hadden & Bob Davis, Shake Shack to Return $10 Million Coronavirus Stimulus Loan, Wall St. J., April 20, 2020, available at https://www.wsj.com/articles/shake-shack-to-return-10-million-coronavirus-stimulus-loan-11587385439.

[83] See, e.g., Bruce Brumberg, Paycheck Protection Loan Backlash: How to Defend Your Business Reputation and Avoid Getting Shake Shacked, Forbes, April 27, 2020, available at https://www.forbes.com/sites/brucebrumberg/2020/04/27/paycheck-protection-loan-backlash-how-to-defend-your-business-reputation-and-avoid-getting-shake-shacked/?sh=4e0118037330.

[84] This is an assumed feature of interest group theory, which predicts that "a small, relatively homogeneous beneficiary group can make substantial gains by imposing unobtrusive costs on large numbers of others," James Q. Wilson, The Politics of Regulation, in Social Responsibility and the Business Predicament 135 (James W. McKie ed., 1974).

[85] David Yaffe-Bellamy, 'The Big Guys Get Bailed Out': Restaurants Vie for Relief Funds, N.Y. Times,

with connections to beneficiaries like auto dealerships risked adverse publicity.[86] One hotel recipient at first determined to hold the government to the word of the statute backed down and returned the money, in the face of a Treasury investigation.[87]

On one hand, the criticism heaped on companies like Shake Shack, Potbelly and others was understandable. The PPP had a public relations headline that was about helping small business, and these companies seemed intuitively to not be small businesses. Larger restaurant chains crowded out smaller businesses in the initial free-for-all race for PPP grants. On the other hand, the larger businesses who successfully applied for PPP funds were technically within the text of the statute, whose main constraints were the 500-employee limit and the hardship certification.

The "Shake Shacked" media attention introduced a new consideration into the decision factors of potential PPP applicants. This was the possibility of adverse publicity. This changed the prior approach of interpreting a statute in a formal and technical fashion to serve the interests of a business. An applicant who adopted a more aggressive position when making a hardship certification might be more exposed to adverse publicity. But the concern did not end there. In addition, a company more prominent or more protective of its reputation would be more interested in avoiding adverse publicity.

Media attention, in other words, introduced a clientele effect that operated alongside the tendence of the PPP to favor well-resourced applicants. An applicant less concerned about its reputation and/or more willing to argue with the government about PPP eligibility would be more likely to apply for a PPP grant. An applicant more averse to the risks of audit and adverse publicity would be less likely to apply.

Available data tends to confirm the existence of a clientele effect. One study finds not only that more financially secure funds were more likely to return PPP grants but also that, controlling for other variables, health industry firms are more likely to return such grants. The authors suggest that this is in part because such firms care more about their reputation, particularly with respect to the government, since they must frequently interact with government agencies on regulatory

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April 20, 2020, available at https://www.nytimes.com/2020/04/20/business/shake-shack-returning-loan-ppp-coronavirus.html.

[86] Ledyard King & Nicholas Wu, Auto Dealers, Restaurants With Ties to Lawmakers Were Among the Firms That Got PPP Loans: Treasury/SBA Data, USA Today, July 7, 2020, available at https://www.usatoday.com/story/news/politics/2020/07/06/ppp-loans-firms-tied-lawmakers-among-those-getting-pandemic-aid/5382594002/.

[87] Noah Manskar, Ashford hotel group slams feds, pledges to return PPP loan, N.Y. Post, May 4, 2020, available at https://nypost.com/2020/05/04/ashford-hotel-group-pledges-to-return-coronavirus-aid-slams-feds/; Konorad Putzier, Dallas Hotel Owner is Biggest Beneficiary of Coronavirus Loan Program, Wall St. J., April 22, 2020, available at https://www.wsj.com/articles/dallas-hotel-owner-is-biggest-beneficiary-of-coronavirus-loan-program-11587568827.

questions such as drug approval. They also find that returning funds often had a positive effect on a firm's stock price, which indicates that reputational risk such as a possible government investigation is indeed costly for some firms.[88]

B. The Second Wave: Regulation and the Second $200 Billion or So

1. Safe harbor, sure shipwreck, April-May 2020

The first wave of PPP funding revealed the core problem of resource allocation. That is, there wasn't enough money to go around. In the first wave, applicants and gatekeeper banks solved the allocation problem as they scrambled for funds as their resources would permit, held back by little other than broad eligibility requirements and an unevenly experienced concern about adverse publicity.

For a second wave of PPP funding, the story began to shift as bureaucrats took action. Administrative "sure shipwreck" and "safe harbor" guidance came to supersede the "Shake Shacked" media interlude. On April 21, Congress added $310 billion of funding, for a total of $659 billion.[89] This gave Treasury and the Small Business Administration some room to work with. However, they remained concerned that the program would be oversubscribed. They began to play their position, and to take more control over how to allocate the limited resources of the program. They began to regulate.

The first piece of guidance aimed to cut public companies out of the PPP. It was the following FAQ, posted April 23, 2020 and published April 28 in the Federal Register:

> Question: Do businesses owned by large companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?
>
> Answer: ... Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere ... borrowers must still certify in good faith that their PPP loan request is necessary. ... For example, 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 the SBA, upon request, the basis for its certification.* ... Any borrower that applied for a PPP loan prior to

88 Tetyana Balyuk, Nagpurnarand Prabhala & Manju Puri, Indirect Costs of Government Aid and Intermediary Supply Effects: Lessons from the Paycheck Protection Program, working paper (Nov. 2, 2020), available at https://ssrn.com/abstract=3717259 at 22-23 & Table VII.

89 Senate passes $484 billion bill that would expand small-business aid, boost money for hospitals and testing, Wash. Post, April 21, 2020, available at https://www.washingtonpost.com/us-policy/2020/04/21/congress-coronavirus-small-business/.

the issuance of this guidance and repays the loan in full ... will be deemed by the SBA to have made the required certification in good faith.[90]

For firms that had already been approved for PPP grants, this provision acted as a safe harbor, and that is what the SBA called it.[91] A safe harbor typically means a legal provision that provides that particular facts comply with the law and will result in no penalty, while leaving other facts to be judged by a standard. Returning the money would provide protection against enforcement, which is a common safe harbor carrot.

But another element was the audit threat, italicized in the language above, that a public company should be prepared to explain itself and its certification to the SBA. This element was prospective as well as retroactive, and thus perhaps was more important. Administrators surely hoped that this provision would act not only as a safe harbor, but rather as a kind of sure shipwreck. That is, the audit threat suggested that certain conduct – applying for the PPP while having public-company status. The provision aimed not only to encourage previous public company applicants to give funds back, but also to discourage future public company applicants from asking for any PPP funds in the first place.

The effort to cut public firms out of the PPP program had an effect. Over 60 public companies (including Shake Shack) returned over $400 million in loans, out of a total of over $1.3 billion in grants to public companies.[92] Others presumably decided not to apply. One analysis suggests that a minority – about 22% -- of the public firms eligible to receive PPP funding sought PPP loans. Their mean loan amount was about $3.4 million. Applicants were likely to be older, smaller and have more employees than all PPP-eligible public firms.[93]

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[90] Small Business Administration, Paycheck Protection Loans, Frequently Asked Questions, FAQ 31, available at https://www.sba.gov/document/support-faq-lenders-borrowers (emphasis added).

[91] See Small Business Administration, Business Loan Program Temporary Changes; Paycheck Protection Program – Requirements – Promissory Notes, Authorizations, Affiliation, and Eligibility, 85 Fed. Reg. 23450, 23451-52 (April 28, 2020) (providing "limited safe harbor" in Federal Register for businesses that gave back funds by May 7, 2020); Small Business Administration, Business Loan Program Temporary Changes; Paycheck Protection Program – Requirements – Extension of Limited Safe Harbor With Respect to Certification Concerning Need for PPP Loan Request, 85 Fed. Reg. 29845, 29846 (May 19, 2020) (extending safe harbor deadline to May 14, 2020).

[92] Hugh Son & Nate Rattner, Hundreds of Public Companies Hold on to Small Business Loans as Deadline to Return Money Nears, CNBC, May 13, 2020, available at https://www.cnbc.com/2020/05/13/small-business-relief-loans-these-public-companies-didnt-need-ppp.html. See also FactSquared, https://factba.se/sba-loans (last visited September 20, 2020) (reporting as of September 18, 2020 that 440 loans totaling $1.39 billion had been made to public companies and that 69 loans totaling $437 million had been returned).

[93] Anna Cororton & Samuel Rosen, Public Firm Borrowers of the US Paycheck Protection Program, working paper (July 15, 2020), available at https://ssrn.com/abstract=3590913.

The data also shows that some public companies continued to apply for PPP funds after the release of the "sure shipwreck" audit threat guidance. But there were fewer. Perhaps 30 percent of the loans made to public companies were made after the release of this guidance.[94] The loans were also smaller. On average, loans to public companies were $3.75 million in the first wave and $2.35 in the second wave.[95] Finally, public company loans in the second wave were also less likely to be marked by a closer relationship with a lender.[96]

Another way to look at the public company loan data is to consider how many public companies applied for PPP loans after the date on which they could give the money back without facing any audit threat. That number is particularly low – just 22 public company loans, out of a total of 440, were made after May 18. It seems clear that the "sure shipwreck" audit threat guidance had a prospective effect.

The second piece of guidance related to the size of PPP loans rather than the type of PPP borrower. It also used an enforcement tactic, this time to discourage loans in excess of $2 million. Initially the guidance promised audit for larger loans. It explained that "the SBA has decided ... that it will review all loans in excess of $2 million."[97] Later guidance promised the inverse -- no audit for smaller loans. It reads, "Any borrower that, together with its affiliates, received PPP loans with an original principal amount of less than $2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith."[98]

This $2 million guidance took a simpler safe harbor form, , in the sense that it promised that certain shipwreck

This guidance technically did not prohibit anyone from applying for a larger grant. It simply specified how the SBA and Treasury would allocate enforcement resources. But the guidance nevertheless – and predictably – had a big impact.

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94 One study used 347 loan observations of which 245 were first-round, totaling about $885 million; and 102 second-round loans, totaling $240 billion. See Ran Duchin, Xiumin Martin, Roni Michaely & Ivy Wang, Concierge Treatment from Banks: Evidence from the Paycheck Protection Program, working paper, January 2021, available at https://ssrn.com/abstract=3775276. The total number of public-company loans was closer to 440, less 69 returned, or 371. See FactSquared, https://factba.se/sba-loans.

95 Id.

96 Id.

97 FAQ 39, published April 29, 2020.

98 FAQ 46, published May 13, 2020. This safe harbor (but not the earlier promise of audit for larger loans) was incorporated into the SBA's interim final rule compendium some months later. See Small Business Administration, Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act, Interim Final Rule, 86 Fed. Reg. 3692, 3706 & n. 87.

PPP reports show that loan size decreased over the course of the program, as shown in Table 2 below. After May, there were no increases in the number of loans greater than $2 million. More granular data also shows a reduction in the number of larger loans following closely after the release of the April 29 guidance.[99] Larger loans were not eliminated – they were still made, but they were made much less frequently.[100] This is a remarkable change in the composition of PPP beneficiaries, accomplished quickly after the release of the safe harbor guidance.

Table 2: Loan Count and Total Dollars Loaned

Approvals through	$150K and under	>$150K - $350K	> $350K - $1M	> $1M - $2M	>$2M - $5 M	Number of loans >$5M
April 13, 2020[101]	725,058 $37.2B	156,590 $35.7B	102,473 $59.3B	31,176 $43.3B	16,516 $49.2B	3273 $22.8B
May 30, 2020[102]	3,827,841 $134.7B	368,714 $82.9B	196,770 $112.0B	52,577 $72.8B	24,857 $73.9B	4840 $34.0B
June 30, 2020[103]	4,227,111 $142.2B	376,113 $84.5B	199,456 $113.4B	53,030 $73.5B	24,838 $72.8B	4840 $34.0B
August 8, 2020[104]	4,552,452 $147.5B	377,797 $84.8B	199,679 $113.6B	53,218 $73.9B	24,248 $72.1B	4734 $33.1B

As Table 2 shows, the loan size and composition across different loan size groups shifts between April 13 and May 30, and then remained steady through the conclusion of the program applications in August 2020. This indicates the remarkable strength of the $2 million safe harbor in discouraging loan requests in excess of $2 million. The mere absence of a no-audit guarantee was enough to transform the composition of the program.

2. Seeking forgiveness

99 See Small Business Administration, Data on Loans Above $150k, https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program/ppp-data#section-header-2

100 The total numbers of larger loans are steady or decreasing because some larger loans were returned.

101 SBA, PPP Report, Approvals Through 4/13/2020, available at https://www.sba.gov/sites/default/files/2020-04/PPP%20Report%20SBA%204.14.20%20%20-%20%20Read-Only.pdf

102 SBA, PPP Report, Approvals Through 05/30/2020, available at https://www.sba.gov/sites/default/files/2020-06/PPP_Report_200530-508.pdf

103 SBA, PPP Report, Approvals Through 06/30/2020, available at https://home.treasury.gov/system/files/136/PPP-Results-Sunday.pdf

104 SBA, PPP Report, Approvals Through 08/08/2020, available at https://home.treasury.gov/system/files/136/SBA-Paycheck-Protection-Program-Loan-Report-Round2.pdf

Applications for the PPP closed on August 8, 2020. $534 billion of an authorized $659 billion had been granted in less than five months. The next question for the program was what would entitle a grantee to forgiveness. In general, the administrative guidance on forgiveness has represented a technocratic effort to implement the statute.[105] Statutory changes, on the other hand, have made the program increasingly forgiving.

Administrative guidance on forgiveness has sometimes leaned toward leniency, for instance when a rule allowed a borrower to avoid recording a reduction in force (which can limit the borrower's ability to obtain forgiveness) if a laid-off employee refused a rehiring offer.[106] In other cases it has been more strict, for instance when a rule required 75% of a grant amount to be used for payroll even though the statute did not require this allocation.[107] In many other cases it has been carefully technical, for instance translating a rule that compensation may not exceed $100,000 annually to a self-employment situation or creating rules applicable to seasonal employers.[108]

Statutory changes, however, have generally loosened restrictions. This was particularly true of the PPP Flexibility Act enacted in June. This statute reduced the regulatory requirement that 75% of grants should be used for payroll costs, to 60%.[109] It also increased the timeframe for using loan proceeds, from 8 weeks to 24 weeks.[110] Finally, the June statute allowed employers to disregard reductions in employment if the reductions are due to compliance with public health regulations.[111] Later, the December 2020 statute further relaxed some requirements, including by adding additional allowed expenses, such as worker protection expenses including capital improvements such as drive-through windows. The December 2020 statute also requires a simple one-page forgiveness process for loans of $150,000 or less.[112]

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105 Feb. 5 Fed Reg cite that collects forgiveness guidance.

106 See Small Business Administration, Business Loan Program Temporary Changes; Paycheck Protection Program – Requirements – Loan Forgiveness, 85 Fed. Reg. 33004, 3307 (June 1, 2020) (explaining why the rule disregarding refusals of reemployment offers was de minimis).

107 Id. at 33007 ("[T]he Administrator notes that the 25 percent cap on nonpayroll costs will avoid excss inclusion of nonpayroll costs.").

108 FAQ 41.

109 Paycheck Protection Flexibility Act of 2020, 134 Stat. 641, 642 (June 5, 2020) (requiring usage of 60% of loan amount for payroll costs).

110 Paycheck Protection Program Flexibility Act of 2020, Pub. L. 116-142, 116th Cong., 2d Sess., 134 Stat. 641, § 3 (extending covered period to end as late as December 31, 2020), codified at 15 U.S.C. § 636(a)(36)(A)(iii); SBA, Revisions to Loan Forgiveness and Loan Review Procedures Interim Final Rules, 85 Fed. Reg. 38304, 38307 (June 26, 2020).

111 Economic Aid to Hard-Hit Small Businesses, Nonprofits and Venues Act § 304 (listing additional allowed covered expenses).

112 Economic Aid to Hard-Hit Small Businesses, Nonprofits and Venues Act § 307 (providing for one-page form that requires information about number of retained employees, estimated amount of loan spent on payroll and total loan value).

Taking all of these developments together reveals a program that is no longer first-come, first-served. It differentiates by grant size – threatening audit for above-$2-million loans and promising easy forgiveness to below-$150,000 loans. It also differentiates by public company status. It also generally, thanks to statutory changes, loosened forgiveness requirements for successful applicants. Both categories of changes – the differentiation among applicants and the loosening of forgiveness requirement – provide lessons about the administration of emergency funds.

3. Winners and losers: a summary

Table 3, below, summarizes some of the winners and losers in each stage of the PPP.

Table 3: PPP Stages, Winners and Losers

PPP Stage	Winners
Free-for-all, March 2020	Well-resourced applicants with good banking relationships
"Shake Shacked", April 2020	Applicants who accept risk of audit and/or media criticism.
Sure shipwreck/safe harbor, April-May 2020	Privately held applicants for loans of $2 million or less. Few if any larger or public applicants will accept risk of audit and/or media criticism that comes with a PPP application.
Seeking forgiveness, after May 2020	Grantees who meet forgiveness requirements, including anticipating changes in terms of program

Considering winners and losers under the PPP also invites evaluation of the program's discriminatory impact. Available evidence largely shows that Black borrowers were less likely to successfully apply for PPP funds compared to white borrowers. Studies agree that minority-owned businesses were less likely to receive PPP funds in the first wave of the program, in March and April 2020. For instance, one study, which overall finds less disparity than others, compared majority white, majority Hispanic and majority Black congressional districts. Against the benchmark that white-owned firms comprise 77% of small businesses, it found that firms in majority white Congressional districts received 83% of loans as of early April and 78% of all loans as of June.[113]

More granular studies draw on data or models about financial services availability at the ZIP code or county level and reach the conclusion that even on an overall basis, considering all grants made in the spring and summer of 2020, Black-owned businesses were less likely than white-owned

[113] Jason Grotto, Zachary R. Mider & Cedric Sam, White America Got a Head Start on Small-Business Virus Relief, Bloomberg, July 30, 2020, available at https://www.bloomberg.com/graphics/2020-ppp-racial-disparity/.

businesses to receive PPP support.[114] The difference is attributed to a disparity in relationships with PPP-eligible banks, including community and regional banks. Studies find evidence of this disparity despite the surplus of available PPP funds, since the spring and summer program was undersubscribed by $130 billion. They conclude that the PPP's reliance on an existing network of financial intermediaries came with the structural inequalities that characterize the U.S. market for banking services.

III. Lessons of the PPP

A. No Instruction Manual, No Time, No Information

When PPP arrived at the doorstep of Treasury and the SBA, it came with the problem of how to allocate limited funds. So long as the applications from eligible applicants exceeded $349 million – which they quickly did – the program required priorities and triage. Congress did not include clear instructions on how to solve this allocation problem. At the same time, the problem required a solution immediately, and in the absence of information about who would apply for the program and in what amounts.

The first lesson of the PPP offers is to illustrate how legislatures give discretion to administrators in an emergency. Two features of the PPP supported administrative discretion in this case. One feature was the PPP's vague hardship certification, which left the idea of necessity undefined. Another feature was general administrative agency enforcement discretion.

The second lesson is that administrative allocation of emergency funds is possible -- even without instructions, information or time. One tool administrators can use is a staged allocation process, where funds are first offered to those whose need best aligns with the program's policies, then to those whose need aligns not quite as well, and so on. This idea draws on the descending-

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[114] Jeffrey Wang & David Hao Zhang, The Cost of Banking Deserts: Racial Disparities in Access to PPP Lenders and Their Equilibrium Implications, working paper, December 10, 2020, draft at 9 (finding that ZIP codes with a 10% higher proportion of Black population have a 1.3% lower take-up rate of PPP loans); Claire Kramer Mills & Jessica Battisto, Double Jeopardy: COVID-19's Concentrated Health and Wealth Effects in Black Communities, Federal Reserve Bank of New York, August 2020 at 2, 6 (finding that Black firms have been "almost twice as likely" to close and that despite at least equal rates of application for financing, Black firms are less likely to have a recent borrowing relationship with a bank), available at https://www.newyorkfed.org/medialibrary/media/smallbusiness/DoubleJeopardy_COVID19andBlackOwnedBusinesses; cf. Lucas Misera, An Uphill Battle: COVID-19's Outsized Toll on Minority-Owned Firms (working paper, October 8 2020), available at https://www.clevelandfed.org/region/article?ID=DDA321FE-ADC5-4DA7-9A1C-122DB2F4413D (noting that Black-owned, Hispanic-owned and Asian-owned businesses closed at a higher rate than white-owned businesses during the COVID crisis and experienced more acute cash shortages).

price auction concept of allocating a finite stock of goods among a group of buyers in the absence of information about the price the buyers are willing to pay.

Another tool administrators can use is back-end guidance. This postpones some guidance about the terms of repaying emergency funds. It is analogous to the income taxation tactic of first providing government benefits, while leaving open the question of whether the benefits will later be "taxed back." This is how Social Security payments, for instance, work.[115]

The third lesson of the PPP is that administrators should often choose regulation, and not deregulation. They should not leave the allocation of emergency funds for private actors in the market and elsewhere to work out. This is because emergency funds are often created to ease the hardship of emergency. Yet there are systematic reasons why people who most need help in an emergency may be least able to claim emergency funds. Instead, the winners in the market will tend to be the players with the best resources. As a result, if administrators do not act, and instead private ordering allocates funds, the result will not channel funds to those most in need.

Emergency funds may be created for reasons in addition to the purpose of addressing need, including fiscal policy. In the case for the PPP, its application process requirement and focus on the maintenance of ongoing operations both suggest that target applicants would not need funds, but would also be able to successfully navigate the PPP's application process. Although there are flaws, including disparate racial impacts, inherent in a strategy of relying on the market, the PPP statute does not leave much room for administrators to ignore the market entirely. It does require an application, through a private financial intermediary.[116]

The PPP's goal might be best described as striking a balance. It appears to target intermediate firms who were not strong enough to survive without the PPP, but would be strong enough to survive with the PPP. Still, the market was not well suited to pursuing even this more balanced goal, because it included the idea that those with greater need should receive priority.

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[115] See, e.g., Jonathan Barry Forman, The Income Tax Treatment of Social Welfare Benefits, 26 U. Mich. J. L. Reform 785, 785-86 (1993) (noting a law change that included some Social Security benefits in income and considering the income taxation of unemployment benefits, Aid For Families With Dependent Children, Medicare, Medicaid, housing assistance, and workers' compensation).

[116] Proposals for addressing disparate impacts such as racial disparity within the limits of the statute include efforts to expand eligible PPP financial intermediaries, for instance by continuing to expand the access online or fintech firms, where disparities in application success for applicants of color are smaller compared to such disparities for traditional banks. Claire Kramer Mills & Jessica Battisto, Double Jeopardy: COVID-19's Concentrated Health and Wealth Effects in Black Communities, Federal Reserve Bank of New York, August 2020, available at https://www.newyorkfed.org/medialibrary/media/smallbusiness/DoubleJeopardy_COVID19andBlackOwnedBusinesses. The SBA policy has been to encourage the enrollment of additional lenders. FAQ 22 ("We recognize that financial technology solutions can promote efficiency and financial inclusion in promoting the PPP.").

B. Bureaucrats Lack Instructions But Have Discretion

1. Underspecified Emergency Statutes

The first lesson the PPP offers is that legislatures are likely to produce forty-second best[117] emergency fund statutes that allow administrators to work out the details of allocation,[118] and leave it to private actors to determine the allocation of funds if administrators do not act. Emergency fund law will often leave it to either fourth-branch administrators or fifth-branch private actors to produce the law in its practical, on-the-ground translation.

In the case of the PPP, a core tension was that the statute was publicized as helping "small business," but the specifics of its statutory text did not achieve that end. The term "small business" is an inherently slippery term.[119] The SBA typically solves the problem of definition with a chart that establishes revenue and employee count thresholds for different industry codes. The PPP statute explicitly rejected that definitional approach, leaving a key concept contested.[120]

The PPP statute was clear on some things. Borrowers (grantees) would have to apply for funds, through banks. They would have to meet the employee-threshold requirements. They would have to provide calculations, for instance based on their monthly payroll figures, to apply for a grant. They would have to apply through a financial intermediary.

But this does not mean that the statute required a first-come, first-served application process – even though early SBA guidance suggested that it did.[121] Perhaps a first-come, first-served approach might have furthered a policy goal of immediate liquidity – to get cash out quickly, no matter to

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117 This is Professor Dan Shaviro's term, coined to describe the difference between actual tax statutes and theoretical tax concepts.

118 Cf. Eric A. Posner & Adrian Vermeule, Crisis Governance in the Administrative State, 76 U. Chi. L. Rev. 1613, 1614 (2009) (studying U.S. crisis governance in context of 9/11 attacks and in context of 2008 global financial crisis) ("In the modern administrative state, it is practically inevitable that legislators, judges and the public will entrust the executive branch with sweeping power to manage serious crises of this sort.").

119 The statutory text diverges from both intuitive understandings of "small business" and previous legal definitions such as the SBA's table of size standards based on revenue, number of employees and industry code. https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf. See, e.g., Robert A. Peterson, Gerald Albaum & George Kozmetsky, The Public's Definition of Small Business, Journal of Small Business Management, July 1986 (reporting survey results); Mirit Eyal-Cohen, Legal Mirrors of Entrepreneurship, 55 B.C. L. Rev. 719 (2014) (reviewing uncertainty about small business definition and its relationship to entrepreneurship, especially in tax law).

120 The SBA's table provides size standards based on revenue, number of employees and industry code. https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.

121 See Small Business Administration, Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811, 20813 (April 15, 2020) ("Is the PPP 'first-come, first-served?' Yes.").

whom. If pushing cash into the economy is the overriding goal, larger loans have an advantage.[122] But it is difficult to square a singleminded focus on liquidity with the required "hardship" certification "that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient."[123]

The hardship certification is an explicit statement that PPP funds should go to where they were necessary, or needed. It is not just about an applicant's ability to leverage a banking relationship and navigate a government application process. It is also about an applicant's need. This is what gives the target PPP audience its intermediate character.[124] The ideal PPP applicant would be strong

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[122] See, e.g., Derek Thompson, Shake Shack is Not the Problem, The Atlantic, April 23, 2020, https://www.theatlantic.com/ideas/archive/2020/04/shake-shack-not-problem/610417/. Cf. Glenn Hubbard & Michael R. Strain, Has the Paycheck Protection Program Succeeded? IZA Institute of Labor Economics Discussion Paper No. 13808, Oct. 2020, available at https://ssrn.com/abstract=3718188 (arguing that the PPP's goal is to preserve small business continuity, rather that simply preserving jobs, and also that in the "fog-of-war atmosphere of the pandemic," the government lacks enough information to sensibly pick "winners and losers." The authors argue that a broader revenue-replacement (not just payroll-replacement) program scope would be appropriate, and as much as $1 trillion should have been allocated to the program from the start.).

[123] 15 U.S.C. § 636(a)(G)(i)(I).

[124] Cf. Gustavo Joaquim & Felipe Netto, Bank Incentives and the Impact of the Paycheck Protection Program, working paper (Oct. 2, 2020), available at https://ssrn.com/abstract=3704518 (presenting a model developed to identify the optimal allocation of PPP funds, assuming that the goal is to save the most jobs and showing that, if the emergency fund is limited, funds should go to those "intermediately affected by the pandemic"). Available empirical studies provide mixed evidence on whether this effort to help intermediate jobs and firms worked. One line of inquiry involves whether the PPP addressed the heterogeneous effects of the pandemic on different economic sectors, e.g. Raj Chetty, John N. Friedman, Nathaniel Hendren, Michael Stepner & The Opportunity Insights Team, How Did COVID-19 and Stabilization Policies Affect Spending and Employment? A New Real-Time Economic Tracker Based on Private Sector Data, NBER working paper 27431 (June 2020) (providing evidence of heavier impact of pandemic on in-person sectors in affluent neighborhoods). There is some evidence of increased PPP requests in harder-hit sectors. Catherine Buffington, Carrie Dennis, Emin Dinlersoz, Lucia Foster, Shawn Klimek, Measuring the Effect of COVID-19 on U.S. Small Businesses: The Small Business Pulse Survey, May 2020, at 17 ("Turning to requests for financial assistance, it is perhaps not surprising to see highest percent of requests for PPP (84.5%) from businesses in Accommodation and Food Services. Overall, 74.9% of businesses applied for PPP. In terms of receiving assistance, 38.1% received assistance from the PPP program.)." However, showing that the PPP saved jobs has proven difficult. See, e.g. Alexander W. Bartik, Zoe B. Cullen, Edward L. Glaeser, Michael Luca, Christopher T. Stanton & Adi Sunderam, The Targeting and Impact of Paycheck Protection Program Loans to Small Business, NBER Working Paper 27623, July 2020 (finding an average effect of increased jobs for PPP recipient but no statistically significant effect when adding consideration of other variables); Chetty et al., supra (finding little difference in employment effect for large firms relative to smaller firms eligible for PPP). Meanwhile, there is some evidence that one key PPP result was replacement of funds rather than provision of funds that could not be found elsewhere. Gabriel Chodorow-Reich Olivier Darmouni Stephan Luck Matthew Plosser, Bank Liquidity Provision across the Firm Size Distribution, Federal Reserve Bank of

enough to have indicia that it can survive – proxied by successfully applying for funds. But it would also be weak enough to need those funds. The statute explicitly seeks to address and alleviate need.

Even though the statute embraces necessity as a policy criterion, it does not consider *relative* necessity. It does not say what to do about different degrees of necessity. It leaves this question open.

That is, the PPP statute does not require the interpretation that so long as a firm can plausibly identify some need for funds to support ongoing operations, however small, the funds should be distributed in a first-come-first served fashion. On the other hand it also does not specify a higher threshold for necessity. Moreover, it does not answer the question of whether "necessary" has an absolute meaning or one which is considered relative to the necessities faced by other applications to a limited emergency fund.[125] The meaning of "necessary to support ongoing operations" is simply unclear.

Plenty of scholarship aims to explain why statutes might be vague. For instance, it is said that the U.S. pluralist legislative process produces imprecise compromise statutory language through the mechanism of "vetogates." These are committee and floor procedures, House and Senate votes, and other moments that provide opportunities to smooth over difference with vague language and leave "agencies, not legislators, [to] make controversial decisions."[126] Another theory is that vague statutes are more likely when Congress will have the opportunity to provide oversight of administrative action.[127] Yet another view is that vague statutes are likely if they allow legislators to claim the

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NY Staff Reports no. 942 October 2020 (finding that PPP loans reduced non-PPP borrowing by between 53 and 125 percent); "SME recipients of PPP loans reduced their non-PPP borrowing in 2020:Q2 by between 53 and 125 percent of the amount of their PPP funds.").

125 Dictionary definitions do not eliminate the ambiguity of the word "necessary." One option is, "absolutely needed." Another is, "logically unavoidable." Merriam-Webster. A firm might find layoffs "logically unavoidable" without PPP funding (i.e., because the firm would in fact choose layoffs absent PPP funding) without concluding that PPP funding was "absolutely needed" to avoid them (i.e., because it would be possible, if the firm so chose, to raise funds elsewhere).

126 William Eskridge, Vetogates and American Public Law, 31 J. L. Econ. & Org. 756, 767-68 (2012). The PPP did not go through the typical Congressional committee process that often produces "vetogates" and amendments that reveal different actors' preferences. But it still emerged from a bipartisan Congressional negotiation process that anticipated the need to gain agreement from different factions. The partisan nature of negotiations was particularly visible in follow-up statutory changes. See, e.g., Heather Caygle & Sarah Ferris, House Passes $484 Relief Package After Weeks of Partisan Battle, Politico, April 23, 2020, available at https://www.politico.com/news/2020/04/23/house-vote-pass-coronavirus-aid-package-203965.

127 See, e.g., Matthew D. McCubbins, Roger G. Nol & Barry R. Weingast, Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies, 75 Va. L. Rev. 431 (1989) (noting various approaches to effective political control of agencies); Jonathan R. Macey, Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies, 80 Geo. L. J. 671, 674 (considering legislative and executive oversight and its interaction with Congressional efforts to control agency behavior).

satisfaction of goals with more popular appeal while simultaneously anticipating that the administrators will interpret the legislation in a way that favors the special interests that legislators also wish to please.[128]

Perhaps some of these vetogate, oversight and dual-legislative-purpose explanations help to explain the vagueness of emergency money statutes. Even in a rushed process that does not include all of the usual vetogates, legislators might still negotiate in the shadow of that process, anticipating the compromises necessary to secure votes.[129] Legislators might think that they have ample opportunity for oversight because the appropriation of emergency money is limited, and/or because of public attention focused on the program. And, they might wish to appear to support both, say, the diffuse interests of small business (for example, because this helps with vote-getting or positive media coverage) and the concentrated interest of funding large hotel and restaurant firms (for example, because this supports campaign donations).

But another reason for vague statutes is simply that emergency and crisis are marked by uncertainty and unpredictability. In a crisis, legislators likely do not know what policy they prefer. And their policy preferences may be contingent on future developments unknown at the moment of enactment.[130]

2. Administrative Discretion

In general, vague statutes leave room for administrative discretion. In the case of the PPP, the statutory provision that best supported interpretation and enforcement discretion was the requirement of the so-called "hardship" certification. In the second wave of the PPP, Treasury and the SBA demonstrated a common pattern of emergency regulation through this provision. The agencies applied their discretion through less formal, subregulatory forms of guidance, including FAQs and the use of enforcement discretion. Cutting off public company and larger borrowers from the program was achieved through subregulatory guidance that announced an enforcement policy with respect to a vague statutory requirement. The safe-harbor promise not to audit certain applicants and the sure-shipwreck threat to audit others did not technically prohibit certain applications, but it had the effect of removing those applications from the program.

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[128] See, e.g., David Epstein & Sharyn O'Halloran, Delegating Powers 8 (1999) ("Legislators will prefer to make policy themselves as long as the political benefits they derive from doing so outweigh the political costs; otherwise, they will delegate to the executive.").

[129] The vagueness of the PPP statute contrasts with more specific statutes enacted in other countries. See, e.g., Steven Hamilton, A Tale of Two Wage Subsidies: The American and Australian Fiscal Responses to COVID-19, 73 Nat'l Tax J. 829, 843 (2020).

[130] See Eric A. Posner & Adrian Vermeule, Crisis Governance in the Administrative State, 76 U. Chi. L. Rev. 1613 (2009) (exploring why the uncertainty of emergency might produce bureaucratic discretion and exercise of power).

The capacity of an emergency statute to support enforcement discretion and informal interpretation will depend of course on the statute. Different contexts offer different scopes of discretion. For example, in the case of 2008's TARP, statutory language allowing the Secretary "to purchase ... troubled assets from any financial institution"[131] was used to support the purchase of equity in troubled financial firms, rather than troubled loan assets.[132] The CARES Act $1200 individual stimulus payments statute stated that "The Secretary shall refund or credit any overpayment attributable to this section as rapidly as possible."[133] But still there was some. IRS and Treasury had to decide, for instance, how to resolve issues like missing tax returns and incorrectly provided or changed bank account information.[134] Nevertheless, the question is contextual, and the individual stimulus provision is an example of a statute that offers less discretion than PPP or TARP.

C. Descending-Price Auction Allocation to Solve Information Constraint

1. Descending-price auction allocation

Given the vagueness of the hardship certification, PPP administrators could claim discretion to interpret "necessity" in a relative way, and to give priority to applications more likely to show need. But they had another problem. They lacked information not only about total demand for the funds, but also about the size and hardship or necessity facts of specific applicants for the funds. Not only a concept of relative need, but also information about relative need was needed in order to prioritize fund disbursement.

In the second wave of the PPP, the government did provide regulation that allocated emergency funds. Their solution was to discourage applications from public firms or firms requesting grants in excess of $2 million.[135] But in the first wave, the government had little or no information ex ante about what the grant applicant pool would look like. The solution they ultimately came to may not have been available on March 27, given the absence of information about demand for the program. How could they have prioritized applicants in the absence of information?

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131 Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 101(a)(1), 122 Stat. 3767 (2008), codified at 12 U.S.C. § 5211.

132 See Davidoff & Zaring 525-29 (explaining shift to equity purchases); Posner & Vermeule 1632-33 ("Critics ... argue that ... Treasury's decisions -- to use TARP funds to buy equity rather than toxic mortgages, and to use TARP funds to bail out automakers – show that the [statute] wrote the executive a blank check. What these decisions really show, however, is just that Treasury's authority is broad ...").

133 See CARES Act § 2101(g)(3) (codified at I.R.C. § 6428(g)(3). The term "overpayment" is used because the stimulus payments were technically designed as advance refundable payments relating to 2020 tax.

134 See, e.g., William Hoffman, IRS to Notify Millions Who Missed Out on Relief Payments, Tax Notes, Sept. 21, 2020 (noting IRS concern with "last mile" taxpayers who don't file tax returns or receive Social Security and estimating that the IRS was trying to reach about 9 million taxpayers0.

135 See supra Part II.B.1.

The problem resembles the problem faced by a person must sell quickly a limited amount of something – like flowers, or bonds – but lacks information about the price that buyers will pay. Information about the different prices different buyers are willing to pay is needed in order to arrive at the price at which all of the goods will sell. A solution is a descending-price, multiple-unit auction. One form of such an auction is known as a Dutch auction. Under this system, the seller starts with a high asking price and then reduces the price until enough bids have been submitted to successfully sell all of the goods.[136] An advantage of an auction format is that it requires bidders to reveal information to sellers – exactly what Treasury and the SBA needed at the outset of the PPP.

Government administrators might have solved the problem of prioritizing and allocating funds with an approach inspired by a descending-price auction. A descending-price auction starts with a high price and proceeds to quickly lower the price in order to sell the goods. Treasury and the SBA might have started with stringent loan conditions and then progressively relaxed them until all of the funds were disbursed.

For example, Treasury and the SBA could have used the single variable of grant size. This would mean that they would first offer small loans, then larger and larger loans until the funds were claimed. For instance, SBA and Treasury might have started with loans of no more than $250,000, based on monthly payroll of no more than $100,000.[137] Then after testing demand for these and making loans at that level, increase the maximum loan size and payroll level in increments. It could have continued this process until the statutory allotment was fully claimed.

A descending-price auction can be conducted on either a multiple-price or on a uniform-price basis. In a multiple-price auction, or each bidder pays the price that bidder stated. A multiple-price auction is generally a pay-what-you-bid auction. In contrast, in a uniform-price auction, each bidder pays the same clearing price – the highest bid at which the seller can successfully sell all of the goods. Even bidders who earlier indicated that they were willing to pay more instead pay the clearing price.[138]

A seller can frame a choice between a multiple-price or uniform-price format by analyzing whether bidders will bid more aggressively in one or the other. If bidders bid more aggressively, then seller are better off. For instance, in the 1990s, the U.S. Treasury conducted a study in which it used a single-price approach to auction 2-year and 5-year notes and a multiple-price approach to auction 3-year and 10-year notes. It decided that the single-price auction appeared to produce the highest prices and minimize the government's financing costs.[139]

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136 See Vijay Krishna, Auction Theory 192-93 (2d ed. 2010) (describing a multiunit open descending price auction).

137 Recall that loan size is based on 2.5 time monthly payroll. See supra Part I.

138 See Vijay Krishna, Auction Theory 189-91 (2d ed. 2010) (distinguishing between multiple-price, or discriminatory, auctions and uniform-price actions when multiple similar items are sold).

139 Department of the Treasury, Uniform-Price Auctions: Update of the Treasury Experience 13 (October

Either multiple-price or a single-price approach could be incorporated into a descending auction concept as it is translated to the administration of an emergency fund like the PPP. Consider a situation where an emergency fund first disbursed smaller grants, then later expanded to disburse larger grants. A multiple-price format would hold the emergency fund applicant to its original, smaller grant request. We might call this an original-bid-only application format. A single-price format would allow an applicant borrower who earlier made a smaller request to increase its grant request to the maximum loan amount granted, if its payroll and other metrics were large enough to support such an increase. We might call this a top-up application format.

To see the difference between the original-bid-only application format and the top-up application format, consider a PPP implementation approach that initially allowed grants of $250,000, then increased to $500,000. Assume one group of restaurants with $100,000 of payroll monthly and another group of restaurants with $200,000 of monthly payroll. The group of restaurants with $100,000 of payroll monthly will apply in the first round in any event, because their payroll numbers only support a maximum grant of $250,000.[140]

For the group of restaurants with $200,000 of payroll monthly, the decision is more difficult. This is especially true if the emergency fund administrator adopts an original-bid-only application format. In the original-bid-only application case, if a restaurant with $200,000 of payroll monthly applies in the first round for $250,000, then it loses the ability to apply in the second round for a larger $500,000 grant, for which it is also eligible. In other words, a restaurant with $200,000 of monthly payroll has to choose between two mutually exclusive options. One option is to apply for a grant of $250,000 initially. The second option is to apply for a grant of $500,000 (which may or may not be available) later.

On the other hand, if the emergency fund administrator adopts a top-up application format, then a restaurant with $200,000 of monthly payroll does not face the same mutually exclusive choice. Instead, the restaurant can apply initially for a grant of $250,000. Then if the government later increases the maximum grant amount, the restaurant could apply for an additional $250,000, for a total of $500,000.

The government's interest in information favors using the top-up application format for emergency fund administration, meaning the approach in line with the uniform or clearing price descending-price auction approach. Under this approach, applicants who initially requested a lower amount could later increase their grant request in line with expanded government guidelines. The top-up application approach encourages larger loan applicants to apply in the first round. This the

1998) (summarizing results that suggest "that expected revenue under the uniform-price technique is at least as great and probably greater than under the multiple-price technique").

140 Recall that PPP loans were limited to 2.5 times monthly payroll.

top-up application format will invite more information from the market and will therefore help administrators fashion the next stages of the program as they increase the grant size.[141]

A factor that would favor an only-one application format is the possibility that a firm's lack of eligibility for a larger loan – i.e. the smaller size of its payroll – is an overwhelming variable indicative of the firm's need, so that other variables, such as willingness to spend resources pursuing a smaller grant request, do not usefully correlate with need. Even in this case, the only-one application format brings with it the disadvantage that information about larger grant applicants will be concealed from the administrator until larger grant phases are opened.

2. Variables other than grant size

Using the single variable of grant size allows a relatively clean translation of the descending-price auction idea into the emergency fund administration context. Grant size is substituted for price of goods, and increased (rather than decreased) until the stock is gone. Other variables might not produce elegant translations of the descending-price auction idea, but could still capture the concept of providing funds first to certain recipients and then, if enough is left over, to others as well.

For instance, consider the possibility of administering an emergency fund like the PPP to address sector-specific emergency need. Say, for instance, that the Treasury and SBA believed that hospitality firms would suffer disproportionately, and had more hardship and necessity, compared to other sectors. Treasury could have allocated funds first to hospitality applicants, and then to other applicants. Or, administrators could have run a parallel allocation process, allowing hospitality firms to apply for larger loans than other kinds of businesses.

3. Would it be fast enough?

A question of time is presented by a descending-price/increasing-loan-size approach to emergency fund disbursement. Other examples of descending-price auctions, like those conducted by the Treasury to sell bonds, proceed very quickly. But the emergency fund allocation approach described here requires the dedication of some period of time to each increasingly larger loan-size pool. It is easier to push a lot of cash out into the economy with $10 million grants than with $250,000 grants. Thus the descending-price/increasing-loan-size allocation approach might have slowed the PPP's infusion of cash into the economy.

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141 The rationale of extracting information from applicants is analogous to the goal of structuring auctions to influence bidder behavior in a way that produces a better result for the seller. See David Easley & Jon Kleinberg, Networks, Crowds, and Markets: Reasoning About a Highly Connected World 262-264 (2010) (explaining choice among auction formats as choice about influencing bidder behavior).

This would be more worrisome if the PPP had been the only source of liquidity in the market. But it was not. Another source was direct relief in the form of stimulus and unemployment checks, were also available. Several emergency Fed facilities were also established, although underused.[142]

In addition, if the fund were administered with a top-up approach, so that an initial grant could later be increased, then early-stage applications would be greater and money might have flowed out faster. Larger borrowers would still have the possible future benefit of an additional grant under the program. If they are better able to bear and manage risk and uncertainty compared to smaller borrowers, they will be better able to estimate and update estimates of the likelihood of a grant. They might borrow against the anticipation of a future grant, for instance by spending saved capital more freely.

4. Using enforcement safe harbors

The mechanism used by Treasury and the SBA to effect the allocation of funds in a descending-auction format could take at least two forms. One tactic is a safe harbor enforcement approach. The other is a straightforward prohibition.

The safe harbor approach would promise certain applicants – for instance, those requesting amounts below the government-set threshold – that the government would not audit the question of whether the applicant correctly certified hardship. This is similar to the approach that the government took in the second wave of PPP regulation. This approach would not expressly prohibit public firms from applying for PPP grants. Instead, it would use enforcement discretion to produce expectations about government audit that in turn influence firms' decision about whether to apply for grants.

It is difficult to challenge a preference effected by a safe harbor in court. Say there is a safe harbor stating that there will be no hardship audit for loans of up to $250,000, and a larger applicant disadvantaged by the safe harbor wishes to challenge it. Consider three alternate situations in turn to illustrate the difficulty of challenging the safe harbor.

First, assume that the larger applicant decides not to apply. In this case, it lacks standing to challenge the government on the validity of the safe harbor rule.

Second, assume that the larger applicant applies, for instance for a $1 million loan, and that the government audits the applicant. The standing issue is probably surmountable, in light of case law

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[142] Rachel Siegel, How the Fed Got Caught in the Middle of Contentious Stimulus Talks, Wash. Post, Dec. 21, 2020, available at https://www.washingtonpost.com/business/2020/12/20/stimulus-fed-politics-lending-programs/ (noting about $400 billion left over from the between $450-$500 billion allocated to the Fed for emergency lending in 2020).

that has reviewed an agency's refusal to grant safe harbor protection to a regulated party.[143] On the other hand, on the merits the $1 million applicant faces a strong body of case law that suggests that an agency has broad discretion to allocate its enforcement resources.[144]

Third, assume that the safe harbor is implemented largely through the institutional decisions of financial intermediaries, which happen to prioritize smaller grant requests (for instance, because there is a greater chance of approval and a lower chance of adverse reputational consequences). In this case, an applicant left out of the program may have no standing to seek review, on the theory that a causal link between the regulatory safe harbor and the bank's decision to prioritize smaller loans lacks definitive proof.[145] The applicant might find a cause of action in state consumer protection law, but this too can be an uphill battle.[146]

The three scenarios reviewed above suggest that a safe harbor enforcement approach to allocating emergency funds would be relatively protected against an adverse judicial review decision.

Another possible administrative tactic is to expressly forbid certain loan applications. The PPP has experience with this as well. Treasury and the SBA initially brought traditional SBA eligibility restrictions over to PPP regulation.[147] Ineligible applicants under usually-applicable regulations included "firms engaged in any illegal activity," businesses "of a prurient sexual nature", firms disqualified because of owner criminal histories, bankrupt firms, gambling businesses and lobbying

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[143] See, e.g., U.S. Army Corps of Engineers v. Hawkes Co. Inc., 136 S. Ct. 1807, 1815 (2016) (concluding that the EPA took a final, reviewable action when it refused to grant a "negative jurisdictional determination" that would have resulted in a five-year safe harbor from civil enforcement proceedings).

[144] See Heckler v. Chaney, 470 U.S. 821, 837 (1985) (stating presumption of unreviewability for "agency decisions not to institute proceedings"). The Chaney decision noted that the case did not involve an express agency policy "that is so extreme as to amount to an abdication of its responsibilities." Id. at 833 n. 4. Courts generally apply Heckler v. Chaney to deny review of nonenforcement decisions. See Kristin E. Hickman & Richard J. Pierce, Jr., Administrative Law Treatise § 19.7 (6th ed. 2020). But see Casa De Maryland v. U.S. Dep't of Homeland Security, 924 F.3d 684, 698-701 (4th Cir. 2019) (reviewing decision to rescind DACA) ("[A]n agency's expression of a broad or general enforcement policy based on the agency's legal interpretation is subject to review.")

[145] Susan Morse, Safe Harbors, Sure Shipwrecks, 49 U.C. Davis L. Rev. 1385 (2016); Susan Morse, The Dark Side of Safe Harbors (working paper). See, e.g., Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930, 938 (D.C. Cir. 2004) (refusing standing on grounds that Title IX proportionality safe harbor did not cause require colleges to change the gender balance of their athletes, for instance by cutting men's teams); Renal Physicians Ass'n v. U.S. Dep't of Health and Human Services, 489 F.3d 1267 (D.C. Cir. 2007) (denying standing because of missing causal connection between regulatory safe harbor under Stark Act and dialysis center compensation reduction).

[146] This is demonstrated by the slow progress of cases raised by would-be borrowers against large banks based on first-wave PPP fund allocation. See supra note 78 (noting case submitted to arbitration in December 2020).

[147] Interim Final Rule, Paycheck Protection Program, 85 Fed. Reg. 20811, 20812 (Apr. 15, 2020).

firms.[148] Many of these provisions have been challenged as applied to the PPP, often on administrative law grounds. Plaintiffs have in a material number of cases persuaded courts that the Treasury and SBA interpretation exceeded the administrators' authority given the statute that extended benefits to "any business concern" without similar limitations.[149]

The vulnerability of these express prohibitions supports the idea that the wily administrator might use a sturdier enforcement safe harbor approach to accomplish the task of prioritizing emergency funds. A safe harbor that in effect allocates funds by providing protection against enforcement is more secure against challenge compared to an outright prohibition. A safe harbor that in effect allocates funds by promising nonenforcement to a third-party intermediary, like a bank, may be more secure still.

D. Back-End Guidance to Solve Time Constraint

1. Temporal solutions

Another emergency fund administration problem is lack of time. This is the concern that administrative resources will not match temporal guidance needs. Immediate and bespoke guidance is needed to implement a new program like the PPP. But immediate administrative resources are not available in sufficient quantities.

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[148] 13 C.F.R. § 120.110 (listing businesses ineligible for SBA business loans).

[149] For adult entertainment businesses, one decision concluded that the PPP's extension of benefits to "any business concern" makes it arbitrary and capricious to deny eligibility to any classification of businesses. DV Diamond Club, ED Mich, 2020 WL 2315880 (granting preliminary injunction); aff'd, 7th Cir. See also Camelot Banquet, ED Wis, 2020 WL 2088637, aff'd, 6th Cir. (granting preliminary injunction on similar facts but basing decision on 1st and 5th Amendments). But another concluded that "any" should instead be construed within the context of the SBA's established practice of allocating resources to certain businesses. See Pharoahs GC, Inc. v. SBA, 2020 WL 3489404 (WDNY 2020) (denying preliminary injunction).

For bankrupt firms, at least two courts have held that the statute allows an interpretation that denies eligibility. Diocese of Rochester, 2020 WL 3071603 (WDNY 2020); Tradeways v. U.S. Dep't of Treasury, 2020 WL 3447767 (D. Md. 2020). At least one has concluded that such an interpretation is arbitrary and capricious. Alaska Urological Institute, P.C. v. SBA, 2020 WL 4910291 (D. Alaska 2020) (holding on summary judgment that bankruptcy exclusion was arbitrary and capricious).

For restrictions based on owner criminal histories, one decision based on a State Farm analysis concluded that earlier rules that limited eligibility with no explanation were invalid, but that later, less restrictive rules that included an explanation were valid. Defy Ventures, Inc. v. SBA, 2020 WL 3546873 (D. Md. 2020) (applying "reasoned explanation" doctrine).

In the gambling sector, a challenge to the exclusion of Native American tribes' casinos from the benefits of the PPP relied on an administrative law and statutory interpretation argument. Flandreau Santee Sioux Tribe v. Carranza, Complaint, Case 4:20-cv-4070 (D.S.D. April 23, 2020). It was dismissed with the plaintiffs' consent after SBA guidance was changed to allow such businesses to apply. See 85 Fed. Reg. 23450 (released April 24 2020, published April 28 2020).

Different kinds of emergency programs address this temporal problem with different tactics. For example, simpler programs such as tax deferral can accomplish speedy disbursement of funds without bespoke guidance. Federal pandemic relief included income tax deferral, in the form of automatically delaying the tax-due payment date from April 15 to July 15.[150] It also allowed payroll tax deferral upon the completion of a truly simple one-page form.[151] Automatic stabilizers are another fiscal policy tool that might offer the advantage of immediate implementation.[152]

Pre-wiring emergency payment systems might also avoid the requirement for bespoke administrative guidance at the moment of the emergency.[153] The Federal Reserve's close connections with financial institutions permit it to very quickly affect monetary policy with interest rate adjustments or bond-buying programs. Other governments have precise information about individuals and businesses in their jurisdiction that enable them to implement cash transfers much more smoothly than is possible in the U.S.[154]

The PPP had none of these features. It was a complex program that required bespoke guidance, in contrast for instance to payroll tax deferral. It was not pre-wired ahead of time, but instead emerged from the scrum of the contemporaneous legislative process. And it did not benefit from a seamless government-to-borrower financial channel, but instead relied on financial intermediaries and a loan guarantee structure to accomplish its purpose.

2. Tax it Back?

Whenever the government transfers cash to taxpayers, it has a built-in opportunity to modify the effect of the program later, through the income tax system. That is, the government can decide to "tax it back," or modify the effect of the grant through the income tax. Social security payments, for

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[150] This was accomplished administratively. See Notice 2020-18, 2020-15 I.R.B. 590 (March 20, 2020) (citing IRC Section 7508A, which allows the Secretary of the Treasury to postpone requirements such as filing and tax payement for up to one year if the taxpayer is affected by a federally declared disaster as defined in IRC 165(i)(5)(A)).

[151] CARES Act § 2302.

[152] Olivier J. Blanchard & Lawrence H. Summers, Automatic Stabilizers in a Low-Rate Environment, PIEE Policy Brief, February 2020 at 2 (recommending "tax or spending measured triggered by the crossing of a statistical threshold such as a low output growth rate or a high unemployment rate").

[153] See, e.g., Recession Ready: Fiscal Policies to Stabilize the American Economy (Heather Boushey, ed.) (May 16, 2019) (available at https://www.hamiltonproject.org/papers/recession_ready_fiscal_policies_to_stabilize_the_american_economy).

[154] See, e.g., Steven Hamilton, A Tale of Two Wage Subsidies: The American and Australian Fiscal Responses to COVID-19, 73 Nat'l Tax J. 829, 843 (2020); Covid-19 strengthens the case for digital ID cards, The Economist, Sept. 5, 2020 (reporting on Estonia's digital ID system which "links every Estonian's records together" so that "[n]obody in Estonia had to join a queue on a pavement to claim benefits").

instance, have been subject to various income tax inclusion rules over the 80 years since they began to be disbursed.[155] Similarly, a decision had to be made as to whether forgiven PPP loans would be included in gross income. They are not.[156] Another, even later decision was made to allow PPP grants, although forgiven and excluded from income, to nevertheless support tax-deductible expenditures.[157]

3. Back-end guidance for forgivable loans

But back-end adjustment opportunities are not confined to the income tax in the case of a forgivable loan program like the PPP. The structure of a forgivable loan provides at least two points at which administrative decisions can be made about the structure of the loan. The earlier, frontloaded moment is at the beginning of the loan, at the time of borrowing. The later, backloaded moment is at the end of the loan, when it is either forgiven or required to be repaid.[158]

Consider the example of the private market. When a lender and a borrower enter into a debt contract, the contract may have various terms allow the lender to force the borrower to repay. For instance, the lender may charge late fees if the borrower fails to pay on time. Or, the breach of a covenant might allow the lender to foreclose on the borrower's property. But in fact, these terms can be changed unilaterally, so long as the party changing the terms does so against its own interest. A lender can unilaterally waive late fees, for instance. A lender can choose to ignore the breach of a covenant rather than pursuing collateral. These are examples of back-end adjustment in private contracts. Government regulation can accommodate back-end adjustment also.

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155 The 2020 stimulus program did not tax back stimulus payments in the future. See 46 (citing I.R.C. § 6428) "[I]n terms of implementation, the ... provision treats eligible taxpayers as having made a payment against tax in 2019 in the amount of the recovery rebate to which that individual is entitled based on 2019 AGI, and then calls for advance refunds in that amount to be paid to eligible taxpayers." But an advance refund program can be designed in this way. Cf. Sarmiento v. United States, 678 F.3d 147 (2012) (holding that status of 2008 payment as "advance refund" meant that IRS would retain refund for particular taxpayers because of the terms of an earlier Offer-in-Compromise settlements). See also Carlton Smith, So, How Will The "Recovery Rebate" Refunds Work This Time Part I," Procedurally Taxing, March 27, 2020, available at https://procedurallytaxing.com/so-how-will-the-recovery-rebate-refunds-work-this-time-part-i/.

156 CARES Act Section 1105(i) (excluding forgiven PPP loans from income).

157 Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act. Both decisions are inconsistent with generally accepted income tax theory, but consistent with some other decisions that have emerged from income tax politics.

158 Back-end adjustments relate to the ordinary-course working of the emergency fund. Other ex post actions, such as enforcement, are not generally included in the idea of back-end adjustments. See, e.g., William Beggs & Thuong Harvison, Fraud and Abuse in the Paycheck Protection Program: Evidence from Investment Advisory Firms, working paper, November 6, 2020, available at https://ssrn.com/abstract=3647606 (finding that of 1080 loans made to investment advisory firms, 107 abnormal (incommensurate with payroll reported on regulatory filings) and factors such as past civil, criminal or regulatory history and assets under management predicted same).

There is a theory of back-end regulatory adjustments that explains several desirable components of such a program. First, back-end adjustments are appropriate when front-end regulation is likely to produce imperfect policy, for instance because of uncertainty or lack of information. Second, an initially stricter policy will support back-end adjustments. Relaxing policy is easier, and more immune to challenge, compared to increasing the strictness of a policy. Third, a transparent process should be used to provide back-end adjustments, to guard against the risk of capture.[159]

Within this framework of back-end adjustments, one design opportunity for a forgivable loan program like the PPP is to start with stricter forgiveness terms, and then more transparently anticipate back-end adjustments that might relax those terms. As it turned out, the PPP guidance did change some forgiveness terms. Some went against best-practices guidance by tightening, rather than relaxing, the terms of the program. The audit threat that caused 69 public firms to return over $400 million falls into this category.

Other changes were consistent with the best-practices approach of starting with stricter rules and then relaxing them. Most of these edits came from Congress. For instance, the Flexibility Act enacted in June reduced the increased timeframe for using loan proceeds, from 8 weeks to 24 weeks,[160] and also allowed employers to disregard reductions in employment if the reductions are due to compliance with public health regulations.[161] Later, the December 2020 statute added allowed expenses, such as worker protection expenses, and required a simpler process for forgiving loans of $150,000 or less.[162]

The example of the PPP demonstrates that back-end adjustments hold one key to solving the emergency money problem of allocation within time constraints. The best-practices approach starts with stricter forgiveness terms, anticipates the possibility that these terms will be relaxed later on,

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[159] See Robert L. Glicksman & Sidney A. Shapiro, 52 U. Kan. L. Rev. 1179, 1183-84 (2004) (citing limitations on ex ante cost-benefit analysis); id. at 1187 (studying "deadline extensions and waivers, variances and exceptions" as examples of back-end adjustments); id. at 1247 (recommending transparent adjustment procedures to allow public monitoring of agency decisions). See generally Sidney A. Shapiro & Robert L. Glicksman, Risk Regulation at Risk: Restoring a Pragmatic Approach (2003) (criticizing the false precision and incomplete welfare analysis of front-end regulatory requirements such as cost-benefit analysis).

[160] Paycheck Protection Program Flexibility Act of 2020, Pub. L. 116-142, 116th Cong., 2d Sess., 134 Stat. 641, § 3 (extending covered period to end as late as December 31, 2020), codified at 15 U.S.C. § 636(a)(36)(A)(iii); SBA, Revisions to Loan Forgiveness and Loan Review Procedures Interim Final Rules, 85 Fed. Reg. 38304, 38307 (June 26, 2020).

[161] Economic Aid to Hard-Hit Small Businesses, Nonprofits and Venues Act § 304 (listing additional allowed covered expenses).

[162] Economic Aid to Hard-Hit Small Businesses, Nonprofits and Venues Act § 307 (providing for one-page form that requires information about number of retained employees, estimated amount of loan spent on payroll and total loan value).

builds a transparent process for later adjustments. In the case of the PPP, Congressional actions illustrated this relaxing of forgiveness requirements.

4. Congressionally-authorized back-end guidance

Congress could also have facilitated administrative back-end guidance by providing for a loan program that was funded with a net figure. That is, instead of allocating $349 million in grants to the program, the statute's first round might have authorized larger loan facility, but provided that no more than $349 million in loans could be forgiven or go uncollected. The statute could also have anticipated postponed administrative guidance to determine the terms of repayment.

This structure would have allowed more latitude for government regulators to make rules later, based on better information. If the program were undersubscribed, administrative guidance about repayment could be more generous. If the program were oversubscribed, administrative guidance would be less generous. If unanticipated facts about an applicant came to light later – for example, a successful IPO – then repayment terms might be adjusted. If unanticipated facts about the economy surfaced – for example, that shutdown orders would last longer than anticipated – then repayment terms could be adjusted and made more generous.

Perhaps concerns would arise that back-end guidance might disadvantage and/or surprise borrowers. A transparent process, open to public comment, for developing and communicating back-end guidance can alleviate this risk. In the case of the PPP program or other especially visible programs, media coverage might have helped minimize the risk of capture. In addition, either Congress or Treasury and the SBA could place and disclose limits on back-end guidance, for instance by restricting it to the loans with the highest balance or the firms in the least-adversely-affected sectors. It is an open question whether Congress would find it advantageous to delegate the modification of forgiveness terms to an agency – perhaps Congress would prefer to keep such a popular kind of change within the legislative process, for instance. But whether lodged in the administrative or in the legislative branch, the prospect of relaxing strict requirements later is another way that can be used by government to limit the control of private actors over emergency fund allocation.

E. Administrators Should Act – Not Leave it to the Market

The example of the PPP shows that given an emergency fund statute with unclear allocation rules, both fourth-branch bureaucrats and fifth-branch private actors can influence where the money goes. Private actors in the market, such as applicants and intermediary banks, act to further self interest, not public policy goals. Where the market has incentives that are not aligned with the goals of an emergency money policy, then bureaucrats should act to limit the influence of the fifth branch.

Sometimes private actors in the market have incentives that *are* aligned with the goals of an emergency money policy. For instance, if the Fed responds to an economic crisis by reducing the interest rate it charges in its capacity as a lender of last resort, it makes the interest rate available to any participating bank. It does not attempt to direct lower-interest money to particular financial intermediaries or borrowers. This is because such interest rate cuts generally have a broad monetary policy purpose.[163] The intended mechanism entrusts the monetary policy to the market, in anticipation that the market will "transmit" the interest rate change to a full range of public and private debt.[164]

The PPP, in contrast, has a purpose not fully aligned with the market. The PPP sought to fund a particular group of firms that met intermediate criteria. They were well-resourced enough to navigate successfully the PPP's application process, including the requirement of processing by a financial institution. But they were weak enough that PPP funding was "necessary" to support "ongoing operations."[165] Fund allocation, if left to the market, would push too far in favor of successful firms, with too little consideration given to identifying firms that needed the help of the PPP in order to survive. This is why regulation, not deregulation, was the right choice for the PPP.

There is an active scholarly debate about whether administrative agencies, like Treasury and SBA, should be allowed to specify the law when the legislature leaves out vital policy details, including in an emergency.[166] One example offered is that of the Troubled Asset Relief Program, or

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163 See 12 U.S.C. § 225a (reciting the Fed's monetary policy tools and goals of "maximum employment, stable long-term prices, and low interest rates); Federal Reserve System: Purposes and Functions 22-28 (10th ed. 2016) (explaining Fed's monetary policy purpose and the central tool of the federal funds rate).

164 Federal Reserve System: Purposes and Functions 26-28 (10th ed. 2016) (explaining that Fed interest rate changes "typically are transmitted to" other interest rates including "those on Treasury notes and bonds, corporate bonds, fixed-rate mortgages, and auto and other consumer loans). More recent authorizations of Fed actions go beyond this traditional purpose with "ad hoc lending facilities" that target, for instance, support for certain municipalities, businesses and nonprofits through the capacity to buy such institutions' debt. See Lev Menand, Unappropriated Dollars: How Congress is Using the Fed to Prop Up Financial Markets, draft at 18-23 (Sept. 21 2020 working paper on file with author).

165 15 U.S.C. § 636(a)(G)(i)(I).

166 Compare, e.g., Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, Unorthodox Lawmaking, Unorthodox Rulemaking, 115 Colum. L. Rev. 1789, 1842 (2015) (acknowledging competing theories of legitimacy including the view that "unorthodox policymaking may indeed advance ... the legitimacy of government getting its work done"); Eric A. Posner & Adrian Vermeule, Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008, 76 U. Chi. L. Rev. 1613, 1640-41 (2009) (arguing, based on the work of Carl Schmitt, that legislatures act too slowly to respond directly to a crisis, and that while they "may be asked to delegate new authority to administrators," "the frontline response is inevitably administrative") with Josh Blackman, Gridlock and Executive Power, 130 Harv. L. Rev. 241 (2016) (arguing that Congressional silence with respect to details of contraceptive mandate under the Affordable Care Act evidences a divided legislature and "demonstrates that Congress did not intent for the agencies to exercise [the] awesome power of burdening free exercise"); Michael S. Greve & Ashley C. Parrish, Administrative Law Without Congress, 22 George Mason L. Rev. 501, 504 (2015) ("[N]o serious doctrine exists that is commensurate to the potential for effectively unchecked executive government.").

TARP, which this Article has referred to at several points. Its statutory language allowed the Secretary "to purchase ... troubled assets from any financial institution."[167] In the legislative process, the Treasury presented the program as one that would purchase troubled assets, such as loans from banks. But after the passage of the statute, Treasury instead followed emerging global best practices for intervention and purchased equity in troubled financial firms.[168]

Another example offered is that of the Affordable Care Act. Its statutory language allowed tax credits when a taxpayer enrolled "through an Exchange established by the State."[169] Other statutory provisions explained that if a state did not create an exchange, a federally established exchange would serve in its stead. Many states did not create exchanges, and many taxpayers enrolled through an exchange established instead by the federal government. Treasury wrote guidance that allowed tax credits anyway.[170] The Supreme Court declined to defer to the administrative interpretation, but arrived at the same answer through an independent analysis of the statute based on a "major question" exception to *Chevron*.[171]

For an emergency fund like the PPP, one response to the concern about bureaucratic overreach is the observation that administrative discretion is an irreducible fact of government. Consider the cut-and-dried instruction to the IRS to disburse individual stimulus payments under another section of the CARES Act. Even this instruction came with administrative discretion relating to, for instance, payment methods, ease of application and the extent of the government's responsibility to locate individuals – numbering about 9 million -- who did not apply for or automatically receive funds. In the case of the PPP, the statute supports Treasury and SBA's administrative discretion because of the requirement of the hardship certification, the unclear meaning of "necessary" in that certification, and the SBA and Treasury's enforcement discretion.

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[167] Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 101(a)(1), 122 Stat. 3767 (2008), codified at 12 U.S.C. § 5211.

[168] See Davidoff & Zaring 525-29 (explaining shift to equity purchases); Posner & Vermeule 1632-33 ("Critics ... argue that ... Treasury's decisions -- to use TARP funds to buy equity rather than toxic mortgages, and to use TARP funds to bail out automakers – show that the [statute] wrote the executive a blank check. What these decisions really show, however, is just that Treasury's authority is broad ...").

[169] I.R.C. § 36B(b)(2).

[170] 26 C.F.R. § 1.36B-2; 45 C.F.R. § 155.20 (including Exchanges "regardless of whether the Exchange is established and operated by a State . . . or by HHS").

[171] See King v. Burwell, 576 U.S. 473, 485-86, 492-98 (2015) (holding that the Court would independently interpret the statute, that the statutory language was ambiguous, and that the statutory scheme directed that federal-established exchanges should be included within it). See also Gillian Metzger, Agencies, Polarization and the State, 115 Colum. L. Rev. 1739, at n. 209 (2015) ("King may signal that the Court is positioning itself as a check against agency efforts to transform statutory schemes in contexts where partisan legislative dysfunction prevents congressional response.").

Another response has to do with Congressional oversight,[172] executive supervision,[173] and judicial review.[174] These pathways for reviewing administrative action are more established and robust than the government mechanisms available for reviewing fifth-branch private-actor action.[175] As an example, consider the litigation that assessed the validity of PPP regulations that disqualified applicants due to criminal history.[176] The point is that this case made it to court. If a financial institution, rather than the government, had disfavored or even excluded the same individuals from its client base, it would have been more difficult for the disadvantaged individuals to challenge the private market decision.

Perhaps some rules for review of administrative action should be strengthened. Above, this Article explained that that emergency fund administrators might choose an enforcement safe harbor regulatory strategy because this strategy offers greater protection against judicial review.[177] Maybe administrative law should be changed so that this strategy is less open to administrators. In other words, maybe enforcement safe harbors should be more open to judicial review.[178] But it is hard to

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172 See, e.g., Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies, 75 Va. L. Rev. 431, 444 (1989); David B. Spence, Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies, 28 J. Leg. Stud. 413 (1999). See also Joshua Chavetz, Congress's Constitution: Legislative Authority and the Separation of Powers (2017) (cataloguing and analyzing hard and soft powers of Congress); Matthew B. Lawrence, Disappropriation, 120 Colum. L. Rev. 1 (2020) (noting Congress' ability to legislate permanently but appropriate temporarily).

173 See Peter L. Strauss, Overseer, or "The Decider"? The President in Administrative Law, 75 Geo. Wash. L. Rev. 696, 715-18 (2007) (noting oversight tactics including appointment and removal); Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2285-2290 (2001) (noting specific Presidential directives such as OMB and OIRA review).

174 For instance, the Administrative Procedure Act empowers reviewing courts to set aside actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." APA § 706(2)(A); Motor Vehicles Manufacturers Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983). See Richard J. Pierce & Kristin E. Hickman, Administrative Law Treatise ¶ 11.1-11.4 (explaining State Farm doctrine and collecting cases); see also Louis L. Jaffee, Judicial Control of Administrative Action 321 (1965) (defending judicial review of administrative action as "the necessary premise of legal validity.").

175 See, e.g., Harold Abramson, 16 Hastings Const. L. Q. 165, 180-87 (explaining more limited Constitutional, statutory, democratic and oversight mechanisms applicable to private regulators). The cases challenging intermediary banks' actions in the PPP give an idea of the kind of action that might be available to challenge private actors. Some actions, such as breach of fiduciary duty or breach of contract, are only available to existing customers of banks. See supra note 78.

176 See Defy Ventures, Inc. v. SBA, 2020 WL 3546873 (D. Md. 2020) (concluding based on State Farm analysis that earlier PPP rules that limited eligibility with no explanation were invalid, but that later, less restrictive rules that included an explanation were valid).

177 See supra Part III.C.4.

178 See, e.g., U.S. Army Corps of Engineers v. Hawkes Co. Inc., 136 S. Ct. 1807, 1815 (2016) (concluding that the EPA took a final, reviewable action when it refused to grant a "negative jurisdictional determination" that would have resulted in a five-year safe harbor from civil enforcement proceedings).

see why administrators should have responsibility for determining how other branches can constrain administrative actions.[179] The PPP experience suggests that the immediate task presented to administrators in an emergency is how to share power with private actors, rather than how to interact with the legislature or judiciary.

CONCLUSION

The PPP is the kind of emergency statute that seems likely to emerge from the United States' political process. That is, it leaves implementation discretion to administrators, in this case Treasury and the SBA. Although the PPP's eligibility requirements are specific, its allocation provisions are vague. Its authorization of hundreds of billions of dollars in funds does not come with instructions about how to prioritize applications if the program is oversubscribed. The statute includes only underspecified ideas about allocation, most notably the requirement that applicants certify that PPP funds are "necessary" to "support ongoing operations."

Treasury and the SBA lacked both information and time as they faced the task of how to allocate authorized funds. In the first wave of the program, they chose deregulation, and failed to act. Private forces allocated funds as a result. In the second wave of the program, Treasury and the SBA chose regulation, and successfully used a sure shipwreck and safe harbor enforcement strategy to discourage public firm applicants and applications for any loan above $2 million.

Treasury and the SBA could have – and should have – regulated earlier. Information and time constraints did not prevent this. For fund allocation, they could have borrowed the idea of a descending-price auction selling process, which starts with a high price and reduces the price until all goods are sold. An allocation approach could have started with a stricter definition of "necessary," perhaps proxied by a low loan amount, and later increased the loan amount until the program was fully subscribed. In addition, the structure of the program allowed the government to delay some regulation until the back end, in connection with loan forgiveness decisions. The promise of this approach was demonstrated by several material changes made by Congress to relax the requirements for PPP loan forgiveness.

The reason that Treasury and the SBA should have acted more forcefully in implementing the PPP is that private actors provided the alternative method for fund allocation. Sometimes, private actors may be well suited to further the goals of an emergency money program. Government allocation may not be desirable when the Federal Reserve reduces a benchmark interest rate, for example. But in the case of the PPP, one policy goal was to address need – to allocate funds where they were "necessary" to "maintain ongoing operations."

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[179] Cf. Rachel Barkow, Overseeing Agency Enforcement, 84 Geo. Wash. L. Rev. 1129, 1164-70 (2016) (noting incentive for agencies in civil cases to settle to avoid judicial review and suggesting that more enforcement resources or "a new framework of judicial review" may be appropriate).

Fifth-branch private actors, including private applicants and intermediary banks, do not allocate funds to those who need them most. The operation of the market allocates funds to the strongest and best-resourced applicants. As a result, in the case of an emergency money fund like the PPP, market incentives do not align with policy incentives. Smarter and more immediate administrative guidance could have implemented the statute on the ground so that it better furthered the goals of the statute on the books.