UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA,	) Fort Myers, Florida
	) Case 2:20-CR-114-FtM-66MRM
Plaintiff	)
	) Wednesday, March 23, 2021
vs.	)
	) 1:38 p.m. to 3:51 p.m.
CASEY DAVID CROWTHER,	)
	) Courtroom 5D
Defendant	)

TRANSCRIPT OF JURY TRIAL TESTIMONY OF JOHN MILLER

HELD BEFORE THE HONORABLE JOHN E. STEELE,

United States District Court Judge

Official Court Reporter:
Jeffrey G. Thomas, RPR, CRR
2110 First Street, Suite 2-194
Fort Myers, FL 33901
Telephone: (239) 461-2033

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A P P E A R A N C E S

COUNSEL FOR GOVERNMENT:

United States Attorney's Office
Middle District of Florida
United States Courthouse
2110 First Street
Room 3-137
Fort Myers, FL 33901
(239)461-2200
BY: TRENT REICHLING, ESQ.
MICHAEL V. LEEMAN, ESQ.

COUNSEL FOR DEFENDANT:

FisherBroyles LLP
2390 Tamiami Trail North
Suite 100
Naples, FL 34103
BY: NICOLE HUGHES WAID, ESQ
BRIAN E. DICKERSON, ESQ.

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I N D E X

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MR. REICHLING: At this time, the government calls John Miller.

THE COURT: Right up here, please.

COURTROOM DEPUTY: Good afternoon.

Please raise your right hand.

Do you solemnly swear or affirm the testimony you are about to give in the case before the Court will be the truth, the whole truth, and nothing but the truth?

THE WITNESS: Yes.

COURTROOM DEPUTY: Thank you, sir.

If you wouldn't mind please taking a seat in the box?

And, once seated, would you please tell us your name, and spell it?

THE WITNESS: Okay.

COURTROOM DEPUTY: Thank you, sir.

THE WITNESS: Do you want me to remove the mask?

THE COURT: You may if you feel comfortable doing that.

THE WITNESS: Thank you.

My name is John Miller. J O H N. M I L L E R.

MR. REICHLING: May I proceed, Your Honor?

THE COURT: You may.

MR. REICHLING: Thank you, Judge.

JOHN MILLER,

called as a witness by the Government, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. REICHLING:

Q Mr. Miller, where do you currently work?
A I work at the Small Business Administration.
Q Is that also referred to as the SBA?
A Yes.
Q And what do you do at the SBA?
A I am the Deputy Associate Administrator in the SBA's Office of Capital Access.
Q And what does the Office of Capital Access oversee?
A The office oversees all of the SBA's business and surety guarantee programs.
Q And does that include the Paycheck Protection Program?
A Yes, it does.
Q Now, could you explain to the jury -- well, first, are you familiar with the Paycheck Protection Program?
A I am.
Q And how did the Paycheck Protection Program come about?
A The program was established in the CARES Act, which was the Coronavirus Aid, Relief, and Economic Security Act signed into law on March 27th of last year.
Q And, if you know, why was the Paycheck Protection

Program included in the CARES Act?

A Well, it was included because of the need to, as the name implies, protect paychecks of American workers affected during the pandemic.

Q And when did the Paycheck Protection Program become available to the public?

A The program became available shortly thereafter. On April 3rd, banks were allowed to begin lending money.

Q And you mentioned banks lend money. Whose money goes out the door? Is it the SBA's money, or is it the lender's money?

A No, it's not the SBA's money. It's the lender's money. It's the bank or the lender.

Q And who administers the program?

A The SBA.

Q And the initial time that the Paycheck Protection Program was created, how much money was available under the Paycheck Protection Program?

A Under the Paycheck Protection Program, Congress authorized $349 billion.

Q And did there come a time where that $349 billion was no longer available?

A Yes. Yes. It went fast, within 14 days, so by April 16th. April 16th, the program was out of money.

Q And do you have a rough estimate as to how many Paycheck

Protection Program loans were authorized by the SBA?
A Well, all in all, I mean, we've authorized, now, close to 8 million loans.
Q Now, who was authorized to make these PPP loans?
A Lenders. Banks, credit unions, farm credit agents -- farm credit organizations. Some non-bank lenders. Fintechs. A lot of different lenders.
Q And was this money guaranteed by the Small Business Administration?
A Yes.
Q And could you explain the guarantee briefly, what's its significant is?
A Congress gave us the authority to temporarily guarantee these loans at 100 percent, meaning if for some reason the borrower could not pay the loan back to the lender, SBA would step in and honor the guaranty if the lender requested it, and we would pay the lender for the loss on the loan.
Q And was this loan a forgivable loan?
A It was.
Q And was this forgivable in whole possibly?
A Yes. That was the intent of the Act, was that, if used properly, this loan is a fully forgivable loan for the borrower.
Q Could that explain the demand for the loan?
A Absolutely.

Q And were there requirements imposed upon borrowers with regards to use of the money?

A Yes. The use of the money was very limited. It was to be used to pay payroll, to keep American workers employed. And that would include pay plus benefits. Also, to pay very basic non-payroll expenses for the business, such as making a mortgage interest payment, making a rent payment, and making a utility -- paying for utilities. To keep the operations of the business going during the pandemic.

Q And who was -- back in April of 2020, at least, who was eligible to apply for a PPP loan?

A Small businesses. So -- and that was determined in -- Congress wrote it into the statute, businesses with 500 or fewer employees. And then, also, sole proprietors, independent contractors, self-employed individuals.

Q And how were they to apply for the loan?

A They were to apply for the loan using an SBA Form 30 -- excuse me -- 2483, which is an SBA form that the borrower had to complete and submit to a bank or a lender of its choice, and then that's how they would apply. They would apply with the bank, not with the SBA.

Q Was there supposed to be -- was anything supposed to be submitted along with the application to the lender?

A Yes. The borrower had to also submit -- in addition to filling out the application, they had to submit documentation to support the amount of the loan request.

Q And how was the amount of the loan request to be determined?

A The amount of the loan request was determined based upon the prior year's payroll. So, because this was a payroll -- or a Paycheck Protection Loan to keep American workers employed, the prior year's -- prior 12 months' payroll was factored in, and the average monthly payroll amount spent by the borrower for payroll was then taken and multiplied by 2.5 to get the amount of the loan. So you'd get the average monthly amount, multiply that by 2.5, and that would be the maximum loan amount.

Q And why was this 2.5 multiplier used?

A That was the -- close to the period that Congress thought the pandemic was going to be of issue. Back then, it was a more -- seen to be more of a short-term thing. Two and half months.

Q Now, were there various representations and certifications contained on this standard SBA PPP application that you referenced?

A Yes. The borrower had to make certain representations and certifications.

Q And could you give us -- well, what were some of the major certifications, I'd say, that the borrower had to make?

A Well, the borrower had to certify that they were going

to use the PPP loan proceeds for the -- for specific purposes: To pay payroll, to pay mortgage interest, rent, or utilities.
Q And let me ask you this: Was there another certification regarding the necessity of the loan, or the need for the loan?
A There was. There was an economic necessity. So there was a certification that the borrower had to say that the uncertainty of the economic -- the uncertainty of the economic necessity made the loan necessary to support the ongoing operations of the business.
Q And were there any representations on -- contained on the application concerning the funds needing to be used for business-related purposes?
A Yes. There was a representation that the borrower would only use the funds for business-related purposes.
Q Now, who received and reviewed the PPP application and the supporting documents?
A The bank, the lender, would have received the application from the borrower with all the supporting documents to substantiate that loan amount.
Q And why was the lender tasked with reviewing all of this information?
A Well, the lender was delegated authority by Congress to make these loans. So, because of the need to get the money out as quickly as possible, Congress wanted the lender to be able

to make the decision quickly, based upon the information the borrower provided, and then fund the loan.

Q Now, after reviewing this documentation, what was the lender expected do?

A The lender was expected to confirm that they had the borrower's certifications, that they also confirmed that they had the documentation to support the loan amount and do a good-faith check of the loan amount based upon the documentation. And then, with that, then the borrower then -- or, excuse me, the lender then had to apply for the SBA guarantee for the PPP loan.

Q And how -- just briefly, how would the lender apply for this SBA guarantee?

A They had to fill out another form, called the 2483 -- 2484, which was the lender application for a PPP loan guaranty. And, once they filled that application out, they had to electronically transmit the data to the SBA so SBA could issue a loan number.

Q And, typically, how long would the lender have to wait to get this SBA loan number?

A It was very quick. Almost instantaneous. The system checks the data for some very -- for completeness, and then returns a loan number to the lender.

Q And why is this loan number of importance to the lender?

A Well, without this loan number, the lender doesn't have a guaranty, and it can't make a legitimate Paycheck Protection Program loan.

Q Other than the standard PPP applications that we talked about, did the SBA require other documents to be completed between the lender and the borrower?

A Yes. The SBA required that the lender and the borrower sign -- or the borrower sign a promissory note with the lender, which is basically the loan document that requires repayment of the loan.

Q Now, after receiving the PPP loan funds -- and this is back in April. We'll get to any changes that were eventually made to the program -- how many weeks did the borrower have to use the money?

A The borrower had to use the money within -- it was an eight-week period. So they had eight weeks with which to pay the money, because we needed to get the money out to American workers as quickly as possible.

Q And were there limits on what the borrower could use the PPP funds for?

A The majority of the funds were required to go and protect those paychecks, so make payroll; and then, also, some very basic necessities of a business to keep them operating, which I mentioned earlier: Making mortgage interest payments, making rent, and utility payments.

Q And was there a benchmark or percentage that had to go towards each, at least back in the initial phases of the PPP program?

A Yes. At least 75 percent of the proceeds had to be spent on payroll. Pay plus benefits. And the remaining 25 percent could be used for the mortgage interest, rent, and utilities.

Q Could the forgiveness on the payroll expenses be reduced?

A Yes.

Q And how could they be reduced?

A Well, because the intent was to make sure that businesses kept people employed, if the borrower reduced the number of employees during that covered period by more than 25 percent, that could impact the forgiveness amount. There was an incentive to keep people on the payroll. The other way was if they reduced the pay of the employees. So if they cut the employees' pay too far, that would also reduce the amount. And that was also 25 percent.

Q Was there a cap on individual salaries for each member of the payroll, so to speak, each worker?

A Yes. Yes, there was. The maximum annual pay was capped at $100,000. So if somebody was making, for example, $150,000 a year, the way that the loan was calculated, they had to remove the $50,000 and calculate the loan based upon the hundred thousand dollar annualized salary.

Q And that's with regard to applying for forgiveness?
A Well, that was with regard to applying for the loan amount, as well. In determining the amount of the loan. And it would also apply to forgiveness.
Q Now, when did this eight-week period involving the use of funds and having to use it within eight weeks, when did that change?
A That changed by another law passed by Congress and signed by the President on June 5th of 2020.
Q And what was the name of that law, if you recall?
A That law was the Paycheck Protection Program Flexibility Act.
Q And what changed? Could you just briefly explain the major changes that were done?
A The two major changes were the amount of forgiveness, the minimum amount of . . . that needed to be spent on payroll went from 75 percent down to 60 percent. So now, as long as a borrower spent 60 percent of the loan proceeds on payroll, they could be completely forgiven. And, as well as that, the covered period, which is the period in which the borrower can make -- has to use the loan funds -- increased from eight weeks up to 24 weeks. Also, the maturity of the loan increased, as well, from two years up to five years.
Q Could you briefly explain how a borrower would apply for forgiveness?

A A borrower would apply for forgiveness after the funds were spent during the covered period, at the end of the covered period, by filling out a forgiveness form, called the Form 3508. 3508.

Q And does that form contain additional certifications concerning the use of funds?

A Yes, it does.

Q And are those the same certifications that are contained on the original application with regards to what the money can be used for?

A Yes. In addition, the borrower states that they knowingly -- they do not knowingly misuse the funds. They used them for the authorized purposes.

Q And what else did they submit to the lender along with this application?

A Well, they would submit all the evidence that they spent the money on the payroll -- what they spent the money for during that covered period. So it could be payroll invoices, payroll records, utility bills, invoices for that, evidence that they paid mortgage interest, and rent.

Q What does the SBA expect of the lender when they receive this information? Are they supposed to do any additional work in reviewing additional documents, or is that what the lender is supposed to do?

A Well, the lender is supposed to make a good-faith effort in reviewing the borrower's forgiveness documentation, all the certifications, check the calculations that was on the 3508, make sure that things were calculated properly, and then, in doing that, the lender would then make a decision as to whether they wanted to forgive the loan in whole, or in part, or not at all.

Q Was the lender expected to look at the borrower's bank records at all to see if they -- see how they used the funds?

A Yes.

Q Well, what I mean is, are they supposed to conduct an audit, for instance, of the borrower's bank accounts, to determine what happened to that money after it was lent to them?

A Well, no, no. Because they were allowed to make a good-faith effort, the bank was not required to actually do some sort of a forensic audit on the borrower's information.

Q Now, after the lender makes this recommendation -- they're making it to the SBA, I suppose; correct?

A Yeah. Actually, the lender makes the decision. They make the forgiveness decision, and the decision is submitted to the SBA. So, in a way, you could kind of call it a recommendation, but it is the lender making the decision, and then that decision is sent into the SBA.

Q And does the SBA have the right to review that decision?

A Yes. Yes.

Q And is there -- are there certain -- a certain amount of loans that the SBA conducts additional reviews on automatically?

A Yes. There's an obligation to review, SBA is required to review, all loans of $2 million or more. And then SBA may review any other loans below $2 million, in its sole discretion, at any time.

Q And what's particular about these $2 million plus loans as far as the SBA review?

A Well, the $2 million plus loans had to -- had to go through a check for the economic certification, the economic loan necessity certification, which was that certification I mentioned earlier, that the economic uncertainty that the borrower was facing made this loan necessary for the operations of the business. And so all loans over $2 million have to fill out, actually, an economic necessity questionnaire, and submit that, and then SBA will make a determination as to whether or not the borrower actually needed the money.

Q Now, when did the SBA, or Treasury . . . sort of roll out this additional guidance on $2 million plus loans, if you recall?

A It was in the latter part of April.

Q Now, if it is determined, at any time, that the borrower was originally ineligible for a PPP loan, is forgiveness possible?

A No. No. If the borrower is ineligible, the forgiveness -- the loan forgiveness -- the loan cannot be forgiven. It's not eligible for forgiveness.
Q And would an example of that be that the borrower didn't need the money?
A Yes, that would be one example. If it's determined during a forgiveness review, after looking at the questionnaire, that the borrower did not need the money, then the loan would not be forgivable.
Q And what about if it's determined that the borrower falsely stated he would use the funds for certain purposes as the certification was that you had indicated earlier?
A If the borrower lacked an adequate basis for any of the certifications, including these -- the use of loan proceeds, that also could lead to an ineligible finding, that the borrower was ineligible for the PPP loan, and then the loan would be ineligible for forgiveness.
Q Has the SBA issued guidance concerning the knowing misuse of -- knowing misuse of PPP proceeds?
A Yes.
Q And what is the -- what is that guidance?
A It would be an Interim Final Rule.
Q And could you just briefly tell the jury what that guidance is concerning the knowing misuse of funds?
A Yeah. Well, the knowing misuse of funds also is in

the -- it's not only in the Interim Final Rules, it's also in the form itself. And the knowing misuse of funds would mean that, if a borrower knowingly misused the funds for unauthorized purposes, they would be subject to prosecution.

MR. REICHLING: One moment, Your Honor? If I may briefly confer with counsel?

THE COURT: You may.

(Mr. Reichling and Mr. Leeman confer privately.)

MR. REICHLING: No further questions at this time, Your Honor. Thank you.

THE COURT: All right. Thank you.

Mr. Dickerson, is this yours?

MR. DICKERSON: This is mine, Your Honor.

THE COURT: All right.

MR. DICKERSON: May I proceed, Your Honor?

THE COURT: Yes, you may.

MR. DICKERSON: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. DICKERSON:

Q Good afternoon, Mr. Miller.

A Good afternoon.

Q My name is Brian Dickerson. I'm one of the defense lawyers for Mr. Crowther.

You just testified about eligibility purposes for the actual PPP program; correct?

A Correct.
Q And you're citing some IFRs, the Interim Final Rules?
A Yes.
Q How many Interim Final Rules are there currently?
A I believe there are 31.
Q Okay. And may I ask why there's so many Interim Final Rules?
A There have been a lot of changes to the program. There have been some changes that Congress made, like when they passed legislation; and, if the program changes, then the rules need to change to go along with it. There have also been -- due to the emergency nature of the program, it was very important that we got the first IFR, which contains the basics for the program, so that lenders could begin getting capital out. We couldn't possibly hold that until we had all of the details of the program, and so that's why additional IFRs were submitted, created, and provided. And there's been further legislation -- in fact, I believe there is a IFR that was just posted last week.
Q You're correct. So when was the first IFR?
A The first IFR was posted on April 2nd.
Q And that IFR is an Interim Final Rule; is that correct?
A That's right.
Q And that's a regulation that the SBA, in partnership with the Department of Treasury, is putting together as far as

the SBA's interpretation of the CARES Act; correct?
A That is correct.
Q It may be wrong; correct?
A I can't speculate on that.
Q All right. Are you aware of another government agency saying that the SBA was wrong in its interpretation of the CARES Act?
A No, I'm not.
Q You're not familiar with the May 8th Flash Report from the Office of Inspector General of the SBA?
A Yes, the Inspector General -- yes, I am aware of the Inspector General.
Q Why don't you tell the ladies and gentlemen of the jury what the Inspector General's responsibility is?
A The Inspector General's responsibility in all government agencies is oversight.
Q So that's an Inspector General assigned to the SBA; correct?
A Yes. And it's also -- it's to prevent waste, fraud, and abuse in programs.
Q And the Inspector General -- Office of Inspector General, called OIG; correct?
A Correct.
Q The OIG for the SBA came out with a report in May, did they not?

A They may have. I mean, they do issue quite a few reports.

Q I guess are you familiar with the OIG's -- it's called the Flash Report -- that came out in May of 2020?

A There have been other IG reports since then, so I don't recall. I don't recall what they mentioned in that particular report.

Q I didn't ask that, I said are you familiar with it. Are you aware of it?

A I'm sure I looked at it, but I don't recall . . . I can't attest to the fact that I reviewed it.

Q All right. I'll come back to that when we get to it.

So let's go back to March 27th. President Trump signs the CARES Act into law, active law; correct?

A Correct.

Q What guidance did any of the banks have, let's say the next day, March 28th, as far as how to actually implement the PPP program?

A I can't think of any guidance that they would have had at that point in time. They . . . . It wouldn't have had -- the guidance that -- there may have been a fact sheet that was issued, but the IFR that was posted April 2nd would have been the initial guidance for the program. Official guidance.

Q And was it up to, then, the banks, at that point in time, May 28th -- March 28th, until that first IFR, to actually

figure out how to implement, read the 200-plus-page CARES Act?
A Well, they could read the 200-page CARES Act, but there is not nearly that many pages that apply to this program. Only a couple of pages. Only a few pages.
Q How many pages?
A Well, I have it on -- I don't have the actual written, but it's not 200 pages. It's maybe ten?
Q And those ten pages apply to specifically what's called the Paycheck Protection Program?
A Paycheck Protection Program; correct.
Q Now, with regard to this April 2nd IFR -- I'm sorry. Yeah. April 2nd. When was it actually published to the banks and the public itself?
A It was posted on the Treasury and the SBA website on April 2nd. And then it was blasted out that -- to all the banks and the trades that the actual IFR was out there.
Q And which IFR number is that; do you know?
A I don't know the number.
Q Do you know when that IFR was actually published in the actual register for the Treasury Department?
A It was published -- it was published in the Federal Register on April 15th.
Q Right. So if someone was an applicant, they would have to actually go to the Treasury Department website to actually see the April 2nd notice. The IFR.

A Well, they would have to -- if there was a borrower, yes, they would have to go to either the SBA's website or the Treasury Department's website. And we've had a lot of traffic. Borrowers were looking at the SBA website very, very frequently.
Q Why do they go to the SBA website?
A Because there was a lot of media around the SBA carrying out this loan. Even the President mentioned it.
Q And is the SBA website something the public is supposed to rely upon?
A Well, I would -- yes, I would hope so.
Q What I'm getting at is, the SBA website is a government website.
A Correct.
Q Controlled by SBA under someone's authority at the SBA's office.
A That's correct.
Q So the information on the SBA's website is -- should be truthful.
A Should be.
Q Should be accurate.
A Should be.
Q And should be able to be relied upon.
A That's correct.
Q Does the SBA have its own Facebook page, as well?

A I believe we have a Twitter, I'm not sure if we have a Facebook page.
Q Let's just call it social media.
A Yes.
Q SBA has social media pages. Sites.
A There is, yes.
Q Who controls those sites?
A That would be our -- I believe our communications office within the SBA.
Q All right. So was part of the SBA's protocol in educating the public in the PPP program using social media, Twitter, and Facebook, as well?
A If it was an official SBA -- yes; if it was an official SBA Twitter, yes.
Q I'm not talking about other Twitters, I'm talking it's an official SBA Twitter page, or an official SBA Facebook page.
A Yes. Official SBA web page, or Twitter page, put out by the headquarters office.
Q And then I believe there was also many district offices that have their own website, as well; correct?
A Well, they have -- they all are supposed to be using the headquarters web page. And then there is content that would be approved by the headquarters office.
Q So if there's content on -- since we're the South Florida District; correct?

A Yes, I believe so.
Q Right. And do you know where the main office is?
A It's in Miami.
Q Yes. I just told you. So. They have their own sub web page from the SBA; correct?
A They would have -- yes. There's a district office web page for all of the 68 offices, but they all feed from the master web page. That's my understanding. I'm not -- definitely not that well versed in the SBA's website.
Q Okay. But the South District website, the SBA website, again, is materials being pushed out to the public to explain the PPP program.
A Well, the south . . . if there's something that is put out by the website, it is supposed to be cleared through the headquarters office.
Q All right. So if there's something on the website --
A Doesn't mean it was cleared, but it should be cleared.
Q How do we know if it was cleared?
A You don't. You wouldn't know.
Q So me, as John Doe citizen, I'm not going to know whether it's cleared or not; correct?
A You probably wouldn't. That's correct.
Q And then wasn't that part of also having the local district offices educate the public on what the program was?
A Yeah. The district offices were given materials with

which to educate the public.
Q Did the national office have some type of training for these local district offices?
A Yes, they did.
Q And what type of training is that?
A The . . . there are webinars. I believe they were given materials --
Q When you say -- sorry to interrupt, but when you say webinars, there's webinars hosted by the national office for the district offices?
A For the district offices; correct.
Q That wasn't something that, again, John Doe public could attend; that was just for the district offices?
A That was for the district offices; correct. There may have been also, then, webinars for the public; but we're talking about the district offices.
Q Right. That's correct. And would those district offices -- did they have their own social media pages?
A You know, I really am not an expert on the -- on the district offices, and what they're allowed to post, or the web pages.
Q What's your position right now, sir, with the SBA, so I understand?
A I'm over the business loan programs. And I'm not over those district offices at all. So I'd like to -- I'd like to

answer your question, but I don't know what they are authorized to and not authorized to post, as far as whether they have their own social media account.

Q Okay. But it was the SBA that was wanting the district offices to reach out and promote to the public what this basis of the PPP program was; correct?

A That is one of the district office's responsibilities, to reach out to the public, and to the lenders, as well as the -- of course, the headquarters office also put out information to the lenders and to the public; but the district office is the local boots on the ground so to speak.

Q And that local office, is it reliable to the public?

A It should be. Yes.

Q Okay. And that's one of the purposes of having it; right?

A Yes. It's to have a local presence, and to help small businesses needing assistance, or to counsel -- there's counseling that happens there. Yes, that is the purpose of the local office.

Q And you stated that part of the . . . rush -- I mean, I'm calling it a rush; if I'm wrong, tell me -- that May 27th to April 1st was -- the purpose of the program was to get the money out; right?

A That's right. It was an emergency program in the middle of a pandemic like we've never seen before.

Q Well, probably the start of the pandemic. The start?
A Yes. Yes, yes, it was.
Q And $349 million is allocated; right?
A 349 billion.
Q Billion, correct?
A We've gotten used to the B number; yes.
Q That allocation, I think you said it, but I want to make clear, that's not actually money going out from Congress to the actual businesses.
A That's correct.
Q That money is being held here so, when the lenders lend money to those businesses, and when those lenders either submit that forgiveness application that the borrower submitted, that's when that money is then used to pay the forgiveness.
A That's correct. The money was used to pay -- will be used to pay -- is being used to pay forgiveness. It will also be used to honor guaranties if the borrower can't pay the loan back and doesn't get the forgiveness.
Q Right. So there's two times that pot is used. Forgiveness is submitted to the lender, lender submits to SBA, SBA approves it and goes here you go lender, you're getting paid back, that loan can be partially or completely forgiven; correct?
A The loan can be partially or completely forgiven.
Q So that's that one tier. The second tier is, if the

borrower just doesn't pay the loan back and doesn't play for forgiveness as well.

A Yes. If the lender can then submit, for -- a request for SBA to honor that guaranty, and if the lender fulfilled its obligations, then yes, that money would then be used to pay that guaranty for that loan.

Q And what do you mean if the lender fulfilled its obligations?

A Well, there's certain things that the lender has to do too. You know, they had to execute a promissory note, for example, that we talked about earlier.

Q Well, we haven't talked about them. You guys talked about them. I'll get to the promissory note.

A So, yeah, there are certain things that the lender had to do.

Q And that promissory note wasn't provided by SBA to the lender to provide to the borrower. That promissory note was up to the lender's responsibility to create; correct?

A That is correct.

Q So when you have the totality of the documents that the lender is supposed to, under their duty, either create or utilize, and then provide to the borrower for the borrower to sign, how many documents are there?

A Well, SBA doesn't dictate how the lender -- how many documents the lender uses. They would use -- we only dictate that they have a promissory note. It would be up to the lender then to determine what other types of loan documents they wanted to obtain.

Q Okay. So promissory note is the only requirement that the SBA actually tells the lender it has to utilize.

A No, no.

Q Of the lender's documents, not SBA documents.

A That's the only document that the SBA told the lender they had to execute with the borrower. Or that the -- that's the --

Q I don't think execute is the right word. What would be the right word?

A That's the only document that the SBA told the lender that they had to use with the borrower.

Q So then the lender didn't have to use an SBA certification form?

A Well, that was part of the borrower application.

Q Okay. That's what I'm getting at. That's what I'm trying to get, the realm of documents -- maybe that was my fault. The realm of documents. So here is the SBA saying here is the documents, lender, you need to have completed for you, lender, to be able to then have an eligible participant, and show the forgiveness requirements; and then you also need, I think I'm hearing, this promissory note to go with it. So I'm trying to figure out what the universe of documents are.

A Okay. Are you talking for when the lender applies to get the PPP loan guaranty?
Q No, I'm not talking about the loan guaranty; I'm talking about the specific documentation the lender's going to have with the borrower.
A Well, the specific documentation that the lender is going to have with the borrower, they need to have the borrower's PPP loan application form, which is the 2483. They also need to have documentation that supports the amount of the loan. So that would be like payroll documentation from the previous 12 months.
Q That's the backup data. Correct?
A Well, it's documentation that --
Q Well, that's my fault. I'm trying to figure out the loan documents.
A Okay.
Q Not the backup documents. What are, specifically, the loan documents? So we have the borrower's application --
A The borrower's application, which is the 2483, along with those certifications that the borrower had to check.
Q And what form is the certifications?
A It's on that 2483.
Q Okay. And if . . . . How many pages is that?
A I don't remember off the top of my head, but I would -- I would just guess maybe three.

Q So we've got that. What's next?
A They also have to have a note. The lender has to execute a note.
Q And that's it.
A But the note does not have to be submitted with that application in order to get the loan guaranty.
Q Why is that?
A Because it's not required. The lender has to obtain the note -- well, let me tell you why it's not required. Because the lender has to get the loan guaranty before they execute the note.
Q Really.
A Yes.
Q The lender has to get the actual application.
A The lender would need to apply for the PPP loan guaranty.
Q For each individual loan?
A For each individual loan, they need to submit -- I wonder if we're talking about the same thing here. Are we talking about a loan to a borrower, a PPP loan to a borrower? Or are we talking about how does a lender get approved to do business with SBA?
Q I'm not -- the prior. I'm not talking about the lender being approved, I'm talking about the lender and the process with the actual borrower.

A All right. The lender needs to submit to the SBA -- they need to submit data, so that what they would have to have in their possession in order to submit that data is they are supposed to have the borrower's application, the Form 2483, and all the certifications, and then they also have to have the backup documentation to support the loan amount that the borrower is requesting, which is the 2.5 times the monthly payroll.

And then they need to do a check of that information, and check to make sure that the loan amount looks accurate. And then they need to transmit data to the SBA. That is on the Form 2484, the lender application for guaranty.

Once they have that guaranty, once they have an SBA loan number that comes back to the lender, the lender then has ten days to disburse the loan.

And typically a loan -- when a loan is disbursed, that's the same day the borrower would sign that promissory note. The borrower would go into the bank, sign the promissory note, say I promise to pay back a hundred thousand dollars, and the bank would disburse the money. That's typically how that would work.

Q Except we're in COVID, so a lot of people weren't going to the banks, since the banks weren't open --

A Well, that's true. Very good point. Very few people were going to the banks. So we were accepting electronic signatures, and there was a lot of electronic signatures, and DocuSign, much like a home mortgage or anything else, was being used extensively.

Q In fact, that's part of the CARES Act where they said they would accept electronic signatures.

A Yes. And SBA said they would accept electronic signatures before that, as well.

Q And I heard you answer questions for Mr. Reichling as far as that approval process, that guaranty approval process, I heard it's 15 to 30 seconds, and everybody uploads -- the lender uploads the data manually from the 2483 form into the SBA portal. Is that how you understand it?

A There are several different ways. That's one way, they can manually enter it, but --

Q I hate to interrupt you, but we have to go back to April 1st, April 2nd, through April 15th. That's the applicable time here. Back then, wasn't the manual way the only way to do it?

A No. Some banks would have already had what they call API calls, where they automatically upload data from their system into the E-Tran system because banks were already familiar with the E-Tran system. I should say SBA participants were already familiar with SBA's E-Tran system. So, with a couple of quick modifications for the data that was required for the PPP loan, they could have -- they could have had an API where the data is transferred instead of having to go and type all the information in.

Q And how many -- do you know how many banks were able to do the electronic versus the manual?

A I don't.

Q Okay. And how many seconds after that data is either uploaded manually -- or let's say somebody did have the API call E-Tran system. What's the timeframe on the review and response back?

A Well, the data isn't reviewed. The system would check it for -- there would be some system edits, to make sure it's complete, that there's a name, an address, things like that. And then, if the data is complete, then it would send back a loan number. I don't know the exact time, but I don't think what you said would be inaccurate. What did you say, 30 seconds?

Q 15 to 30 seconds.

A It's possible.

Q But again, SBA isn't reviewing the data, it's just doing that system check.

A They system is -- that's right. The system, there could be business rules in it. I don't know what those business rules were, but there were some validations that it had to go through.

Q So then once that 2483, which that's the only form that

needs to be submitted to the SBA -- I get the backup data, but that's the only form that needs to be submitted from the lender to the SBA to obtain the approval for the guaranty.
A I think you said 2483.
Q Yes.
A No; it's 2484.
Q Oh, that's the lender app?
A That's the lender app, yes.
Q But then, for the lender to actually get approved for each SBA application, aren't they uploading a 2483?
A No. The lender is -- for each loan application, the lender is uploading the 2484.
Q And that's a document the lender creates; right?
A The 2483 is submitted by the borrower. For each unique borrower, there's also a unique lender application for the guaranty for that one individual loan. That's the 2484.
Q 2483 the borrower is completing, giving to the bank. The bank then, whether they that that debt, or whatever it is, creates this 2484 --
A They fill it out; right.
Q And then they submit that to the SBA and get that 15 to 30-second delay before it's here is the SBA guaranty.
A That's correct.
Q And that guaranty, again, is for whether it's going to be forgiven, or whether or not the lender loses money because

the borrower doesn't pay it back.
A Well, the guaranty isn't for whether it's forgiven. The PPP, Paycheck Protection Program, allowed for the loan to be forgiven; but the guaranty is for whether or not it's paid back.
Q Okay. But part of that allocation of the funds, the 249 billion, was for the forgiveness and the guaranty if it wasn't paid back?
A The 349 billion authorized by Congress was for those -- that would be for those purposes; correct.
Q So if a borrower has never filed for forgiveness, what's the status of that loan in the SBA's eyes?
A Well, it would depend. If they haven't filed for forgiveness, then the loan is on deferment. And I can explain that if you would like.
Q Yeah, go ahead. Explain it.
A Okay. The loan is on deferment, meaning no payments are due. So no payments are due on that loan until SBA makes its forgiveness decision and either forgives the loan or not.
Now, the loan will come off of deferment status at some point even if the borrower does not submit the application for forgiveness, and then the borrower will have to begin making loan payments.
Q And isn't that ten months after the conclusion of the covered period?

A Yes.
Q So the cover period in what, December 31st?
A It depends on when the loan was disbursed.
Q So if we're talking about April it's disbursed --
A Yes.
Q -- we're going 24 weeks from that time period.
A Yes. Which is six months.
Q And then, from there, we've got a ten-week calendar as far as when that loan becomes due.
A Ten month.
Q Yeah.
A Yes; ten months after that is when the deferment period would end and the borrower would have to make loan payments unless the loan has been forgiven.
Q And if the borrower doesn't submit for forgiveness, then, after that ten-month period, then the borrower has to start paying on that promissory note; correct?
A Then the borrower has to pay on that promissory note; correct.
Q Now you said that was a temporary program. When does the guaranty end on that loan?
A The guaranty would stay with the loan for the life of the loan.
Q So, as long as the borrower is paying on that loan, there no guaranty that's going to kick in.

A That's right. The guaranty won't kick in as long -- until if the borrower defaults on the loan, that's when the guaranty would kick in. Or if the loan is called earlier. If demand is made on the borrower to repay the loan? For example, if the proceeds were used in an inappropriate manner? Then SBA can require that the loan be fully due and payable. And then, at that point in time, the borrower would have to either pay the loan, and if they didn't pay the loan, then the SBA guaranty could be requested by the lender.

Q Where is that language where the SBA can make that demand for the repayment?

A There's language in the IFRs. I think it could be the loan review. I can't recall exactly the IFR, but it does say the SBA may require repayment of the loan.

Q But you don't know in which document that's in.

A I don't have the exact one.

Q Do you know whether that language is required to be in a document with the borrower?

A I think as long as -- if it's a program requirement, it could be in the promissory note. But if it's a program requirement, I don't know that it would need to be in the document with the borrower.

Q So it doesn't matter if the lender never conveyed that to the borrower, the borrower is supposed to make sure they know all the IFRs that Treasury and SBA is publishing?

A Well, the lender -- you know, the lender would typically convey information like that to the borrower.

Q But it would be in a lender documentation, not necessarily an SBA documentation?

A It could be the IFRs. They could share that document with the borrower.

Q Well, I get share, but there's, I guess, not a form by the SBA that that's required by.

A There was no form for the note, no.

Q Is the -- have you heard of a notice of Paycheck Protection Program forgiveness document?

A I don't know that one off the top of my head. Is there a different explanation?

Q There's not a form number, that's all I'm getting at.

A It's not a form number?

Q No.

A When you say notice, does it say procedural notice?

MR. DICKERSON: Actually, can I take a step back, Your Honor?

THE COURT: You may.

MR. DICKERSON: May I approach, Your Honor?

THE COURT: You may.

(Counsel provides evidence to the witness.)

BY MR. DICKERSON:

Q Now, I don't want you to read that, John, as far as the content, out loud. I just want you to look at it, see if that document -- if you think that is an SBA document, or whether that is a lender document.

(Witness examines evidence.)

A I don't recognize this document as an SBA document.

Q So is this -- if it's not an SBA document, is this probably one of the documents where the lender is making its own documentation with regard to that promissory note?

A This appears to be lender documentation; correct.

Q And the lenders are given guidance on the program, but they're also given their own ability to make their own documentation to secure their interests in the loan that they have with the borrower; correct?

A Yes.

Q And that was an important part of this, is the lender's documentation with the borrower so that the lender has a promissory note so that the lender can protect its interest with the borrower.

A Yes. Lenders have -- may have their own formats of documentation that they use. It depends upon the state, it depends upon the lender. And the lender was free to use its own documentation as long as it did not conflict with the Paycheck Protection Plan rules. And if it did, then the PPP rules would apply.

Q And what do you mean, conflict with the PPP rules?

A Well, if any of the lender's documentation conflicted with the laws or the requirements of the program, then the -- if it was in disagreement, then the requirements of the program would apply.

Q Okay. So if a borrower goes to the lender, has the lender's documents, executes the lender's documents, you're saying that, even in that case, the borrower -- if the lender documents are wrong, the borrower still has to make sure that the borrower is complying with all of these IFRs?

A The borrower is still required to be in compliance with the Act. So, yes, if there's a mistake in the documentation, then the lender -- it may be an issue with the lender.

Q Okay. But the borrower still has to comply with the lender documentation, the promissory note and the supporting documents; correct?

A The borrower would need to -- also need to comply with the documentation with the lender.

Q Okay. So if the documentation from the lender says one thing, SBA thinks that it's not the same that -- the loan documents are not the same as the SBA requirements, the borrower has to comply with the lender and the interpretation of the SBA of the PPP program?

A Yes. And it would also depend upon the actual -- you know, what the issue is. What this particular issue is.

Q All right. Well, we'll get to that issue. First, though, I'm going to get you back to the Flash Report.

Flash Report, Small Business Administration's implementation of Paycheck Protection Program issued by the Office of Inspector General on May 8th, 2020.

Is an OIG report a public record?

A Yes, they do issue it publicly.

Q And, when they publish that on the OIG's website, that is for the public to all be able to review, kind of like those internal rules; correct?

A Correct.

Q And it's Report 20-14 for May 8th, 2020. I'm assuming that won't refresh your recollection on that, at all.

A OIG always numbers all of their reports.

MR. DICKERSON: Okay.

Your Honor, may I? Thank you.

THE COURT: You may.

MR. DICKERSON: May I approach, Your Honor?

THE COURT: You may.

(Counsel provides evidence to the witness.)

BY MR. DICKERSON:

Q Again, sir, I don't want you to read that out loud, I just want you to look at that document. I'm not expecting you to read the entire thing. It's 40 pages. I just want you to be able to look at that and see if it refreshes your recollection at all as far as what the OIG found in their report.

(Witness examines evidence.)

A Okay.

Q Does that refresh your recollection at all?

A Some -- some of it does, yes.

Q And what does that recollection -- what does it refresh?

A Well, they stated --

MR. REICHLING: Your Honor, objection. This is improper questioning. He hasn't asked him what he needs to have his memory are refreshed on.

THE COURT: You need to ask him a specific question, not just tell me what you remember.

MR. DICKERSON: First he was --

THE COURT: You don't need to argue with me, just refresh your question.

MR. DICKERSON: Thank you, Your Honor.

BY MR. DICKERSON:

Q Does reading that document right there, the little bit that you read, does that refresh any of your recollection as to what the SBA/OIG opined as far as how the SBA was interpreting the CARES Act?

A I don't see anything in here about interpretation of the CARES Act.

Q So, reading that, do you not see that it actually discusses the Act.

A It does discuss the Act.

MR. DICKERSON: Your Honor, I would move to admit this document. G18.

THE COURT: I'm sorry, the number again?

MR. DICKERSON: G18. Defendant's G18. It is a public record. The witness has stated it's a public record available on line. Federal government agency record.

THE COURT: G18. Okay.

MR. DICKERSON: I'll get you a copy, Your Honor.

THE COURT: All right. Hang on a second. It's not on my list yet. We can just add it.

Any objection?

MR. REICHLING: Judge, we'd object to relevance.

THE COURT: May I see it, please?

MR. DICKERSON: Yes.

(The Court reviews a document provided by Mr. Dickerson.)

THE COURT: All right. Thank you.

The objection is overruled, and G18 will be admitted.

MR. DICKERSON: Thank you, Your Honor.

(Defendant's Exhibit G18 admitted.)

MR. DICKERSON: May I publish it, Your Honor?

THE COURT: You may.

(Evidence was published via the projector.)

BY MR. DICKERSON:
Q So I want to direct your attention to the first page. This is a document discussing the comparison by the SBA Office of Inspector General as to the interim rules and how they actually compare with the actual CARES Act in accuracy; correct?
A There are . . . yes. There are . . . there are comparisons between SBA's Interim Final Rule and the Act in this document.
Q And the section on what we found is talking about, "Though OIG found that the SBA's Interim Final Rules for implementing the PPP and the SBA's FAQs mostly align with the Act, we identified the following areas, however, where they do not fully align with the Act's provisions;" is that correct?
A That's what it says.
Q And one of those provisions is the loan proceed's eligibility for forgiveness.
A Yes.
Q Guidance on loan deferments.
A Yes.
Q And the first one, prioritizing underserved and rural markets; correct?
A Yes.
Q Have you been able to review the document, to actually get down to Appendix 2, the comparison between the CARES Act,

the Interim Final Rule, and the related frequently asked questions?

A I'm there now.

Q Okay. So did you ever review this document in your capacity at the SBA?

A I . . . I did not review the entire document. I did review parts of the document.

Q All right. Now, looking at this entire 40-page document, does that refresh your recollection as to the concerns that SBA/OIG had with the eligibility and the applying by the SBA of their Interim Final Rules in compliance with the CARES Act?

A Yes. I see some of the items that they're raising here.

Q Did you happen to recollect those items, or do you need to review the documents?

A I can see the items right here in the text.

Q Right. Which page are you on, sir?

A I'm on Page 5.

Q And what do you understand the findings to be?

A The . . . .

MR. REICHLING: Objection, Your Honor. What's the question? I'm trying to understand. He's asking for his opinion under the guidance as contained in the exhibit. I don't think he's laid the proper predicate to ask that question.

MR. DICKERSON: I'll rephrase, Your Honor.

THE COURT: Okay.

BY MR. DICKERSON:

Q With regard to the loan proceeds eligible for forgiveness, do you have any independent memory of what that issue was by the SBA, and what the recommendation was to the SBA?

A You know, the administrator, in consultation with the secretary, determined that the minimum amount of proceeds for forgiveness should be the 75 percent. And the Office of Inspector General is saying that that was not . . . they -- well, let's see here. They point out that that was different than what was in the Act.

Q So you have the SBA Office of Inspector General pointing out that the interim rule interpretation by the SBA was not in compliance with the Act.

A I don't know that they're saying it was not in compliance with the Act, but they are saying that that was not in the Act.

Q How about it's not aligned with the Act? And I'll take you back up to the first page.

A Okay.

Q What we found.

A Yeah, it mostly aligned with the Act, but there were some areas that did not fully align.

Q Right. And the one area is the loan proceeds.
A Loan proceeds eligible for forgiveness.
Q Okay. Thank you. You can put that document down.
Can you un-publish me, please? Thank you.
So Mr. Reichling asked you the questions about the loan time period, the covered time period, extending from eight weeks to then 24 weeks on the June 5th date; correct?
A Correct.
Q That's also when the law affirmatively said that payroll was 60 percent as far as the forgiveness.
A Correct.
Q Where do you rely upon your statement that 60 percent of the money had to be used for payroll as one of the eligible purposes of the loan?
A It would be in -- well, it would be in an IFR. I'd have to look for it. But it would be in the -- likely in the IFR that was provided right after the June 5th law was passed. It may also be in the . . . in some of the forms, the 2483 if it was revised, and the forgiveness form.
Q So was the 2483 form revised? Are there different versions of it?
A There are a few different versions because of changes in the law.
Q So if somebody signed the application on April 3rd, April 13th, that would be different than an application after?

A Yes. In fact, a good example is, in January, under the Economic Aid Act, there is a second draw loan that was created, so we had to create a second draw loan application. But the loan application that was in effect at the time the application was made was the -- is the governing document. So that wouldn't change the requirements for the borrower.

MR. DICKERSON: May I get another document, Your Honor?

THE COURT: You may.

MR. DICKERSON: May I approach the witness, Your Honor?

THE COURT: You may.

(Counsel provides evidence to the witness.)

BY MR. DICKERSON:

Q Again, Mr. Miller, if you'd just look at that. Don't read anything at this point in time. That is an IFR; correct?

A Yes, this is an IFR, Interim Final Rule.

Q And, for the record, which IFR number is this, as far as the IRN number? Or you can use the SBA document number, whichever one you prefer.

A The IRN number is 1505-AC75.

Q And that's for the Department of Treasury IRN number; correct?

A Yes.

Q And then there is an SBA IRN number as well; correct?

A Yes.
Q And what is that?
A 3245-AH65.
Q And then these IFRs are posted on the Federal Register, they're publicly available, this is a government document; correct?
A Yes, these are available, and it is a government document.
MR. DICKERSON: Your Honor, we move -- defense moves to have G16 admitted.
THE COURT: Any objection to G16?
MR. REICHLING: No, Judge.
THE COURT: G16 will be admitted.
(Defendant's Exhibit G16 admitted.)
MR. DICKERSON: May I publish, Your Honor?
THE COURT: You may.
MR. DICKERSON: Thank you.
(Evidence was published via the projector.)
BY MR. DICKERSON:
Q Sir, so this is one of the IFRs that you're talking about that has the direction to follow; correct? For the public?
A That's correct.
Q If you would, go to the second page, middle column, where it says, "This rule." If you would just read that to

yourself first.

(Witness examines evidence.)

Q Okay, sir. Do you recall reviewing this IFR when it was published?

A Yes.

Q And, when you reviewed this when it was published, what was your understanding of this IFR?

A This IFR was a consolidated IFR that was issued after the passage of the -- well, it's for loan forgiveness and loan review as provided by the Economic Aid Act.

Q And we haven't talked about the Economic Aid Act yet. What is that?

A The Economic Aid Act was another of the stimulus . . . stimulus acts, or programs, that was passed by Congress and signed by the President. I believe it was signed at the end of December.

Q Okay. And so this IFR is saying anything from the Economic Aid Act overrides any conflicting past, previous guidance in the FAQs, and the SBA will be revised in the FAQs; correct?

A It does state SBA will be revising the FAQs. It overrides any conflicting guidance in the FAQs. So, if there wasn't conflicting guidance, then the other guidance would stand. And it says that the SBA will be revising the FAQs to conform.

Q Do you understand what this interim rule, as far as how it changed the forgiveness application process, or eligibility of forgiveness?
A It did -- it did make some changes; but, generally speaking, the process is very similar.
Q Did it expand what was eligible for forgiveness?
A It expanded -- I don't know that it expanded what's eligible for forgiveness, but there were some additional expenditures passed under the Act that were eligible . . . that were eligible for forgiveness.
Q And do you know what those are?
A Off the top of my head, they were expenditures for things such as accounting -- kind of an accounting software, supply chain expenditures that were for vital supplies that businesses needed. There were also some -- it would cover expenditures for worker protection equipment, like these shields; if a restaurant or something had to expand into the parking lot, or add a ventilation system. All the things we know now that we didn't know at the time the CARES Act was created, so they had to add some additional expenses.
They even added property damage from the summer of unrest that occurred in 2020 during the riots. So if businesses suffered damage, those could be forgiven.
Q And that aspect of the damage from the riots, that had nothing do with COVID, as far as the CARES Act, the original

CARES Act; correct?
A That's correct.
Q So, again, the rules, regulations, are changing.
A The rules and the regulations do change. Especially when Congress changes the laws.
Q And this retroactively applies to anybody that took out a loan even on that first available date back in April of 2020.
A For forgiveness, yes.
Q For forgiveness.
A But not for the loan application itself.
MR. DICKERSON: Okay.
Will you un-publish me, please?
One second, Your Honor?
BY MR. DICKERSON:
Q I think you said 31 IFRs?
A Yes.
Q Do you know, are all of them touching on eligible forgiveness?
A No, I don't believe all of them are. Some of them are very narrow.
Q Narrow focuses to a certain business?
A Yes, that's -- that could be certain industry, certain business type.
Q Okay.
A Certain tax filer type.

Q But all the IFRs are public documents.
A Yes.
Q What is SBA Form 1846; do you know?
A I'd have to take a look at it.
(Mr. Dickerson confers with Mr. Reichling privately.)
MR. DICKERSON: May I approach the witness, Your Honor?
THE COURT: You may.
(Counsel provides evidence to the witness.)
BY MR. DICKERSON:
Q Again, Mr. Miller, I don't want you to read out loud, I just want you to look at that document.
(Witness examines evidence.)
A I see there are several documents here.
Q Yeah. So that is loan documentation for what we're dealing with here, this case. I'm going to direct you to . . . . Look at the bottom. It says SBA Form 159. At the footer?
A I saw it before. I know it's in here.
(Witness examines evidence.)
A There it is.
Q And again, I don't want you to read it. I want you to see is that a form that's required, or is that something the lender has chosen?
A That's something the lender chose, because the form is

not required for PPP.

Q Okay. And then, after that form, there's another document. Heading is "CARES Act Disclosure." Is that a document that the SBA requires, or is that a document the lender has chosen to use?

A That is a document that the lender has chosen.

Q So again, if this documentation is not accurate, it is the lender's responsibility with the borrower; correct?

A That is correct.

Q And then, after that document, SBA Form 1846, is that a standard document that needs to be with the application, or is that a lender chosen document?

A This appears -- it's a standard document, but it was not required, and -- but the lender chose to use it.

Q I'm almost done here.

THE COURT: Do you want the record to reflect any exhibit numbers for those?

MR. DICKERSON: Yeah, that would be a good idea, Your Honor.

Let me get the right number for it.

May I go check, Your Honor?

Exhibit I, Your Honor.

THE COURT: Thank you.

BY MR. DICKERSON:

Q Looking at the remaining section of that -- those documents, do you see anything else in here that is SBA required; or is it, in your opinion, all documents that the lender had created?

A The first document in the stack appears to be the promissory note, so that would have been required by SBA.

Q But that is a lender drafted document; correct? Or is that an SBA form?

A It does not have an SBA form number on it. It may . . . it may contain the identical language to the SBA form of promissory note, but that would not have been required. I couldn't tell you. But there's no SBA form number on it, so I can't say that it is an SBA form.

Q So there was an SBA form that actually had a form style promissory note.

A There is an SBA form number that has a form style promissory note.

Q And so the lender could have used that form; correct?

A They could have. But they were not required to.

Q And is it your understanding that that form is accurate as it applies -- that promissory note form is accurate as it applies to the CARES Act?

A Yes, it should be accurate as it applies to the CARES Act.

Q Was FICA and FUCA supposed to be included in the calculation for the payroll when you did the -- as you described it -- the past year monthly average for payroll multiplied by 2.5?

A No. There are certain allowable expenses, and some that weren't. I don't remember, off the top of my head, if those were included. But there's a list of them on the form.

Q Okay. And you're saying there's a list of them on the form today or the form that was used on April 1st?

A I believe there is a list of those allowable expenses. It may be in the IFR or on the form.

Q I'm not talking allowable expense, I'm talking about when the lender was doing the calculation.

A Right. I think that was listed in the original IFR.

Q So you could include FICA and FUCA.

A No. The expenses are listed on the original IFR.

Q Right. What I'm asking --

A The allowable expenses, and I don't recall what they all are.

Q I'm not talking allowable expenses. I'm talking when a borrower is doing the calculation that you described to see what the number is that they're eligible for.

A Yes.

Q Was FICA and FUCA, tax, federal tax, was that allowed to be included in that calculation of average payroll?

A And that's what I would have to look at the IFR to determine. I keep saying expense. I mean what was allowable

in the calculation is listed, and I would have to look at that.
Q Okay. And you were asked by the government about economic necessity. What are the guidelines for the economic necessity for applying for the PPP program?
A It was a certification by the borrower. So it would have been a certification that the borrower had to make at the time of application.
Q So it's subjective.
A Yes. It's in the eyes of the borrower. Correct.
Q So it's in the eyes of the borrower as of the date of the application?
A As of the date of the application.
Q All right. And what SBA document states that the borrower can only use the PPP money for business-related purposes?
A Their certifications in the 2483. There is also information, I believe, in the IFR. The first IFR. In addition to others.
Q And . . . just give me a second, sir. I'll see if I have that.
A In addition, I would just add that any 7A loan proceeds would be under that Act . . . that loan proceeds for 7A would be required to be used for business purposes. They're not used for personal.
Q And was the PPP required to be -- have an isolated

account, a segregated account?
A When you segregated account.
Q So when the lender then provided the funds to the borrower, was it required to be in a segregated account?
A The Act -- I don't recall anything requiring that.
Q And so if the borrower commingled it by not having a separated account, but just went directly to the operating account, that was permissible.
A I don't know about when you say commingling, but the --
Q Well, let me define it. Commingling is I have $500,000 in my account right now. The bank then deposits the PPP money into that $500,000 account. Now I have -- let's say it's a million-dollar loan -- a $1.5 million balance.
A That would be permissible.
Q So there's no requirement to have a standalone account, and it can be commingled with the other bank account.
A If your definition of commingling, yes, is that it's deposited into an account with other funds, then yes.
Q Okay. And then, for the loan, the borrower had, at first, eight weeks to use the loan proceeds for the eligible purposes if they wanted forgiveness.
A That's correct.
Q And then it extended to 24 weeks.
A Yes. Under the Flexibility Act, it was extended.
Q So if that money from the bank is deposited in the

account, and they use all the money within the first 30 days, it's done. They don't go again. Right?
A That's correct.
Q If they hold onto that money, and they don't spend those proceeds until week 20 through 24, that's still eligible for forgiveness.
A Yes.
Q But if a company doesn't file for forgiveness, they just repay that loan; correct?
A That's correct.
Q And that's a one-percent loan.
A It is a one-percent loan. That interest rate at that low of an interest rate is highly unusual, and it was because of the emergency nature of the funds during the pandemic.
Q And part of the CARES Act was to stimulate the economy; correct?
A There were certain parts of the CARES Act that were to stimulate the economy. Paycheck Protection Plan was really to pay workers.
Q So if a recipient, a borrower of the money, ends up using more than the money they received from the PPP loan in paying payroll, that was satisfying that purpose.
A Could you rephrase the question?
Q Sure.
A I want to make sure I understand what you're saying.

Q If a borrower.
A Yes.
Q Recipient of a loan.
A Correct.
Q Receives its money from the PPP program through its lender after signing the promissory note, and it spends more in payroll over that 24 week period than it actually received, that was fulfilling the purpose of the CARES Act and the PPP program.
A That would be acceptable.
Q Yes.
A Yes, that would be acceptable, that they spend more money on payroll than they received. But they had to spend the payroll -- the money that they received on payroll, as well.
Q I thought you just said it didn't have to have like a segregated account. Are you saying it has to be earmarked?
A It has to be spent for those purposes.
Q All right. So if my lender on the PPP program gives me money, and I put it in my right pocket, then I can only use that right pocket for the payroll?
A You should be able to demonstrate to your lender that you used that money for the payroll.
Q The definition, and maybe I'll just ask you, do you know what the definition with the IFR as far as proceeds being used over the covered period?

A I'm not sure I follow.

MR. DICKERSON: All right.

If you want, Your Honor, this would be a great time for a break. Then I can get my documentation.

THE COURT: All right. I think that's a good idea.

Let's take our afternoon recess, 15 minutes or so.

Please do not discuss the case among yourselves, or allow anyone else to discuss with you or in your presence.

About 15 minutes we'll get started.

(At 3:17 p.m., the jury was escorted from the courtroom.)

THE COURT: All right. Fifteen minutes.

(At 3:17 p.m., court was recessed.)

AFTER RECESS

(At 3:35 p.m., court was reconvened.)

THE COURT: Everybody ready for the jury?

MS. WAID: Yes, Your Honor.

MR. DICKERSON: Yes, sir.

MR. REICHLING: Yes, sir.

THE COURT: Bring the jury, in please.

(At 3:35 p.m., the jury was escorted into the courtroom.)

THE COURT: Be seated, please.

And you may proceed.

MR. DICKERSON: Thank you, Your Honor.

BY MR. DICKERSON:

Q So, Mr. Miller, we took the break, we were talking about the period of 24 weeks, and using the money received from the lender to pay for payroll over that time. I'm just getting us back to where we were talking about, okay?

A Okay.

Q If you would, look at Defendant's Exhibit 16 I provided you before. That's the February interim rule?

A Got it.

Q Okay. And, as we discussed, this interim rule, retroactively applied to the complete Paycheck Protection Program; correct?

A Yes. As long as it didn't -- if there were any -- if there was any conflicting guidance, this would over . . . this would . . . this guidance would be in effect.

Q So it's safe to say, like when a new guidance comes out, if it does apply to a previous guidance, the new guidance applies?

A Generally yes. Except for situations that refer to loan -- the loan application itself, which would be governed by the time -- the rules in effect at the time the loan application was submitted.

MR. DICKERSON: Okay. If you would, look to . . . it's the fourth page.

And if I may publish again, ma'am.

And Section 4, the very top.

(Evidence was published via the projector.)

BY MR. DICKERSON:

Q That is talking about the forgiveness requirements; right?

A Yes.

Q And am I reading this right? "Borrower shall be eligible for forgiveness of their PPP loan in an amount equal to the sum of the following costs incurred and payments made during the covered period."

A That is what it says; yes.

Q And so that is the sum of total costs of the payroll and other following costs during the covered period. It says, "Shall be eligible;" correct?

A Yes, it does say, "Shall be eligible".

Q All right. Not a may, it's a shall.

A Right.

Q And, in the SBA world, what does the word "shall" mean?

A That is probably -- there's probably a legal interpretation there.

Q I'm not asking for a legal interpretation. I'm saying, in the SBA world, what does "shall" mean?

A I believe it means will.

Q Okay.

A A subject -- it does say subject to several important limitations though. I want to point that out. Right before that.

Q And where does it say the limitations?

A That same sentence. "Section 7A of the Small Business Act provides that, subject to several important limitations, borrower shall be eligible for forgiveness."

Q Right but this was an add-on to the 7A; correct?

A That's correct.

Q And correct me if I'm wrong, 7A SBA loans are directly from the SBA to the actual borrower?

A No, they are not. They are guaranteed loans, as well.

Q Okay. So, when is the SBA proceeds ever come into play with regard to a 7A loan, is it only during either the guaranty when there's a default, or with a Paycheck Protection Program when there's actually forgiveness?

A Yes. The government funds would only come into play for a 7A loan in the event of a guaranty purchase, as you suggest -- or when a guaranty is honored. Or in the case of the Paycheck Protection Program forgiveness. Some of the funds, though, are also issued to lenders for processing loans. They are paid a fee in the PPP loan. I just want to point that out.

Q But, with a borrower who has not defaulted on the loan, and a borrower who has not applied for forgiveness, there's no SBA proceeds applied to that loan.

A Not to the loan; correct. There would have been proceeds applied to the lender for making that loan.
Q That goes to the lender.
A That goes to the lender. Correct.
Q But no SBA proceeds going to the borrower.
A No SBA proceeds going to the borrower; correct.
Q And do you have any direct knowledge or information about the Target Roofing PPP application?
A None. No.
Q And none about the forgiveness eligibility, nothing; right?
A No. I don't know if a forgiveness application was submitted.
Q You don't even know if a forgiveness application was submitted.
A That's correct, I do not know.
Q Okay. And you made a comment about if the SBA . . . I think -- I don't want to paraphrase it, so correct me if I'm wrong. If an applicant uses the proceeds knowingly wrong, the SBA will ask them for repayment?
A Actually, if the SBA -- I'm not sure that that's what I said.
Q All right. Well, tell me. I want your words.
A Okay. If -- if the SBA -- if a borrower knowingly uses the proceeds for an unauthorized purpose, the borrower could be

held legally liable. Could be prosecuted. Such as for charges of fraud.

Q Okay.

A Are you getting to when payment in full could be required? Is that what you want to be --

Q Yeah, sure.

A That would occur if the SBA finds that a borrower is ineligible, which could also stem from a knowing misuse of funds.

Q So knowing misuse of funds would qualify as ineligible for the SBA to be able to demand the money back from the borrower.

A It would depend upon the facts and circumstances of the case, but if there's an inadequate basis for the borrower to make the certifications that the borrower attested to in the PPP loan application, then SBA could declare the borrower to be ineligible for the loan.

Q Is that a could or will standard for the SBA?

A That's a could.

Q What's the difference between could and will?

A Well, again, it depends upon the facts and circumstances of the case. The loan review would look at the case, and they would make the determination based upon weighing all of the facts and circumstances of that issue.

Q And are you aware that the SBA has not requested or demanded any repayment from Target Roofing or Casey Crowther?

A I am not aware of that.

MR. DICKERSON: Nothing further, Your Honor.

THE COURT: All right. Thank you.

Any redirect from the government?

MR. REICHLING: One moment, Judge.

I have a few questions, Your Honor. I'm going to go the old fashioned way and use ELMO.

THE COURT: Go ahead.

MR. REICHLING: It's a good thing I trimmed my nails before coming to court today. So I'll put it up on the projector if I need to use it.

REDIRECT EXAMINATION

BY MR. REICHLING:

Q I just have one or two, maybe three, four questions for you. Could be more, I guess. Famous last words, right?

Mr. Dickerson commented on the February, 2021, IFR concerning the expansion of costs that were eligible for forgiveness. Could you explain why the SBA expanded the costs eligible for forgiveness in February of 2021? Specifically, the topics that you discussed previously. I believe it had to do with various things because of the pandemic and stuff like that.

A Yes. Well, I don't think I explained, but I may have.

Q Could you explain now then?

A Well, the Act. The Act specified those additional costs. So the Economic Aid Act, which was signed by the President, I believe, December 27th, 2020, added additional authorized expenditures that could be covered with the PPP loan proceeds because they were, again, proceeds tied to the emergency . . . the emergency of the pandemic.

Q Okay. I'm going to project Defense Exhibit G16 on the ELMO here, and I'd like you to take a look at it. I think this is the original copy. So if you don't mind looking at it on the screen, perhaps --

A Okay.

Q -- in front of you. Could you read off some of these covered operations expenditures that you were referring to that have changed between the beginning of the PPP and now, in February of 2021 -- I guess we're in March, now, of 2021.

A Yes. Covered operations expenditures is a payment for any business software, cloud computing service that facilitates business operations, products, or service deliver. The processing payment or tracking of payroll expenses, human resources, sales and billing functions, or accounting and/or tracking supplies, inventories, records and expenses.

Q What about, I think it's Sub 6 there?

A Covered property damage costs. A covered property damage cost is a cost related to the property damage in vandalism or looting due to public disturbances that occurred in 2020 that was not covered by insurance or other compensation.

Q And could you read Sub 7?

A Covered supplier cost. A covered supplier cost means an expenditure made by a borrower to a supplier of goods for the supply of goods that, A, are essential to the operations of the borrower at the time at which the expenditure is made; or B, is made pursuant to a contract, order, or purchase order; 1, in effect at the time before the covered period with respect to the applicable covered loan; or 2, with respect to perishable goods in effect before or at the time during the covered period with respect to the applicable covered loan.

Q And then I'm just going to want you to read this last covered portion here about covered worker protection expenditures; and, if you want, you can just briefly explain what this section's about. You don't have to go into detail and read the entire section.

A Okay. Well, this is what I mentioned earlier, things like these shields. And it goes on -- actually, if you want to flip the page, it gives some better examples.

Q Okay. Let me show you that right now.

A Yeah. So modifications that businesses had to make in order to survive. Essentially, the purchase, maintenance, renovation, they could have added a drive-through window facility; indoor, outdoor, or combined air pressure ventilation system or filtration system, physical barriers like sneeze guards, expansion of an indoor/outdoor combined business space.

I don't know about in Florida, but in Maryland, where I'm from, restaurants, if they couldn't expand to the outside, they really would have gone out of business. So this covered that.

Q Generally what are these expenses for?

A Well, these expenses are for . . . to operate a business that's struggling during the pandemic and protect employees and workers.

Q Did this expansion of eligible uses of PPP money for certain business expenses expand to include personal property like a boat?

A No.

MR. REICHLING: No further questions, Judge.

THE COURT: Any recross?

MR. DICKERSON: No, Your Honor.

THE COURT: You may stand down. Thank you.

THE WITNESS: Thank you.

(The witness left the witness stand and left the courtroom.)

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(Thereupon, at 3:51 p.m., the testimony of John Miller was concluded.)

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CERTIFICATE

I CERTIFY THAT THE FOREGOING TRANSCRIPT IS A TRUE AND ACCURATE TRANSCRIPT FROM THE ORIGINAL STENOGRAPHIC RECORD IN THE ABOVE-ENTITLED MATTER.

Dated this 24th day of March, 2021.

[redacted]