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Big Little Lies: How Loopholes in the Small Business Act Allow Large Businesses to Profit

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Big Little Lies: How Loopholes in the Small Business Act Allow Large Businesses to Profit

Halley Townsend*

Abstract

The Small Business Administration (SBA) was established by Congress to create and administer programs to help small businesses compete in the national economy. But far too often, large, sophisticated firms profit from SBA programs meant to assist the little guy. Currently, Congress legislates specific programs tailored towards one type of small business, and the SBA is responsible for implementing the program. This process has resulted in loopholes in the SBA's enabling act that permit powerful businesses to qualify for SBA programs. This result is the opposite of what Congress intended.

Part II provides background and the history of the SBA. Part III then discusses four SBA programs in detail: the 8(a) Business Development Program for minority owned small businesses, the Service Disabled Veteran Owned Small Business Program, the 7(a) Business Loan Program, and the 7(b) Disaster Loan Program. Part IV exposes the loopholes in these four programs that, at best, enable large entities to profit and, at

* J.D. Candidate, Class of 2022, Washington and Lee University School of Law. I want to thank my family and my fiancé for their unwavering support, as well as Maria Swaby for her government perspective on this topic, Mike Gardner, Shomari Wade, and Brett Castellat for their input from the government contracts attorney point of view, and Professor Haan for serving as my Note advisor. Thank you also to the members of the *Washington and Lee Law Review* for their excellent editing.

worst, facilitate outright fraud. Finally, to ensure that federal assistance programs intended for smaller businesses do not instead benefit larger entities, Part V proposes that Congress amend the Small Business Act to create a broad, enabling superstructure under which the SBA could both create and implement its own programs to assist small businesses.

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I. INTRODUCTION

Chenega Corporation describes itself as “the most successful Alaska Native village corporation.”¹ Established in 1974, after the Alaska Native Claims Settlement Act granted the Chenega people 70,000 acres of land,² Chenega now operates almost exclusively through its thirty subsidiaries.³ These subsidiary entities enable Chenega to perpetually compete for high-value contracts exclusive to the Small Business Administration’s (SBA) 8(a) program for minority-owned small

1. *Capabilities*, CHENEGA, <https://perma.cc/VS2V-TJQV>.

2. *About*, CHENEGA, <https://perma.cc/9UNA-H328>.

3. *See Chenega Corporation Company Hierarchy*, BLOOMBERG L., <https://perma.cc/K28G-2JGV> (PDF) (documenting Chenega’s subsidiaries and related entities) (last updated Jan. 27, 2022).

businesses—access to these contracts is only meant to last for nine years.⁴ From 2000 to 2009, the federal government awarded Chenega federal prime contracts totaling more than \$1.9 billion.⁵ In 2020, Chenega’s gross revenue was \$949 million.⁶

In 2012, the federal government awarded over \$500 million in contracts to Strong Castle LLC, an SBA-designated service-disabled veteran-owned small business (SDVOSB).⁷ The owner of Strong Castle, Braulio Castillo, had obtained SDVOSB status based on a minor foot injury he suffered while playing sports at a military preparatory school.⁸ After nine months of prep school, he played quarterback for the University of San Diego’s football team—despite the foot injury on which his SDVOSB status later hinged—and went on to found Strong Castle.⁹ The General Services Administration, rather than the

4. See 13 C.F.R. § 124.2 (2022) (“[A] Participant receives a program term of nine years from the date of SBA’s approval letter certifying the concern’s admission to the program.”).

5. STAFF OF S. SUBCOMM. ON CONTRACTING OVERSIGHT, COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, 111TH CONG., REP. ON NEW INFORMATION ABOUT CONTRACTING PREFERENCES FOR ALASKAN NATIVE CORPORATIONS (PART II) 16 (2009), <https://perma.cc/UB7R-G7UY> (PDF).

6. *Alaska’s Top Locally-Owned Companies Ranked by Gross Revenue*, ALASKA BUS. MAG. (Oct. 2021), <https://perma.cc/NP6K-3CZ9> (click on thumbnail number 5). Also note that of Chenega’s 6,505 employees, only 188 are listed as being “in Alaska.” *Id.*

7. See John P. Fletcher, Note, *Recognizing Sacrifice: Prioritizing Contract Awards Within the Service-Disabled Veteran-Owned Small Business Program and the Veterans First Contracting Program*, 45 PUB. CONT. L.J. 143, 144 (2015) (describing Castillo’s story). Castillo founded Strong Castle LLC as a holding company; the company was ultimately operating as Strong Castle Inc. See STAFF OF H. COMM. ON OVERSIGHT & GOV’T REFORM, 113TH CONG., REP. ON QUESTIONABLE ACQUISITIONS: PROBLEMATIC IT CONTRACTING AT THE IRS 16 (2013) (PDF), <https://perma.cc/ZS82-XEWW>.

8. Fletcher, *supra* note 7, at 144; see STAFF OF H. COMM. ON OVERSIGHT & GOV’T REFORM, 113TH CONG., REP. ON QUESTIONABLE ACQUISITIONS: PROBLEMATIC IT CONTRACTING AT THE IRS 16–25 (2013) (PDF), <https://perma.cc/ZS82-XEWW> (giving background on Strong Castle and detailing how he exaggerated his injury and military service).

9. Fletcher, *supra* note 7, at 144; STAFF OF H. COMM. ON OVERSIGHT & GOV’T REFORM, 113TH CONG., REP. ON QUESTIONABLE ACQUISITIONS: PROBLEMATIC IT CONTRACTING AT THE IRS 16–25 (2013) (PDF), <https://perma.cc/ZS82-XEWW>.

SBA, later debarred Strong Castle.¹⁰ Two years later he was convicted for murdering his wife and business partner, Michelle Castillo.¹¹

In 2020, Martin Defense Group LLC obtained more than \$12.8 million in SBA Paycheck Protection Program (PPP) loans.¹² The CEO, Martin Kao, lied on his application regarding the number of workers he employed and the fact that he had already received a PPP loan.¹³ The SBA also sent money to “self-described farmers operating in densely populated cities” via its Economic Injury Disaster Loan (EIDL) program.¹⁴ The SBA approved over \$150,000 for a poultry farm whose registered address was an upscale apartment in Greenwich Village, Manhattan.¹⁵

The actions of some of the characters in these stories are explicitly allowed by law, while others are blatantly fraudulent, but there is one common theme: each individual and firm described above used an SBA program to turn a profit. Listed here are just a few instances of countless more examples of

10. Although it requires creating a free System for Award Management (SAM) account, once you create your account you can find this fact by navigating to “search,” “entity information,” then “all entity information.” Under “filter by,” open the “entity status” drop down and check the box next to “inactive.” Open the “entity name” drop down, then under “DUNS” enter 052821050 to search. Select the result “Strong Castle, Inc” and click “exclusions” on the sidebar. You can see that the registration is expired, which is why the exclusions are listed under “inactive.” General Services Administration is listed as the excluding agency. *Strong Castle, Inc.*, SYSTEM FOR AWARD MANAGEMENT, <https://perma.cc/345U-J546>.

11. See Castillo v. Commonwealth, 827 S.E.2d 790, 797 (Va. Ct. App. 2019) (containing Castillo’s conviction); STAFF OF H. COMM. ON OVERSIGHT & GOV’T REFORM, 113TH CONG., REP. ON QUESTIONABLE ACQUISITIONS: PROBLEMATIC IT CONTRACTING AT THE IRS 16 (2013) (PDF), <https://perma.cc/ZS82-XEWW> (stating that Braulio and Michelle Castillo founded Strong Castle in 2011).

12. David McAfee, *Hawaii CEO Charged With \$12.8 Million Covid Relief Fraud Scheme*, BLOOMBERG L. (Oct. 1, 2020, 7:18 PM), <https://perma.cc/M7YN-JA4Q>.

13. *Id.*

14. Zachary Mider et al., *Poultry Farms in Apartment 13D Show Scale of Pandemic-Aid Fraud*, BLOOMBERG L. (Dec. 24, 2020, 5:00 AM), <https://perma.cc/K2SW-AATZ>.

15. *Id.*

sophisticated entities benefitting from SBA programs.¹⁶ This Note explains why this happens so often, and points towards a solution that would realign SBA programs with congressional intent for the agency.

The SBA is a federal agency that was established by the Small Business Act¹⁷ to assist the concerns of small businesses.¹⁸ The SBA maintains several contracting assistance programs, including the 8(a) program for businesses owned by economically and socially disadvantaged individuals¹⁹ and the SDVOSB program for service-disabled veteran-owned businesses.²⁰ The SBA also provides business loans to small businesses that are unable to obtain funding from traditional sources through its 7(a) program,²¹ as well as loans to small businesses after a declared disaster via its 7(b) program.²² The head of the SBA is called the Administrator and is not only appointed by the President but is a member of the Cabinet.²³

16. See, e.g., Michelle Davis et al., *An Avalanche of Fraud Buried a Small-Business Relief Program*, BLOOMBERG L. (Oct. 29, 2020, 4:00 AM), <https://perma.cc/3YRB-DWCF> (describing how an SBA program meant for small businesses gave out \$10,000 to anyone who filled out a five-minute online application); ROBERT JAY DILGER, CONG. RSCH. SERV., R46322, SBA WOMEN-OWNED SMALL BUSINESS FEDERAL CONTRACTING PROGRAM 18 (2021) (discussing the high number of ineligible businesses found in the SBA's women-owned small business program during annual reviews); U.S. SMALL BUS. ADMIN. OFF. OF INSPECTOR GEN., SEMI-ANNUAL REPORT TO CONGRESS 18 (2018), <https://perma.cc/ZC7S-Y6JY> (PDF) (discussing a large construction corporation's exploitation of SBA HUBZone and 8(a) programs, resulting in a \$1.5 million settlement with the U.S. Attorney's Office and the Department of Justice).

17. 15 U.S.C. §§ 608 et seq.

18. See Small Business Act, 15 U.S.C. § 631(b)(1) ("It is the declared policy of the Congress that . . . the Small Business Administration . . . should aid and assist small businesses . . .").

19. See *id.* § 637 (authorizing the 8(a) program).

20. See *id.* § 657b (authorizing the SDVOSB program).

21. See *id.* § 636(a) (authorizing the Business Loan Program, also known as the 7(a) program).

22. See *id.* § 636(b) (authorizing the Disaster Loan Program, also known as the 7(b) program).

23. See 13 C.F.R. § 101.101 (2022) ("An Administrator, appointed by the President with the advice and consent of the Senate, manages SBA."); *About SBA*, U.S. Small Bus. Admin., <https://perma.cc/KH75-RW46> (SBA is the only cabinet-level federal agency fully dedicated to small business . . .").

This Note argues that the structure through which Congress and the SBA create and administer SBA programs is broken. Congress quickly creates one-off small business assistance programs, and then turns to the SBA to actually implement the program.²⁴ This process results in foreseeable and repeated instances of fraud and the creation of statutory loopholes.²⁵ This Note argues that many of these undesirable outcomes would resolve if Congress amended the Small Business Act to create a broad, enabling superstructure under which the SBA could both create and implement its own programs to assist small businesses.²⁶

Part II provides background on the history of the SBA to illustrate how the SBA evolved into what it is today. Part III introduces the four SBA programs on which the Note will focus in greater detail. Part IV points to how these four programs contain loopholes allowing large entities to profit and are vehicles for outright fraud. Finally, Part V proposes that Congress and the SBA could interrupt this cycle if Congress amended the Small Business Act to create a broad, enabling superstructure under which the SBA could create and administer its own programs. These changes would ensure that high dollar federal assistance programs intended for small businesses do not benefit larger businesses instead.

II. HISTORY OF THE SBA

The SBA did not officially exist until 1953 when President Eisenhower signed the Small Business Act into law.²⁷ The storyline of the SBA, however, began when Congress created the

24. See, e.g., Kate Rogers et al., *As Pandemic Aid Was Rushed to Main Street, Criminals Seized on Covid Relief Programs*, CNBC (Apr. 15, 2021, 1:00 PM), <https://perma.cc/UGL4-QS5E> (describing how “the U.S. government and SBA rushed to get loans out the door” in response to the pandemic); Press Release, U.S. Small Bus. Admin., *SBA Announces Opening of Paycheck Protection Program Direct Forgiveness Portal* (Jul. 28, 2021), <https://perma.cc/J76C-S2AT> (noting how a new portal “will help rush relief to” small businesses).

25. See *infra* Part IV.

26. See *infra* Part V.

27. See Small Business Act of 1953, Pub. L. No. 83-163, § 204(a), 67 Stat. 230, 233 (July 30, 1953) (codified at 15 U.S.C. §§ 608–609) (creating the Small Business Administration).

War Finance Corporation during World War I and the Reconstruction Finance Corporation (RFC) during the Great Depression to give loans to banks, railroads, and businesses.²⁸ Contract manipulation, in which the government attaches conditions to contract awards, became widespread during the 1930s or shortly after.²⁹ During World War II, Congress became concerned with large industries obtaining most of the defense contracts, and as a result created the Smaller War Plants Corporation (SWPC) agency in 1942.³⁰ The SWPC issued both direct loans and encouraged banks to give credit to small businesses.³¹ The agency also advocated on behalf of small businesses, encouraging other agencies and larger businesses to contract with smaller firms.³² The SWPC only lasted for four years³³ until Congress took away its lending authority as a result of public pressure to stop spending taxpayer money to fund an agency that lacked expertise.³⁴ Five years later, the Korean War broke out and Congress created the Small Defense Plants Administration (SDPA), giving it similar powers to those held by the SWPC.³⁵

28. Mirit Eyal-Cohen, *Why Is Small Business the Chief Business of Congress*, 43 RUTGERS L.J. 1, 14 (2011).

29. See Arthur Miller, *Government Contracts and Social Control: A Preliminary Inquiry*, 41 VA. L. REV. 27, 28–29 (1955) (“[Contract manipulation] can enforce a prescribed standard, or prohibit certain activities, or favor one segment of society.”); see also Andrew George Sakallaris, Note, *Questioning the Sacred Cow: Reexamining the Justifications for Small Business Set Asides*, 36 PUB. CONT. L.J. 685, 686–87 (2007) (discussing the history of small business set asides).

30. Eyal-Cohen, *supra* note 28, at 32; see Jonathan J. Bean, *World War II and the “Crisis” of Small Business; The Smaller War Plants Corporation, 1942–1946*, 6 CAMBRIDGE J. POL’Y HIST. 215, 220–21 (2011) (discussing the establishment of the SWPC).

31. See Eyal-Cohen, *supra* note 28, at 32 (stating that the SWPC “offered direct loans [and] encouraged financial institutions to provide credit to small firms”).

32. See *id.* (“[The SWPC] urged federal agencies and big businesses to increase the participation of small business in procurement contracts.”).

33. Bean, *supra* note 30, at 230.

34. See Eyal-Cohen, *supra* note 28, at 32 (noting that the SWPC’s “lending authority was dispersed due to criticism regarding its lack of information and expertise”).

35. CONG. RSCH. SERV., R44844, SBA’S “8(A) PROGRAM”: OVERVIEW, HISTORY, AND CURRENT ISSUES 3 (2021) (citing An Act to Amend and Extend the Defense Production Act of 1950 and the Housing and Rent Act of 1947,

After the SWPC and its successor, the SDPA, were abolished, the Small Business Act of 1953 created the initial, temporary version of the SBA.³⁶ The Act transferred some of the SDPA's powers to the newly created SBA.³⁷ This time, Congress intended that the SBA would use its broad grant of powers in peacetime in addition to when the nation was at war.³⁸ The SBA's authority originally terminated on June 30, 1955.³⁹ In 1958, Congress granted the SBA permanent agency status.⁴⁰ Early powers of the SBA included its business and disaster loan programs under sections 7(a) and (b);⁴¹ these programs have lasted until the present day.⁴²

Over time, Congress amended the SBA's Enabling Act to add additional programs. Particularly relevant to this Note is an amendment passed in 1978, a decade after Martin Luther King, Jr. was assassinated,⁴³ with the Civil Rights Movement of the 1960s in the intervening decade.⁴⁴ In that amendment, Congress updated the SBA's Enabling Act "to give the SBA express statutory authority for its 8(a) Program for minority-owned businesses."⁴⁵ Over the years this has become known simply as the 8(a) program, which provides contracting

Pub. L. No. 82-96, § 110, 65 Stat. 131, 139 (1951) (codified at 50 U.S.C. § 4501)).

36. See Small Business Act of 1953 § 221(a) (terminating the SBA's authority on June 30, 1955).

37. *Id.* § 104.

38. *Id.* § 207(a).

39. *Id.* § 221(a).

40. CONG. RSCH. SERV., R44844, SBA'S "8(A) PROGRAM": OVERVIEW, HISTORY, AND CURRENT ISSUES 3 (2021); Small Business Act of 1958, Pub. L. 85-536, § 2(a), 72 Stat. 384, 387 (July 18, 1958) (codified at 15 U.S.C. § 631).

41. These loan programs existed as early as the 1953 Act, although the section numbers did not become familiar until 1958. §§ 207(a)–(b), 67 Stat. at 235–36; §§ 7(a)–(b), 72 Stat. at 387–89.

42. See Small Business Act, 15 U.S.C. § 636 (authorizing the SBA to make business and disaster loans).

43. *Assassination of Martin Luther King, Jr.*, MARTIN LUTHER KING, JR. RSCH. & EDUC. INST., <https://perma.cc/AUS6-UJRH>.

44. See *Civil Rights Movement*, HISTORY.COM (Oct. 27, 2009), <https://perma.cc/J968-44MY> (last updated Jan. 18, 2022) (detailing a timeline, key events, and leaders of the Civil Rights movement).

45. CONG. RSCH. SERV., R44844, SBA'S "8(A) PROGRAM": OVERVIEW, HISTORY, AND CURRENT ISSUES 5 (2021).

assistance and set-asides to small businesses owned by an individual who is a member of a minority group.⁴⁶

In addition to contracting assistance for minority-owned small businesses, Congress also granted the SBA authority to provide support for service-disabled veteran-owned small businesses (SDVOSB) in 1999.⁴⁷ Congress created the SDVOSB program as a reaction to public pressure for the government to provide more assistance to veteran entrepreneurs.⁴⁸ The deployment of small business owners to the Gulf War had economically injured their small businesses.⁴⁹

Today, the SBA's fingers are in a lot of pies. In addition to the contracting assistance programs discussed above, the SBA has programs for women-owned small businesses and small businesses located in historically underutilized business zones.⁵⁰ The SBA facilitates a mentor-protégé program that pairs small businesses with experienced government contractors.⁵¹ The agency's loan programs include the 7(a) business loans and the 7(b) disaster loans mentioned *supra*, as well as investment capital assistance, surety bonds, and grants.⁵² It provides business guides to many different business communities, and creates and disseminates online learning

46. See 13 C.F.R. § 124.1 (2022) (describing the purpose of the 8(a) program).

47. See Veterans Entrepreneurship and Small Business Development Act, Pub. L. No. 106-50, § 502, 113 Stat 233, 247 (1999) (codified at 15 U.S.C. § 644) (creating the SDVOSB program).

48. See *id.* § 101 (“The United States must provide additional assistance and support to veterans to better equip them to form and expand small business enterprises, thereby enabling them to realize the American dream that they fought to protect.”).

49. See S. Rep. No. 106-136, at 3–4 (1999) (“The Committee [on Small Business] believes that the SBA has not provided enough assistance to veteran entrepreneurs During and after the Persian Gulf War in the early 1990’s [sic], the Committee heard from reservists whose businesses were harmed, severely crippled, or even lost, by their absence.”).

50. *Women-Owned Small Business Federal Contracting Program*, U.S. SMALL BUS. ADMIN., <https://perma.cc/T5JA-ED2C>; *HUBZone Program*, U.S. SMALL BUS. ADMIN., <https://perma.cc/SS9G-7W89>.

51. *SBA Mentor-Protégé Program*, U.S. SMALL BUS. ADMIN., <https://perma.cc/J8S9-CEVK>.

52. See also *Investment Capital*, U.S. SMALL BUS. ADMIN., <https://perma.cc/3YGE-82BV>; *Surety Bonds*, U.S. SMALL BUS. ADMIN., <https://perma.cc/BUV7-JJY9>; *Grants*, U.S. SMALL BUS. ADMIN., <https://perma.cc/SS5V-ZXQ4>.

programs to educate business owners.⁵³ While individuals have critiqued many of the SBA programs,⁵⁴ this Note will focus on the exploitation of the 7(a) and 7(b) loan programs, as well as the 8(a) and SDVOSB contracting assistance programs.

It is easy to see how the SBA came to oversee and regulate so many varied programs. The small business has taken on a mythological character in American culture.⁵⁵ Because of the widespread popularity of the small business, politicians have virtually no choice but to hop on the small business bandwagon.⁵⁶ As a result, Congresspersons pass policies so they can tell their constituents that they support small businesses, and the SBA receives yet another program under its umbrella. This Note provides a cautionary tale about the potential for undesirable results when one agency regulates such a wide range of business assistance programs, some of which are not even restricted to small businesses.⁵⁷

III. SBA PROGRAMS TODAY: A PRIMER

This Part introduces two of the SBA's contracting assistance programs and two of the SBA's loan programs in

53. *Business Guide*, U.S. SMALL BUS. ADMIN., <https://perma.cc/7T7N-79B8>; *SBA Learning Platform*, SMALL BUS. ADMIN., <https://perma.cc/8B4M-H3TV>.

54. See, e.g., Denise Benjamin Sirmons, *Federal Contracting with Women-Owned Businesses: An Analysis of Existing Challenges and Potential Opportunities*, 33 PUB. CONT. L.J. 725, 768 (2004) (critiquing the effect of recent acquisition reforms on the purpose of the Women-Owned Small Business Program).

55. See Eyal-Cohen, *supra* note 28, at 14, 24 (describing small businesses as the “epitome of American liberty” and as “promot[ing] social justice”); Miller, *supra* note 29, at 45 (“[T]he small businessman is one of our national heroes, occupying a high place in the myth-system which makes the national tradition.”); Bean, *supra* note 30, at 216 (“Small business has always had a special place in the mythology of American democracy.”); Sakallaris, *supra* note 29, at 685 (“[T]he small business set aside has become one of the most sacred of the current sacred cows of the federal procurement scene.” (citations omitted)).

56. See Frank Newport, *Americans’ Views of Socialism, Capitalism Are Little Changed*, GALLUP (May 6, 2016), <https://perma.cc/4T4B-CQ3R> (reporting that 96 percent of Americans have a positive image of small businesses).

57. See *Disaster Assistance*, SMALL BUS. ADMIN., <https://perma.cc/F7M2-YWCW> (stating that “[b]usinesses of all sizes located in declared disaster areas” can use an SBA disaster loan).

more detail. For all the programs described below except the 7(b) Disaster Loan Program,⁵⁸ firms supposedly have to meet a certain size standard depending on the industry in which they conduct their business.⁵⁹ After considering four SBA programs, Part IV examines their continued exploitation by sophisticated entities.

A. 8(a) Program

The 8(a) program is for economically and socially disadvantaged business owners.⁶⁰ “Socially disadvantaged,” as defined by the statute, means the individual has “been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.”⁶¹ Members of enumerated racial minority groups, such as Alaska Natives, are entitled to a rebuttable presumption that they are socially disadvantaged.⁶² Individuals whose race or ethnicity is not listed in the regulations can “establish social disadvantage by a preponderance of the evidence.”⁶³

Economically disadvantaged means that the individual is socially disadvantaged as defined above, and their “ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities.”⁶⁴ The statute mandates that “[t]he net worth of an individual claiming disadvantage must be less than \$750,000,” but this excludes several assets: the individual’s primary residence; funds invested in an IRA or official retirement account; income (but not losses) received from an 8(a) participant that is an S-corporation, LLC, or partnership that is reinvested in the firm or used to pay the firm’s taxes; and several other assets that apply specifically to Alaska Native Corporations (ANCs)

58. See Small Business Act, 15 U.S.C. § 636(b)(1)(A) (authorizing the SBA to make disaster loans to businesses of any size).

59. *North American Industry Classification System*, U.S. CENSUS (2022), <https://perma.cc/BB4P-9AMB>.

60. See 15 U.S.C. § 637 (authorizing the 8(a) program).

61. *Id.* § 637(a)(5).

62. 13 C.F.R. § 124.103(b)(1) (2022).

63. *Id.* § 124.103(c)(1).

64. 15 U.S.C. § 637(a)(6)(A).

discussed in greater detail *infra*.⁶⁵ The 8(a) program is a one-time program that lasts for nine years,⁶⁶ although small businesses may extend this period for one year if they were a participant during the COVID-19 pandemic.⁶⁷ Although the statutory goal is for agencies to spend 5 percent of federal contracting dollars on 8(a) businesses,⁶⁸ over the past five years agencies have spent 9.8 percent with 8(a)s.⁶⁹ President Biden’s goal is to increase this figure to 15 percent by fiscal year 2025.⁷⁰ To meet this goal, the administration issued a memo directing that 11 percent of total eligible contract spending will be awarded to 8(a) businesses in fiscal year 2022.⁷¹ This proposed increase makes the changes advocated in this Note even more important to ensure that the increased federal dollars intended for minority-owned small businesses are not instead spent with larger businesses.

B. SDVOSB Program

The SDVOSB program is for small businesses owned by veterans “who possess[] either a valid disability rating letter issued by the Department of Veterans Affairs [VA] . . . or a valid disability determination from the Department of Defense.”⁷²

65. See *infra* Part IV.B.

66. 13 C.F.R. § 124.104(c)(2) (2022).

67. See Extension of Participation in 8(a) Business Development Program, 86 Fed. Reg. 2,529, 2,530 (Jan. 13, 2021) (to be codified at 13 C.F.R. pt. 124) (“[F]or a firm participating in the 8(a) BD program as of March 13, 2020 and through January 13, 2021, SBA will extend its program term by one year . . .”).

68. See 15 U.S.C. § 644(g)(1)(A)(iv) (“The Governmentwide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year.”).

69. See SMALL DISADVANTAGED BUSINESS FY2020 PRIME CONTRACTING, U.S. SMALL BUS. ADMIN. 1, <https://perma.cc/N9KC-9UGN> (PDF) (providing 8(a) data from 2014 to 2020); Daniel Wilson, *White House Ups Small Biz Contracting Goals in Equity Push*, LAW360 (Dec. 2, 2021, 8:07 PM), <https://perma.cc/5T5A-KCA2> (PDF) (averaging data for the past five years).

70. Jason S. Miller, Memorandum for the Heads of Exec. Dep’ts & Agencies on Advancing Equity in Fed. Procurement 1 (Dec. 2, 2021), <https://perma.cc/669A-423Y>.

71. *Id.* at 2.

72. 13 C.F.R. § 125.11 (2022).

The business may also register in the VA's database as a service-disabled veteran.⁷³ Additionally, "reservists or members of the National Guard disabled from a disease or injury incurred or aggravated in line of duty or while in training" qualify for the SDVOSB program.⁷⁴ To obtain SDVOSB status, firms merely have to self-certify.⁷⁵

The business must be "at least 51% unconditionally and directly owned by one or more service-disabled veterans."⁷⁶ The "management and daily business operations of the concern must be controlled by one or more service-disabled veterans."⁷⁷ SDVOSBs can have multiple managers, but the "highest officer position in the concern" must be held by the service-disabled veteran.⁷⁸ In the case of a partnership, at least one of the general partners must obtain service-disabled veteran status.⁷⁹ The VA has a parallel program called "Vets First" with extremely similar qualifications; however, the VA has a verification process that requires documentation rather than self-certification.⁸⁰

C. 7(a) Business Loan Program

In addition to contracting assistance programs, the SBA also assists small businesses by providing business loans.⁸¹ The 7(a) program is meant for small businesses that are not able to obtain funding from traditional sources.⁸² The Paycheck

73. *Id.*

74. *Id.*

75. See *Veteran Assistance Programs*, U.S. SMALL BUS. ADMIN., <https://perma.cc/9GLA-WUWU> (stating that owners "can self-certify [their] business to the federal government as being owned by a service-disabled veteran").

76. 13 C.F.R. § 125.12 (2022).

77. *Id.* § 125.13(a).

78. *Id.* § 125.13(b).

79. *Id.* § 125.13(c).

80. 38 C.F.R. § 74.2 (2022).

81. Small Business Act, 15 U.S.C. § 636.

82. See *id.* § 636(a) (authorizing the Business Loan Program, also known as the 7(a) program).

Protection Program (PPP) fell under the SBA's 7(a) authority⁸³ and was "designed to provide a direct incentive for small businesses to keep their workers on the payroll" during the pandemic.⁸⁴ The first round of the program ran from February 15, 2020⁸⁵ to August 8, 2020;⁸⁶ loans were made by banks and guaranteed by the SBA.⁸⁷ The SBA disbursed \$523 billion during the first round of the PPP.⁸⁸ The SBA began disbursing round two of the PPP on January 11, 2021.⁸⁹ Round two ended on May 31, 2021, although existing borrowers are still eligible for PPP loan forgiveness.⁹⁰

83. Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 1102, 134 Stat. 281, 286 (Mar. 27, 2020) (codified at 15 U.S.C. § 636).

84. Press Release, Small Business Administration, Paycheck Protection Program Forgiveness Town Hall (July 27, 2020, 7:00PM), <https://perma.cc/6RMW-9DGB>.

85. CARES Act § 1102.

86. Extending Authority for Commitments for the Paycheck Protection Program and Separating Amounts Authorized, Pub. L. No. 116-147, § 1, 134 Stat. 660, 660 (July 4, 2020) (codified at 15 U.S.C. § 636). Note that in between this Act, passed on the Fourth of July, and the CARES Act, Congress actually extended the covered period of the PPP until December 31, 2020. Paycheck Protection Program Flexibility Act of 2020, Pub. L. No. 116-142, § 3, 134 Stat. 641, 641 (June 5, 2020) (codified at 15 U.S.C. § 636). However, Section 1102 of Pub. L. No. 116-147 walked the December 31 date back without explicitly overruling it by only appropriating funding through August 8. § 1102(b)(1), 134 Stat. at 660.

87. *Paycheck Protection Program (PPP) Loan Data—Key Aspects*, U.S. SMALL BUS. ADMIN. 1, <https://perma.cc/NV8G-6CES> (PDF).

88. Stacy Cowley & Ella Koeze, *1 Percent of P.P.P. Borrowers Got Over One-Quarter of the Loan Money*, N.Y. TIMES (Dec. 2, 2020), <https://perma.cc/8KDM-VJLA> (last updated Oct. 11, 2021).

89. See Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, Pub. L. No. 116-260, § 304, 134 Stat. 1182, 1996 (2021) (codified at 15 U.S.C. § 636) (restarting the PPP); Press Release, U.S. Small Business Administration, PPP Reopens Jan 11 (Jan. 8, 2021), <https://perma.cc/UCF7-DU99> (announcing that the SBA would reopen the PPP on January 11, 2021).

90. See PPP Extension Act of 2021, Pub. L. No. 117-6, 135 Stat. 250 (codified at 15 U.S.C. § 636) (extending the PPP to June 30, 2021 but noting that beginning on June 1 "the Administrator of the Small Business Administration shall not accept new lender applications," effectively ending the program on May 31).

D. 7(b) Disaster Loan Program

The Disaster Loan Program, or the 7(b) program, provides loans to businesses and homeowners after a government-declared disaster.⁹¹ The Disaster Loan Program is the only SBA program that is not limited to small businesses,⁹² so instead of discussing the exploitation of this program by large businesses, this Note will discuss fraud in this program generally. For example, the SBA's Economic Injury Disaster Loan Program (EIDL) was created in response to the pandemic, and offers small businesses up to \$2 million in loans.⁹³ The EIDL also distributed \$20 billion in grants over the summer of 2020.⁹⁴

IV. COMMON TRENDS ACROSS SBA PROGRAMS

The creation of SBA programs is cyclical. A problem arises in society, and politicians in Congress become concerned. They create new programs with catchy names⁹⁵ in response to the latest societal ill by amending the Small Business Act.⁹⁶ Then, Congress essentially steps out of the picture, benefitting from all the political currency the one-off program generated. Once Congress amends the Small Business Act, the creation of federal regulations to implement the program lies with the SBA.⁹⁷ Meanwhile, the Small Business Act remains a Frankenstein's monster of incongruous programs.

Each time Congress rushes to create complex systems in response to small business contracting problems, the resulting

91. *Disaster Assistance*, *supra* note 57.

92. *See* Small Business Act, 15 U.S.C. § 636(b)(1)(A) (authorizing the SBA to make disaster loans to businesses of any size).

93. U.S. SMALL BUS. ADMIN. OFF. OF INSPECTOR GEN., OIG-21-02, INSPECTION OF SMALL BUSINESS ADMINISTRATION'S INITIAL DISASTER ASSISTANCE RESPONSE TO THE CORONAVIRUS PANDEMIC 1 (2020), <https://perma.cc/5DWP-HF7S> (PDF).

94. *Id.*

95. *See, e.g.*, the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 1102, 134 Stat. 281, 286 (Mar. 27, 2020) (codified at 15 U.S.C. § 636) (nicknamed the CARES Act).

96. *See id.* (amending Section 7(a) of the Small Business Act).

97. *See* 15 U.S.C. § 634(b)(6) (stating that the SBA Administrator may make "rules and regulations as he deems necessary to carry out the authority vested in him by or pursuant to" the Small Business Act).

programs are rife with opportunity for abuse. Forcing Congress to reinvent the wheel each time leads to foreseeable, repeat problems with the resulting programs. This Part will discuss the issues that result when Congress, rather than the SBA, creates new, complicated small business programs. These common issues point to the fact that the real problem is the structure through which Congress creates SBA programs. Many of the instances of large businesses profiting from programs not meant for them would resolve if the SBA utilized Congress's original grant of authority in the Small Business Act⁹⁸ as a broad, enabling superstructure under which to create its own programs.⁹⁹

A. *SBA Programs Are Reactionary and Short-Sighted*

The first common problem is the reactionary and short-sighted nature of SBA programs. This subpart discusses the events that led to the hasty creation of SBA programs. Prime examples of this phenomenon come from the SDVOSB program and the PPP.

1. The SDVOSB Program Was a Reaction to the Aftermath of the Gulf War

In the late 1990s, the United States was reeling with the aftereffects of the Gulf War.¹⁰⁰ The SBA eliminated a direct loan program for veterans in 1995,¹⁰¹ and the public was upset by this

98. See Small Business Act of 1958, Pub. L. 85-536, 72 Stat. 384, 387 (July 18, 1958) (codified at 15 U.S.C. § 631) (describing the SBA's authority as of the 1958 amendments giving it permanent agency status).

99. See *infra* Part V.

100. See *Persian Gulf War*, ENCYC. BRITANNICA, <https://perma.cc/C5F4-S7FR> (last updated Jan. 9, 2022) (describing the Gulf War); Leonard Silk, *Economic Scene: The Broad Impact of the Gulf War*, N.Y. TIMES (Aug. 16, 1991), <https://perma.cc/87AP-TH6Q> (describing testimony from the director of the Office of Management and Budget that the total cost of the Gulf War was \$61 billion and reporting that it "either triggered or aggravated the American recession"). For a deeper dive on the impact of the war on the economy see *The Gulf War and the U.S. Economy*, 91-31 FRBSF WKLY. LETTER (Sept. 13, 1991), <https://perma.cc/6YZH-UY86> (PDF).

101. See JAMES TALENT, VETERANS ENTREPRENEURSHIP AND SMALL BUSINESS DEVELOPMENT ACT OF 1999, H.R. REP. NO. 106-206, at 14 (1999) ("Over the years, the interests of veterans, particularly the service-disabled, have fallen on infertile ground."); S. Rep. No. 106-136, at 3 (1999) (describing

development because businesses owned by servicemembers had recently suffered as a result of their owners deploying.¹⁰² As a reaction to public outcry, Congress passed the Veterans Entrepreneurship and Small Business Development Act in 1999, which established the SDVOSB program.¹⁰³ At this time, the Small Business Act already gave the SBA the authority to craft rules and policies designed to assist veterans, but Congress decided to add a program to the Act instead.¹⁰⁴

Although the Veterans Entrepreneurship and Small Business Development Act set a goal of awarding 3 percent of federal contracting dollars to SDVOSBs,¹⁰⁵ it did not provide any systems for agencies to reach this mandate.¹⁰⁶ As a result, agencies struggled to meet the 3 percent goal.¹⁰⁷ From 1999 to 2003, only four government agencies were able to meet the contracting goal as mandated by Congress.¹⁰⁸ Instead of Congress legislating the lengthy and complex SDVOSB program, the SBA could have developed rules creating the SDVOSB program using the original grant of authority from Congress to “make such rules and regulations . . . necessary to

the necessity of more legislation to assist veterans because “[f]ederal support for veterans entrepreneurs, particularly service-disabled veterans, has declined”).

102. See S. Rep. No. 106-136, at 3–4 (1999) (“The Committee [on Small Business] believes that the SBA has not provided enough assistance to veteran entrepreneurs During and after the Persian Gulf War in the early 1990’s [sic], the Committee heard from reservists whose businesses were harmed, severely crippled, or even lost, by their absence.”); Veterans Entrepreneurship and Small Business Development Act, Pub. L. No. 106-50, § 101, 113 Stat. 233, 234 (1999) (codified at 15 U.S.C. § 657b) (“The United States must provide additional assistance and support to veterans to better equip them to form and expand small business enterprises, thereby enabling them to realize the American dream that they fought to protect.”).

103. Veterans Entrepreneurship and Small Business Development Act § 502.

104. See Small Business Act of 1958, Pub. L. 85-536, 72 Stat. 384, 387 (July 18, 1958) (codified at 15 U.S.C. § 631) (describing the SBA’s authority as of the 1958 amendments giving it permanent agency status).

105. Veterans Entrepreneurship and Small Business Development Act § 502(a)(2).

106. Fletcher, *supra* note 7, at 149.

107. Paul Sherman, *Paved with Good Intentions: Obstacles to Meeting Federal Contracting Goals for Service-Disabled Veteran-Owned Small Businesses*, 36 PUB. CONT. L.J. 125, 131 (2006).

108. *Id.*

carry out the [Administrator's] authority" under the Small Business Act.¹⁰⁹

2. The PPP Was a Reaction to the COVID-19 Pandemic

Similarly, the PPP was one of a suite of stimulus packages that Congress rolled out in response to the dire economic situation caused by the COVID-19 pandemic.¹¹⁰ Like the SDVOSB program, the PPP and its subsequent amendments were incredibly complicated and difficult to interpret.¹¹¹ As early as 1958, section 7(a) of the Small Business Act granted the SBA the power "to make loans . . . as may be necessary to insure [sic] a well-balanced national economy."¹¹² Congress defined a well-balanced economy as ensuring "that a fair proportion of the total purchases and contracts . . . for property and services for the Government . . . be placed with small-business enterprises."¹¹³ Rather than Congress legislating and re-legislating, the SBA could have granted loans for small businesses to use during the pandemic under this existing grant of authority from Congress.¹¹⁴

109. Small Business Act of 1958 § 5(b)(6).

110. See *Coronavirus Relief Options*, U.S. SMALL BUS. ADMIN., <https://perma.cc/9W6S-RRS5> (listing the different options for receiving monetary assistance from the SBA if a business was adversely impacted by the COVID-19 pandemic).

111. Since the CARES Act was passed in March 27, 2020, the PPP was amended in June and July to extend the covered period of the program until December 31, 2020, and to appropriate funding through August 8, 2020, respectively. Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 1102, 134 Stat. 281, 286 (Mar. 27, 2020) (codified at 15 U.S.C. § 636); Paycheck Protection Program Flexibility Act of 2020, Pub. L. No. 116-142, § 3, 134 Stat. 641, 641 (June 5, 2020) (codified at 15 U.S.C. § 636); Extending Authority for Commitments for the Paycheck Protection Program and Separating Amounts Authorized, Pub. L. No. 116-147, § 1, 134 Stat. 660, 660 (July 4, 2020) (codified at 15 U.S.C. § 636). Congress also restarted the PPP as of January 11, 2021. See *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act*, Pub. L. No. 116-260, § 304, 134 Stat. 1182, 1996 (2021) (codified at 15 U.S.C. § 636) (restarting the PPP); Press Release, *supra* note 89 ("The U.S. Small Business Administration, in consultation with the Treasury Department, announced today that the Paycheck Protection Program will re-open the week of January 11 for new borrowers and certain existing PPP borrowers.").

112. Small Business Act of 1958 § 7(a).

113. *Id.* § 2(a).

114. *Id.* § 7(a).

B. Rushed Legislation Leads to Loopholes Benefitting Large Businesses

One of the most common and repeated problems that results from rushed¹¹⁵ and complicated programs is the unintended creation of loopholes that enable agencies to spend dollars with large, rather than small, businesses. The Alaska Native Corporations (ANCs) are perhaps the most famous entities to benefit from loopholes in the 8(a) program for socially and economically disadvantaged business owners.¹¹⁶

1. Loopholes in the 8(a) Program: Alaska Native Corporations

In the normal 8(a) program, management must be a member of the economically and socially disadvantaged group.¹¹⁷ Managers of firms taking advantage of the ANC rules do not have to be Alaska Natives at all.¹¹⁸ Owners of 8(a) companies that are not ANCs must have a net worth of below \$750,000, excluding the individual's primary residence, to meet the economically disadvantaged requirement.¹¹⁹ On the other hand, owners of ANCs are deemed economically disadvantaged as long as Alaska Natives or their descendants "own a majority of both the total equity of the ANC and the total voting powers to elect directors of the ANC through their holdings of settlement common stock[.]"¹²⁰ Unlike the norm under the 8(a) program, "individual contract awards to ANCs are completely uncapped, remarkably even for contracts awarded on a

115. See *supra* note 24 and accompanying text.

116. See 13 C.F.R. § 124.103(b)(1) (2022) (codifying the rebuttable presumption that Alaska Natives are socially disadvantaged under the 8(a) program).

117. See *id.* § 124.101 (stating that a firm meets the 8(a) requirements "if it is a small business which is unconditionally owned and controlled by one or more socially and economically disadvantaged individuals").

118. See *id.* § 124.109(c)(4)(i)(B) ("Management may be provided by non-Tribal members if the concern can demonstrate that the Tribe can hire and fire those individuals, that it will retain control of all management decisions common to boards of directors . . . and that a written management development plan exists . . .").

119. *Id.* § 124.104(c)(2).

120. *Id.* § 124.109(a)(1)–(2).

sole-sourced basis.”¹²¹ They are also exempt from a total 8(a) award ceiling.¹²²

The most shocking loophole, however, is the fact that ANCs do not need to be small businesses at all.¹²³ This is possible because “affiliations with the owning entity or other business enterprises of that entity are excluded in size determinations.”¹²⁴ ANCs have grown at an unprecedented rate as businesses have caught on to these immense statutory benefits.¹²⁵

2. Loopholes in the PPP

Sophisticated entities also profit from loopholes in the SBA’s loan programs. For example, the PPP did not force recipients to use the loan to actually protect paychecks.¹²⁶ In the hotel industry, over 210 owners received a PPP loan, including Omni Hotels & Resorts.¹²⁷ Omni properties received anywhere from \$30 to \$71 million while also laying off workers and ceasing their health insurance coverage.¹²⁸ The PPP was not restricted to small businesses which were unable to obtain funding from traditional sources¹²⁹ and recipients were not required to use the

121. Daniel K. Oakes, Note, *Inching Toward Balance: Reaching Proper Reform of the Alaska Native Corporations’ 8(a) Contracting Preferences*, 40 PUB. CONT. L.J. 777, 784 (2011) (citing 13 C.F.R. § 124.506(b)).

122. See *id.*; CONG. RSCH. SERV. R44844, SBA’S “8(A) PROGRAM”: OVERVIEW, HISTORY, AND CURRENT ISSUES 21–22 (2021); see also 13 C.F.R. § 124.519(a) (describing dollar limits on the amount of 8(a) contracts program members may receive but exempting ANCs).

123. Oakes, *supra* note 121, at 783.

124. CONG. RSCH. SERV. R44844, SBA’S “8(A) PROGRAM”: OVERVIEW, HISTORY, AND CURRENT ISSUES 17 (2021).

125. See *Alaska Native Corporations*, RES. DEV. COUNS. FOR ALASKA, <https://perma.cc/M2FH-GBYL> (“Alaska Native corporations cumulatively reported more than \$10.5 billion in revenues in 2018 . . .”).

126. Peter Whoriskey et al., *‘Doomed to Fail’: Why a \$4 Trillion Bailout Couldn’t Revive the American Economy*, WASH. POST, <https://perma.cc/WV7X-8WM6> (last updated Oct. 5, 2020, 12:30 PM) (stating that loan recipients “were not compelled to use [PPP loan dollars] to protect paychecks—and many didn’t”).

127. *Id.*

128. See *id.* (noting that Omni took PPP money “while also furloughing workers and cutting off their health insurance coverage”).

129. This is a requirement of the SBA’s Enabling Act for 7(a) financings. Small Business Act, 15 U.S.C. § 636; Coronavirus Aid, Relief, and Economic

funds to protect workers' paychecks.¹³⁰ A program without these basic provisions benefitted sophisticated entities who used up valuable program dollars intended for small businesses.¹³¹

Another loophole in the PPP stems from its prior inconsistent application of rules depending on a business's size. When PPP round two began, it applied different rules to sole proprietors, independent contractors, and self-employed individuals than it did to businesses comprised of more than one person.¹³² Specifically, sole proprietors, contractors, and self-employed workers had to use a dollar amount from their income tax form that reflected the amount of money their business made after expenses to calculate how much they could get from the PPP.¹³³ Other small businesses could use the amount of money their business made before expenses when making the calculation, which was obviously much higher than the net profit numbers from the single-employee companies.¹³⁴ It is not clear why the SBA applied different rules depending on how small a firm is; if anything, it should aim to assist smaller firms equally or greater than larger businesses to stay in line with congressional intent.¹³⁵

Over fifty days after round two of the PPP began, the SBA finally issued an interim final rule that fixed this loophole and applied the same calculation rules to sole proprietors, independent contractors, self-employed individuals, and larger

Security (CARES) Act, Pub. L. No. 116-136, § 1102, 134 Stat. 281, 291 (Mar. 27, 2020) (codified at 15 U.S.C. § 636).

130. See Whoriskey et al., *supra* note 126 (reporting that PPP recipients were not required to use the money to protect employees' paychecks).

131. See Jessica Silver-Greenberg et al., *Large, Troubled Companies Got Bailout Money in Small-Business Loan Program*, N.Y. TIMES (Apr. 26, 2020), <https://perma.cc/P7G3-BK55> (last updated May 13, 2020) ("Within days of [the PPP's] start, its money ran out. . . . Countless small businesses were shut out, even as a number of large companies received millions of dollars in aid.").

132. See David Hood, *Self-Employed Businesses Seek Rule Tweaks for Larger PPP Loans*, BLOOMBERG L. (Feb. 17, 2021, 1:34 PM), <https://perma.cc/TYA2-88T7> (last updated Feb 17, 2021, 4:49 PM) (PDF) (describing the rule discrepancy).

133. *Id.*

134. *Id.*

135. See Small Business Act, 15 U.S.C. § 631(b)(1) ("It is the declared policy of the Congress that . . . the Small Business Administration . . . should aid and assist small businesses . . .").

small businesses.¹³⁶ Following implementation of the rule, both types of businesses were able to use gross profit numbers to calculate how much they could receive from the PPP.¹³⁷ The SBA determined that it had discretion to make this change, and if it had discretion in January when the PPP reopened, it is not clear why it waited until March to fix this loophole.¹³⁸ Single-employee companies only had two months to benefit before the PPP ended on May 31, 2021,¹³⁹ although the program ran out of money a month after these smallest of small businesses became eligible.¹⁴⁰ Groups like the Main Street Alliance and the National Association for the Self-Employed have pointed out that single-employee firms missed out on a large part of round two of the PPP because the change was not retroactive.¹⁴¹

Over the summer of 2021, the Supreme Court interpreted the CARES Act in a manner that created another loophole for ANCs in addition to those discussed *supra*. The Department of the Treasury and the Interior had determined that ANCs were eligible for CARES Act funding.¹⁴² Seventeen tribes sued in 2020, arguing that Congress intended for CARES Act funding to be restricted to sovereign tribal nations rather than Alaska

136. Business Loan Program Temporary Changes; Paycheck Protection Program—Revisions to Loan Amount Calculation and Eligibility, 86 Fed. Reg. 13,149, 13150–56 (Mar. 8, 2021) (to be codified at 13 C.F.R. pt. 120).

137. *Id.* at 13,150.

138. *Id.*

139. *See id.* (“Given the urgent need to provide borrowers with timely relief and the short period of time before the program ends on March 31, 2021, SBA in consultation with Treasury has determined that it is impractical and not in the public interest to provide a 30-day delayed effective date.”); PPP Extension Act of 2021, Pub. L. No. 117-6, 135 Stat. 250 (codified at 15 U.S.C. § 636) (extending the PPP to June 30, 2021 but noting that beginning on June 1 “the Administrator of the Small Business Administration shall not accept new lender applications,” effectively ending the program on May 31).

140. *See* Stacy Cowley, *The Paycheck Protection Program Is Out of Money*, N.Y. TIMES (May 4, 2021), <https://perma.cc/7PHL-UZ2E> (last updated Aug. 17, 2021) (describing how the PPP ran out of money “[f]our weeks before its scheduled end” of May 31).

141. *See* Lydia O’Neal, *PPP Loan Changes Expected to Open Doors for Smallest Businesses*, BLOOMBERG L. (Feb. 23, 2021, 4:46 AM), <https://perma.cc/B7J2-VEYMY> (stating that these groups are pushing Congress and the SBA to make the rule change retroactive).

142. *Yellen v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 2434, 2438 (2021).

Native Corporations,¹⁴³ which as a reminder, non-Alaska Natives can own.¹⁴⁴ The District Court ruled that ANCs qualified as “Indian Tribes” under the language of the statute.¹⁴⁵ The D.C. Circuit reversed, finding that Congress meant to limit the CARES Act to formally recognized tribes.¹⁴⁶ In overturning the D.C. Circuit, Justice Sotomayor concluded that “ANCs are Indian tribes, regardless of whether they are also federally recognized tribes.”¹⁴⁷ The lawsuits “all but guarantee[d] that some of the aid will remain frozen, leaving tribal citizens without critical federal assistance.”¹⁴⁸

Yellen v. Confederated Tribes of Chehalis Reservation resulted in ANCs becoming eligible to receive \$450 million in CARES Act funding.¹⁴⁹ This is in addition to the potentially unlimited set-aside contracts for which ANCs qualify under the 8(a) program.¹⁵⁰ “The Confederated Tribes of the Chehalis Reservation, the Tulalip Tribes, and other plaintiff tribes” stated that they were “deeply disappointed” with the Court’s ruling in *Yellen*.¹⁵¹ The President of the Navajo Nation noted that “[t]he ruling undermines federally-recognized tribes and will have consequences far beyond the allocation of CARES Act

143. *Id.* at 2441.

144. See 13 C.F.R. § 124.109(c)(4)(i)(B) (“Management may be provided by non-Tribal members if the concern can demonstrate that the Tribe can hire and fire those individuals, that it will retain control of all management decisions common to boards of directors . . . and that a written management development plan exists . . .”).

145. *Confederated Tribes of Chehalis Rsrv. v. Mnuchin*, 471 F. Supp. 3d 1, 20 (D.D.C. 2020).

146. *Confederated Tribes of the Chehalis Rsrv. v. Mnuchin*, 976 F.3d 15, 23 (D.C. Cir. 2020).

147. *Yellen*, 141 S. Ct. at 2443.

148. Mark Walker & Emily Cochrane, *Native American Tribes Sue Treasury Over Stimulus Aid as They Feud Over Funding* (May 1, 2020), <https://perma.cc/3W6A-GRXH> (last updated June 25, 2021).

149. *Yellen*, 141 S. Ct. at 2453–54 (Gorsuch, J., dissenting) (citing Letter from E. Prelogar, Acting Solicitor General, to S. Harris, Clerk of Court (May 12, 2021)) (noting that the funding “would otherwise find its way to recognized tribal governments across the country, including Alaska’s several hundred Native Villages”).

150. See *supra* Part IV.B.1.

151. Andrew Westney, *Justices Say Alaska Native Cos. Can Get Tribal COVID Funds* (June 25, 2021, 10:33 AM), <https://perma.cc/5RWR-VWX6>.

dollars.”¹⁵² Chairwoman Teri Gobin of the Tulalip Tribes stated that the decision “makes it more important than ever that Congress carefully craft legislation to ensure that federal funding and programs are targeted to federally recognized tribes and the Native communities they serve.”¹⁵³

C. *The Disproportionate Racial Impact of SBA Programs*

In addition to creating loopholes that enable large businesses to profit, the disjointed way Congress creates SBA programs is systemically biased to favor majority over minority racial groups. This subsection examines this phenomenon by comparing the 8(a) program, meant to aid minority-owned small businesses in obtaining federal government contracts,¹⁵⁴ with other SBA contracting assistance programs.

1. The Government Disproportionately Limits Aid to Minority-Owned Small Businesses

Businesses with SDVOSB certifications can qualify for lucrative set-aside contracts for an unlimited amount of time, as long as they remain owned and controlled by a service-disabled veteran.¹⁵⁵ SDVOSBs merely need to self-certify to this fact.¹⁵⁶ Likewise, the SBA’s Women-Owned Small Business (WOSB) program, briefly discussed in this Note’s Introduction, operates in the same way.¹⁵⁷ Small businesses owned by women can simply submit some verifying information to the SBA,¹⁵⁸ and annually represent to the SBA that it continues to meet all

152. *Id.*

153. *Id.*

154. *See 8(a) Business Development Program*, U.S. SMALL BUS. ADMIN., <https://perma.cc/2UZ2-BEMZ> (stating that the 8(a) program was created to “help firms owned and controlled by socially and economically disadvantaged individuals . . . compete effectively in the American economy”).

155. 13 C.F.R. § 125.12 (2022); § 125.13(a)–(b) (2022).

156. *Service-Disabled Veteran-Owned Small Businesses Program*, *supra* note 75.

157. *Women-Owned Small Business Federal Contracting Program*, *supra* note 50.

158. 13 C.F.R. § 127.300 (2022).

WOSB eligibility criteria.¹⁵⁹ Thereafter, they perpetually qualify for federal set-aside contracts.¹⁶⁰

When Congress amended the Small Business Act to add on the 8(a) program for minority-owned small businesses, and the SBA implemented the program,¹⁶¹ it carefully crafted limiting conditions on this federal grant of aid to minorities. The most obvious example is the fact that the program only lasts for nine years, as opposed to perpetually like the SDVOSB and WOSB programs.¹⁶² Additionally, the net worth of the minority business owner must be below \$750,000.¹⁶³ If the 8(a) business is too successful during its nine-year stint, it gets kicked out of the 8(a) program and may no longer benefit from lucrative set-aside contracts.¹⁶⁴

A subtler racially-charged barrier 8(a) firms face is the paternalistic prohibition on excessive withdrawals by an 8(a) participant.¹⁶⁵ Federal regulations state that “[i]f SBA determines that funds or assets have been excessively withdrawn from the Participant for the personal benefit of one or more owners or managers . . . and such withdrawal was detrimental to the achievement of the targets, objectives, and goals contained in the Participant’s business plan,” the SBA can terminate the business from the 8(a) program.¹⁶⁶ The regulations define excessive withdrawals based on the small business’s sales; the higher the sales, the more a Participant can withdraw.¹⁶⁷ While the SBA usually does not count officers’ salaries towards the withdrawal total, it will count salaries “where SBA believes that a firm is attempting to circumvent the

159. *Id.* § 127.400.

160. *Id.*

161. CONG. RSCH. SERV. R44844, SBA’S “8(A) PROGRAM”: OVERVIEW, HISTORY, AND CURRENT ISSUES 5 (2021); *see* 13 C.F.R. § 124.1 (2022) (describing the purpose of the 8(a) program).

162. 13 C.F.R. § 124.2 (2022).

163. *Id.* § 124.104(c)(2).

164. *Id.* § 124.104(c).

165. *Id.* § 124.112(d).

166. *Id.* § 124.112(d)(2).

167. *See id.* § 124.112(d)(3) (“Withdrawals are excessive if in the aggregate during any fiscal year of the Participant they exceed (i) \$250,000 for firms with sales up to \$1,000,000; (ii) \$300,000 for firms with sales between \$1,000,000 and \$2,000,000; and (iii) \$400,000 for firms with sales exceeding \$2,000,000.”).

excessive withdrawal limitations through the payment of officers' salaries."¹⁶⁸ Taken together, these restrictions are insulting to the intelligence of the minority small business owner because they disallow the owner from determining for himself or herself how much to withdraw from their own business. Similar restrictions do not apply to the SDVOSB program or the WOSB.¹⁶⁹ There is no reason for the three programs to have different rules, however, because being a member of a minority group, like being a service-disabled veteran or a woman, is an immutable characteristic. The nine-year limitation on the length of the 8(a) program is an arbitrary restriction, as if, in the government's eyes, minority small business owners will not experience bias or racism in federal procurement after a nine-year period of government assistance. The net worth requirement is likewise illogical. Does the government fear that a minority-owned small business will become "too" successful? John Shoraka argues that the excessive withdrawal rule shows how the government treats 8(a) participants "like grade school children that can't survive without their hands being held by the all-knowing and all-protective federal government."¹⁷⁰

2. The Government Disproportionately Punishes Perceived Exploitation of the 8(a) Program

The government also stringently enforces perceived fraud in the 8(a) program, with the exception of ANCs.¹⁷¹ R&W Builders, Inc. recently settled with the United States government for \$400,000.¹⁷² R&W had graduated from the 8(a) program and formed a joint venture with a current 8(a)

168. *Id.* § 124.112(d)(1). The standard of review is totality of the circumstances. *Id.*

169. *See id.* §§ 125.12–14, 127.400 (describing the requirements for WOSB and SDVOSB to maintain their certifications).

170. John Shoraka, *Why Systemic Bias Exists in Government Contracting Programs*, FED. NEWS NETWORK (Feb. 10, 2021, 12:33 PM), <https://perma.cc/V7C4-BHJK>.

171. *See supra* Part IV.B.

172. Press Release, U.S. Atty's Off., Southern Dist. of Ill., O'Fallon Building Co. Settles Fraud Claims (Feb. 25, 2021), <https://perma.cc/7RKV-RG98>.

participant called Global Environmental, Inc.¹⁷³ Together, they created Patriot Commercial Construction, LLC.¹⁷⁴ Once Patriot secured a set-aside contract, R&W began to manage the joint venture and use its employees, rather than employees of the current 8(a) company, to complete the contract work.¹⁷⁵ Although a typical marketplace would encourage a joint venture created to use the most experienced workers for a job, in this case the U.S. government prosecuted R&W with all the force of the U.S. Attorney's Office for violating the False Claims Act.¹⁷⁶ After proudly listing the almost half a million dollar settlement, the press release stated, “[i]t is important that 8(a) joint ventures comply with the SBA's criteria because misuse of the Program deprives real disadvantaged businesses of valuable economic opportunities and undermines the Program's integrity.”¹⁷⁷ Despite a minority individual still owning R&W, R&W was no longer considered really disadvantaged because it had exceeded its nine year allocation.

3. ANC Loopholes Enable Majority Groups to Profit from the 8(a) Program

The exploitation of the 8(a) program by ANCs is another example of the disproportionate racial impact of SBA programs. As discussed in Part IV.B above, ANCs are exempt from almost every limitation of the 8(a) program. The three most glaring holes in the statutory scheme are the facts that Alaska Natives do not have to own ANCs,¹⁷⁸ ANCs do not need to be small businesses,¹⁷⁹ and ANCs can perpetually qualify for lucrative 8(a) set-aside contracts.¹⁸⁰ The upshot of these statutory

173. *Id.*

174. *Id.*

175. *Id.*

176. *See* 31 U.S.C. §§ 3729–33 (codifying the False Claims Act).

177. Press Release, *supra* note 172 (emphasis added).

178. *See* 13 C.F.R. § 124.109(c)(4)(i)(B) (2022) (“Management may be provided by non-Tribal members if the concern can demonstrate that the Tribe can hire and fire those individuals, that it will retain control of all management decisions common to boards of directors . . . and that a written management development plan exists . . .”).

179. *See supra* notes 123–124 and accompanying text.

180. An ANC's size is determined “independently without regard to its affiliation with the tribe, any entity of the tribal government, or any other

provisions is that they create the potential for white people, rather than Alaska Natives, to own ANCs.¹⁸¹ They enable white people, rather than Alaska Natives, to perpetually profit off of a program meant to assist minority individuals.¹⁸² As a result, each set-aside an ANC wins takes federal dollars away from a “real” disadvantaged small business.¹⁸³

4. The PPP Was Inaccessible to Many Minority-Owned Small Businesses

A final example of SBA programs having a disproportionate racial impact is the initial inconsistent application of PPP rules depending on a business’s size. As discussed in Part IV.B, sole proprietors, contractors, and self-employed workers previously qualified for lower PPP loans than small businesses with more than one employee.¹⁸⁴ Ashley Harrington of the Center for Responsible Lending argued that this rule difference had a disproportionate impact on minority single-worker companies, because most of these companies are owned by Black and Latino people.¹⁸⁵ While the SBA has now changed this inconsistency in an interim final rule,¹⁸⁶ the fact that the limitation existed in the first place is indicative of the systemic bias in SBA programs.¹⁸⁷

business enterprise owned by the tribe[.]” 13 C.F.R. § 124.109(c)(2)(iii). As a result of this loophole, ANCs have a habit of creating a spinoff affiliate that qualifies under the 8(a) program each time they are about to exceed their nine years. *See, e.g., Chenega Corporation Company Hierarchy, supra* note 3 (documenting Chenega’s thirty subsidiaries and related entities). The regulations themselves provide a potential solution that the SBA rarely uses in practice: the SBA determines an ANC’s size without regard to affiliations “unless the Administrator determines that one or more such tribally-owned business concerns have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category.” 13 C.F.R. § 124.109(c)(2)(iii).

181. *See* 13 C.F.R. § 124.109(c)(4)(i)(B) (stating that non-Tribal members may manage ANCs if the Tribe retains some control over the manager).

182. *See supra* note 180 and accompanying text.

183. *See supra* notes 1–6 and accompanying text.

184. *See supra* notes 132–135 and accompanying text.

185. David Hood, *supra* note 132.

186. *See supra* notes 136–141 and accompanying text.

187. To its credit, the interim final rule recognizes this fact. It states

The heightened barriers that apply to the 8(a) program support the notion that the federal government wants to help minority groups, but only for a certain amount of time before it removes them from Uncle Sam's payroll.¹⁸⁸ Meanwhile, businesses owned by women and service-disabled veterans are able to profit from set-aside contracts for an unlimited amount of time.¹⁸⁹ The 8(a) program allows Congresspersons to gain the political currency of assisting minority individuals, without actually effecting a systemic change. If the Biden administration is as serious as it appears about tackling issues of racial inequity, it needs to swiftly remedy these disparities in federal procurement.¹⁹⁰

This change would affect many sole proprietors who have been effectively excluded from the PPP, especially those with very little or negative net profit, many of which are located in underserved communities. [Sole proprietors] have higher concentrations of ownership by members of underserved groups. An analysis by the SBA Office of Advocacy of Census data found that firms with no employees are 70 percent owned by women and minorities, compared to 40 percent for businesses with employees. SBA has determined that changing the calculation for sole proprietors, independent contractors, and self-employed individuals will reduce barriers to accessing the PPP and expand funding among the smallest businesses.

Business Loan Program Temporary Changes; Paycheck Protection Program—Revisions to Loan Amount Calculation and Eligibility, 86 Fed. Reg. 13,149, 13,150 (Mar. 8, 2021) (to be codified at 13 C.F.R. pt. 120). The SBA may have made this change too little, too late, however, because the rule change was effective for only two months before round two of the PPP ended. *See* PPP Extension Act of 2021, Pub. L. No. 117-6, 135 Stat. 250 (codified at 15 U.S.C. § 636) (extending the PPP to June 30, 2021 but noting that beginning on June 1 “the Administrator of the Small Business Administration shall not accept new lender applications,” effectively ending the program on May 31).

188. This notion plays into the meritocracy myth, or the belief that rewards in our society go to the hardest worker. *See, e.g.,* Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 590 (2000) (“The meritocracy myth reflects dominant cultural assumptions about employment opportunity and success, and is comprised of two interconnected beliefs. The first is an assumption that employment discrimination is an anomaly. The second is a belief that merit alone determines employment success.”).

189. *See supra* notes 155–160 and accompanying text.

190. *See* Exec. Order No. 13,985, 86 Fed. Reg. 7,009 (Jan. 25, 2021) (describing the Biden administration's comprehensive policy on “advancing racial equity and support for underserved communities through the federal government”).

D. Anemic Fraud Controls

In addition to a disproportionate racial impact, the current structure through which Congress creates SBA programs leads to an increased opportunity for fraud. Many existing SBA programs are vulnerable to abuse, but instead of learning from past exploitations, each new program remarkably lacks fraud controls. It is worth mentioning here that some of the exploitation may be behavioral; that is, with any government contracting program there is the potential for bad actors to swoop in and take advantage. However, this Note argues that the frequency and commonality of fraud in SBA programs is largely preventable.

1. Fraud in the SDVOSB Program

The first example of lack of fraud controls comes from the SDVOSB program. Two companies and a joint venture were owned by a service-disabled veteran and two non-service disabled veterans at the same location.¹⁹¹ As a reminder, a service-disabled veteran must directly own and control a SDVOSB, but they only need to self-certify to this status.¹⁹² Despite this mandate, the operating agreements of the two firms allowed the non-service-disabled veterans to control the companies.¹⁹³ Additionally, the service-disabled veteran did not manage the joint venture.¹⁹⁴ The three companies together received over \$91 million in SDVOSB contracts.¹⁹⁵ To prevent this waste of government resources, the SBA could easily update the regulations to enact fraud controls, such as requiring documentation of service-disabled status of management and control rather than self-certification.¹⁹⁶

191. U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-697, SERVICE-DISABLED VETERAN-OWNED SMALL BUSINESS PROGRAM: VULNERABILITY TO FRAUD AND ABUSE REMAINS 22 (2012).

192. See *supra* notes 76–80 and accompanying text.

193. GAO-12-697, *supra* note 191 at 22–23.

194. *Id.*

195. *Id.*

196. See *supra* notes 76–80 and accompanying text. The VA has a verification process that requires documentation rather than self-certification. See *supra* note 80 and accompanying text.

2. Fraud in the PPP

In addition to profiting from the SBA's contracting assistance programs, large and sophisticated entities also exploit the agency's loan programs. The PPP was passed under the SBA's 7(a) program,¹⁹⁷ which was intended for small businesses that are not able to obtain funding from traditional sources.¹⁹⁸ Instead, large businesses signed up: the SBA issued individual loans from \$5 to \$10 million to around 5,000 businesses.¹⁹⁹ Among these companies were the expensive sushi restaurant in the Trump Hotel in Washington, D.C., Kanye West's company, and President Trump's personal lawyer.²⁰⁰ Big law firms also received between \$210 million and \$425 million from the program.²⁰¹ In December 2021, the Secret Service announced that the total amount stolen from the PPP was up to \$100 billion.²⁰²

Fraud was so widespread during the first round of PPP loans that the SBA Office of Inspector General (OIG) teamed up with the Department of Treasury to issue a PPP fraud report.²⁰³

197. Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 1102, 134 Stat. 281, 286 (Mar. 27, 2020) (codified at 15 U.S.C. § 636).

198. See 15 U.S.C. § 636(a) (authorizing the Business Loan Program, also known as the 7(a) program).

199. Jeanna Smialek et al., *Lobbyists, Law Firms and Trade Groups Took Small-Business Loans*, N.Y. TIMES (July 6, 2020), <https://perma.cc/DZX7-UXZ2> (last updated July 7, 2020).

200. *Id.*

201. Roy Strom, *Boies Schiller, Big Law Firms Obtained Millions in PPP Loans*, BLOOMBERG L. (July 6, 2020, 1:38 PM), <https://perma.cc/D8L9-7HL5> (last updated July 6, 2020, 6:38 PM).

202. See Press Release, U.S. Secret Service Names National Pandemic Fraud Recovery Coordinator to Bolster Fight Against Fraud, U.S. Secret Service (Dec. 21, 2021) (stating that the Service appointed an agent to investigate and recover the "fraudulent use of COVID-19 relief applications, with potential fraudulent activity nearing \$100 billion"); Andrew Ackerman & Amara Omeokwe, *Covid-19 Relief Fraud Potentially Totals \$100 Billion, Secret Service Says*, WALL ST. J. (Dec. 22, 2021, 5:58 PM), <https://perma.cc/3C83-JMRW> ("Some \$100 billion has potentially been stolen from Covid-19 relief programs designed to help individuals and businesses harmed by the pandemic, the U.S. Secret Service said.").

203. U.S. SMALL BUS. ADMIN. OFF. OF INSPECTOR GEN., OIG-21-06, PAYCHECK PROTECTION PROGRAM LOAN RECIPIENTS ON THE DEPARTMENT OF

The OIG is an independent department within the SBA that provides oversight via auditing and investigation.²⁰⁴ The Report found that the SBA granted approximately \$3.6 billion in PPP loans to potentially ineligible recipients.²⁰⁵ Treasury maintains a “Do Not Pay List” in an online portal.²⁰⁶ The database accesses multiple federal data sources to track whether a business has any current federal debarments or suspensions or federal loans for which the business is delinquent or has defaulted.²⁰⁷ The Report recommends that “SBA should take immediate action to limit improper payments by strengthening existing controls and implementing additional internal controls to address improper payments, especially through the utilization of existing resources.”²⁰⁸

For the second round of the PPP, the SBA checked all PPP applicants against the Do Not Pay List and required lenders to do the same.²⁰⁹ However, some of the other round two changes potentially increased the possibility of fraud and waste.²¹⁰ Although round two applicants are supposed to show that their revenues were down by at least 25 percent in the first, second, or third quarter of 2020, the SBA does not require applicants for loans of \$150,000 or less to provide verifying documentation.²¹¹ Applicants in this dollar range comprise the vast majority of total applicants.²¹² There is also no evidence that documenting lost revenue would be unduly burdensome on round two PPP applicants.²¹³

TREASURY’S DO NOT PAY LIST (2021) [hereinafter PPP Fraud Report], <https://perma.cc/8WBN-C9TT> (PDF).

204. *About the Office of Inspector General*, U.S. SMALL BUS. ADMIN., <https://perma.cc/P4WQ-AFKJ>; see *infra* Part V.B.

205. PPP Fraud Report, *supra* note 203, at 2.

206. *Id.* at 2–3.

207. *Id.*

208. *Id.* at 5.

209. *Id.* at 11.

210. See Geoff Colvin, *Round 2 of PPP Loans Could Be Open to Even More Fraud*, FORTUNE (Jan. 12, 2021, 10:00 PM), <https://perma.cc/W378-MXYH> (describing how Round 2 of the PPP “invites more fraud” than Round 1).

211. *Id.*

212. *Id.*

213. See *id.* (“Getting the SBA to forgive Round 1 loans demanded that borrowers fill out three forms and a worksheet, supported by five pages of instructions, and submit potentially dozens of documents. Under the new law,

All of this fraud was possible because Congress rushed out COVID-19 relief legislation, which left states and the SBA, who actually implemented the programs, in the lurch.²¹⁴ To try to dole money out as quickly as possible, the PPP did not require applicants to prove they had been harmed by the pandemic.²¹⁵ The SBA could have easily checked the Do Not Pay List from the beginning—the law may have required it to do so anyway—or the SBA could have implemented even slightly heightened documentation requirements.²¹⁶

Rather than having the SBA process loan applications, it delegated this authority to banks, who could collect fees for each loan they made.²¹⁷ However, neither the SBA nor the banks were required to monitor whether the loan recipients were using PPP dollars for protecting paychecks.²¹⁸ This is true of almost all SBA loans: rather than the SBA making the loan directly to the small business, the SBA instead uses “lending partners” and guarantees to the bank that the small business will repay the loan.²¹⁹ Every intermediary the SBA introduces between the overarching program and the aid recipient adds to the program’s intricacy and, accordingly, to the opportunity for fraud.²²⁰

3. Fraud in the Disaster Loan Program: The EIDL

The 7(b) Disaster Loan Program has likewise not been spared from deception. In response to the pandemic, Congress

borrowers of \$150,000 or less can get full forgiveness by submitting a one-page certification.”).

214. See Timothy L. O’Brien, Opinion, *Fraud and Ineptitude Are Undermining Covid Relief*, BLOOMBERG L. (Oct. 13, 2020, 6:30 AM), <https://perma.cc/2GR2-UTBD> (describing the passage of the CARES Act as a “well-intentioned rush”).

215. Jessica Silver-Greenberg et al., *supra* note 131.

216. See Payment Integrity Information Act, Pub. L. No. 116-117, § 3352, 134 Stat. 113, 114–15 (2020) (codified at 31 U.S.C. § 3352) (requiring agencies to conduct risk assessments if, in the prior fiscal year, the sum of the agency’s improper payments may have exceeded \$10 million).

217. Jessica Silver-Greenberg et al., *supra* note 131.

218. See *id.* (stating that banks did not have to “monitor whether the recipients use[d] the money appropriately”).

219. See *Loans*, U.S. SMALL BUS. ADMIN., <https://perma.cc/V3M3-HLZX>.

220. O’Brien, *supra* note 214 (arguing that the SBA’s use of banks as lending partners adds to the PPP’s “complexity and therefore to the possibility of errors or fraud”).

granted the SBA the authority to administer the EIDL program under the SBA's 7(b) authority.²²¹ The EIDL program provides loans of up to \$2 million to small businesses, farms, nonprofits, and other eligible entities.²²² Like the PPP, the EIDL was rushed out; an Office of Inspector General Report stated that the SBA "lowered the guardrails' by removing or weakening [] controls" to expedite the loan disbursement process.²²³ The report found that over the summer of 2020, the SBA approved \$14.3 billion "to applicants who later changed the bank account number to pay out the loan to a different number than that listed on the original loan application," an indicator of potential fraud.²²⁴ Additionally, the SBA "approved more than one loan to applicants that used the same IP addresses, email addresses, business address, or bank accounts" for a total of \$62.7 billion.²²⁵ Amazingly, "SBA's management continues to insist that its controls are robust despite overwhelming evidence to the contrary."²²⁶

When Congress passes complex legislation to address socioeconomic disparity, the common trends across SBA programs described above emerge. Congress drafts one-off small businesses assistance programs that are reactionary and short-sighted.²²⁷ This leads to glaring statutory loopholes, which in turn qualifies large businesses for SBA programs.²²⁸ The legislation also has a disproportionate racial impact.²²⁹ It lacks controls that could address foreseeable fraudulent exploitation.²³⁰ Congress has tied the SBA's hands when it comes time to implement each program. SBA programs have the capability to assist small businesses, and can be improved.

221. Small Business Act, 15 U.S.C. § 636(b)(9)(C).

222. OIG-21-02, *supra* note 93, at 1.

223. *Id.* at 24.

224. *Id.* at 17.

225. *Id.* at 19.

226. *Id.* at 31.

227. *See supra* Part IV.A.

228. *See supra* Part IV.B.

229. *See supra* Part IV.C.

230. *See supra* Part IV.D.

E. Program Success Stories

It would be irresponsible to deny that SBA programs do some good for the small business community. The SBA created an entire online platform to share these success stories in 2016.²³¹ Despite its exploitation and dubious timeframe,²³² the 8(a) program actually does enable some minority business owners to break into the government contracts market. For example, two friends, one of whom is Native American, founded PC Mechanical and were accepted into the 8(a) program.²³³ They won multiple government contracts, including a \$140 million multi-year contract, using their 8(a) certification.²³⁴ After graduating from the 8(a) program, they were able to buy a larger facility and continue to receive government contracts.²³⁵

The same goes for the SDVOSB program. The SBA was instrumental in assisting Scott Allen and his business Wisdom Tree Technologies.²³⁶ Despite having obtained both an 8(a) and SDVOSB certification, Wisdom Tree struggled to obtain federal contracts.²³⁷ Allen contacted his local SBA office and was connected with a Business Opportunity Specialist, who provided tailored guidance about the federal procurement marketplace.²³⁸ Wisdom Tree quickly received a small federal contract that translated into larger contracts as a result of the SBA's assistance.²³⁹

While the news is replete with instances of fraud in the PPP, it also helped many small businesses keep employees on the payroll during the pandemic. An owner of a bakery described the PPP her business received as “an umbrella of financial

231. See Press Release, U.S. Small Bus. Admin., New SBA Platform Lets Small Businesses Tell Their Stories (Sept. 1, 2016), <https://perma.cc/8RHF-KRGM> (describing the SBA's “Small Business Owners Speak” platform).

232. See *infra* Part IV.C.

233. *Small Business Owner Finds Success and Growth with 8(a) Program*, U.S. SMALL BUS. ADMIN., <https://perma.cc/JYS3-B3F4>.

234. *Id.*

235. *Id.*

236. *Persistence Pays Off for Native American SDVOSB, an SBA 8(a) Business*, U.S. SMALL BUS. ADMIN., <https://perma.cc/UFV4-N2M7>.

237. *Id.*

238. *Id.*

239. *Id.*

safety for the employees and the business.”²⁴⁰ The owner contacted her preexisting business advisor who helped her make an informed decision about securing a PPP loan.²⁴¹ Additionally, there is at least some evidence that the SBA was responsive to concerns about fraud in the first round of the PPP. For example, during the PPP’s second round, the SBA, in its own words, “developed systems to screen potential borrowers against the Treasury Department’s Do Not Pay List.”²⁴² Applications processed through a lender were also searched against the list.²⁴³ Similar stories have come out of the EIDL program under the SBA’s disaster loan authority.²⁴⁴

Veronique de Rugy has suggested that Congress should abolish the SBA because it is such a waste of money.²⁴⁵ This Note does not go that far. Instead, it suggests a fundamental shift in the way the SBA uses the Small Business Act to achieve its goal of helping small businesses.²⁴⁶ The goal is for the SBA to grow its bank of success stories, while tamping down on exploitation by larger businesses.

V. SUGGESTED AMENDMENTS TO THE SMALL BUSINESS ACT

This Part will first suggest that, rather than Congress adding new SBA programs in response to crises as they arise, the SBA could use the Small Business Act as a broad, enabling superstructure to pass federal regulations to assist small businesses. To this end, Congress could amend the Small Business Act to look more like it did in 1958, before it contained

240. *Bellingham Bakery Utilizes SBA Resources and PPP Loan to Spread Joy Through Cake*, U.S. SMALL BUS. ADMIN., <https://perma.cc/QU2G-NJG6>.

241. *Id.*

242. PPP Fraud Report, *supra* note 203, at 11.

243. *See id.* (containing the statement of then-SBA Administrator Jovita Carranza).

244. *See, e.g., Fairmont Businesses Uses Paycheck Protection Program to Navigate Storm*, U.S. SMALL BUS. ADMIN., <https://perma.cc/6MXH-M2SN> (describing how a West Virginia training on the PPP and EIDL helped one business owner obtain the loans and keep her fourteen employees on payroll during the pandemic).

245. *See* Editorial, *Should the Small Business Administration Be Abolished*, WALL ST. J. (Mar. 20, 2012, 3:58 PM), <https://perma.cc/J8EA-TUMT> (exploring the debate on both sides).

246. *See infra* Part V.A.

a patchwork of lengthy, complex, and specific programs. In 1958, the SBA had the broad authority to “make such rules and regulations” as were necessary to “aid, counsel, assist, and protect . . . the interests of small-business concerns” to increase competition for federal contracts.²⁴⁷ Because this proposal is likely far away from happening, this Note, in Part V.B, points to some long and short term solutions fixes that Congress and the SBA could deploy in the meantime. This Part will begin with a discussion of the long-term solution: amending the Small Business Act.

A. Amending the Small Business Act and its Regulatory Role

This Note proposes that Congress amend the Small Business Act to reflect the following three long-term changes: (1) amend Sections 7 and 8 to create a general framework that empowers the SBA to make its own rules, (2) only allow the SBA to make Disaster Loans through lending partners and require it to make all other types of loans directly, and (3) require SBA programs to comply with the Act itself.

1. Make the Enabling Act Enabling, Rather than Prescriptive

As early as 1958 when Congress granted the SBA permanent agency status, its policy was “to insure [sic] that a fair proportion of the total purchases and contracts for property and services for the Government . . . be placed with small-business enterprises”²⁴⁸ The Small Business Act of 1958 gave the SBA broad authority “to arrange for the performance of [] contracts [with the United States Government] by negotiating or otherwise letting subcontracts to small-business concerns”²⁴⁹ To accomplish these goals, Congress gave the SBA authority to “make such rules and regulations as [it] deem[ed] necessary to carry out the authority vested in [it] by or pursuant to” the Small Business Act.²⁵⁰ Under Section 7 of the Act, the SBA has the power to make rules and

247. Small Business Act of 1958, Pub. L. 85-536, §§ 2(a), 5(b)(6), 72 Stat. 384, 384, 386 (July 18, 1958) (codified at 15 U.S.C. § 631).

248. *Id.* § 2(a).

249. *Id.* § 8(a)(2).

250. *Id.* § 5(b)(6).

regulations for its loan programs.²⁵¹ Likewise, Section 8 of the Act gives the SBA authority to create and administer contracting assistance programs.²⁵²

Despite granting this authority to the SBA, Congress has taken control by amending the Small Business Act to add on a hodgepodge of complicated programs that prove difficult for the SBA to administer and contain loopholes that allow large businesses to profit.²⁵³ A better approach would be for the SBA to utilize the existing statutory framework of the Small Business Act to create small business programs by promulgating its own regulations. If the SBA used its existing grant of authority from Congress, it could potentially reduce each program's vulnerability to fraud by decreasing the complexity of the programs.²⁵⁴

Because the Small Business Act is currently lengthy and program-specific,²⁵⁵ however, Congress would need to initially amend both sections to create a general framework under which the SBA could make rules. Congress would also need to ensure that this general framework amendment came with enough funding for the SBA to make meaningful rules and regulations.²⁵⁶ This change is less daunting than it appears at first glance; the general framework existed in the 1958 Small Business Act.²⁵⁷

This initial legislative investment would pay off, because once Congress amends the Small Business Act to include a

251. Small Business Act, 15 U.S.C. § 636.

252. *Id.* § 637.

253. *See supra* Part IV.

254. O'Brien, *supra* note 214.

255. *See, e.g.*, 15 U.S.C. § 637 (listing out specific contracting assistance programs).

256. Congress often issues unfunded mandates, rather than appropriate funding with positive legislative changes. *See* CONG. RSCH. SERV., R40957, UNFUNDED MANDATES REFORM ACT: HISTORY, IMPACT, AND ISSUES 1–2 (describing the history of unfunded mandates). Accordingly, all of the proposed changes in Part V. would need to come with enough funding to make them a reality.

257. The Small Business Act of 1958 contains just twenty-one sections and takes up just twelve pages in the *Statutes at Large*. Small Business Act of 1958, Pub. L. 85-536, 72 Stat. 384–396 (July 18, 1958) (codified at 15 U.S.C. § 631). By contrast, as of this writing the Small Business Act contains ninety lengthy sections. 15 U.S.C. Ch. 14A.

general framework for loan and contracting assistance programs, the SBA would be able to create rules for the existing and new programs as the need arises, keeping the small business regulation within the agency tasked with the regulation of small businesses. Congress formed the SBA as an administrative agency to create rules and regulations that would ensure a fair percentage of the Government's spending power benefitted small businesses.²⁵⁸ When making small business rules and regulations, the SBA is required to follow the Administrative Procedure Act (APA).²⁵⁹ The SBA must provide the public with notice and the opportunity to comment on any proposed rulemaking at least thirty days before the rule's effective date.²⁶⁰ Under the APA, the SBA has the capacity to solicit comments from key stakeholders impacted by the proposed rule before it becomes final.²⁶¹ The SBA accordingly

258. Small Business Act of 1958 § 2(a).

259. 5 U.S.C. §§ 551–59.

260. 5 U.S.C. §§ 553(b)–(d). The SBA also has the ability to skip the notice and comment period if it “for good cause finds” that issuing a proposed rule and holding a comment period would be “impracticable, unnecessary, or contrary to the public interest.” *Id.* § (b)(3)(B), (d)(3). The SBA followed these expedited rulemaking procedures to enable sole proprietors to immediately benefit from the same revenue calculation as their larger-sized counterparts when the PPP was running out of time. *See supra* Part IV.B.2; Business Loan Program Temporary Changes; Paycheck Protection Program—Additional Eligibility Revisions to First Interim Final Rule, 85 Fed. Reg. 38,301, 38,302 (June 26, 2020) (to be codified at 13 C.F.R. pt. 120)

SBA has determined that there is good cause for dispensing with advance public notice and comment on the grounds that that [sic] it would be contrary to the public interest. Specifically, advance public notice and comment would defeat the purpose of this interim final rule given that SBA's authority to guarantee PPP loans expires on June 30, 2020. These same reasons provide good cause for SBA to dispense with the 30-day delayed effective date provided in the Administrative Procedure Act (APA).

Id.

261. For example, the SBA issued a controversial interim final rule on April 15, 2020 that prohibited a PPP applicant from applying if

[a]n owner of 20 percent or more of [] equity . . . is incarcerated, on probation, on parole; presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction; or has been convicted of a felony within the last five years.

Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20,811, 20,812 (Apr. 15, 2020) (to be codified at 13 C.F.R. pt. 120).

gains small business expertise it can utilize when creating the final rule. This rulemaking process could create better outcomes for small businesses than the current process of Congress creating lengthy and complicated programs and then handing them to the SBA to administer.

2. Require the SBA to Make All Loans Except for Disaster Loans Directly

Changes to the way the SBA doles out money would also prevent large businesses from profiting from SBA programs. Ever since the SBA became a permanent agency in 1958,²⁶² Congress has empowered it to give loans to small businesses “either directly or in cooperation with banks or other financial institutions.”²⁶³ Currently, the SBA only makes Disaster Loans directly.²⁶⁴ However, because the Disaster Loan program is the only SBA program that is not limited to small businesses,²⁶⁵ the SBA could issue these loans through banks rather than directly.

Several criminal justice organizations commented on the rule, urging “the SBA to reconsider those provisions of the Rule that discriminate against individuals who have a record of arrest or conviction.” Am. C.L. Union et. al., Comment Letter on Business Loan Program Temporary Changes (May 15, 2020), <https://perma.cc/U6ZZ-AXZZ>. In response to these kinds of comments, as well as a lawsuit alleging that the criminal record exclusion violated the APA, the SBA ultimately revised the rule to only exclude owners facing felony charges from the past year or facing felony charges involving lying on a loan application in the past five years. Business Loan Program Temporary Changes; Paycheck Protection Program—Additional Eligibility Revisions to First Interim Final Rule, 85 Fed. Reg. 38,301, 38,302 (June 26, 2020) (to be codified at 13 C.F.R. pt. 120); see *Defy Ventures, Inc. v. U.S. Small Bus. Admin.*, 469 F. Supp. 3d 459, 475 (D. Md. 2020) (finding that “[t]he plaintiffs [were] likely to show that the SBA acted arbitrarily and capriciously in promulgating the April IFR . . . because [that] rule[] contain[s] no explanation for the criminal history exclusion”).

262. See *supra* note 40 and accompanying text.

263. Small Business Act of 1958 § 7(a) (codified at 15 U.S.C. § 631) (emphasis added). This is the same language that appears in the most current version of the Small Business Act. 15 U.S.C. § 636(a).

264. See GUIDE TO SBA PROGRAMS, U.S. SMALL BUS. ADMIN. 22 (last updated Feb. 2013), <https://perma.cc/2JTX-W64L> (PDF) (describing how the Disaster Loan Program is administered directly from the SBA to afflicted businesses of any size).

265. U.S. SMALL BUS. ADMIN. OFF. OF INSPECTOR GEN.: SEMIANNUAL REP. TO CONG. 9 (Apr. 30, 2018), <https://perma.cc/28MT-T7Z7> (PDF).

This change would distribute money as quickly as possible to any qualifying business after a disaster.

The SBA administers all of its other loans, including the PPP, indirectly by requiring small businesses to apply through banks.²⁶⁶ These programs are only meant to assist small businesses under Section 7(a) of the Small Business Act.²⁶⁷ Experience teaches that requiring recipients to apply for SBA loans through banks, rather than to the SBA itself, decreases the certainty that the money will actually end up with small businesses because the SBA's oversight is dramatically decreased.²⁶⁸ To give the SBA the most oversight and streamline the loan application process, Congress could amend the Small Business Act to require the SBA to make all of its loan programs except for Disaster Loans directly.²⁶⁹ The level of control the SBA would have if it made most of its loans directly would enable it to ensure that only qualified small businesses receive small business loans.²⁷⁰

266. See 15 U.S.C. § 636(a) (authorizing the SBA to make business loans “either directly or in cooperation with banks or other financial institutions through agreements to participate on an immediate or deferred (guaranteed) basis”).

267. See GUIDE TO SBA PROGRAMS, *supra* note 264 (“The U.S. Small Business Administration (SBA) provides critical support and resources . . . to help small businesses grow and create jobs.”).

268. See O’Brien, *supra* note 214 (“Every extra conduit in the process adds to its complexity and therefore to the possibility of errors or fraud.”); Editorial Board, Opinion, *The Small Business Administration Needs Reforming*, WASH. POST (Dec. 18, 2016), <https://perma.cc/TB2A-X2CW> (“Banks such as Wells Fargo and JPMorgan Chase are among the largest SBA lenders. They pay a fee for the government guarantee, but it’s worth it, in return for knowing that Uncle Sam will pay them back if the client cannot. Sweet deal.”).

269. Congress would accomplish this by amending Section 7(a) to remove the language that allows the SBA to make financings “in cooperation with banks or other financial institutions,” but retain this language in Section 7(b) so that it would continue to apply to Disaster Loans. 15 U.S.C. §§ 636(a), (b)(1)(A); GUIDE TO SBA PROGRAMS, *supra* note 264.

270. It is worth noting here that this change would require a greater level of specialization than what currently exists at the SBA. If the SBA begins making the majority of its loans directly, rather than through banks, it should hire individuals with banking expertise to prevent fraud, waste, and abuse. The critical difference is that the individuals would work for the SBA and protect the government’s interests rather than working for a bank and attempting to protect both the bank and the government’s interests.

3. SBA Programs Must Comply with the Enabling Act

Another suggested change to the way the SBA and Congress use the Small Business Act is to ensure that SBA programs adhere to the Act itself. Congress enacted two programs for COVID-19 business relief: the PPP under Section 7(a), small business loans,²⁷¹ and the EIDL under Section 7(b), Disaster Loans.²⁷² Businesses are not supposed to receive money under Section 7(a) “if the applicant can obtain credit elsewhere.”²⁷³ Because the PPP aid distribution process was outsourced to banks, and neither the banks nor the SBA monitored whether the recipients used the money to protect paychecks,²⁷⁴ it was not physically possible to satisfy the provision restricting 7(a) loans to applicants who could not “obtain credit elsewhere.”²⁷⁵ To comply with this requirement, the SBA could have issued direct PPP loans exclusively to small businesses, and outsourced the EIDL to banks to distribute to larger businesses.

Alternatively, Section 7(b) of the Small Business Act gives the SBA authority to create loans after a disaster.²⁷⁶ The global pandemic caused by the COVID-19 virus is a disaster,²⁷⁷ so it is not clear why the SBA did not simply create one loan program under its Section 7(b) Disaster Loan authority rather than categorizing the PPP under Section 7(a) and the EIDL under Section 7(b). If Congress and the SBA truly wanted to distribute loans as quickly as possible, one loan program under the SBA’s disaster loan authority would likely have been more effective for two reasons. First, the Disaster Loan program is not restricted to small businesses,²⁷⁸ so banks and the SBA would not have needed to verify a firm’s size before dispensing money. Second,

271. 15 U.S.C. § 636(a).

272. *Id.* § 636(b).

273. *Id.* § 636(a)(1)(A)(i).

274. *See Whoriskey et al., supra* note 126 (finding that many businesses did not use the money to protect employees’ paychecks).

275. *Id.*

276. *Id.* § 636(b).

277. The President has the authority to declare a disaster under the Small Business Act. *Id.* § 636(a)(31)(A)(i).

278. *See id.* § 636(b)(1)(A) (authorizing the SBA to make disaster loans to businesses of any size).

the SBA could probably have administered one loan program covering all businesses impacted by the pandemic easier than the two separate PPP and EIDL. Had the SBA devoted all its resources to allotting funds to impacted companies via one loan program, it could potentially have prevented the widespread fraud that occurred under the PPP.²⁷⁹

In sum, making Section 7(a) business loans directly and continuing to make Section 7(b) Disaster Loans through banks would ensure that small business and disaster loans are kept separate and would serve the SBA's twin goals of both assisting small businesses generally and helping every business after a declared disaster.²⁸⁰

B. Short-Term Solutions

Part V.A *supra* discussed long-term fixes to the Small Business Act that would move the SBA closer to Congress's intent for the agency to assist only small businesses.²⁸¹ Sweeping change of a major regulatory regime takes a long time; amending the Small Business Act from specific programs to a general framework will likely be no exception. Accordingly, this subpart suggests some short-term solutions for the SBA and Congress to employ in the meantime. This Note recommends the following short-term fixes: (1) that Congress appropriate funding for states to use on fraud-fighting technology; (2) that private parties increase filings under the Freedom of Information Act to force the SBA to disclose loan and claims data; and (3) that Congress amend the Inspector General Act to increase the SBA Office of the Inspector General's authority.

1. Appropriate Funding to States for Use on Fraud-Fighting Technology

Congress could appropriate federal resources to states to use on technology upgrades to fight fraud.²⁸² If the SBA worked

279. See Press Release, *supra* note 202 (stating that "potential fraudulent activity" in COVID-19 relief programs totaled almost \$100 billion).

280. Small Business Act, 15 U.S.C. § 631(a), (g).

281. See *id.* § 631(b)(1) ("It is the declared policy of the Congress that . . . the Small Business Administration . . . should aid and assist small businesses . . .").

282. See O'Brien, *supra* note 214 (making this suggestion).

more closely with states and employers, and provided states with SBA claims data, states could help combat fraud in their respective jurisdictions.²⁸³ The SBA could require their one hundred and twelve district offices located all over the country to work with states and employers in the local area.²⁸⁴ It could also provide district offices with program claims data, who could in turn provide it to local lenders. This solution is more akin to a grassroots approach, rather than the top-down way the SBA currently conducts itself.

2. Greater Use of FOIA to Compel SBA to Release Loan and Claims Data

Should the SBA decide not to cooperate with states, courts could compel the SBA to release loan and claims data under the Freedom of Information Act (FOIA).²⁸⁵ On May 12, 2020, several news organizations filed a complaint in the District of Columbia to compel the SBA “to release the names, addresses, and precise loan amounts of all individuals and entities that obtained PPP and EIDL COVID-related loans.”²⁸⁶ The Court originally gave the SBA a deadline of November 19, 2020.²⁸⁷ After a failed attempt to stay the Court’s decision,²⁸⁸ the SBA released the data on December 1, 2020.²⁸⁹ *WP Co. v. U.S. Small Business Administration* is precedent supporting the release of loan data

283. *Id.*

284. *Find Local Assistance*, U.S. SMALL BUS. ADMIN., perma.cc/YM68-XA9A.

285. *WP Co. v. U.S. Small Bus. Admin.*, 514 F. Supp. 3d 267 (D.D.C. 2021).

286. Complaint at 2, *WP Co. v. U.S. Small Bus. Admin.*, No. 20-1240 (D.D.C. May 12, 2020), ECF No. 1. The SBA released some of this information, but declined to identify the exact loan figure once the dollar amount exceeded \$150,000, instead expressing the figures in ranges. *WP Co. LLC v. U.S. Small Bus. Admin.*, 502 F. Supp. 3d 1, 9 (D.D.C. 2020).

287. *WP Co. LLC v. U.S. Small Bus. Admin.*, CV 20-1240 (JEB), 2020 WL 6887623, at *1 (D.D.C. Nov. 24, 2020).

288. *Id.* at *5.

289. See Kiernan Nicholls, *SBA Releases Details on PPP Loans*, INVESTIGATIVE REPORTING WORKSHOP (Dec. 2, 2020), <https://perma.cc/ESA6-L7WW> (reporting on the release of loan data); *Paycheck Protection Program (PPP) Loan Data—Key Aspects*, *supra* note 87 (noting an effective date of December 1, 2020).

under the FOIA.²⁹⁰ Releasing data will expose fraudulent loans and put public pressure on the SBA and Congress to ensure these dollars end up assisting small businesses.

3. Appropriate Funds to Increase Timeliness of OIG Investigations and Reports

Federal administrative agencies contain an Office of the Inspector General (OIG), designed to combat fraud, waste, and abuse within the programs and operations of that agency.²⁹¹ The SBA OIG is an independent and objective office created by the Inspector General Act.²⁹² The Act empowers the SBA OIG to “conduct and supervise audits and investigations” into SBA programs, “recommend corrective action[,]” and report to the Attorney General whenever it believes “there has been a violation of Federal criminal law.”²⁹³ While the SBA OIG has issued reports about several of the issues covered by this Note,²⁹⁴ it merely has the statutory authority to recommend changes.²⁹⁵ Although one of the SBA OIG’s “guiding principles” is to conduct investigations and issue reports “defined by their [] timeliness,”

290. *WP Co.*, 2020 WL 6887623, at *5. Although the litigation was not over at this point because the SBA found additional PPP loan information—and attempted to withhold some of it—the SBA released the data relevant to this Part on December 1, 2020. *See WP Co. LLC v. U.S. Small Bus. Admin.*, CV 20-1240, 2021 WL 5881972, at *1–*2 (D.D.C. Dec. 13, 2021) (summarizing the background of these cases).

291. *See* 5 U.S.C. app. 3 § 2 (establishing the Offices of Inspector General); *id.* app. 3 § 12(2) (listing the agencies that have Inspectors General).

292. 5 U.S.C. app. 3.

293. *Id.* app. 3 §§ 2, 4(a)(5), (b)(2)(d).

294. *See supra* notes 93, 242 and accompanying text.

295. 5 U.S.C. app. 3 § 4. On the first day lenders began processing PPP applications, the SBA Inspector General published a white paper warning that “increased loan volume, loan amounts, and expedited loan processing timeframes may make it more difficult for SBA to identify red flags in loan applications” and calling for the SBA to put in place “sufficient controls.” U.S. SMALL BUS. ADMIN. OFF. OF INSPECTOR GEN., REP. NO. 20-11, WHITE PAPER: RISK AWARENESS AND LESSONS LEARNED FROM PRIOR AUDITS OF ECONOMIC STIMULUS LOANS 1 (Apr. 3, 2020), <https://perma.cc/DJ7H-53F7>. The Project on Government Oversight pointed out that the SBA “did not heed the watchdog’s warnings at that time.” Nick Schwellenbach & Ryan Summers, *Red Flags: The First Year of COVID-19 Loan Fraud Cases*, POGO (Apr. 15, 2021), <https://perma.cc/K6TE-QD46>.

sometimes these come too little, too late.²⁹⁶ For example, while the PPP began on February 15, 2020,²⁹⁷ and some individuals and firms began taking advantage of the program right away,²⁹⁸ the SBA OIG did not issue its first report regarding fraud in the pandemic loan programs until July 28, 2020.²⁹⁹ Resource deficiencies and low staffing at the SBA OIG have caused issues in its investigations of other SBA programs.³⁰⁰

Congress could appropriate additional funding to the SBA OIG to enable it to act faster than it currently does in detecting fraud and abuse in SBA programs.

VI. CONCLUSION

The Small Business Administration was established to assist small businesses through its contracting assistance and

296. About the Office of Inspector General, U.S. SMALL BUS. ADMIN., <https://perma.cc/3KMM-U5TX>; see James R. Richards & William S. Fields, *The Inspector General Act: Are Its Investigative Provisions Adequate to Meet Current Needs?*, 12 GEO. MASON U.L. REV. 227, 238 (1990) (“There are many examples of costly delays in Inspector General investigations because [] other federal law enforcement agencies could not provide timely assistance.”).

297. See Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 1102, 134 Stat. 281, 286 (Mar. 27, 2020) (codified at 15 U.S.C. § 636) (“[T]he term ‘covered period’ means the period beginning on February 15, 2020.”).

298. See, e.g., Complaint at 1–2, *United States v. Muge Ma*, 20 Mag 5202 (S.D.N.Y. 2020), <https://perma.cc/T4RD-GT99> (alleging that as early as March 2020, an individual received an \$800,000 PPP loan and over \$650,000 from the EIDL based on fraudulent tax documents, bank records, and payroll records).

299. See U.S. SMALL BUS. ADMIN. OFF. OF INSPECTOR GEN., SERIOUS CONCERNS OF POTENTIAL FRAUD IN ECONOMIC INJURY DISASTER LOAN PROGRAM PERTAINING TO THE RESPONSE TO COVID-19, OIG-20-16 (July 28, 2020), <https://perma.cc/Y875-6LZM> (“Our preliminary review reveals strong indicators of widespread potential fraud in the program.”). Although the SBA OIG issued a report on May 8, 2020 regarding the PPP, it did not mention fraud but rather dealt with the SBA’s initial implementation of the program. U.S. SMALL BUS. ADMIN. OFF. OF INSPECTOR GEN., FLASH REPORT: SMALL BUSINESS ADMINISTRATION’S IMPLEMENTATION OF THE PAYCHECK PROTECTION PROGRAM REQUIREMENTS, OIG-20-14 (May 8, 2020), <https://perma.cc/93XW-T46T>.

300. Mirit Eyal-Cohen’s Article discusses fraud and abuse within the SBA’s Small Business Investment Company (SBIC) program. Eyal-Cohen, *supra* note 28. Specifically, it points out that “[t]he responsibilities of the SBA’s investigatory staff exceeded its resources. Overload on the [SBA OIG] was a big part of why the SBA was impaired in investigating SBICs.” *Id.* at 45.

loan programs.³⁰¹ Too often, however, large, sophisticated entities profit from programs meant to help small firms. Statutory loopholes and fraud are wasteful of federal dollars, dearly cost the American taxpayer, and go directly against Congressional intent for the agency.³⁰² Although SBA programs are not without their successes,³⁰³ the fact of their continued fraudulent and improper utilization by large businesses calls for a change. The process by which Congress and the SBA create programs is fundamentally flawed: after something negative happens in society, Congress amends the Small Business Act, and leaves implementation of the program up to the SBA.³⁰⁴

When Congress passes small business assistance legislation too quickly, there are common and foreseeable problems across SBA programs.³⁰⁵ The resulting programs are short-sighted, riddled with loopholes, impact different races differently, and are left open to fraud.³⁰⁶ Congress could amend the Small Business Act to create a broad, enabling superstructure under which the SBA could make its own rules to address these problems.³⁰⁷ Only then will SBA programs fully favor the small businesses the agency was created to protect.

301. See Small Business Act, 15 U.S.C. § 631a (declaring congressional policy behind the SBA).

302. See *id.* § 631(b)(1) (“It is the declared policy of the Congress that . . . the Small Business Administration . . . should aid and assist small businesses . . .”).

303. See *supra* Part III.E.

304. See 15 U.S.C. § 634(b)(6) (stating that the SBA Administrator may make “rules and regulations as he deems necessary to carry out the authority vested in him by or pursuant to” the Small Business Act).

305. See *supra* Part IV.

306. See *supra* Part IV.

307. See *supra* Part V.A.