

COVID-19 Oversight and Enforcement

SMALL BUSINESS MONEY GRAB UNDER THE PAYCHECK PROTECTION PROGRAM BRINGS ENFORCEMENT RISKS | By: Matthew Lin and Scott Roybal

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The Paycheck Protection Program (PPP) provides a glimmer of hope to small businesses struggling to survive the COVID-19 pandemic, providing hundreds of billions in funding to assist small businesses impacted by the pandemic. The U.S. Small Business Administration (SBA) loan programs, including the PPP under the CARES Act, are only available to qualifying businesses that strictly comply with complex rules related to the size of the business, including its employee count, financial condition, affiliations, control and ownership, and industry classifications. Businesses that reflexively jumped at the SBA money grab without discipline or compliance are at risk of aggressive government enforcement that will surely follow.

Making misrepresentations to the government when applying for PPP funds may lead to severe civil and/or criminal liability. The Department of Justice, United States Attorneys' Offices, Inspectors General, and new enforcement bodies created by the CARES Act will prioritize investigation and prosecution of fraud and abuse related to CARES Act funds. Prosecutors have already begun prosecuting individuals for wrongfully taking or using PPP funds. Private whistleblowers will also look to bring claims under the False Claims Act (FCA) for alleged PPP fraud.

In addition, the SBA Office of Inspector General (OIG) is no stranger to aggressive enforcement actions, often bringing investigations against recipients of SBA funds that lead to criminal and civil actions. The Department of Treasury and SBA have stated that they will review all PPP loans in excess of \$2 million and any other loans as appropriate.

Businesses must understand the complex regulatory requirements when applying for PPP funds and loan forgiveness to avoid making unintended misrepresentations. Here are some steps PPP recipients can take to avoid legal pitfalls:

1. Ensure That All Representations are Complete and Accurate

Businesses applying for PPP loans and loan forgiveness must provide details about its business, including the number of employees before and after receiving PPP funds and their expenses related to payroll, rent mortgage payments, and utilities. Applicants must also provide documentation verifying this information. Material misrepresentations relating to any required information, including supporting documentation, can lead to liability.

2. Ensure That Certifications Are Truthful

Just like submitting a false statement or record to the government, making a false certification can subject a business to liability. PPP applicants must make a number of certifications in good faith, including that they meet the size requirements for PPP eligibility and that current economic uncertainty make the loan necessary to support the applicant's ongoing operations. Importantly, the SBA will deem any applicant as certifying in good faith that the loan was necessary if the loan was less than \$2 million or if the applicant repaid the loan in full by May 18, 2020.

3. Understand the Eligibility Requirements for CARES Act Relief

Eligibility requirements for PPP funds are complex and often counterintuitive. For example, some businesses may be required to count employees of other businesses under the SBA's affiliation rules when reporting their total number of employees. Businesses should seek counsel to fully understand the complex rules before submitting applications for PPP loans or loan forgiveness.

4. Avoid Using SBA Funding for Unauthorized Purposes

PPP funds must be used for specific purposes, including payroll, rent, mortgage payments, and utilities. Using PPP funds for unauthorized purposes may subject recipients to liability. Recipients who misuse funds may face further liability if they apply for PPP loan forgiveness because loan forgiveness applicants must certify that they used the funds for authorized purposes.

5. Keep Detailed Records of All Documents Related to PPP Applications and Follow-on Program Reporting

The SBA requires recipients of PPP funds to retain PPP documentation for six years after the loan is forgiven or repaid in full, and permit the SBA to access such files upon request. Retaining documentation is also a best practice for reducing enforcement risks, since it will provide an audit trail and help defend against allegations of misconduct.

Sheppard Mullin's COVID 19 Oversight and Enforcement Response Team helps our clients navigate the multifaceted scrutiny they face as a result of the government's COVID 19-related oversight and enforcement. Our team consists of attorneys experienced in regulatory compliance, agency oversight, congressional investigations, civil and criminal law enforcement and crisis management. It includes former prosecutors, high-level DOJ and DHS officials and congressional staff, as well as prominent white collar, IG defense and False Claims Act experts. We rely on our range of prior experiences to forecast oversight and enforcement priorities and action, and monitor the governmental response to the pandemic. In so doing, we help our clients identify opportunities, assess risks and protect their reputations. We help our clients make informed business decisions and, if necessary, defend their actions in the face of oversight agency, law enforcement, or public scrutiny.

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