



The U.S. government has recently embarked on a quiet but active campaign against Paycheck Protection Program (PPP) recipients believed to have submitted inaccurate information as part of their applications.

Although the government has long been [prosecuting](#) cases of larger-scale, outright PPP fraud, it now appears to be shifting its focus to cases involving more technical noncompliance with the Small Business Administration’s (SBA) complex [\(and often confusing\)](#) PPP regulations.

PPP funds were a lifeline for many small businesses, helping them to keep their workforce employed and cover essential expenses during the COVID-19 pandemic. The unprecedented business impact of stay-at-home orders, the desire to take advantage of the limited funds available, and conflicting early advice from the SBA and others concerning eligibility criteria all led to an “apply now, ask questions later” mentality that became the norm for

many.

There is a significant risk of civil [False Claims Act](#) (FCA) actions and criminal prosecutions, as well as the serious reputational damage typically accompanying such enforcement actions. Those who are in the enforcement crosshairs of the government—or who may find themselves there in the future—should, therefore, take proactive steps to understand and limit their legal and reputational exposure.

By way of a brief refresher, the basic loan eligibility [requirements](#) were as follows:

**Qualifying entities.** Small businesses, nonprofit organizations, veterans' organizations, tribal businesses, sole proprietors, independent contractors, and self-employed individuals were eligible to apply for funds.

**Business operation date.** The business needed to operate as of February 15, 2020.

**Employee count.** With a few exceptions, only businesses with 500 or fewer employees could apply. Setting aside waivers, the SBA factored in employees across all affiliated entities (controlled by one parent), including parents and subsidiaries, to calculate the employee count. Even controlling investors in a business could be considered affiliates of that business.

**Necessity.** Companies applying for PPP loans had to certify in good faith that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”

**Payroll costs.** The loans were earmarked to cover payroll costs, including salaries, wages, commissions, tips (capped at \$100,000 annually for each employee), employee benefits, and state and local taxes assessed on compensation.

**Other expenses.** The loan could also cover mortgage interest, rent, and utilities if those obligations were in place before February 15, 2020.

## **Enforcement Impact**

Between April 2020 and May 2021, the federal government approved 11.5 million individual loans to almost one million [separate applicants](#). Of the total \$793 billion of taxpayer funds disbursed, over \$760 billion (95%) were ultimately “forgiven,” effectively converting these purported loans into free money.

[Pressure](#) on the government to examine potentially historic levels of PPP fraud has understandably been mounting. In response, the U.S. Department of Justice (DOJ) recently began sending out notices of FCA investigations to those it believes engaged in PPP fraud. It has also been mailing civil investigative demand letters to those it believes might have engaged in such misconduct.

The letters typically request that the target companies “voluntarily” preserve broad swaths of information, including communications on PPP loan applications, all communications with the SBA, internal communications on whether to apply for a PPP loan, and documentation of the companies’ financial condition and PPP loan eligibility.

## **Actionable Steps**

According to the SBA inspector general’s 2022 [report](#), at least 70,000 PPP loans are potentially fraudulent. Entities that receive letters from authorities about their loans or are worried about possible exposure or the breadth of the government’s enforcement sweep should consider several practical actions:

**Gather and preserve documentation.** Work with counsel to carefully collect (and note the collection of) documents related to the PPP loan, including applications, financial records, and communications. This can demonstrate compliance with the program’s requirements—establishing specific, adverse impacts of COVID-19 on the entity, cost-saving measures undertaken, payroll numbers, economic necessity prompting the loan application, application oversight, and appropriate use of funds.

**Consult qualified legal counsel.** Reach out to counsel that is experienced in federal investigations and white-collar crime for guidance on navigating the investigation, explaining any potential discrepancies, protecting your rights, and minimizing legal or reputational fallout.

**Do a self-review for compliance.** Conduct an honest internal review to determine whether you can prove that use of the PPP funds followed the program’s guidelines. Identify any discrepancies or issues that must be addressed.

**Prepare for possible outcomes.** Understand the potential consequences of the investigation, which could span negotiation with authorities, fines, repayment of funds, and criminal charges.

**Communicate internally.** Keep critical stakeholders within the company informed about the investigation and any steps being taken. Transparency can help maintain trust and morale within the organization.

PPP loans were disbursed for the commendable objective of mitigating the economic impact of the pandemic and supporting the recovery of small businesses across the country. However, and [as we advised](#) when the PPP program was first launched, it helps to keep the perspective of a potential prosecutor in mind.

To the extent oversights or mistakes are identified, the entity must prepare a persuasive explanation to avoid the significant civil, criminal, and reputational damage that’s likely in the wake of unwanted federal attention.

As with so many situations involving compliance and government enforcement, proactive investigation and honest self-evaluation today will help keep the enforcers at bay.

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