

In extremis — PPP Money Is Not “Free” So Applicants & Recipients Need to Beware

As most of the population is aware, to try and preserve the economy and businesses viable during the COVID-19 pandemic, congress passed the CARES Act. That bill included the Payroll Protection Program (PPP), in which small businesses could receive government funded loans to cover certain payroll costs to help employee finances during the shutdown that the country experienced in 2020.

With this federally financed program, also came requirements, policies, procedures, and anti-fraud tools that have resulted in investigations and enforcement actions by the U.S. government. The CARES Act created a special inspector general and the Department of Justice (DOJ) established a “CARES Act Task Force” who have been auditing, investigating, and, where appropriate, prosecuting PPP recipients who broke the rules. Understanding what one “signed up for” and being prepared to comply with, and meet the obligations of, the PPP are paramount to protecting your business and, as an owner or officer, your freedom and finances.

The PPP Loans — Some Basics and Background

PPP loans came in two tranches (the first and second draws). One key to the program was that eligible borrowing employers could obtain loan forgiveness, meaning that if the employer qualified, it would not need to repay the loan. This loan forgiveness was conditioned on, among other things, the employer meeting the following obligations during the 8- to 24-week period following each loan disbursement:

1. The employer’s employee *and* compensation levels were required to be maintained;
2. Those loan proceeds were required to be spent on payroll costs and other eligible expenses;
3. A minimum of 60 percent of the proceeds had to be spent on payroll costs; and
4. An application for loan forgiveness needed to be timely made.

As those in the government contracts universe are aware, the receipt or application for financial proceeds from the federal government include various certifications by the applicant/recipient. Up front, the applicants seeking the proceeds signed and certified in their loan application to, among other things:

I have read the statements included in this form, including the Statements Required by Law and Executive Orders, and I understand them.

* * *

The **Applicant is eligible** to receive a loan under the rules in effect at the time this application is submitted that have been issued

* * *

All loan proceeds will be used only for business-related purposes as specified in the loan application and consistent with the Paycheck Protection Program Rules including the prohibition on using loan proceeds for lobbying activities and expenditures. If Applicant is a news organization that became eligible for a loan under Section 317 of the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, proceeds of the loan will be used to support expenses at the component of the business concern that produces or distributes locally focused or emergency information. If the Applicant is an Internet-only news or periodical publisher that became eligible for a loan under Section 5001 of the American Rescue Plan Act of 2021, the proceeds of the loan will be used to support expenses at the component of the business or organization that supports local or regional



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I further **certify** that the information provided in this application and the information provided in all supporting documents and forms **is true and accurate in all material respects**. I understand that **knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 18 U.S.C. 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 U.S.C. 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a federally insured institution, under 18 U.S.C. 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.**

Likewise, as part of the loan forgiveness application, the applicant/recipient certified to, among other things:

The authorized representative of the Borrower certifies to all of the below by initialing next to each one

The dollar amount for which forgiveness is requested (which does not exceed the principal amount of the PPP loan):

- was **used to pay business costs that are eligible for forgiveness** (payroll costs to retain employees; business mortgage interest payments; business rent or lease payments; business utility payments; covered operations expenditures; covered property damage costs; covered supplier costs; or covered worker protection expenditures);
- includes all applicable reductions due to decreases in the number of full-time equivalent employees and salary/hourly wage reductions;
- includes **payroll costs equal to at least 60% of the forgiveness amount;**
- for any owner-employee (with an ownership stake of 5% or more) or self-employed individual/general partner, does not exceed 2.5 months' worth of compensation received during the year used to calculate the PPP loan amount, capped at \$20,833 per individual in total across all businesses.

I understand that **if the funds were knowingly used for unauthorized purposes, the federal government may pursue recovery of loan amounts and/or civil or criminal fraud charges.**

The Borrower has accurately verified the payments for the eligible payroll and nonpayroll costs for which the Borrower is requesting forgiveness.

* * *

The information provided in this application and the information provided in all supporting documents and forms **is true and correct in all material respects**. I understand that **knowingly making a false statement to obtain forgiveness of an SBA-guaranteed loan is punishable under the law, including 18 U.S.C. 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 U.S.C. 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a Federally insured institution, under 18 U.S.C. 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.**

(Emphasis added).

The foregoing language creates unique, federally derived, exposure for applicants and recipients of PPP (and for that matter other) funds. Upfront understanding of those risks is critical to plan and mitigate liability and exposure. Reading the "fine print" and knowing what one is getting into is critical to not only understand what one is "signing up for" but also allows for planning and documentation to avoid such risks.

RECOGNITION OF POTENTIAL EXPOSURE & RISKS

So, you may ask, what is the concern? Applying for, and receiving, federally funded monies, particularly given the types of certifications above, can subject the applicant to the both the Civil and Criminal False Claims Acts (the FCAs). Summarily, a violation of the FCAs can expose the applicant to criminal and civil (financial and administrative) penalties including jail time and the possibility of suspension or debarment precluding the employer and its signatories and officers from continuing to have access to government contracts.

While the PPP program has been widely reported as successful in helping employers and employees alike, to say nothing of the economy, one concern that has remained is the traditional situation where “free money” is offered and the criminal elements coming out of the woodwork to pursue those proceeds. The PPP is no different. In pursuing the “lifeline” that was the PPP program, many employers failed to fully read the fine print or read it and ignored it in signing their applications. Stories are starting to come out about fraudsters taking advantage of the PPP despite not qualifying therefor.

CURRENT HEADLINES — Extreme Examples

While the PPP monies came out in mid-to-late 2020, by March 2021, just one year after the CARES Act was passed (but before PPP funds were distributed), the DOJ had announced that it had investigated over half a billion dollars in fraud and charged 474 persons with monetary theft-related crimes. Many of those persons were PPP fund recipients. Since then, more cases have been pursued. Just announced by the Department of Justice on November 29 is the case of Lee Price III, who pled guilty to charges of wire fraud and money laundering arising out of his submission of two fraudulent PPP loan applications for three entities, in which:

Price falsely represented the number of employees and payroll expenses in each of the PPP loan applications. To support the fraudulent PPP loan applications, Price also submitted fraudulent tax records and other materials. Illustratively, with respect to the 713 Construction LLC loan application, Price applied in the name of an individual who died shortly before the application was submitted. After he received the PPP loan funds, Price spent the money on, among other purchases, a Lamborghini Urus, a Ford F-350 truck, a Rolex watch, and to pay off a loan on a residential property. The Department of Justice, along with law enforcement partners, seized over \$700,000 of the funds Price fraudulently obtained.

<https://www.justice.gov/opa/pr/two-men-plead-guilty-multimillion-dollar-covid-19-relief-scheme>.

While perhaps an extreme case, the DOJ COVID-19 Fraud Enforcement Task Force and related officials, are making significant efforts to investigate and pursue hucksters such as Mr. Price. There are a plethora of other cases that have been prosecuted or pled out, and undoubtedly there are many more to come.

CONCLUSION

While the PPP program has expired and should have already been spent by the recipients, this is not the end of the program or exposure. Recipients need to make sure they have made proper and accurate certifications, sought forgiveness timely, and that their spending and supporting documentation are above board and accurate.

As critically, this is a good reminder that FCA liability is not limited only to the PPP program but to any situation where any application for payment is made and/or federal monies received under false or fraudulent circumstances. Any concerns that a recipient may have should be investigated and considered with legal counsel now, so that actions or mitigation efforts can be taken now, and not when the government comes knocking at the door.
