

PPP Forgiveness Application Certification May Lead to Enforcement Headaches

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I. Introduction

The Paycheck Protection Program (PPP) was enacted as part of the Coronavirus Aid, Relief, and Economic Security (CARES) Act on [March 27, 2020](#). Unfortunately, the path to providing PPP loan relief has not been smooth. Instead, it has been paved with uncertainty. While the CARES Act laid out specific requirements for PPP eligibility and relief, the Small Business Administration (SBA) and Department of Treasury have since issued incremental and at times untimely and inconsistent guidance.

Since its enactment, there has been a flurry of activity associated with the preparation of applications for PPP loans and loan forgiveness, including the issuance of PPP interim final rules, guidance and Frequently Asked Questions (FAQs). While the SBA issued an initial draft application in advance of the date that applications could begin to be submitted, that form was substantially changed and only released the morning that borrowers were eligible to submit, and lending organizations were eligible to receive and process, PPP loan applications.

Guidance on how to interpret the act's requirements for basic aspects of the program, including borrower size, eligibility, affiliation and allowability of costs under the loan and for forgiveness has been issued iteratively. Indeed, borrowers have had to apply while the provisions and guidance on their interpretation remained ambiguous or potentially contradictory. Those that applied and were fortunate enough to have received loans, have since had to proceed to expend those funds pending the issuance of guidance regarding which costs would be allowable and to what extent so that they might expend their loaned funds properly and obtain forgiveness of the loans.

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Due to the exigent circumstances being faced by many in this environment, these delays in clarification and simultaneous requirements to expend monies received under the PPP, have forced borrowers to proceed. Many have done so cautiously, relying on agency guidance that may or may not ultimately be determined to be consistent with the act.

The agency guidance provided states that:

Borrowers and lenders may rely on the guidance provided in this document as SBA's interpretation of the CARES Act and of the Paycheck Protection Program Interim Final Rules. The U.S. government will not challenge lender PPP actions that conform to this guidance and to the PPP Interim Final Rules and any subsequent rulemaking in effect at the time.

The agency guidance also noted that:

This document does not carry the force and effect of law independent of the statute and regulations on which it is based.

Given ongoing concerns with the direction issued regarding PPP matters, and this contradictory guidance on the ability of a PPP borrower to rely on the guidance provided, there are likely to be issues down the road regarding borrower's statutory eligibility and entitlement to PPP loans and forgiveness and federal investigator's concerns that such assertions may contain false claims regarding borrower's assertions of eligibility or efforts to seek entitlement.

II. PPP Forgiveness Certification

The PPP Forgiveness Application form, issued for the first time on May 15, 2020, contains express and implied certification requirements. Specifically, the form includes places for the borrower to insert its calculations of the costs that it has incurred and for which it would seek forgiveness. In addition, the form includes an express set of "Representations and Certifications on Behalf of the Borrower," which require the authorized representative of the borrower, to certify "to all of the below."

This form seeks express certifications that the borrower:

- Incurred the proper type and dollar amounts of costs for which forgiveness is being sought
- Took appropriate reductions from those amounts where it (a) decreased full-time equivalent employees and/or (b) there were applicable salary/hourly wage reductions
- Includes no more than 25% of the requested amount for forgiveness for nonpayroll costs
- Did not "knowingly ... [use loan funds] for unauthorized purposes"

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- Accurately verified its payments for which forgiveness is being sought
- Has and will submit to the lender information consistent with what it has and will submit to the IRS, state and workforce agencies
- Agrees to provide additional information where requested by the SBA for purposes of evaluating its eligibility for the loan and loan forgiveness or risk being found ineligible for the loan and denied loan forgiveness.

Significantly, the form also requires the borrower to certify that it has provided accurate and complete information and done so in good faith, without any intent to mislead, and that it is aware of the significant penalties it may be subject to in the event it is determined to have failed to comply with these requirements:

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 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 USC 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 USC 1014 by imprisonment of not more than 30 years and/or a fine of not more than \$1,000,000.

Whether and to what extent a borrower may be eligible for and receive forgiveness for its PPP loan clearly depends on the information provided in the forgiveness application *and* the initial loan application. This information must be accurate and complete as the application conditions forgiveness on whether the borrower provided true and correct information and documentation its PPP loan application and this forgiveness application for all “material” aspects of the applications. As discussed in the next section, enforcement authorities are carefully watching all aspects of PPP administration.

III. PPP Enforcement

In the wake of passage of the CARES Act and PPP, in March 2020, the U.S. Department of Justice (DOJ) issued directives to senior DOJ personnel, law enforcement agency heads and all U.S. attorneys, directing DOJ prosecutors to prioritize the detection, investigation and prosecution of illegal conduct related to the pandemic. The fallout from the COVID-19 pandemic has been fluid and ongoing, and the government’s response, at the federal, state and even local levels has been swift. In March and April alone, the DOJ initiated more than a dozen criminal and civil actions involving COVID-19 related fraud, and the PPP was not immune from this law enforcement scrutiny.

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As in the aftermath of the great recession's Troubled Asset Relief Program and American Recovery Reinvestment Act (TARP) stimulus aid packages, the DOJ, the U.S. Securities and Exchange Commission (SEC) and other federal enforcement agencies are on the lookout for any abuses of the PPP. Indeed, the DOJ has reported that, by the end of April, it had already begun criminal investigations of PPP loan applications and identified possible fraud by certain borrowers. To aid its investigation, the DOJ obtained the assistance of 15 to 20 of the largest loan processors and the SBA to review the vast amount of PPP loan data. To date, this joint review has found several red flags for follow up investigations among both approved and rejected PPP loan applications.

The DOJ has not wasted any time in making examples of PPP-related bad actors. By May 13, the DOJ had already announced at least three separate criminal actions stemming from PPP fraud. One involved borrowers setting up sham companies and falsifying loan applications to obtain PPP funds. Another involved a PPP loan recipient using the loan proceeds to purchase \$85,000 in jewelry and to pay \$40,000 for child support, neither of which were authorized uses of PPP funds under the CARES Act. The third criminal action involved a PPP borrower falsely claiming to have 250 employees with an average monthly payroll of \$4 million on his application for a \$3 million PPP loan. According to the DOJ's criminal complaint in that matter, there were no state employment records of any employee wages paid by the defendant or his company.

While the above-mentioned cases are egregious examples of fraud, the more important question for borrowers will be how criminal and civil enforcement agencies will view the much closer calls that legitimate businesses will be making regarding their PPP loans, such as making certifications regarding necessity, eligibility, loan amount, forgiveness and on how those companies used the PPP loan proceeds. For example, when submitting a PPP application, all borrowers must certify in good faith that "[c]urrent economic uncertainty makes this loan request necessary to support then ongoing operations of the Applicant" – also known as the "hardship certification." Knowingly making a false or misleading statement or certification in connection with a PPP loan, such as with the hardship certification, could expose to the borrower to a host of criminal and civil liability under various federal statutes, many of which are specifically listed in the PPP Forgiveness Application mentioned above, such as false statements (18 U.S.C. § 1001), false statements to the SBA (18 U.S.C. § 645), the False Claims Act (31 U.S.C. § 3729), the Financial Institution Reform, Recovery, and Enforcement Act of 1989 (FIRREA, 12 U.S.C. § 1833a), or false statements in connection with a loan application (18 U.S.C. § 1014), among others.

The SBA has issued 47 FAQs, or informal guidance, to assist borrowers in evaluating whether or not they qualify for PPP loans, with the last two FAQs providing key guidance on important safe harbors. FAQ #46 advises that any borrower (including its affiliates) who received a PPP loan of \$2 million or less will be deemed to have made this required hardship certification in good faith. This does not mean that borrowers who sought and received less than \$2 million will not be subjected to any scrutiny. This only means that

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borrowers with these smaller PPP loans won't be audited by the SBA in relation to the necessity certification. These borrowers still may be investigated by the DOJ, the SEC or another enforcement agency regarding fraud in their PPP loan application or their use of the associated loan proceeds. And, if they are government contractors, they may be subjected to potential debarment or suspension if they are indicted or otherwise determined to have engaged in fraud in their applications or the improper use of the PPP loan funds.

FAQ #46 provided further that, while borrowers with loans of more than \$2 million may still have an adequate basis to make their certifications, those loans will be subject to review by SBA for compliance with program requirements, and if the "SBA determines that the that a borrower lacked an adequate basis for the required certification concerning the necessity of the loan request, SBA will seek repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for loan forgiveness." The SBA has advised that if the borrower repays the loan after receiving notification regarding the SBA's determination, it will not pursue administrative enforcement or referrals to other agencies based on its determination with respect to the hardship certification. Similar to the case of borrowers with loans less than \$2 million, however, repayment of a loan that was \$2 million or more does not necessarily preclude an investigation into whether fraud was involved in the loan application or other administrative actions.

The most recent FAQ, FAQ #47, extended the safe harbor for return of money received under the PPP program to May 18, 2020. The SBA previously advised that any borrower who applied for a PPP loan and repaid the loan in full by May 14, 2020 would be deemed by the SBA to have made the required certification concerning the necessity of the loan request in good faith. The new guidance allows PPP borrowers additional time to determine whether they satisfy the need requirement for PPP funding, or whether they should return the proceeds without incurring any penalties.

Recipients of PPP loans above and below \$2 million can expect to face scrutiny from a variety of enforcement bodies. The CARES Act created new authorities to investigate the administration of CARES Act related funding: (1) a Pandemic Response Accountability Committee (PRAC), consisting of 21 Inspectors General from various federal agencies, has been tasked with preventing and detecting fraud, waste, and abuse; (2) a Special Inspector General for Pandemic Recovery (SIGPR) has been established to investigate suspected PPP loan fraud; and, (3) a COVID-19 Congressional Oversight Commission will study the impact and effectiveness of the PPP. While the DOJ, the SEC, the SIGPR, and congressional commission, can all issue subpoenas for documents and testimony, only the DOJ and SEC can levy civil penalties, and only the DOJ can prosecute the violators criminally.

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Accordingly, regardless of the size of the PPP loan, the size of the borrower, or which enforcement body is doing the investigating, borrowers that applied for and those that received loans should take steps to protect themselves from future liability. It is critical that borrowers be able to support their eligibility for the PPP loan, as well as the accuracy of the underlying data they used to support the representations made in the application. Borrowers should ensure that all supporting documentation, such as financial forecasts and any board and/or management minutes reflecting the deliberations made and information relied upon, is secured and readily available. Finally, publicly traded companies should verify that the information provided to the SBA in the PPP loan application is consistent with any statements made to investors or filings made to the SEC or other federal, state or local government authorities.

IV. Conclusion

The borrower *and* the person signing the certifications must take good faith steps to verify the accuracy and completeness of its submissions. Indeed, the form makes the signer of the forgiveness application subject to personal liability for any false statement(s) contained in these documents. The certification cites criminal and civil false statement statutes for the requirement that the Borrower and its representative must provide accurate and complete information: 18 USC 1001 (false statement) and 3571 (criminal false statement), 15 USC 645 (securities false statement), and 18 USC 1014 (loan application false statement). A knowing or willful violation – such as the provision of incomplete information that responds to questions, but that does not disclose relevant information and would potentially lead the evaluator to a different result, may raise false statement and false claim concerns.

Accordingly, borrowers and their representatives executing the forgiveness form must exercise diligence in verifying the accuracy and completeness of their prior and current submissions. Given that these applications and the underlying loans may be subjected to audit and further investigation, you should engage in efforts to assemble and document the basis for your submissions in both the initial loan application and the forgiveness application to preserve evidence of your contemporaneous good faith efforts and deliberations.

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