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LEGAL UPDATES

Risks Abound: Shield Yourself From Liability for Your PPP Loan

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A Florida business owner facing criminal charges serves as a cautionary tale: think twice before using Payroll Protection Program funds to upgrade to a Lamborghini.^[1] And, think a third time if you believe you are liability-free simply because you were more judicious than that with your loan funds.

The Small Business Administration rapidly implemented the Payroll Protection Program, or PPP, to provide financial life support to businesses weathering the COVID-19 storm. During the sometimes bumpy rollout, the SBA issued various sets of guidelines and modifications to the program. Although challenges are to be expected with rapid administration of a program of this size, an air of uncertainty remains around enforcement of the program's rules. Adding to that uncertainty is the uptick in investigations as well as civil and criminal actions being brought against PPP loan borrowers.

As loan funds run dry and forgiveness applications are submitted, expect an increase in those investigations and enforcement actions. The PPP loan program ended in early August, and it has been reported that the Department of Treasury would begin granting loan forgiveness in early October. For borrowers who received PPP loan disbursements in April, they may already be or may soon be eligible for loan forgiveness. Because of scrutiny from the media and Congress, as well as reports of extreme cases of fraudulent abuse of the program, we have likely only seen the tip of the iceberg for civil and criminal actions against PPP borrowers.

Expect no industry to be spared. Actions have already been brought against businesses of all kinds, including in the medical and technology industries, vehicle rental companies and movie production firms.

Many of these cases have been low-hanging fruit for DOJ prosecutors. Cases have involved such obvious fraud as the submission of falsified tax documents different from those submitted to the IRS, and misrepresentations about the incorporation documents of the business, the felony history of the applicant and the immigrations status of the applicant. One extreme case involved a \$17 million interstate scheme where nine individuals in Florida and Ohio accepted kickbacks in exchange for submitting over 90 PPP loan applications.^[2] A common fact in

Related People

Susan Gaertner

Senior Counsel

Minneapolis

612.632.3355

susan.gaertner@lathropgpm.com

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many cases is businesses funneling PPP loan money toward personal expenditures, such as home mortgages, personal credit cards, student loans, jewelry and luxury cars.

These kinds of enforcement actions do not provide much guidance to the majority of businesses, which did not falsify tax, employee or other records when applying for a PPP loan. But, the swift initiation of these early cases is an indicator that more are to come.

Importantly, none of the cases have involved the most difficult legal issue with the program. Every applicant was required to certify that the loan was “necessary” for the business to continue its operation. How strictly the SBA intends to interpret this requirement remains to be seen and may open the floodgates for future civil and criminal actions.

With the prospect of expensive civil penalties and the possibility of criminal prosecution on the horizon, borrowers of PPP loans should begin preparing now:

- **Maintain your records.** A business will need to provide the government all documents and records that were relied on by the borrower at the time of applying for the loan. Additionally, a business will need to provide records that demonstrate the truth of any employee, tax or incorporation information. The business will also need to provide proof that the funds were necessary and used properly. The law requires that these records to be kept for at least six years.
- **Diligence is critical.** Look for inaccuracies in *any* reported information. Providing the wrong NAICS code, the wrong franchise code or any other inaccurate information may raise red flags to government entities conducting a review, even if the mistake is not directly relevant to the applicant’s eligibility for the loan or its forgiveness.
- **The loan amount may not matter.** The SBA has issued guidance indicating that any loan over the amount of \$2 million would come under automatic review.^[3] The SBA did not provide guidance about what that “review” would entail, but recipients of such loans should be braced for increased scrutiny and a higher likelihood of an investigation. Notably, the guidance does state that the SBA has the discretion to review any loan, so those businesses that received less than \$2 million are not in the clear. Numerous criminal actions have already been brought by the DOJ against borrowers well under the \$2 million threshold.
- **Keep up-to-date with legal changes.** The SBA has tweaked the rules of the program numerous times since it began in April. Although a business may have been eligible for a loan and loan forgiveness at one point, it may no longer be. Be aware of the current parameters in order to understand your liability risk.
- **Know when to seek legal advice.** Do not expect that your business has no concerns because you have not yet received a Civil Investigatory Demand or Search Warrant. The SBA, Department of Treasury and lending institutions are all reviewing applications for loans and loan forgiveness. If you hear that your loan is under review, your business may be in the preliminary stages of an investigation. React accordingly.

For more information, please contact Susan Gaertner, Thomas Pacheco, Litigation and Dispute Resolution Practice Group Chair Matthew Jacober or your regular Lathrop GPM contact.

[1] <https://www.justice.gov/opa/pr/florida-man-who-used-covid-relief-funds-purchase-lamborghini-sports-car-charged-miami-federal>.

[2] <https://www.justice.gov/opa/pr/nine-charged-24-million-covid-relief-fraud-scheme>.

[3] <https://www.sba.gov/sites/default/files/2020-07/PPP%20Loan%20Data%20-%20Key%20Aspects-508.pdf>.