



Paycheck Protection Program: After the Pay Comes the Chase

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I. Federal Stimulus and Oversight

On March 27, 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which included among its provisions the Paycheck Protection Program (PPP). The PPP authorizes the Small Business Administration (SBA) to guarantee up to \$349 billion in forgivable loans to small businesses. On April 23, 2020, Congress added another \$310 billion to PPP funding. As a result of this and other programs passed in response to the COVID-19 pandemic, many businesses, for the first time, are business partners with the federal government. Companies otherwise unfamiliar with federal oversight and enforcement must carefully consider their compliance with PPP terms and interpretations, or risk facing allegations of fraud.

Because of the volume of the PPP program, and the speed with which applications are submitted and funds are disbursed, the government will employ what is known as a “pay then chase” method of fraud enforcement. Most commonly seen in federal healthcare programs, especially Medicaid, the “pay then chase” idea accepts on the front end that some improper funds will be paid out, and that fraud will only be identified and punished retroactively. Under a pay then chase model, the penalties are harsh, in theory deterring wrongdoing from the outset.

Numerous commenters have concluded that PPP funds will be an area ripe for government investigation. PPP loans are based on applications subject to the penalty of perjury and are otherwise subject to federal fraud statutes. Companies submitting requests for funding, and later loan forgiveness, face potential exposure under federal law, including criminal statutes, such as 18 U.S.C. § 1001 (submitting false statements), 18 U.S.C. § 1014 (false statements to the SBA), 15 U.S.C. § 645 (SBA fraud), 18 U.S.C. 371 (conspiracy to defraud the United States), and the False Claims Act. The Department of Justice has already announced that it will make COVID-19-related fraud a high enforcement priority.

II. Lessons from TARP

The Troubled Asset Relief Program (TARP), passed in response to the global financial crisis in 2008, is the closest modern analogue for PPP. TARP authorized the federal government to purchase certain troubled or critical assets, with the goal of stabilizing the financial markets. As is the case with PPP, large sums of money were disbursed in a relatively short period of time amidst substantial market uncertainty and without the time to develop robust guidance for participants.

In the years after TARP, there was a wave of civil and criminal enforcement actions against recipients of

the program funds. Like the PPP, TARP built in a number of oversight mechanisms, including the establishment of an independent inspector general with subpoena powers and other investigatory authority. The Department of Justice prioritized investigation of alleged fraud related to TARP and worked closely with the inspector general to investigate fraud and abuse.

A key weapon in the government's arsenal for punishing waste and abuse under TARP was the False Claims Act (FCA). The FCA, which dates to the Civil War era, imposes liability on companies and individuals for submitting false claims for funds to the federal government. Its breadth and scope are far-reaching, especially in the healthcare and government contracting sectors where it is ordinarily employed. The FCA is incredibly punitive, even in its civil iteration, allowing for fines of \$10,781.40 to \$21,562.80 per false claim, plus treble damages. TARP participants faced FCA claims for actions like misrepresentation of financial need or uses and non-compliance with program terms. Even second-order participants, like those who billed vendors who received TARP funds or made misrepresentations affecting TARP funds disbursed to others, found themselves in the enforcement crosshairs. After the passage of TARP, the federal government recovered billions of dollars from entities and people that it accused of fraud and abuse.

III. Key Takeaways for Employers

For many companies outside of the healthcare and contracting areas, the PPP is the first time they will have real exposure to federal enforcement. Companies should not expect to fly below the radar due to their size. Historically, DOJ has not hesitated to bring its full enforcement power to bear against small companies and individuals. Accordingly, now is the time to take steps to protect yourself and your company from any scrutiny.

a. Carefully document your actions and steps to comply.

FCA and other federal investigations may occur years down the road—and sometimes have been ongoing for a substantial period before you even become aware of them. The people most involved with this process now may no longer be with your company, or their recollections may fade with the passage of time. It is important to take the time now to thoroughly document your application process, including the underlying information and guidance that informed your application. Likewise, thoroughly document the uses of these funds. Keep these documents specially identified, and keep them for at least seven years after the later of the use of the funds or the loan forgiveness so that, if an investigation were to occur, it would be easy to locate them. This could save valuable time and money when responding to an inquiry years later.

b. Stay current with PPP interpretations from the government and your bank.

Because the passage of the CARES Act and implementation of the PPP occurred so suddenly, the Department of the Treasury and other federal entities have been issuing near-daily clarifications and interpretations to guide banks and borrowers. Just because your company has already submitted an application or received funds does not mean your obligation to comply with subsequently-issued guidance has terminated. Continue monitoring guidance and rules as they are issued. In addition, communicate regularly with your financial institution regarding its internal processes and requirements. If issues arise after the disbursement of funds, the financial institution may be able to help you resolve them proactively.

c. Check your insurance coverage.

Now is a good time to review your D&O and umbrella policies. If those policies do not include coverage for government investigations and enforcement actions, or even criminal investigations, you should consider obtaining coverage information from your insurer. Policies can cover the actual payout to the

government for any fraud finding or settlement, although these policies can be quite expensive. FCA and other government investigations can themselves be incredibly costly. Accordingly, a policy covering defense expenses may be a more cost-effective way to insure against the risk of a subsequent enforcement action.

d. Establish whistleblower best practices.

Many FCA cases begin with a relator, or whistleblower—the FCA incentivizes insiders to alert the government to alleged wrongdoing by providing substantial recoveries to relators in successful cases. Companies dealing with workers in this difficult economic circumstance do well to remember that any current or former contractor or employee is a potential whistleblower. Best practices for managing potential whistleblowers include: (i) maintaining an adequate internal reporting system adjusted to the company's circumstances; (ii) promptly and thoroughly investigating internal reports of issues; and (iii) maintaining appropriate communication with workers to demonstrate how the company is maintaining a culture of compliance. Where possible, conducting exit interviews of departing employees may also identify employees' concerns or, where no allegation is made, create a record that the employee left without raising a concern. For those who may be government contractors, be aware of expectation to self-report to government instances of potential fraud.

IV. Conclusion

The Paycheck Protection Program is a vital lifeline for many businesses. However, applicants must plan to face scrutiny comparable to a government contractor over the use of government funds. PPP investigations and actions may occur months or years down the road, in an unpredictable economic and political environment. Attorneys at Williams Mullen can help you and your team take proactive measures now to help reduce the risk of enforcement exposure.

Please note: This alert contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not meant to be and should not be construed as legal advice. Readers with particular needs on specific issues should retain the services of competent counsel.

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