

Could Retention of PPP Loan Funds Create False Claims Act Liability'

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PRACTICES False Claims Act and Qui Tam Defense, Corporate, Finance

Updated on May 6, 2020

The Paycheck Protection Program (“PPP”) is intended to provide nearly \$700 billion of economic relief to small businesses adversely affected by COVID-19. Those eligible for the program include businesses deemed small businesses by Small Business Administration (“SBA”) standards, certain non-profits, veterans’ organizations, sole proprietors, self-employed individuals, independent contractors, and other businesses meeting size standards based on their North American Industry Classification System code.

After the program’s initial allotment of \$350 billion was exhausted in a mere two weeks, the revelation that many [large and/or public companies](#) received millions in loans while thousands of small businesses’ applications were still pending caused public outcry. Over two dozen companies have since [announced](#) that they were returning their loans. The voluntary return of funds coincided with public comments by U.S. Treasury Secretary Steven Mnuchin promising a “full review” before forgiving any loan in excess of \$2 million as well as new guidance from the SBA, which noted that (1) PPP borrowers had to certify that the current economic uncertainty made their loan request necessary to support ongoing operations, and (2) any borrower that returned PPP loan funds in full by May 14, 2020 would be deemed to have made that certification in good faith.

This raises the issue of whether retaining PPP loan funds could subject a company to liability under the False Claims Act.

As we have [previously discussed](#), the federal government will be cracking down on fraud during the COVID-19 pandemic. The Department of Justice has also [affirmed](#) that it remains “committed to pursuing” violations of the False Claims Act, 31 U.S.C. §§ 3729 *et seq.* (“FCA”), “especially during this critical time as our nation responds to the outbreak of COVID-19.”

The FCA imposes liability for knowingly presenting a false or fraudulent claim or making a false record or statement material to a false or fraudulent claim. A defendant can also be liable under the FCA for a “reverse false claim” if it knowingly makes or uses a false record or statement for the purpose of avoiding or decreasing an “obligation” owed to the federal government. 31 U.S.C. § 3729(a)(1)(G). An obligation includes “the retention of an overpayment.” *Id.* § 3729(b)(3). Generally speaking, an “overpayment” means any funds that a person or entity receives or retains to which that person or entity is not entitled. 42 U.S.C. § 1320a–7k(d)(4)(B).

Last week, the SBA provided additional guidance for business entities applying for PPP loans by issuing several interim final rules and updating its PPP [Frequently Asked Questions \(“FAQs”\)](#). We outlined the details of the latest rule as well information about previous PPP guidance [here](#). But the FAQs and [an interim final](#) rule issued on April 28, 2020 include clarifications about PPP eligibility with potential “reverse false claim” implications. Collectively, they state:

- “**All borrowers must assess their economic need** for a PPP loan under the standard established by the CARES Act and the PPP regulations at the time of the loan application.”
- Borrowers “must certify in good faith that their PPP loan request is necessary. Specifically, before submitting a PPP application, all borrowers should review carefully the required certification that ‘current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.’”
- “Borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business.”
- “It is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification.”
- “Lenders may rely on a borrower’s certification regarding the necessity of the loan request. Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 14, 2020 will be deemed by SBA to have made the required certification in good faith.”¹
- The May 14, 2020 repayment deadline serves as a limited safe harbor “to ensure that borrowers promptly repay PPP loan funds that the borrower obtained based on a misunderstanding or misapplication of the required certification standard.”

Thousands of businesses had already submitted loan applications before the above guidance was issued. While the FAQs explain that borrowers may rely on the laws, rules, and guidance available at the time they submitted their application, they also suggest that the latest guidance merely clarifies earlier guidance that was published on April 2, 2020 (discussed [here](#)). In addition, U.S. Treasury Secretary Steven Mnuchin responded to companies returning PPP loans by [admonishing](#) large companies that received PPP funds, stating that the purpose of the PPP was “to help small businesses,” “not social welfare for big business.” Further, the SBA has since [announced](#) that it will work with the Department of the Treasury to automatically review all loans in excess of \$2 million, as well as other loans as appropriate, following submission of a borrower’s loan forgiveness application.

Thus, the relevant question for all borrowers is whether the federal government could retroactively interpret some companies’ retention of PPP loan funds as “retention of an overpayment”—that is, funds the company was not entitled to retain given its economic need at the time it submitted its loan application. Such an interpretation could subject companies to “reverse false claims” liability under the FCA.

Companies applying for PPP loans may consider the following best practices to minimize the risk of future “reverse false claims” liability:

- Consider writing a position statement and documenting any board meetings evaluating the initial decision to apply. This may include:
 - Identifying the grounds for meeting loan eligibility requirements and certifications (with supporting documents and data);

- Documenting the submission of financial information and/or the loan application to the board; and
 - Documenting any efforts to identify, evaluate, and/or obtain “other sources of liquidity sufficient to support [] ongoing operations in a manner that is not significantly detrimental to the business.”
- Document any and all communications to and from the government and its agents regarding FCA compliance and/or PPP loan eligibility.
 - Implement and regularly evaluate a comprehensive compliance program, which should include specific policies, procedures, and training for corporate counsel and compliance officers regarding FCA compliance.

Similarly, companies that have already received a PPP loan may consider the following best practices:

- Meticulously and contemporaneously detail the purposes for which the funds are spent and maintain supporting documentation, including expense receipts, employee counts, and employee compensation.
- Determine by May 14, 2020, whether you may qualify as an entity that the SBA has suggested may be unable to make the required certifications for PPP loan eligibility—for example, a business with adequate sources of liquidity to support its ongoing operations, or a public company with substantial market value and access to capital markets.
- If you qualify as such an entity, be prepared to demonstrate to the SBA your basis for meeting the required loan certifications. Alternatively, consider whether you should return loan funds by May 14, 2020.

If you have questions about PPP loan eligibility or FCA compliance, please contact a member of our Government Enforcement and Litigation Practice Group below. You can also review our [COVID-19 Resources page](#) for more information.

¹The SBA initially set the repayment deadline as May 7, 2020. But an update to the FAQs on May 5, 2020 indicated the SBA is extending the repayment deadline to May 14, 2020 and intends to provide additional guidance on how it will review the certification prior to that date.