

Benesch COVID-19 Resource Center: Paycheck Protection Program

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Recent news reports as to the making of Paycheck Protection Program (PPP) loans to certain large and well-known businesses prompted the Small Business Administration (SBA) to issue guidance that potential borrowers must take 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*” before applying for a PPP loan. Treasury Secretary Steven Mnuchin stated that companies that received more than \$2 million in small business loans would be audited by the SBA and could face “criminal liability” if it turns out they were not eligible to apply for a PPP loan.

The SBA guidance and the Secretary’s comments prompted concern by some PPP borrowers that they may face serious consequences for having relied on earlier guidance from the SBA in applying for their PPP loans. Some have gone so far as to consider returning their PPP loans to the SBA.

We believe that the SBA guidance and the Secretary’s remarks were aimed at large, well-funded businesses that have ready access to working capital and that should not have applied for PPP loans in the first place. We also believe that the guidance and remarks were meant as a “warning shot” to applicants for PPP loans in the second phase of the PPP now underway. Given this, we wanted to explain what type of conduct in the PPP might result in investigation, and perhaps action, by federal authorities.

Potential Government Scrutiny of PPP Loan Applications

1. The intentional making of a false statement

To apply for your PPP loan, you were required to make multiple certifications.

If your certifications were false at the time, criminal action could result **if** the government can also prove that you made those certifications with intent to deceive. The federal charges that would likely apply to such a situation are 18 U.S.C. §§ 1001 (false statements), 1014 (false statements in connection with federal agencies such as the Small Business Administration), and 1341/43/44 (wire, mail and bank fraud). To prove such charges, the government generally would have to prove, beyond a reasonable doubt, that you made a statement:

- (a) that was false at the time the statement was made, as opposed to something that was true at the time but not true at a later time,
- (b) that was made with intent to defraud or deceive, as opposed to a statement that was made in good faith belief as to its accuracy, and
- (c) that could have influenced someone, whether or not the person actually relied on the statement.

If your certifications were false at the time, and *if* you do not repay the PPP loan in full, the government could bring a civil case under the False Claims Act without providing intent to deceive, but the government would still need to prove that you made the false certification with “reckless disregard,” “deliberate ignorance” or “actual knowledge” of the falsity.

Significantly, if a PPP borrower made a statement that was incorrect at the time but did so by mistake or based on a good-faith belief in the accuracy of the statement, that would *not* be a crime and should not be the basis of a False Claims Act case.

Some certifications in the PPP application are statements of clear fact which can be easily proven or disproven, such as whether a PPP borrower had employees as of February 15, 2020. Other certifications are vague and open to interpretation, such as the certification that “current economic uncertainty makes this loan request *necessary* to support the ongoing operations of the Applicant (emphasis added).”^[1] The PPP application did not define the term “necessary,” and people can have different good-faith opinions as to what was “necessary” at any given time given the “current economic uncertainty” at that time. Accordingly, it may be difficult for the government to prove that a person’s certification regarding “necessary” was false at the time the statement was made. This may make criminal prosecutions regarding the “necessary” certification difficult except in extreme circumstances.

The Treasury Department published a FAQ on April 23, 2020 that appears to signal what the government might do in the future.^[2]

- First, the Treasury Department now has provided some guidance as to what the Treasury Department considers “necessary.” The Treasury Department stated that borrowers should “tak[e] 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.” The Treasury Department also said that it was “unlikely” that a “public company with substantial market value and access to capital markets” could make “the required certification in good faith.” Future applicants should consider these factors when applying for PPP loans.
- Second, the Treasury Department has signaled that it will “deem” that any borrower who repays a PPP loan by May 7, 2020 made its certifications in good faith. This appears to signal that any incorrect certifications by a borrower who repays by May 7, 2020 will be assumed to be a mistake, rather than considered a potentially intentional falsehood that might warrant further scrutiny.
- Third, the Treasury Department acknowledged that the CARES Act “suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere.” This indicates that the Treasury Department will not necessarily question a “necessary” certification simply because a borrower could have obtained capital elsewhere.

Based on this guidance, borrowers should consider whether they can sufficiently demonstrate that their “necessary” certification was made in good faith at the time of the PPP application. The better the contemporaneous documentation available to support those decisions, the lower any potential risk would be for any future criminal or civil action. If borrowers are concerned about their ability to

support their “necessary” certification, they may want to consider repaying the PPP loan by May 7, 2020 to avoid having to prove that any mistakes were not intentional. If they believe that the certification was made in good faith at the time of the application, but that circumstances have changed since then so that they could not make that certification now, they may want to consider repaying the PPP loan by May 7, 2020 out of an abundance of caution.

2. Potential consequences

The Treasury Department’s April 23, 2020 statement indicates that the SBA will scrutinize PPP applications for companies whose “necessary” certifications are questionable, such as companies which had “substantial market value” and had “access to capital markets.” The statement indicates that the SBA will first make requests to such companies for the basis for the borrower’s certification. This may take the form of document requests and possibly interviews. If the SBA determines that a certification was false, the SBA could refer such certifications to the Department of Justice for investigation and possible prosecution. The Department of Justice may also open its own investigations if it receives information about false certifications from other sources of information.

Apart from potential criminal liability, if a PPP loan goes into default and triggers a request from a lender to the federal government for payment, a PPP borrower could face civil liability under the federal False Claims Act if the PPP borrower made a false certification with “reckless disregard,” “deliberate ignorance” or “actual knowledge” of the falsity or if a PPP borrower retained money that it knew should have been paid back to the government. If a PPP borrower were to be sued under the False Claims Act, the borrower would face potential penalties up to three times the damages suffered by the federal government, which likely would be the amount that the government paid the lender, not necessarily the full amount of the loan. PPP borrowers should be able to avoid potential False Claims Act liability by repaying PPP loans prior to any default.

If a PPP borrower does business with the federal government, it should consider possible collateral consequences stemming from a future review of its PPP loan. Simply undergoing an audit or being asked to provide information typically will not trigger collateral consequences. If a PPP borrower committed a crime in connection with a PPP loan, that could lead to suspension or debarment. On its website, the General Services Administration has stated that suspension is “usually used pending the completion of investigation or legal proceedings” and is “based upon adequate evidence, usually an indictment,” and that debarment is “based upon a preponderance of the evidence, usually a conviction.”^[3] Accordingly, suspension or debarment typically occurs in the context of criminal conduct, though suspension or debarment can be possible in non-criminal cases. The GSA’s website specifically states that suspension or debarment can be based on causes such as “willful, or a history of, failure to perform,” “knowing failure to disclose violation of criminal law,” and “any other cause that affects present responsibility.”

3. Recommendations

PPP borrowers should be prepared to respond to requests from the SBA or the Department of Justice regarding the basis for their “necessary” certification. This can consist of some or all of the following:

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Memoranda documenting the decision to apply for a PPP loan and/or the consequences of not applying for a PPP loan

- Board resolutions authorizing the PPP application
- Emails or other contemporaneous documents regarding the decision to apply for a PPP loan

PPP borrowers should also re-evaluate their certifications in light of the Treasury Department's April 23, 2020 guidance. If a PPP borrower determines that the Treasury Department might question its "necessary" certification and decides to repay the PPP loan, the PPP borrower should make clear that its certification was made in good faith based on the information available at the time of the application.

For further questions, please contact Mark Silberman at msilberman@beneschlaw.com or (773)-318-4258.

Please note that this information is current as of the date of this Client Alert, based on the available data. However, because COVID-19's status and updates related to the same are ongoing, we recommend real-time review of guidance distributed by the CDC and local officials.



[1] <https://www.sba.gov/sites/default/files/2020-04/PPP-Borrower-Application-Form-Fillable.pdf>

[2] <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>

[3] <https://www.gsa.gov/about-us/organization/office-of-governmentwide-policy/office-of-acquisition-policy/gsa>