

The Paycheck Protection Program Today: Lessons Learned and What Lies Ahead

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In this article, the authors explain that many small businesses are still navigating the Paycheck Protection Program's forgiveness process or may find themselves the subject of a post-forgiveness audit by the Small Business Administration—or worse, the target of a civil U.S. Department of Justice False Claims Act investigation.

In April 2020, lenders began dispersing Paycheck Protection Program (PPP) loans to small businesses in what would become the largest Small Business Administration (SBA) lending program in history. The SBA approved 11,338,996 loans totaling \$785,773,859,100.¹ According to the SBA, it has forgiven more than 96% of the total value of all Paycheck Protection Program (PPP) loans.²

However, while most small businesses are relieved to put the pandemic and the PPP in their rearview mirror, many others are still navigating the forgiveness process or may find themselves the subject of a post-forgiveness audit by the SBA—or worse, the target of a civil U.S. Department of Justice (DOJ) False Claims Act investigation.

THE SBA'S AUDITS OF FORGIVEN LOANS

In reaction to Congress and the media raising concerns about fraud within the PPP, the SBA has increasingly turned to post-forgiveness audits to review borrowers' eligibility for their loans. There has been an uptick in the number of small businesses that have received a "Notification of Post Payment Paycheck Protection Program Loan Review and Request for Documents" from the SBA. These notifications inform borrowers that even though they have received full loan forgiveness, the SBA has decided to audit their loan and request documents and information to aid the SBA with its review. These notifications often indicate that the SBA is currently recommending a full denial of a previously forgiven loan.

Borrowers who receive such notifications should be aware that the SBA has the authority to demand repayment of loans even when the borrower has already received forgiveness. Borrowers should take the SBA's request for

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¹ https://www.sba.gov/sites/default/files/2022-10/2022.10.24_Weekly%20Forgiveness%20Report_Public.pdf.

² *Id.*

documents seriously and compile the requested information where possible. We recommend responding to the SBA with an explanation of why the borrower was eligible for its loan and the forgiveness it received. For example, the SBA is providing borrowers the opportunity to demonstrate eligibility under the alternative size standard, which is a path to eligibility that the SBA failed to clearly communicate to borrowers in the early stages of the PPP rollout, but which borrowers may take advantage of now.

THE FALSE CLAIMS ACT AND CRIMINAL ENFORCEMENT

Since the outset of the COVID-19 pandemic, the DOJ has devoted extensive resources to criminal and civil enforcement of fraudulent PPP loans. The government created a COVID-19 Fraud Enforcement Task Force along with five COVID-19 Fraud Enforcement Strike Forces with the goal of coordinating national enforcement efforts.³

The DOJ's COVID-19 Fraud Enforcement Task Force recently released its 2024 report summarizing the government's enforcement efforts.⁴ The report emphasizes that the government has already criminally charged 3,500 defendants in pandemic-fraud-related cases, reached more than 400 civil settlements and recovered more than \$1.4 billion in Coronavirus Aid, Relief and Economic Security (CARES) Act funds. These enforcement efforts focused not just on the PPP, but also on recipients of Economic Injury Disaster Loans, unemployment insurance benefits and other CARES Act relief programs.

Also recently, in support of these efforts, Senate Democrats (backed by the White House) have introduced a \$1.3 billion bill to combat pandemic fraud.⁵ Among other things, the bill would provide \$300 million to triple the COVID-19 Fraud Enforcement Strike Forces, increase the statute of limitations on pandemic fraud to 10 years, increase the cap for administrative recoveries of fraudulent claims, and provide \$250 million to the SBA and the U.S. Department of Labor for the express purpose of ensuring they have the resources to investigate pandemic fraud.

While we expect the government to continue to pursue criminal charges, we anticipate a particular focus on civil False Claims Act cases. Earlier this year,

³ <https://www.justice.gov/opa/pr/justice-department-announces-results-nationwide-covid-19-fraud-enforcement-action>.

⁴ <https://www.justice.gov/opa/pr/covid-19-fraud-enforcement-task-force-releases-2024-report>.

⁵ <https://www.whitehouse.gov/briefing-room/statements-releases/2024/04/09/fact-sheet-president-bidens-sweeping-proposals-to-crack-down-on-pandemic-fraud-and-help-victims-recover-introduced-in-congress/>.

DOJ announced that False Claims Act settlements and judgments exceeded \$2.68 billion in Fiscal Year 2023. This figure resulted from 543 settlements and judgments, the highest number ever in a single year. Of these settlement and judgements, 270 involved PPP loans and the government has recovered more than \$48.3 million in improper loans. DOJ's civil False Claims Act settlements thus far have primarily involved clear matters of ineligibility and DOJ has shown a willingness to invest its resources into investigating small dollar loan recipients.

We expect DOJ to turn its enforcement efforts toward more complex False Claims Act cases involving compliance with the SBA's numerous PPP regulations. One area we are watching closely is False Claims Act cases that focus on more nuanced legal questions involving issues of affiliation and size eligibility. The COVID-19 Fraud Enforcement Task Force's 2024 report stated that DOJ's Civil Division had opened more than 1,200 civil pandemic fraud matters, including more than 600 qui tam actions filed under the False Claims Act. The report also states that DOJ anticipates "that civil pandemic fraud enforcement will continue to require substantial resources for years to come."

As many small businesses probably (painfully) remember, there was much confusion and uncertainty regarding the application of the SBA's affiliation rules and the size standards applicable to the PPP. The SBA and the U.S. Department of the Treasury released new and sometimes conflicting guidance, rules, and borrower application forms on a near daily basis during an economic and public health crisis that was causing turmoil for small businesses. These small businesses bore the burden of deciphering these constantly evolving rules, as the SBA relieved lenders from the responsibility of verifying instances of eligibility. Hindsight may be 20/20 but in 2020, the SBA gave borrowers no such clarity.

THE SBA'S EFFORTS TO COLLECT LOANS IN DEFAULT

In a December 2023 letter to Congress, SBA Administrator Isabella Guzman stressed that the SBA would continue its efforts to collect all unforgiven loans, regardless of amount.⁶ Administrator Guzman stated that the SBA will "fully exhaust[] all collection tools at its disposal including direct customer outreach, collateral and personal guarantees, credit reporting, and CAIVRS/Treasury Do Not Pay lists, among others." She stated that the SBA would extend a grace period for borrowers in default of loans under \$100,000 but emphasized that the SBA would seek to collect these loans despite an SBA analysis of the cost

⁶ <https://federalnewsnetwork.com/wp-content/uploads/2024/01/sba-letter-on-covid-loans.pdf>.

benefit of referring loans to the Treasury for collection, which found that it would cost taxpayers more to collect than the anticipated amount recovered.

We have increasingly seen the SBA and the Treasury levy heavy penalties on borrowers and refer loans to private debt collectors, sometimes without first communicating with borrowers or giving borrowers the chance to craft a repayment plan. These debt collectors are then incentivized to push borrowers for repayment without any concern for the interests of the small businesses. To avoid destroying countless small businesses, the Treasury and the SBA would be wise to allow these loans to be remitted to the SBA to implement a “Workout Plan” that allows the borrower to repay its loan obligation over time.

THE FUTURE OF SBA LENDING

Despite recent criticism over the scope of the PPP and the inevitable fraud that comes with any large-scale funding program, many consider the PPP a success. Congress rolled out the PPP mere weeks after states began mandating business closures to fight the spread of COVID-19. Loans began rolling out just days after the program became law.

In a review of the research conducted on the impact of the PPP, the Bipartisan Policy Center concluded that the balance of research showed that the PPP successfully preserved jobs during the pandemic.⁷ One such study conducted by the U.S. Bureau of Labor Statistics showed “an 8% increase in employment, 11.5% increase in wages, and a 5.8% decline in the likelihood of closure within one month of PPP approval.”⁸ The Bipartisan Policy Center emphasized that studies showed that the PPP’s impact extended beyond the businesses that received loans and the employees who retained jobs. Small businesses that received loans were able to continue paying rent and purchasing supplies, which had a wider impact on the local economy.

There are certainly lessons to be learned, however, and studies reveal that the economic boost provided by the PPP was not evenly distributed. While FinTech lenders and community development financial institutions later began processing loans, offering borrowers more lender options, studies have increasingly pointed to FinTech lenders as processing a disproportionate number of fraudulent loans. A staff report from the House Select Subcommittee on the Coronavirus Crisis found that “[d]espite fintechs’ claims that their use of technology and innovation would allow them to better administer the PPP than

⁷ <https://bipartisanpolicy.org/explainer/the-ppp-experience/#:~:text=to%20small%20businesses.-,Paycheck%20Protection,of%20December%20%5B2020%5D.%E2%80%9D>.

⁸ <https://www.bls.gov/osmr/research-papers/2021/pdf/ec210080.pdf>.

traditional financial institutions, many of these companies appear to have failed to stop obvious and preventable fraud, leading to the needless loss of taxpayer dollars.”

Nevertheless, the SBA believes the need to support America’s small businesses outweighs the risk of fraud within relief programs. In testimony before the Senate, Administrator Guzman highlighted the importance of America’s 33 million small businesses, which are responsible for nearly two-thirds of net new jobs in this country, employ nearly half of the country’s private sector workforce and produce more than 40% of the country’s economic output. She stated that in 2023 the SBA distributed more than \$50 billion to small businesses⁹ across its lending, investment and disaster programs. And recently, the SBA announced that it would extend disaster loans to small businesses impacted by the Baltimore Francis Scott Key Bridge disaster, allowing eligible businesses to apply for long-term loans of up to \$2 million at 4% interest.¹⁰

Even as SBA audits of PPP loans continue, and even as DOJ increases its civil and criminal PPP enforcement, SBA loans will continue to play an important role in supporting small businesses as they combat an array of economic challenges.

⁹ https://www.sbc.senate.gov/public/_cache/files/5/3/539d8802-abe0-413a-8c5e-34829d560a9a/AA58747F3E2692425AE44C7B54053964.guzman-testimony.pdf.

¹⁰ <https://www.sba.gov/article/2024/03/30/sba-offers-economic-assistance-mid-atlantic-small-businesses-affected-francis-scott-key-bridge>.