

## Insights

# ACTION ITEMS FOR RECIPIENTS OF PPP LOANS TO MITIGATE RISK RELATED TO FRAUD ALLEGATIONS

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In our last article, we discussed how recipients of larger PPP loans are at risk for allegations of fraud and specifically addressed how these recipients may become targets of False Claims Act (FCA) allegations, which can be made not only by the government, but also by individual whistleblowers. We now take a more in-depth look at best practices for mitigating risk and responding to fraud allegations in connection with PPP funds.

First, a brief refresher: Under the PPP, applicants are required to make various certifications, including the necessity of the funds, how the funds will be used, and the applicant's payroll history. These certifications can become the subject of fraud allegations under the FCA and result in civil liability with significant monetary penalties. The government has already said that investigating and prosecuting allegations of PPP loan fraud will be a top priority.

Fortunately, there are actions you can and should take now to not only mitigate the risk of future fraud allegations, but also ensure you are armed to defend against these allegations, should they ever arise.

## 1. Keep Detailed Records

Allegations of fraud in connection with PPP loans may not arise for a number of years. Keeping detailed records now will establish the facts that may not be easily recalled as time passes and the events and decisions you previously made become foggy. You should maintain complete and accurate records related to the PPP funds from the time of the initial application through the receipt of and transactions from the funds, including any correspondence with the government and any financial institutions providing the funds. These records should be updated regularly and reviewed to ensure nothing is missing or unclear.

Documentation today will create an audit trail for the future and help defend against any allegations of fraud or misconduct that may arise in the future. Ideally, the records should be maintained to a level where an unrelated party could review them and know exactly 1) how much was received, 2) how much was spent and on what (i.e., payroll, rent/mortgage), 3) if and when there was any communication with the government or any financial institutions providing the funds

regarding the PPP loan, and 4) the rationale for any decisions made or interpretations of guidance in connection with the funds.

## **2. Document Retention**

In addition to keeping detailed records related to the PPP loan, you should ensure all documents related to the PPP funds, including the initial application and the underlying documents that support the company's various certifications, are retained and maintained in an easily accessible and separate file. This should include all paper and electronic documents, including any handwritten notes.

You should identify who are the key custodians of the information related to the PPP loan across all stages from application, to funding, to use of funds. If any of these employees are voluntarily leaving, terminated, or moved to a new role, it is critical that their email and other data related to the PPP loan is preserved for future reference.

## **3. Separately Document Government Guidance and Reasonable Interpretations**

We are aware of numerous ambiguities in connection with the PPP loan and more will emerge as we move into the loan forgiveness phase. While guidance and FAQs have been issued and provide some clarity, this guidance is changing regularly and there are still unanswered questions. Document the guidance and FAQs on which you relied, noting the date of any such guidance. Some of what was originally published has changed over time, but thus far the SBA and Treasury have indicated that reliance by companies who took action based on published guidance before it was revised or "clarified" will not be challenged. Although receipt of any individualized guidance is rare, if you happen to be the lucky recipient of it, you must ensure you document it and retain it.

In addition, it is equally, if not more important, that you document your interpretations of the guidance on which you relied, including any ambiguities and demonstrate your interpretations are reasonable. It is also critical to ensure your interpretations are not in conflict with any interpretive guidance.

## **4. Have A Response Plan**

Create a plan for how you will respond to reports or allegations of fraud related to the PPP loan and how you will respond to government inquiries. The plan should complement other internal governance and compliance procedures. Once the plan is established, it should be disseminated to key employees in roles likely to be the subject of these allegations or inquiries.

The plan should establish:

- Steps to ensure prompt communication with a potential whistleblower or government regulator;

- Criteria for conducting an internal investigation and criteria for determining if allegations or inquiries rise to the level of necessitating an independent, internal investigation conducted by outside counsel;
- A single point of contact within the company who will be responsible for all company communications with the government or whistleblower; and
- A data collection plan and an individual within the company who will be responsible for ensuring the data is retained and segregated until the conclusion of the matter.

If the recipient of PPP funds becomes the subject of a FCA inquiry by the DOJ or other government agency, or is alerted by a whistleblower of potential wrongdoing, the initial response is critical and has long-lasting consequences to the entire life of the investigation or lawsuit. As noted above, if allegations or inquiries rise to the level that merits an independent, internal investigation, you should retain experienced counsel to ensure you respond appropriately and effectively. Use of outside counsel also helps protect the attorney-client privilege; which is most critical as privilege claims involving in-house counsel or compliance officers are increasingly scrutinized and denied. Retention of counsel also sends a clear message to the government/whistleblower that the company is taking the matter very seriously.

## RELATED PRACTICE AREAS

- White Collar
- Investigations
- False Claims Act

## MEET THE TEAM



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