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## PPP Fraud Enforcement Shows No Signs of Slowing

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After dozens of high-profile criminal prosecutions and a growing wave of civil investigations, the Department of Justice's ("DOJ") Covid-19 Fraud Enforcement Strike Force is poised to continue its pursuit of fraud, abuse, and waste related to various Covid-19 relief programs.

With billions in suspected fraud, and following the early success in prosecuting that fraud, businesses, individuals, and financial institutions involved in Paycheck Protection Program ("PPP") loans should be prepared to receive notices from the Strike Force.

This article explores the DOJ's and Small Business Administration's ("SBA") sustained concerns with pandemic relief borrowers, key considerations for borrowers that have sought or received forgiveness of their PPP loans, and how the government appears to be exercising its discretion to pursue and resolve borrowers' (and others') conduct through criminal and civil avenues. In future articles, the authors will explore the DOJ's scrutiny of financial intermediaries who played a role in approving and distributing the funds, as well as the next pandemic relief fraud that the government may target—"Employee Retention Credits," which the IRS recently ended amid "rising concerns about a flood of improper" claims.<sup>1</sup>

### Background: the CARES Act and the PPP

Unpleasant as it may be, recall February and March 2020: businesses, schools, cities, counties, and entire states began shuttering social and economic activity to prevent the spread of Covid-19. In March 2020, Congress passed the Coronavirus Aid, Relief, and

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<sup>1</sup> IRS, Press Release, IR-2023-169 (Sept. 14, 2023) (available at <https://www.irs.gov/newsroom/to-protect-taxpayers-from-scams-irs-orders-immediate-stop-to-new-employee-retention-credit-processing-amid-surge-of-questionable-claims-concerns-from-tax-pros>).

Economic Security (“CARES”) Act. In addition to other programs, the CARES Act authorized up to \$659 billion in low-interest, forgivable loans to small businesses through the PPP. Businesses had two opportunities to receive PPP loans, the First and Second Draw.<sup>2</sup> The government would forgive PPP loans if the borrower used the funds primarily for business expenses like payroll, benefits, rent, and utilities.<sup>3</sup>

Congress encouraged the SBA to expedite the release of PPP loans.<sup>4</sup> The priority at the time was delivering funds quickly “to offer a helping hand for businesses that were struggling.”<sup>5</sup> Congress simplified the underwriting obligations for PPP loans, requiring minimal proof of eligibility or ability to repay. Although private lenders funded PPP loans, the SBA guaranteed them 100%.<sup>6</sup> Furthermore, the SBA’s list of participating lenders expanded to 5,500 institutions,<sup>7</sup> including nontraditional lenders—all of whom the government would “hold harmless” for any shortcomings in their review of loan applications.<sup>8</sup>

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<sup>2</sup> Dep’t of the Treas., *Policy Issues—Paycheck Protection Program* (available at <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-small-businesses/paycheck-protection-program>).

<sup>3</sup> SBA, *PPP Loan Forgiveness* (available at <https://www.sba.gov/funding-programs/loans/covid-19-relief-options/paycheck-protection-program/ppp-loan-forgiveness>). The SBA was also authorized to provide Economic Injury Disaster Loans (“EIDL”) to help small businesses and other entities. These were similar to PPP loans, with one notable exception: they were not forgivable. Indeed, the SBA required many business owners to personally guarantee EIDLs. Accordingly, these loans require a different analysis than PPP loans.

<sup>4</sup> PPP loans were forgivable, uncollateralized, and low-interest, providing up to \$10 million in emergency aid to sole proprietors and businesses with fewer than 500 employees.

<sup>5</sup> Nicholas Anthony, *Fintech Fraud or Federal Failure?*, CATO Institute (Jan. 17, 2023) (available at <https://www.cato.org/briefing-paper/fintech-fraud-or-federal-failure-how-paycheck-protection-program-became-source>).

<sup>6</sup> Dep’t of the Treas., *Paycheck Protection Program (PPP) Information Sheet* (available at <https://home.treasury.gov/system/files/136/PPP%20Lender%20Information%20Fact%20Sheet.pdf>).

<sup>7</sup> Anna Hrushka, *PPP 2 Years Later: Analyzing the Legacy and Impact of the \$800B Government Relief Program*, Banking Dive (May 4, 2022) (available at <https://www.bankingdive.com/news/ppp-sba-small-business-lending-banks-analyzing-legacy-impact-800b-paycheck-protection-program/623160/>).

<sup>8</sup> SBA, *Business Loan Program Temporary Changes; Paycheck Protection Program*, 85 Fed. Reg. 20811 (Apr. 15, 2020) (available at <https://www.federalregister.gov/documents/2020/04/15/2020-07672/business-loan-program-temporary-changes-paycheck-protection-program>).

Businesses were closing. People were scared. The SBA was clear that lenders “did not have to worry about the quality of borrowers,”<sup>9</sup> and need not “conduct any verification if the borrower submits documentation supporting its request for loan forgiveness and attests that it has accurately verified” eligibility for a PPP loan.<sup>10</sup>

## Fraud and Response

The money poured out.<sup>11</sup> The government immediately recognized that PPP loans were “vulnerable to exploitation”<sup>12</sup> and began investigating the “biggest fraud in a generation.”<sup>13</sup> The DOJ initially pursued high-profile frauds, often involving multiple fake businesses, multiple PPP loan applications with fabricated records, resulting in multi-million dollar loans, spent on lavish cars, property, and travel.<sup>14</sup>

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<sup>9</sup> Note 5, *supra*.

<sup>10</sup> SBA, *Business Loan Program Temporary Changes; Paycheck Protection Program*, 85 Fed. Reg. 20811 (Apr. 15, 2020) (available at <https://www.federalregister.gov/documents/2020/04/15/2020-07672/business-loan-program-temporary-changes-paycheck-protection-program>).

<sup>11</sup> See SBA, *Paycheck Protection Program (PPP) Report: Approvals through 12 PM EST 4/16/2020*, (available at <https://home.treasury.gov/system/files/136/SBA%20PPP%20Loan%20Report%20Deck.pdf>). Approximately \$800 billion in PPP loans were issued to nearly 93% of all small businesses in the United States. David Autor, et al., *The \$800 Billion Paycheck Protection Program: Where did the Money Go and Why Did It Go There?*, Nat'l Bur. of Economic Research (Jan. 2022) (available at <https://www.nber.org/papers/w29669>).

<sup>12</sup> U.S. Gov't Accountability Office, *Covid-19: Opportunities to Improve Federal Responses and Recovery Efforts* (June 2020) (available at <https://www.gao.gov/assets/gao-20-625.pdf>).

<sup>13</sup> Ken Dilanian and Laura Strickler, “Biggest Fraud in a Generation”: The Looting of the Covid Relief Plan Known as PPP, NBC News (Mar. 28, 2022) (available at <https://www.nbcnews.com/politics/justice-department/biggest-fraud-generation-looting-covid-relief-program-known-ppp-n1279664>).

<sup>14</sup> See, e.g., *U.S. v. Benlevi*, 21-cr-00246 (C.D.Cal.), and DOJ, *California Man Sentenced to Over 11 Years for \$27 Million PPP Fraud Scheme*, Press Release (July 19, 2022) (available at <https://www.justice.gov/opa/pr/california-man-sentenced-over-11-years-27-million-ppp-fraud-scheme>); see also *U.S. v. Hines*, 21-cr-20011 (S.D. Fla.), and DOJ, *Man Purchased Lamborghini After Receiving \$3.9 Million in PPP Loans*, Press Release (Feb. 10, 2021) (available at <https://www.justice.gov/opa/pr/man-purchased-lamborghini-after-receiving-39-million-ppp-loans>).

In May 2021, the DOJ responded with Covid-19 Fraud Enforcement Strike Force teams, which have since expanded.<sup>15</sup> The Strike Force teams have charged more than 3,000 defendants with crimes, brought hundreds of civil enforcement actions, and recovered more than \$1.4 billion in Covid-19 relief funds. In a single recent nationwide takedown, the DOJ announced a sweep of “718 enforcement actions—including federal criminal charges against 371 defendants—for offenses related to over \$836 million in alleged Covid-19 fraud.”<sup>16</sup>

As of early 2023, the SBA had manually reviewed approximately 2% of PPP loan applications.<sup>17</sup> It has recently signaled, however, that it will scrutinize the remaining 98% of PPP loans in a more sophisticated way, with “new computer search techniques,” optimizing its “search techniques,” and incorporating “newly gathered data into the search” for “fraud schemes perpetrated against the SBA pandemic loan programs.”<sup>18</sup>

Approximately 92% of PPP loans have received partial or full forgiveness.<sup>19</sup> Borrowers whose loans have not yet been forgiven are receiving notices of requests for additional information or outright denials of forgiveness. Appealing these denials or producing other responses to the SBA are due within a short timeframe, typically between 20 and 30 business days.<sup>20</sup> A timely appeal will extend the deferment period.<sup>21</sup>

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<sup>15</sup> DOJ, *Justice Department Announces Covid-19 Fraud Strike Force Teams*, Press Release (Sept. 14, 2022) (available at <https://www.justice.gov/opa/pr/justice-department-announces-covid-19-fraud-strike-force-teams>).

<sup>16</sup> DOJ, *Justice Department Announces Results of Nationwide Covid-19 Fraud Enforcement Action*, Press Release (Aug. 23, 2023) (available at <https://www.justice.gov/opa/pr/justice-department-announces-results-nationwide-covid-19-fraud-enforcement-action>).

<sup>17</sup> SBA, *Covid-19 Pandemic EIDL and PPP Loan Fraud Landscape*, White Paper Report 23-09 (June 27, 2023) (available at <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.sba.gov/sites/sbagov/files/2023-06/SBA%20OIG%20Report%2023-09.pdf>).

<sup>18</sup> *Id.*

<sup>19</sup> Sacha Pfeiffer and Austin Fast, *How the Paycheck Protection Program went from Good Intentions to a Huge Free-for-All*, NPR (Jan. 9, 2023) (available at <https://www.npr.org/2023/01/09/1145040599/ppp-loan-forgiveness>).

<sup>20</sup> 13 C.F.R. § 134.1202(a).

<sup>21</sup> 13 C.F.R. § 134.1202(d).

## Developing Trends

Producing records and responses to a DOJ “Civil Investigative Demand” or an SBA request for information is a delicate matter. As analyzed below, penalties appear to increase in tandem with the perceived deceptiveness of a borrower’s conduct.

Two recent civil PPP loan fraud cases in California involved whistleblowers (analyzed below)—known as a *qui tam* action—where a third-party files a civil complaint under seal, giving the DOJ time to decide whether to intervene and assume primary responsibility for the litigation of any “false claims.”<sup>22</sup> If the DOJ prevails, the whistleblower can receive a portion of the penalties, which can reach triple the amount falsely claimed by the borrower.<sup>23</sup> This means that, in addition to the SBA’s sophisticated fraud review techniques, more than 250,000 private individuals are now assisting the PPP loan fraud fight.<sup>24</sup>

Furthermore, the statute of limitations for PPP loan fraud is ten years.<sup>25</sup> Borrowers would be mistaken if they believed that there is no further risk from the DOJ or SBA after receiving a forgiveness letter. Finally, the DOJ has signaled its willingness to reduce penalties where a borrower self-discloses its potential ineligibility for PPP funds.<sup>26</sup>

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<sup>22</sup> DOJ, *Three California Companies Settle False Claims Act Allegations Relating to Improper Paycheck Protection Program Loans*, Press Release (Feb. 1, 2023) (available at <https://www.justice.gov/opa/pr/three-california-companies-settle-false-claims-act-allegations-relating-improper-paycheck>).

<sup>23</sup> 31 U.S.C. § 3729(a)(1).

<sup>24</sup> SBA, *Fraud Landscape* (June 2023) (available at <https://www.sba.gov/sites/sbagov/files/2023-06/Fraud%20Landscape%20One-Pager%20June%202023.pdf>).

<sup>25</sup> PPP and Bank Fraud Enforcement Harmonization Act of 2022 (H.R. 7352) and the COVID-19 EIDL Fraud Statute of Limitations Act of 2022 (H.R. 7334).

<sup>26</sup> 31 U.S.C. § 3729(a)(2), *see, e.g.*, DOJ, *Eastern District of California Obtains Nation’s First Civil Settlement for Fraud on Cares Act Paycheck Protection Program*, Press Release (Jan. 12, 2021) (available at <https://www.justice.gov/usao-edca/pr/eastern-district-california-obtains-nation-s-first-civil-settlement-fraud-cares-act>) and Settlement Agreement, noting that borrower explained it “may not have answered [Question 1 on the PPP application] correctly since we filled out the application quickly and wanted to bring it to your attention” (available at <https://www.justice.gov/usao-edca/press-release/file/1352931/download>). More generally, *see* DOJ’s *Voluntary Self Disclosure and Monitor*

## Recent Representative Enforcement Actions

The following cases reflect the DOJ's most recent prosecutions and the related custodial sentences that courts are ordering.

*U.S. v. Harding*<sup>27</sup>—In October 2023, a Florida lawmaker received a 4-month sentence after pleading guilty to wire fraud, money laundering, and false statements related to a \$150,000 PPP loan.<sup>22</sup> Although \$150,000 in PPP funds is on the lower end of the criminal spectrum, this case had aggravating factors that appear to have warranted custody. The borrower was a politician, who did more than misrepresent the business's eligibility. The business had been dormant for some time, and the application contained an inflated number of employees and falsified bank records. Harding also made false statements to investigators.<sup>28</sup>

*U.S. v. Casutt*<sup>29</sup>—Also in October 2023, a Nevada man received a 28-month sentence after pleading guilty to wire fraud and money laundering. The defendant submitted PPP and related CARES Act loan applications to at least four lenders on behalf of two businesses—seeking \$5.7 million in total. He ultimately obtained two loans in an aggregate amount of \$500,000. The applications were littered with misrepresentations, including business's number of employees, payroll expenses, and revenue. In truth, neither business had any employees, nor ever paid any wages. The conduct turned additionally offensive when the defendant wrote dozens of fake payroll checks to himself, friends, and family. The funds were later diverted back to him.

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*Selection Policies* (available at <https://www.justice.gov/corporate-crime/voluntary-self-disclosure-and-monitor-selection-policies>).

<sup>27</sup> *U.S. v. Joseph Harding*, 22-cr-32-AW (N.D. Fla.).

<sup>28</sup> DOJ, *Former Florida State Representative Sentenced to Federal Prison for Wire Fraud, Money Laundering, and Making False Statements in Connection with Covid-19 Relief Fraud*, Press Release (Oct. 19, 2023) (available at <https://www.justice.gov/usao-ndfl/pr/former-florida-state-representative-sentenced-federal-prison-wire-fraud-money>).

<sup>29</sup> *U.S. v. Brandon Casutt*, 20-cr-231-APG-NJK (D. Nev.).



As for matters on the civil side, the following are a representative sample of recent actions:

*U.S. v. Institute for Policy Studies*<sup>30</sup>—A whistleblower filed an action alleging that the Institute for Policy Studies improperly claimed it was not an entity “primarily engaged in political or lobbying activities.” Borrowers had to make this attestation for the PPP Second Draw, but not the First Draw. The DOJ took up the whistleblower’s complaint. The DOJ did not impose any penalty multipliers. The borrower agreed to provide full restitution despite the SBA having already forgiven the full amount of the PPP loan. This resolution suggests that mere ineligibility will not result in criminal prosecution or excessive penalties—especially where the borrower showed no other deceptive conduct. The borrower’s prior eligibility for the PPP First Draw likely further mitigated its perceived deception after the eligibility rules changed for the Second Draw.<sup>31</sup>

*U.S. v. Victory Automotive Group Inc.*<sup>32</sup>—Also involving a whistleblower and a civil settlement for false statements on the PPP loan application, the borrower ignored “affiliation” rules. Borrowers of related or controlled entities could not apply for multiple PPP loans,<sup>33</sup> meaning the SBA treated affiliated groups as a single employer and imputed employees from one affiliated entity to another.<sup>34</sup> As a result of these affiliation

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<sup>30</sup> DOJ, *Think Tank Agrees to Pay More Than \$500,000 to Resolve Allegations That It Falsely Certified Its Eligibility to Receive PPP Loan*, Press Release (June 27, 2023) (available at <https://www.justice.gov/usao-ma/pr/think-tank-agrees-pay-more-500000-resolve-allegations-it-falsely-certified-its>).

<sup>31</sup> *U.S. v. Institute for Policy Studies*, Settlement Agreement (available at <https://www.justice.gov/media/1302361/dl?inline>).

<sup>32</sup> DOJ, *Victory Automotive Group Inc. Agrees to Pay \$9 Million to Settle False Claims Act Allegations Relating to Paycheck Protection Program Loan*, Press Release (Oct. 11, 2023) (available at <https://www.justice.gov/opa/pr/victory-automotive-group-inc-agrees-pay-9-million-settle-false-claims-act-allegations>).

<sup>33</sup> See generally, 13 CFR § 121.301(f).

<sup>34</sup> See generally, 13 CFR § 121.106. In general, “entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both.” 13 CFR § 121.103(a)(1). To determine control, “SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists.” 13 CFR § 121.103(a)(2). “A person (including any individual, concern or other entity) that owns, or has the power to control, 50 percent or more of a concern’s voting stock, or a block of voting stock which is large compared to other outstanding blocks of voting stock, controls or has the

rules, Victory Automotive Group had over 3,000 employees under the regulations, well beyond the 500-employee cap for PPP loan eligibility. The borrower agreed to pay back the full \$7 million in PPP loans, as well as a nearly 30% penalty of \$2 million.<sup>35</sup> Compared to the *Institute for Policy Studies* resolution that took into account the differences in eligibility between the First and Second PPP Draws, Victory Automotive Group was never eligible for a PPP loan. This appears to have been the motivating factor behind the 30% penalty.

*U.S. v. Fujisoft America Inc.*<sup>36</sup>—Lastly, in June 2023, Fujisoft America, Inc. resolved its civil liability under the False Claims Act after improperly applying for and receiving two PPP loans totaling \$400,000. The company paid the loans back, plus an extra \$650,000 penalty—150% of the underlying loans. The borrower had 8,000 global employees under the attribution rules. It also falsely claimed a 25% decrease in revenue on its PPP loan application. What appears most aggravating, however, is that Fujisoft asked its banker in the U.S. whether foreign employees counted against the 500-employee eligibility cap. An email from the company’s CFO concluded before applying for the loan: “I don’t think we’re eligible for the program.”<sup>37</sup> The SBA, despite having already forgiven its PPP loans, punished Fujisoft with the 150% penalty for what it perceived as knowingly deceptive conduct, on top of its ineligibility.

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power to control the concern.” 13 CFR § 121.103(c)(1). Affiliation can also be based on common management when the “[a]ffiliation arises where one or more officers, directors, managing members, or partners who control the board of directors and/or management of one concern also control the board of directors or management of one or more other concerns.” 13 CFR § 121.103(e).

<sup>35</sup> *U.S. v. Victory Automotive Group Inc.*, Settlement Agreement (available at <https://www.justice.gov/media/1319041/dl?inline>).

<sup>36</sup> DOJ, *San Mateo Company to Pay More than \$1,000,000 for Improperly Seeking and Obtaining Paycheck Protection Program Loans*, Press Release (June 9, 2023) (available at <https://www.justice.gov/usao-ndca/pr/san-mateo-company-pay-more-1000000-improperly-seeking-and-obtaining-paycheck>).

<sup>37</sup> *U.S. v. Fujisoft America Inc.*, Settlement Agreement (available at [https://www.justice.gov/d9/2023-06/fsai\\_settlement\\_agreement.pdf](https://www.justice.gov/d9/2023-06/fsai_settlement_agreement.pdf)).



## Conclusion

PPP enforcement actions are poised to continue. All PPP participants with concerns should consider reviewing their original PPP loan applications, scrutinizing all statements made to the SBA regardless any loan forgiveness status, and perhaps avail themselves of the lower penalties for self-disclosure.

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