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Preparing for an SBA PPP Audit: What are the Risks?

Borrowers who received Paycheck Protection Program (“PPP”) loans of less than \$2 million are deemed to have made the necessity certification in good faith. However, those who made misrepresentations in the loan application process from criminal charges. The early criminal cases arising out of the PPP loans offer examples of borrowers allegedly using the PPP money to enrich themselves. For example, the Department of Justice (DOJ) recently charged a reality TV personality with bank fraud for using more than \$1.5 million of PPP loan proceeds to buy a Rolex watch, a diamond bracelet, and a 5.73 carat diamond ring for himself, and to pay \$40,000 in child support. We can expect criminal investigations involving PPP loans of less than \$2 million to continue. The Small Business Administration (“SBA”) Office of Inspector General, the Special Inspector General for Pandemic Recovery, and federal law enforcement partners like the FBI will conduct criminal investigations of frauds involving PPP funds.

Attorney General Andy Barr directed U.S. attorneys across the country to prioritize the detection, investigation, and prosecution of fraud offenses related to the COVID-19 health crisis. The DOJ’s Criminal Division is assisting in the investigation and prosecution of those offenses. Federal prosecutors will continue to use traditional fraud statutes in their criminal enforcement efforts. Some of the fraud statutes likely to be used include: conspiracy (18 U.S.C. § 371), false statements (18 U.S.C. § 1001), false statements on loan applications (18 U.S.C. § 1014), mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343), bank fraud (18 U.S.C. § 1344), and conspiracy to commit fraud (18 U.S.C. § 1349).

Every U.S. Attorney district in the nation and include federal, state, and local law enforcement entities have formed COVID-19 Task Forces have. Each U.S. attorney district also has a COVID-19 Coordinator who is responsible for overseeing the enforcement response to fraud cases. Criminal and civil enforcement efforts are bolstered by hotlines and reporting portals where members of the

public can make complaints. The DOJ will also use data analytic tools to identify potential fraud issues involving PPP loans.

In addition to criminal enforcement actions, unlawful PPP loans are ripe for affirmative civil enforcement actions, like the False Claims Act ("FCA"). Some of the potential grounds for enforcement under the FCA include false certifications in the PPP loan application, the use of the reverse FCA provision to pursue those who knowingly retain the funds even after realizing ineligibility, and kickbacks in exchange for loan approvals. The FCA provides remedies including hefty fines and treble damages. Whistleblowers are incentivized to bring information forward by sharing in the recovery obtained by the government.

There are several risk areas for liability under the FCA related to the PPP. At a basic level, there is risk for borrowers who provided false, inaccurate, or misleading information during the loan application process. There may also be risk for those who assisted in the preparation of such applications. Another risk area is the misuse of the funds after receiving the loan. There is also a risk in the loan forgiveness process if a borrower misrepresents how the money was used. The danger in each of these scenarios is that the applicant, or someone who assisted in the submission of the application, is investigated by the government (or a whistleblower) for violating the FCA and potentially found liable for violations after extensive litigation. Findings of liability could result in the aforementioned significant fines and treble damages as well as attorney's fees. Investigations alone, even absent an eventual finding of liability, could result in significant attorney's fees and intrusive processes such as Civil Investigative Demands by the government or civil discovery.

The scope of the financial crisis created by the health pandemic created a need for the government to get money to small businesses who needed it quickly. The truncated disbursement timeline for the PPP forced the government to use a pay and chase method of fraud enforcement. While the PPP funds were distributed quickly, criminal and civil enforcement efforts related to fraud in the process will continue for years. For more information, please contact [Kevin Tierney](#), [Gabe Davis](#) or any attorney in Frost Brown

Todd's [Business & Commercial Litigation](#) or [Finance](#) Practice Groups.

To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a [Coronavirus Response Team](#). Our attorneys are on hand to answer your questions and provide guidance on how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce.

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