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INSIGHT: You Got Millions in PPP Loans From the Government—Is That Good?

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Recipients of Payroll Protection Programs loans under the CARES Act will soon need to face another difficult question: Should they seek loan forgiveness? Morgan Lewis attorneys discuss how to mitigate False Claims Act risk and offer ideas for deciding to do so in the weeks and months to come.

Billions of dollars in Covid-19 financial relief in the form of forgivable loans to small businesses came under the Payroll Protection Program (PPP). Early inquiries focused on “eligibility,” loan amounts, how to calculate “payroll costs” under SBA guidance, and more.

Those questions gave way to further questions about eligibility and certifications in light of the SBA’s nuanced “affiliation” regulations, especially regarding how “affiliation” is determined when a company is owned by a private equity firm or venture capital or other private investors, or has a pending transaction.

One of the most difficult discussion points is yet to come: should a recipient seek loan forgiveness?

PPP Loan Forgiveness

PPP loans may be forgivable up to the full amount of the principal balance of the loan making them an attractive economic relief option under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).

The primary purpose of PPP funds is to retain employees during the pandemic. To seek forgiveness, a business must use 75% of the loan proceeds toward “payroll costs.” Other forgivable expenses include rent, mortgage interest and utilities, paid in an eight-week period following the disbursement of the PPP loan.

Current guidance suggests that any PPP loan recipient who has the appropriate documentation to show that loan proceeds were used in this manner can apply for loan forgiveness. Lenders can accept forgiveness documentation at face value where a borrower [“attests that it has accurately verified the payments for eligible costs.”](#)

For many PPP borrowers, the difficult question may not be “can I seek forgiveness?” but “should I?” The “*should I*” question may be important to reducing the risk of future litigation or enforcement. Treasury has announced that it will audit any PPP loan of \$2 million or more upon the application for forgiveness.

The answer may best be informed by a look back: what happened in the eight weeks after the loan proceeds were received? Did business dry up, as feared? Or did the company see better conditions than anticipated (e.g., unanticipated growth, a significant sale or positive business results)? These types of questions take on increasing importance given SBA’s recent attention to borrower certifications that the loan is necessary.

False Certifications and the False Claims Act

When a company accepts government funds and makes certifications about those funds, the certifications may be scrutinized through the lens of the Civil False Claims Act. 31 U.S.C. §§ 3729, et. seq. Liability arises under the FCA when a person knowingly submits a material false claim for payment to the U.S. government or where a person submits a claim with deliberate ignorance or reckless disregard for the truth of the information in the claim.

PPP loan applications require borrowers to make certain certifications including that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” Many PPP loan applicants will have carefully analyzed the truth and accuracy of this certification prior to submitting a loan application.

Borrowers have an important opportunity to revisit that assessment given SBA’s recent guidance and when they decide whether to ask the lender and government to forgive the loan. This decision should be made with valuable hindsight of how their business actually was affected and a clear record that loan proceeds were used as authorized during the period.

The inevitable FCA whistleblowers and plaintiff’s lawyers who routinely follow large outlays of government funding will take advantage of this same hindsight to look for opportunities to challenge—now and in the future—certifications that businesses and individuals are preparing to make.

Whistleblowers will allege that certifications to support that loans should be forgiven were “false” if, at the end of the day, some businesses fared better than expected and forgiveness appears to create a windfall benefit for the business.

How Do I Decide Whether to Seek Loan Forgiveness?

Deciding to seek loan forgiveness is a fact-based individual decision that each company must make weeks or months from now, once it evaluates its actual impact from the Covid-19 crises and how it spent or is spending the loan proceeds.

This decision should be made and documented with the assistance of legal counsel. In today's remote work environment, company employees should be reminded to keep communications regarding loan forgiveness decisions privileged with legal counsel.

The first question is whether the company meets the technical requirements established in the CARES Act for loan forgiveness. If the company is eligible for forgiveness, it should carefully evaluate its financial performance during the time it used government funds to pay its payroll and other expenses. With FCA scrutiny, each dollar of forgiven loan amounts could result in three dollars of damages (plus additional penalties) in future FCA litigation.

The PPP loan program is an important program to help businesses continue to pay workers during these uncertain times. Taking steps now to ensure that loans and forgiveness are sought with appropriate care regarding certifications as to eligibility and necessity should help businesses mitigate the risks that always accompany the acceptance of federal funds.

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Author Information

[Sheila Armstrong](#) is a partner in Morgan Lewis's Dallas and Washington, D.C., offices and represents companies in all aspects of government contracting including investigations, compliance, and counseling matters.

[Margaret Erin Rodgers Schmidt](#) is a partner in Morgan Lewis's Philadelphia office and represents clients in complex civil and criminal government investigations and internal investigations involving allegations arising under the False Claims Act.

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