

## CARES Act PPP Enforcement Escalates — A Toolkit for Common Production Requests

June 1, 2020

**Update:** The Small Business Administration (SBA) and Department of the Treasury released detailed Paycheck Protection Program (PPP) loan-level data to the public. For further discussion, please see our [July 28, 2020, alert](#).

Many government entities have already begun review and enforcement actions related to the Coronavirus Aid, Relief, and Economic Security (CARES) Act Paycheck Protection Program (PPP) loans. The Small Business Administration (SBA) and its inspector general are already scrutinizing PPP loan eligibility certifications and necessity certifications, and the most recent interim final rules issued with respect to PPP loans indicate that SBA will review any PPP loan application or forgiveness application it chooses, including reviews of necessity and eligibility certifications, loan size and forgiveness amounts.

Separately, the U.S. Securities and Exchange Commission (SEC) and the U.S. House Select Subcommittee on the Coronavirus Crisis have sent letters of inquiry and requests for documents to PPP loan recipients based on review of public documents and SEC filings. These communications seek to verify recipient compliance with eligibility and spending requirements under the CARES Act. In addition, the Department of Justice Criminal Division, Fraud Section, began prosecuting recipients, in collaboration with the SBA and Internal Revenue Service.

Applicants received notice of SBA's intention of rigorous enforcement through the application itself, which stated that SBA would enforce applicant certifications as well as release applicant information to other federal, state, local and foreign entities charged with investigation, enforcement and prosecution of violations. SBA guidance, including frequently asked question (FAQ) No. 46, reinforced SBA's right and commitment to compliance.

Regardless of borrower size or other qualifications, it is vital for companies to proactively document PPP compliance and prepare for effective defense of their eligibility and necessity certifications, as well as loan and forgiveness calculations. Waiting to receive an inquiry to gather supporting documentation may be too late. Most inquiries provide 5-10 days for response. This is a very short timeframe for a company to research and gather supporting documentation. Applicants should consider seeking competent legal guidance related to collecting supporting materials and holding them in a central repository, *contemporaneously* as the events occur.

Applicants who receive government inquiries should anticipate the following types of requests for production as part of initial government communications.

1. All documents submitted to the lender as part of the PPP application, including attachments *and* evidence that the applicant relied upon to answer application questions, including: "Is the Applicant or any owner of the Applicant an owner of any other business, or have common management with, any other business? If yes, list all such businesses and describe the relationship on a separate sheet identified as addendum A."
2. Documentation of the applicant's good-faith analysis of its eligibility based on its understanding at the time of application submission — including size and ownership, affiliation, employee count and wage estimates, entity status and loan amount. Examples of documentation include the following:
  - a. Applicant memorandum or analysis and documents relied upon, corporate formation documents, management agreements, memoranda of understanding that may indicated common management or control, payments or other financial transactions between affiliates such as shared service agreements over the preceding three years, financial statements, payroll records, policies and procedures, organizational charts, and contractual agreements between potential affiliates.
  - b. Evidence of the applicant's exclusion from affiliation including SBIC financial assistance documentation, evidence that the company qualifies for SBA franchise designation, franchise agreements and documentation of company revenues from NAICS code 72 (accommodation and food services).
3. Documentation of the applicant's analysis of eligibility in response to the applicant's determination of necessity. This includes response to this application certification: "Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." Documentation should include the applicant's analysis of the SBA Safe Harbor guidance and related FAQs.
4. Documentation of payroll, tax and other IRS submissions, as well as all documentation required under the documentation directions in the forgiveness application.

Proactively preparing for the common inquiries outlined above will assist companies in completing submission of a timely and transparent response. This increases the likelihood of an expedited and successful audit or review.

In addition, executives should seek competent legal guidance to perform internal investigations and take appropriate and prompt remedial action where evidence exists to suggest inaccurate application submission.

McGuireWoods is prepared to assist your company every step of the way. If your company requires assistance in navigating these complex standards, please contact one of the authors of this alert or your regular McGuireWoods attorney. McGuireWoods has a robust COVID-19 compliance and defense team, including attorneys extensively experienced in government contracts, regulatory compliance, lending, internal investigations and white collar defense.

McGuireWoods has published additional thought leadership analyzing how companies across industries can address crucial [business and legal issues related to COVID-19](#).

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