



# CARES Act in 2024 – Fraud Investigations Are Just Beginning

It has been nearly four years since the U.S. Congress enacted the \$1.9 trillion<sup>1</sup> Coronavirus Aid, Relief, and Economic Security (CARES) Act to provide economic assistance for American workers, businesses, and industries. The objective of the CARES Act, and more specifically the Paycheck Protection Program (PPP), was to help save workers and businesses; therefore, loan processing was often expedited. In fact, in a recent *Nightline* segment, it was reported that the U.S. Small Business Administration (SBA) executed more than 14 years of lending in 14 days.<sup>2</sup>

Although the pandemic may be over, pandemic relief fraud investigations are just beginning. Primarily, we are seeing an uptick in criminal and False Claims Act (FCA) investigations related to loans issued under the PPP and other CARES Act stimulus programs. Common examples of PPP and CARES Act fraud include false certifications, misappropriation of funds, submission of false information, and failure of institutions to reasonably evaluate the accuracy of certifications. To further illustrate the uptick in COVID-19 fraud prosecutions, below is a snapshot of recent press releases on the U.S. Department of Justice's (DOJ) Coronavirus Fraud News web page, all of which were posted between January 11, 2024, and January 16, 2024<sup>3</sup>:

- “Six Individuals Charged in Connection with \$7.5 Million Multi-State PPP Fraud Scheme”
- “Baltimore County Man and Woman Plead Guilty to Fraudulently Obtaining More Than \$300,000 in COVID-19 CARES Act Loans”
- “Former Arizona Man Sentenced to 5 Years for Stealing Mainer’s Identities as Part of Pandemic Unemployment Fraud Scheme”

<sup>1</sup> Committee for a Responsible Federal Budget, *Breaking Down \$3.4 Trillion in COVID Relief*, Blog Post, January 7, 2021 (available at <https://www.crfb.org/blogs/breaking-down-34-trillion-covid-relief>). According to USAspending.gov, the total amount spent by the U.S. government in response to the COVID-19 pandemic is approximately \$4.4 trillion to \$4.6 trillion (see <https://www.usaspending.gov/disaster/covid-19>).

<sup>2</sup> *Nightline*, “Inside the Hunt for Alleged COVID Loan Fraudsters,” January 4, 2024 (available at <https://abcnews.go.com/Nightline/video/inside-hunt-alleged-covid-loan-fraudsters-106094585>).

<sup>3</sup> These press releases appear chronologically on DOJ’s Coronavirus Fraud News web page (see <https://www.justice.gov/coronavirus/news>).



- “Fifteen People Sentenced For Defrauding Unemployment Insurance Agencies During Covid-19 Pandemic”
- “New York Man Indicted for Stealing COVID-19 Unemployment Benefits”

## U.S. Government Efforts to Combat Pandemic Relief Fraud

In May 2021, DOJ deployed the COVID-19 Fraud Enforcement Strike Force teams, which have since expanded. 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.<sup>4</sup> Demonstrating DOJ’s efforts to combat pandemic relief fraud, in August 2023, Deputy Attorney General Lisa Monaco announced the creation of two additional COVID-19 fraud enforcement strike forces.

Further, as of early 2023, SBA had manually reviewed approximately 2% of PPP loan applications.<sup>5</sup> For contextual purposes, SBA approved approximately 11.8 million loans, totaling approximately \$800 billion,<sup>6</sup> through 2021 (i.e., when most PPP loans originated). SBA has recently signaled, however, that it will scrutinize the remaining 98% of PPP loans in a more sophisticated manner going forward.<sup>7</sup> The exact amount of fraudulent relief funds is unknown, but SBA’s Inspector General estimated that more than \$200 billion – or at least 17% of the roughly \$1.2 trillion in pandemic loans the agency doled out – had been disbursed to “potentially fraudulent actors.”<sup>8</sup> Many of the fraudulent acts have involved applying for multiple loans, fraudulent self-certifications, and improper usage of loan proceeds.

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To date, the U.S. government has predominantly focused on criminal investigations. We have also seen civil FCA cases brought against PPP borrowers and lenders, but we anticipate a significant increase in the number of FCA cases in the upcoming years. Many of these are likely to be *qui tam* cases, in which a relator or whistleblower brings an action against a company on behalf of the government.

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<sup>4</sup> Madeleine Ngo, “Over 3,100 Charged With Pandemic Relief Fraud, Justice Dept. Says,” *The New York Times*, August 23, 2023 (available at <https://www.nytimes.com/2023/08/23/business/pandemic-relief-fraud-justice-department.html>).

<sup>5</sup> Daniel Silva, Sanjay Bhandari, and Marshall Olney, *PPP Fraud Enforcement Shows No Signs of Slowing*, *Buchalter Client Alert*, October 31, 2023 (available at <https://www.buchalter.com/wp-content/uploads/2023/10/PPP-FRAUD-ENFORCEMENT-SHOWS-NO-SIGNS-OF-SLOWING.v2-1.pdf>).

<sup>6</sup> U.S. Small Business Administration, *Paycheck Protection Program (PPP) Report*, Approvals through 05/31/2021 (available at [https://www.sba.gov/sites/default/files/2021-06/PPP\\_Report\\_Public\\_210531-508.pdf](https://www.sba.gov/sites/default/files/2021-06/PPP_Report_Public_210531-508.pdf)).

<sup>7</sup> Daniel Silva, Sanjay Bhandari, and Marshall Olney, *PPP Fraud Enforcement Shows No Signs of Slowing*, *Buchalter Client Alert*, October 31, 2023 (available at <https://www.buchalter.com/wp-content/uploads/2023/10/PPP-FRAUD-ENFORCEMENT-SHOWS-NO-SIGNS-OF-SLOWING.v2-1.pdf>).

<sup>8</sup> U.S. Small Business Administration, Office of Inspector General, *COVID-19 Pandemic EIDL and PPP Loan Fraud Landscape*, White Paper Report 23-09, June 27, 2023 (available at <https://www.sba.gov/sites/sbagov/files/2023-06/SBA%20OIG%20Report%2023-09.pdf>).



## Recent Trends/Observations

Considering the recent efforts of DOJ, SBA, and other government agencies to target COVID-19 pandemic relief fraud, we expect PPP and CARES Act enforcement actions to continue to rise. We anticipate that such investigations will focus on both funding recipients and financial/lending institutions because financial institutions were allowed to receive lender fees in connection with the PPP program. In fact, we are already seeing a trend where DOJ and other enforcement agencies are focusing on the lending institutions for not performing a reasonable evaluation of the accuracy of PPP loan applicants' self-certifications (i.e., failure to perform proper review practices and failure to follow policies). For example, in January 2023, the Federal Reserve Board fined Popular Bank \$2.3 million for not reporting potential fraud in a timely manner in connection with six loans. Specifically, the Federal Reserve Board alleged that Popular Bank did not follow its internal anti-money laundering policies, which "constituted unsafe or unsound banking practices."<sup>9</sup> Similarly, and albeit a smaller dollar amount, in September 2022, DOJ and Prosperity Bank settled for \$18,674 to resolve an allegation that Prosperity Bank "improperly processed a PPP loan on behalf of an ineligible applicant."<sup>10</sup> It was alleged that Prosperity Bank knew the owner of the applicant was facing criminal charges and was ineligible to receive the PPP loan, but Prosperity Bank nonetheless processed the loan. The Prosperity Bank settlement demonstrates that investigations are not solely focused on large-dollar recoveries.

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As evidenced by these matters and other similar enforcement actions, deceptiveness is not always connected to intentional misconduct; in many cases, it results from a lack of proper internal controls. Further, penalties appear to increase in tandem with the perceived deceptiveness of the conduct.

Significantly, deficiencies in internal controls can also give rise to multiple legal violations with respect to a single PPP loan. For example, a lender could face liability for submitting a PPP loan application to SBA for an ineligible borrower. That same lender could face additional liability for submitting a forgiveness application to SBA for that ineligible borrower or for requesting that SBA purchase its 100% guaranty on the loan. There are even circumstances where the lender could be accused of submitting three separate false claims to the government for the same PPP loan—at application, forgiveness, and guaranty purchase. Therefore, it is important for lenders, if they fell short of their legal obligations at origination, to identify and remediate underwriting and

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<sup>9</sup> Board of Governors of the Federal Reserve System, *Federal Reserve Board announces it has fined Popular Bank \$2.3 million for processing six Paycheck Protection Program (PPP) loans despite having detected that the loan applications contained significant indications of fraud*, Press Release, January 24, 2023 (available at <https://www.federalreserve.gov/newsevents/pressreleases/enforcement20230124a.htm>).

<sup>10</sup> United States Attorney’s Office, Southern District of Texas, *First-ever False Claims Act settlement received from Paycheck Protection Program lender*, Press Release, September 13, 2022 (available at <https://www.justice.gov/usao-sdtx/pr/first-ever-false-claims-act-settlement-received-paycheck-protection-program-lender>).



compliance issues before seeking forgiveness or guaranty purchase. The risk is compounded exponentially when lenders seek payment from the government on loans that fail to comply with PPP requirements.

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Responding to DOJ task force investigation demands is a major challenge for many businesses and lending institutions. Therefore, it is important for lending institutions to maintain documentation evidencing they consistently followed established policies for evaluating PPP loan applications. Similarly, businesses that received PPP loans should maintain documentation establishing their eligibility to receive the loans and demonstrating that the loan proceeds were used in accordance with the CARES Act requirements and terms of the loan. To the extent that businesses were eligible to receive relief or a waiver from repayment of PPP loans, such businesses should maintain documentation supporting their eligibility for repayment relief or waiver of forgiveness. Although maintaining documentation substantiating these types of transactions is always critical, it becomes especially important when investigations and/or audits may not occur for several years after the initial transactions.

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