

## PPP Data Could Lead To Trouble For Loan Recipients

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Recently the U.S. Department of the Treasury published data on the loans issued to date under the Paycheck Protection Program.<sup>i</sup> The report provided high-level summary data, including the total amount of loans issued, the amount of loans by state, and loans by industry.

Perhaps more notably, the report also included searchable data on individual loans, including the names of recipient businesses, approximate loan sizes, and the number of jobs supported by each PPP loan. While the vast majority of loans were under \$150,000,<sup>ii</sup> many businesses received millions, which has already led to public attention and will almost certainly spur intense scrutiny by government enforcement agencies and the public.

Businesses that come under this spotlight could face severe legal consequences and potential reputational damage.

Under the Coronavirus Aid, Relief, and Economic Security, or CARES, Act, Congress created the \$659 billion PPP with the intent of providing forgivable loans through the Small Business Administration to small businesses impacted by the COVID-19 pandemic. Importantly, the PPP required applicants to certify that the economic impact of COVID-19 pandemic made the loan necessary for the applicant's ongoing business operations.

Soon after the initial issuance of PPP loans in April, the government announced that many seemingly large businesses, like fast food franchises and technology companies, had received PPP loans, leading to public outcry.

In response, the SBA promulgated additional rules, announcing that it would audit all loans above \$2 million,<sup>iii</sup> but also created a safe harbor where all companies that returned their PPP loans before May 14 would be deemed to have certified in good faith that the loan was necessary.<sup>iv</sup> The PPP data released July 6 has already attracted

public scrutiny, and may lead to a similar rulemaking response by the SBA.

The data released by the Treasury Department includes a statistical overview of the distribution amounts, a summary of reported jobs, statistics related to income groups, the recipients' industries, and lender information. Overall, the data show that as of June 30, nearly 4.9 million PPP loans had been approved, totaling around \$521.5 billion.<sup>v</sup> The average loan size was approximately \$107,000 and 86.5% of all loans were for less than \$150,000. This seems to line up with the stated intent of the program: to provide economic relief to small businesses.

However, nearly 30,000 loans (accounting for 20.7% of the total amount distributed) were above \$2 million.<sup>vi</sup> This is significant because, assuming none of these loans were returned during the safe harbor, the SBA will be auditing all 30,000 of those loans. Additionally, the Treasury Department published the names, approximate loan amounts, supported jobs, and other information for each recipient of a loan over \$150,000. These companies would be well-advised to prepare for SBA audits, possible enforcement actions, and increased public scrutiny.

The federal government has already prioritized enforcement against fraud under the CARES Act. The Special Inspector General for Pandemic Recovery and the Pandemic Response Accountability Committee, both created to investigate spending in response to COVID-19, may seize on the Treasury Department's data as evidence that large businesses wrongfully took funds meant for small businesses.<sup>vii</sup>

U.S. attorney's offices have prioritized prosecution of CARES Act fraud, and have already brought several cases for PPP fraud around the country.<sup>viii</sup> While early cases involved obvious cases of fraud, such as PPP applications for nonexistent businesses, prosecutors will soon focus their attention on other applications that may have included reckless or less obvious misrepresentations. The Treasury Department's public data will make it easy for enforcement agents to prioritize investigations into businesses receiving the largest loans.

Likewise, whistleblowers from inside or outside the PPP-recipient businesses can mine this data to scrutinize businesses for potential wrongdoing. The U.S. Department of Justice has created a website and hotline specifically for reporting CARES Act fraud.

In addition to these legal risks, companies should brace for increased public attention as the media scrutinize the newly released Treasury Department data. We already saw this happen in mid-April, when the first round of PPP funding ran out. Several news outlets reported that large companies had applied for and received PPP funds, commenting that they were corrupting the PPP by taking funds intended to help small businesses.<sup>ix</sup> In some cases, the negative public attention caused companies to return the funds, even though they may not have actually run afoul of the requirements of CARES Act.<sup>x</sup>

This public scrutiny may also have caused the SBA's release of additional guidance regarding the certification of necessity and associated safe harbor. Backlash to this new Treasury Department data could lead to a similar rulemaking response by the SBA. This increased public attention may not only increase the likelihood of enforcement efforts, but also lead to congressional hearings and other public forms of oversight.

With the release of the Treasury Department data, PPP recipients can expect increased scrutiny from the public and the federal government. Businesses receiving larger PPP loans should be especially wary of accusations that they wrongfully took advantage of funds intended for small businesses, and should prepare for potential backlash in the form of public relations and legal actions.

As you are aware, things are changing quickly, there is no clear-cut authority or bright-line rules in this area, and the aid measures and interpretations described here may change. This article does not address the potential impacts of the numerous other local, state and federal orders that have been issued in response to the COVID-19 pandemic, including, without limitation, potential liability should an employee become ill, requirements regarding family leave, sick pay, and other issues.

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<sup>i</sup> U.S. Department of The Treasury, "SBA and Treasury Announce Release of Paycheck Protection Program Loan Data," July 6, 2020, available at: <https://home.treasury.gov/news/press-releases/sm1052>.

<sup>ii</sup> [U.S. Small Business Administration](#), Paycheck Protection Program (PPP) Report: Approvals through 06/30/2020, July 6, 2020, available at: <https://home.treasury.gov/system/files/136/PPP-Results-Sunday.pdf>.

<sup>iii</sup> While the Treasury and SBA stated they will audit all loans over \$2 million, they did not exempt loans under that threshold. Therefore, loans under \$2 million could still be subject to audits.

<sup>iv</sup> See "Paycheck Protection Program Loans Frequently Asked Questions," FAQ no. 46, available at <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf?>

<sup>v</sup> U.S. Small Business Administration, Paycheck Protection Program (PPP) Report: Approvals through 06/30/2020, at 2.

<sup>vi</sup> U.S. Small Business Administration, Paycheck Protection Program (PPP) Report: Approvals through 06/30/2020, at 3.

<sup>vii</sup> We note, however, the Treasury data shows approximately \$131 billion in PPP funding remaining as of June 30, 2020. See U.S. Small Business Administration, Paycheck Protection Program (PPP) Report: Approvals through 06/30/2020, at 18. While this is unlikely to drastically change public perception (or dissuade a federal investigator), it does undercut the argument that qualified small businesses were excluded from the PPP because large businesses took all of the funding.

<sup>viii</sup> <https://www.smcoronavirusinsights.com/2020/07/enforcement-actions-tracker/>

<sup>ix</sup> See, e.g., Greg Iacurci, Here's How Big Companies Used a Loophole to Get Paycheck Protection Program Loans, CNBC, Apr. 20, 2020, available at <https://www.cnbc.com/2020/04/20/how-shake-shack-potbelly-and-ruths-chris-got-small-business-loans.html>.

<sup>x</sup> See, e.g., Robert C. Wolcott, [Shake Shack Returns Its PPP Loan: Give Them Credit – And Buy A Shake](https://www.forbes.com/sites/robertwolcott/2020/04/20/shake-shack-returns-its-ppp-loan-given-them-credit-and-visit-a-shake-shack/#5ccfb36e2886), Forbes, Apr. 20, 2020, available at <https://www.forbes.com/sites/robertwolcott/2020/04/20/shake-shack-returns-its-ppp-loan-given-them-credit-and-visit-a-shake-shack/#5ccfb36e2886>.