



**COVID-19**

UPDATE:  
May 13, 2020

**Coronavirus / COVID-19  
Response Team**

MILLER   
JOHNSON  
Attorneys

1

MILLER   
JOHNSON  
Attorneys

**Bait and Switch:  
Understanding the Risk of  
Retaining PPP Funds**

» Erik Daly  
Loic Dimithe  
Laci Reséndiz

MILLER   
JOHNSON  
Attorneys

The materials and information have been prepared for informational purposes only. This is not legal advice, nor intended to create or constitute a lawyer–client relationship. Before acting on the basis of any information or material, readers who have specific questions or problems should consult their lawyer.

3

## Paycheck Protection Program (PPP): Conceptual Overview

- Small business loans that may be wholly or partially forgiven
  - Support cash flow to cover payroll costs (at least 75% of loan) and rent, mortgage interest and utility payments
  - Loans may be forgiven (wholly or partially) based on use of funds and employee / wage retention
  - Available to businesses with 500 or fewer employees (maybe more depending on industry and other factors)
  - Also available to self-employed/“gig economy” workers and 501(c)(3) non-profit organizations
  - No “credit elsewhere” testing (\*sort of\*)

4

## Evolving Guidance on PPP Loan “Need” Certification

March 27: CARES Act	March 31: Overview	April 3: Info Sheet	April 23: FAQ #31	April 28: FAQ #39
<ul style="list-style-type: none"> <li>• “uncertainty of economic conditions makes necessary the loan request to support the ongoing operations”</li> <li>• Negative impact of COVID-19 presumed for eligible borrowers</li> </ul>	<ul style="list-style-type: none"> <li>• “We encourage you to apply as quickly as you can because there is a funding cap”</li> <li>• “All small businesses are eligible”</li> <li>• Certification of need not even mentioned</li> </ul>	<ul style="list-style-type: none"> <li>• Language of statute</li> <li>• “Do I need to first look for other funds before applying to this program? <u>No.</u>”</li> <li>• “We are waiving the usual SBA requirement that you try to obtain some or all of the loan funds from other sources”</li> </ul>	<ul style="list-style-type: none"> <li>• “taking into account their current business activity and their ability to access other sources of liquidity”</li> <li>• “not significantly detrimental”</li> <li>• Cert. deemed in good faith if loan returned in full by May 7</li> </ul>	<ul style="list-style-type: none"> <li>• Reference to FAQ #31</li> <li>• Will review all loans in excess of \$2 million following submission of the borrower’s loan forgiveness application</li> </ul>

## Recent SBA Guidance and FAQs

- **FAQ #31:** While directed at “large companies with adequate sources of liquidity,” reminds all borrowers to assess their “economic need” for a PPP loan under the standard established by the CARES Act and PPP rules and regulations.
  - Specifically, before submitting a PPP application, all borrowers should review carefully the required certification that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”
  - Borrowers must make this certification in good faith, taking into account their current business activity and ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to their business.

## Recent SBA Guidance and FAQs (cont.)

- Guidance on what constitutes a “necessary” loan has not been issued; however, recent updates from the SBA, the Treasury and Senator Rubio (Chairmen of the Committee on Small Business and Entrepreneurship) indicate that the term “necessary” likely means that the business needs the loan funds because it lacks the revenue to cover its operating expenses.
- A borrower may return its PPP loan “in full” by May 14<sup>th</sup> if it believes its certification was invalid based on this latest guidance.

## Today’s Topics

- The SBA and the Treasury’s authority to audit and the audit process.
- Potential fines and penalties a borrower may face following the SBA and the Treasury’s enforcement actions.
- Best Practices to prepare and respond to an audit.

## Authority to Audit

- The Special Inspector General for Pandemic Recovery and Section 15010 of the CARES Act created the Pandemic Response Accountability Committee.
- Together, they are responsible for preventing and detecting any fraud, waste, and abuse in connection with the loans made under the CARES Act.
- They each have the power to subpoena borrowers for documents relevant to their inquiry.

## The Audit Process

- The audits will examine factors such as:
  - The size of the business;
  - Whether the business had an actual need for the funds;
  - Whether the funds were properly spent on the business expenses specified in the CARES Act;
  - Whether the loans were used for forgivable purposes; and
  - Whether employee and compensations levels were maintained as per the conditions for loan forgiveness.

## Ranges of Fines and Penalties

Type of Action	Standard	Possible Fines / Penalty
False Statements on SBA Loan Applications (Federally Insured)	Liability can stem from both “ <u>knowing</u> ” and “ <u>willful</u> ” misstatements.	Imprisonment of not more than 30 years and/or a fine of not exceeding \$1 million
Wire or Mail Fraud	Government must show that the defendant took part in a scheme that used electronic, interstate communications, or use of mail to further the scheme to defraud the victim of money or property.	Imprisonment of not more than 20 years and/or a fine of not more than \$250,000

## Ranges of Fines and Penalties (cont.)

Type of Action	Standard	Possible Fines / Penalty
Civil Liability under False Claims Act (“FCA”)	<p><u>Knowingly</u> presenting or causing to be presented a false claim for payment to the government.</p> <p>For FCA purposes, “knowingly” can mean having actual knowledge, or acting in deliberate ignorance or reckless disregard of the truth or falsity of the information.</p>	Three times the amount of its actual damages – with damages in this context likely viewed by the government as the full amount of the loan – plus penalties ranging from \$11,665 to \$23,331 for each false claim.

## Enforcement Actions To Date

- David A. Staveley of Andover, Massachusetts, and David Butziger of Warwick, Rhode Island, were charged with conspiring to seek forgivable loans guaranteed by the SBA, claiming to have dozens of employees earning wages at four different business entities when, in fact, there were no employees working for any of the businesses.
- Note the willful intent to deceive and mislead the government.

## Best Practices To Prepare for Enforcement or Other Actions

- Evaluate and document economic impact
  - Determining how a business was doing before the crisis, and how much COVID-19 has financially impacted your business.
  - Analyzing annual and quarterly budgets and projections.
- Evaluate and document assessment of other options
  - Does the business have available cash or debt capacity?
  - Would the business opt to lay off workers or decrease comp?
- Keep thorough records
  - Loan applications and related information
  - Be audit-ready if loan is greater than \$2MM

## Best Practices when Responding to an Enforcement or Other Action

- Take note of all impending deadlines and respond accordingly.
  - Ask for extensions where necessary.
- Coordinate with your response team.
  - Contact your advisors, including your legal counsel, tax advisors and accountants.
  - Note Miller Johnson's PPP Enforcement Preparedness Kit and the benefit of attorney client privilege.
- Assert applicable defenses.
  - Argue against the enforceability of the new necessity standard and its retroactive effect.



**Erik Daly**

616.831.1723

dalye@millerjohnson.com



**Loic Dimithe**

616.831.1785

dimithe@millerjohnson.com



**Laci Reséndiz**

616.831.1734

resendizl@millerjohnson.com

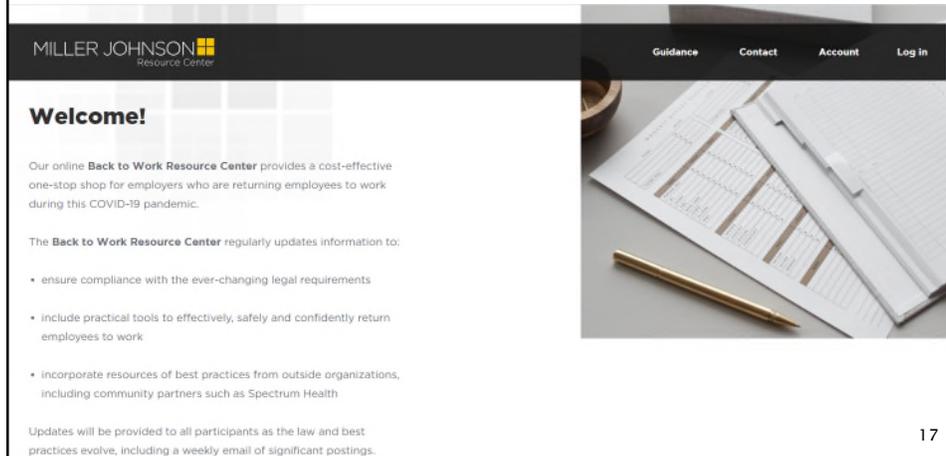
millerjohnson.com

45 Ottawa Ave SW  
Suite 1100  
Grand Rapids, MI 49503

100 W Michigan Ave  
Suite 200  
Kalamazoo, MI 49007

## Miller Johnson Back to Work Resource Center

<https://resources.millerjohnson.com/>



MILLER JOHNSON  
Resource Center

Guidance Contact Account Log in

### Welcome!

Our online **Back to Work Resource Center** provides a cost-effective one-stop shop for employers who are returning employees to work during this COVID-19 pandemic.

The **Back to Work Resource Center** regularly updates information to:

- ensure compliance with the ever-changing legal requirements
- include practical tools to effectively, safely and confidently return employees to work
- incorporate resources of best practices from outside organizations, including community partners such as Spectrum Health

Updates will be provided to all participants as the law and best practices evolve, including a weekly email of significant postings.

17