



PPP and CARES Act Audit, Investigations and Defense Team

RESPONSE KIT

A kit specifically designed to inform, prepare and help answer important questions related to PPP and CARES Act audits and investigations.

Burr's PPP and CARES Act Audit, Investigations and Defense team brings together the firm's variety of resources to help guide and prepare businesses for a post-COVID climate.

KIT INCLUDES:

- PPP and CARES Act Audit, Investigations and Defense Overview
- FAQ's
- Important Documents List
- Burr's PPP and CARES Act Audit, Investigations and Defense Team

PPP and CARES Act Audit, Investigations and Defense Team

1. Paycheck Protection Program Audits and Investigations

Millions of American businesses and self-employed individuals applied for and received Paycheck Protection Program (PPP) loans authorized by the CARES Act. PPP loans are obtained from a bank, and guaranteed by the Small Business Administration (SBA) similar to existing SBA business loan programs. Businesses and individuals are required to provide documents and information and make important certifications to their bank when they apply for a PPP loan. The certifications include the eligibility of the business or individual for a PPP loan under the requirements of the CARES Act. The CARES Act also allows PPP loans to potentially be forgiven, but subject to many conditions. Businesses and individuals seeking PPP loan forgiveness must provide additional documents and certifications through an application filed with their PPP lending bank. The SBA, charged by Congress with administering the PPP, is issuing and updating guidance concerning the PPP on a regular basis. Interpretation of the PPP is constantly evolving.

PPP loans under the CARES Act will be audited. The Department of the Treasury announced that all PPP loans over \$2 million will be audited; other PPP loans will also certainly be audited. Borrowers that seek forgiveness of a PPP loan increase their likelihood of being audited, and not limited just to forgiveness, but eligibility of the borrower for the loan and the accuracy of certifications made by the borrower in the borrower's PPP loan application. A PPP loan may be subject to the "False Claims Act" and other federal laws. The SBA and the United States Department of Justice have begun criminal investigations related to PPP loans and have issued indictments.

While the audit of federal tax returns (income and employment) will be handled exclusively by the IRS, the audit/review of PPP loans and related PPP loan audit procedures are less clear. The SBA Office of Inspector General (OIG) may be assigned responsibility for PPP audits; however, the OIG traditionally has acted in an independent agency review function, making reports to Congress about SBA performance and then reporting and monitoring findings with SBA.¹ OIG does have responsibility for certain audits, but these have traditionally involved bank compliance with SBA loan programs. OIG also has responsibility for investigating criminal violations of SBA programs but in conjunction with the United States Department of Justice/U.S. Attorneys' Offices.

1. The CARES Act also created the new "Office of the Special Inspector General for Pandemic Recovery," whose task is to "conduct, supervise, and coordinate audits and investigations" of the financial assistance programs for businesses included in Title IV of the CARES Act. It is not known at this time whether this new Office of Inspector General for Pandemic Recovery will replace or supplant the SBA and the OIG in connection with PPP loan audits and investigations.

OIG has a relatively small staff, and may be unable to effectively perform the large number of PPP audits that are expected. The SBA/OIG expect support from Treasury, the IRS, and other federal agencies, whose auditors are more experienced in reviewing the tax, payroll, bank account, and expenditure information for PPP loans. Some commentators have observed that the SBA may require more involvement of the PPP lending bank in the audit process, especially where the banks' ability to keep fees already paid for originating PPP loans may hang in the balance.

Administrative appeal remedies from disputed PPP audits, including resulting litigation, are presently unclear. More guidance from SBA concerning PPP audits and appeal remedies will be issued. Many SBA administrative decisions and determinations, including small business size determinations and NAICS designations, are presently reviewable by the SBA Office of Hearings and Appeals – an administrative hearing/review function within the SBA (OHA). However, the jurisdiction of OHA is limited, and may not contemplate many audit areas involving PPP loans. It may be that future amendments to the CARES Act, and other applicable federal statutes, are needed to expand the jurisdiction of OHA for this purpose. Adverse decisions of the OHA are appealable to federal courts.

A. PPP Loan Audits and Issues

SBA reserves the right to review/audit all PPP loans and related loan issues, including eligibility, borrower certifications, and forgiveness. SBA may review whether a borrower calculated its loan amount correctly and whether the borrower used loan proceeds for allowable purposes. It is the responsibility of the borrower to provide an accurate calculation of loan forgiveness and to attest to the accuracy of its reported information. Documents and Information to be provided by businesses and individuals seeking PPP loan forgiveness, and also related documents that must be separately maintained by a business or individual for their PPP loan, are identified in a separate Burr & Forman PPP/CARES Act Audit, Investigation and Defense Team summary titled - **Documents Each Borrower Must Submit with its PPP Loan Forgiveness Application and PPP Documents Each Borrower must Maintain for Potential Audit/Review by the SBA.**

In a PPP loan application (Borrower Loan Application – SBA Form 2483 (or lender's equivalent form) - a borrower must certify that “[c]urrent economic uncertainty make this loan request necessary to support the ongoing operations of the Applicant.” The SBA issued guidance stating that a borrower who received a PPP loan of less than \$2 million will be deemed to have made this required certification in good faith. For Borrowers who received a PPP loan of \$2 million or more, the borrower may have to prove that its application was based on current economic uncertainty and that the PPP loan was necessary to support ongoing operations of the borrower. SBA recognizes that borrowers who received PPP loans of \$2 million or more may still have an adequate basis for making the required good-faith certification, based on their individual circumstances in light of the language of the certification and SBA guidance. If SBA determines in the course of its audit/review that a borrower lacked an adequate basis for the required certification concerning the necessity of the loan request, SBA will seek repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for loan forgiveness. If the borrower repays the loan after receiving notification from SBA, SBA has announced that it will not pursue administrative enforcement or referrals to other agencies based on its determination with respect to the certification concerning necessity of the loan request. SBA's determination concerning the certification regarding the necessity of the loan request will not affect SBA's loan guarantee.

Applicable to forgiveness, SBA has released a form of Loan Forgiveness Application (SBA Form 3508) and related instructions. SBA states that, to receive loan forgiveness, a borrower must complete and submit the Loan Forgiveness Application (or equivalent bank form) to the PPP lending bank (or the lender that is servicing the PPP loan). The bank will review the application and make a decision regarding loan forgiveness. Banks are expected to perform a good-faith review, in a reasonable time, of the borrower's calculations and supporting documents concerning amounts eligible for loan forgiveness. The lender must issue a decision to SBA on a loan forgiveness application no later than 60 days after receipt of a complete loan forgiveness application from the borrower.

That decision may take the form of an approval (in whole or in part), denial, or (if directed by SBA), a denial without prejudice due to a pending SBA review of the loan for which forgiveness is sought. In the case of a denial without prejudice, the borrower may subsequently request that the bank reconsider its application for loan forgiveness, unless SBA has determined that the borrower is ineligible for a PPP loan. If the bank determines that the borrower is entitled to forgiveness of some or all of the amount applied for under the statute and applicable regulations, the bank must request payment from SBA at the time the bank issues its decision to SBA. SBA will, subject to any SBA audit/review of the loan or loan application, remit the appropriate forgiveness amount to the bank, plus any interest accrued through the date of payment, not later than 90 days after the bank issues its decision to SBA. If applicable, SBA will deduct EIDL Advance Amounts from the forgiveness amount remitted to the Bank as required by Section 1110(e)(6) of the CARES Act. If the bank denies forgiveness, in whole or in part, the bank must also notify the borrower in writing that the lender has issued a decision to SBA denying the loan forgiveness application. SBA reserves the right to review the bank's decision in its sole discretion. Within 30 days of notice from the bank, a borrower may request that SBA review the bank's decision.

In the event the SBA reviews/audits a borrower's PPP loan, the SBA will notify the bank, who is required to notify the borrower in writing within five (5) business days of receipt of notice from the SBA and to request information from the borrower, if requested by the SBA. The SBA may also request information directly from the borrower. A borrower's failure to respond to the SBA may result in a determination that the borrower was ineligible for a PPP loan or ineligible to receive the loan amount or loan forgiveness claimed by the borrower. The PPP lending bank must respond to the SBA with all requested documents within five (5) business days of the request from SBA. However, there is no specific time period yet provided for the borrower to respond and provide documents to the bank. Again, SBA has announced that it does intend to issue additional guidance addressing the administrative process for disputing PPP audit determinations.

If SBA determines in the course of its audit/review that the borrower was ineligible for a PPP loan based on the provisions of the CARES Act, SBA rules or guidance available at the time of the borrower's loan application, or the terms of the borrower's PPP loan application (for example, because the borrower lacked an adequate basis for the certifications that it made in its PPP loan application), the loan will not be eligible for forgiveness. SBA may direct a lender to disapprove the Borrower's loan forgiveness application. The bank is responsible for notifying the borrower of the forgiveness amount. If only a portion of the loan is forgiven, or if the forgiveness request is denied, any remaining balance due on the loan must be repaid by the borrower on or before the two-year maturity of the PPP loan. If the amount remitted by SBA to the bank exceeds the remaining principal balance of the PPP loan (because the borrower made scheduled payments on the loan after the initial deferment period), the bank must remit the excess amount, including accrued interest, to the borrower. This general loan forgiveness process described above applies only to loan forgiveness applications that are not reviewed by SBA prior to the bank's decision on the forgiveness application.

FAQ'S

About Paycheck Protection Program & CARES Act Audits, Investigations and Defense

1. Will my PPP loan be audited?

Yes, if your PPP loan is over \$2 million. If your PPP loan is less than \$2 million, you may be audited, but this is not certain.

2. If I apply for forgiveness of my PPP loan does this increase the likelihood of my loan being audited?

Yes, as a practical matter. If you apply for loan forgiveness, you must provide documents and information to support your request for loan forgiveness, and your bank, the SBA, and potentially others in the government will review this information, as well as your original PPP loan application.

3. What documents and information must I give to my lender with my application for PPP loan forgiveness?

Bank account, payroll, employment records, employment tax returns, certain business records (e.g. for rent, interest on loans, and utilities), and other documents and information verifying your full-time employees and what you have been paying them, and how you used (spent) your PPP loan.

A list of specific documents and information can be found [here](#).

4. In addition to documents and information that must be submitted if I seek forgiveness of my PPP loan, are there any other documents for my PPP loan I must maintain, and for how long?

In addition to required documents you must submit if you seek PPP loan forgiveness you must also maintain/keep documents showing (1) employee salary/wage reductions; (2) whether you paid any employee more than \$100,000 in annualized pay during any pay period in 2019; (3) reductions in employee job offers and refusals, firings for cause, voluntary resignations, and written requests by any employee for reductions of their work schedules; and (4) generally, all other records relating to your PPP loan, including documentation submitted with your PPP loan application, and documentation supporting the certifications you made in your PPP loan application and demonstrating your material compliance with PPP requirements. You must keep all these documents for at least six (6) years from the date the loan is forgiven or repaid in full. You must also allow authorized representatives of SBA (including representatives of its Office of Inspector General) to access these records upon request. A list of specific documents and information you must maintain can be found [here](#).

5. What government agencies may be auditing my PPP loan, and loan forgiveness if I make this request?

The SBA, its Office of Inspector General, and also your PPP loan lender (or loan servicer) may contact you to audit/review your PPP loan documents.

6. If my PPP loan and/or my request for forgiveness is audited, and it is determined that I did not qualify for a PPP loan or my PPP loan does not qualify for forgiveness (in whole or in part), will I have to pay some or all of the loan back?

Yes. If you do not qualify for a PPP loan you received, you will be required to pay it back; if you apply for forgiveness, and the loan is not forgivable (in whole or in part), you will have to repay the amount that is not forgiven generally within five (5) years (and with interest at 1%).

7. What if I disagree with a determination that I did not qualify for a PPP loan or that some or all of my PPP loan will not be forgiven?

You will have the right to request a review of this determination, and which can include administrative appeal rights. The SBA will be issuing guidance on how you can request a review, including administrative appeal rights, and which will be posted as an updated “Question and Answer” here when this information becomes available.

8. If I request review or appeal of a determination that I did not qualify for the PPP loan I received or that some or all of the loan will not be forgiven, and I still disagree with this determination, what then?

You should have the ability to then request an administrative hearing, and you may also be able to go to court to challenge an adverse decision concerning your PPP loan, including forgiveness. The SBA will be issuing guidance on how you can request a review, including administrative appeal rights, and which will be posted as an updated “Question and Answer” here when this information becomes available.

9. What is the difference between an “audit” or “review” of my PPP loan and an “investigation” of the loan?

An “audit” or “review” of your PPP loan is the administrative process where the government seeks to verify that you qualify for the loan and also for forgiveness if you applied for PPP loan forgiveness. However, an “investigation” of you and your PPP loan may mean the government believes you have engaged in criminal misconduct. The government may not even initially contact you or your business where it is investigating you or your business and a PPP loan. However, if you are contacted by the government, including the SBA, Office of Inspector General, the Department of Treasury, the IRS, the FBI, or any other government office or agency and are informed you and your PPP loan are being investigated, you should immediately consult with your attorney.

10. I claimed tax benefits under the CARES Act, such as the employee retention credit, payroll tax deferral, or a carryback of net operating loss for my business to receive a tax refund. Will any of these tax benefits be audited by the SBA?

No. If you claimed tax benefits under the CARES Act, these tax benefits would be claimed/reported by you on tax returns filed with the IRS, including federal employment and income tax returns. The IRS, not SBA, has responsibility for auditing your federal tax returns.

11. If the IRS audits CARES Act tax benefits I claimed on my federal tax returns, should I represent myself in this tax audit?

Individuals and businesses that are audited by the IRS may certainly represent themselves in an IRS audit. However, the provisions and new tax benefits under the CARES Act may be complicated. If you do not fully understand these tax issues, it may always be good to consult with a tax attorney or CPA experienced in IRS audits, and who also may be able to represent you in the IRS audit.



Paycheck Protection Program DOCUMENTS LIST



The following are documents and information that will need to be provided by a PPP loan borrower to its lending bank, and also potentially the SBA, if the borrower seeks forgiveness of its PPP loan. This also identifies other documents and information that the borrower must also maintain, and to have available if requested by the PPP bank or the SBA. These documents are information are based on PPP guidance issued by the SBA and the Department of Treasury, and may be subject to change.

1. Payroll: Documentation verifying the eligible cash compensation and non-cash benefit payments from the Covered Period or the Alternative Payroll Covered Period consisting of each of the following:
 - a. Bank account statements or third-party payroll service provider reports documenting the amount of cash compensation paid to employees.
 - b. Tax forms (or equivalent third-party payroll service provider reports) for the periods that overlap with the Covered Period or the Alternative Payroll Covered Period:
 - i. Payroll tax filings reported, or that will be reported, to the IRS (typically, Forms 941 and 940); and
 - ii. State quarterly business and individual employee wage reporting and unemployment insurance tax filings reported (SUTA), or that will be reported, to the relevant state.
 - c. Payment receipts, cancelled checks, or account statements documenting the amount of any employer contributions to employee health insurance and retirement plans that the Borrower included in the forgiveness amount (PPP Schedule A, lines (6) and (7)).

2. Full-Time Employees (FTE): Documentation showing (at the election of the Borrower):

- a. The average number of FTE employees on payroll per month employed by the Borrower between February 15, 2019 and June 30, 2019;
- b. The average number of FTE employees on payroll per month employed by the Borrower between January 1, 2020 and February 29, 2020; or
- c. In the case of a seasonal employer, the average number of FTE employees on payroll per month employed by the Borrower between February 15, 2019 and June 30, 2019; between January 1, 2020 and February 29, 2020; or any consecutive twelve-week period between May 1, 2019 and September 15, 2019. The selected time period must be the same time period selected for purposes of completing PPP Schedule A, line 11. Documents may include payroll tax filings reported, or that will be reported, to the IRS (typically, Forms 941/940) and state quarterly business and individual employee wage reporting and unemployment insurance tax filings reported (SUTA), or that will be reported, to the relevant state. Documents submitted may cover periods longer than the specific time period.

3. Nonpayroll: Documentation verifying existence of the obligations/services prior to February 15, 2020 and eligible payments from the Covered Period.

- a. Business mortgage interest payments: Copy of bank amortization schedule and receipts or cancelled checks verifying eligible payments from the Covered Period; or bank account statements from February 2020 and the months of the Covered Period through one month after the end of the Covered Period verifying interest amounts and eligible payments.
- b. Business rent or lease payments: Copy of current lease agreement and receipts or cancelled checks verifying eligible payments from the Covered Period; or lessor account statements from February 2020 and from the Covered Period through one month after the end of the Covered Period verifying eligible payments.
- c. Business utility payments: Copy of invoices from February 2020 and those paid during the Covered Period and receipts, cancelled checks, or account statements verifying those eligible payments. Utility payments during the Covered Period can include business-related electricity, gas, water, transportation, telephone, or internet access.

Documents that Each Borrower Must Maintain but is Not Required to Submit

1. PPP Schedule: A Worksheet or its equivalent and the following:

- a. Documentation supporting the listing of each individual employee in PPP Schedule A Worksheet Table 1, including the “Salary/Hourly Wage Reduction” calculation, if necessary.
- b. Documentation supporting the listing of each individual employee in PPP Schedule A Worksheet Table 2; specifically, that each listed employee received during any single pay period in 2019 compensation at an annualized rate of more than \$100,000.
- c. Documentation regarding any employee job offers and refusals, firings for cause, voluntary resignations, and written requests by any employee for reductions in work schedule.
- d. Documentation supporting the PPP Schedule A Worksheet “FTE Reduction Safe Harbor.”

All records relating to the Borrower’s PPP loan, including documentation submitted with its PPP loan application, documentation supporting the Borrower’s certifications as to the necessity of the loan request and its eligibility for a PPP loan, documentation necessary to support the Borrower’s loan forgiveness application, and documentation demonstrating the Borrower’s material compliance with PPP requirements.

The Borrower must retain all such documentation in its files for six years after the date the loan is forgiven or repaid in full, and permit authorized representatives of SBA, including representatives of its Office of Inspector General, to access such files upon request.

A dedicated team to counsel businesses and financial institutions in government audits, investigations and defense related to the *Paycheck Protection Program* (PPP) and *Coronavirus Aid, Relief and Economic Security* (CARES) Act.

GENERAL SUPPORT



JEFF ALLEN
Partner | Columbia
T: (803) 753-3258
jallen@burr.com



JOSH EHRENFELD
Partner | Nashville
T: (615) 724-3232
jehrenfeld@burr.com



GEORGE MORRISON
Partner | Charleston
T: (843) 973-6862
gmorrison@burr.com



CALLIE WHATLEY
Partner | Birmingham
T: (205) 458-5441
cwhatley@burr.com



JENNIFER LEAPHART
Associate | Columbia
T: (803) 753-3252
jleaphart@burr.com

PPP & IRS Administrative Audit Representation



JEFF ALLEN
Partner | Columbia
T: (803) 753-3258
jallen@burr.com



ERIK DOERRING
Partner | Columbia
T: (803) 799-9800
edoerring@burr.com



ALLEN SULLIVAN
Partner | Birmingham
T: (205) 458-5108
asullivan@burr.com



CHRISTIAN BOREK
Associate | Birmingham
T: (205) 458-5220
cborek@burr.com

PPP/False Claims Act Civil Litigation



JIM HOOVER
Partner | Birmingham
T: (205) 458-5111
jhoover@burr.com



TOM POTTER
Partner | Nashville
T: (615) 724-3231
tpotter@burr.com

Criminal Investigation/Defense



ERIK DOERRING
Partner | Columbia
T: (803) 799-9800
edoerring@burr.com



ALEX LITTLE
Partner | Nashville
T: (615) 724-3203
alex.little@burr.com



CELESTE JONES
Partner | Columbia
T: (803) 753-3255
cjones@burr.com