

COVID-19 Payment Protection Program: Lender Guidelines Subject to Litigation Risks

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Lenders electing to participate in the \$349 billion federal Paycheck Protection Program (PPP) understood the many challenges they faced in accepting and processing loan applications. They recognized, for example, the extraordinary pressure to act within only days of seeing legislation establishing the PPP, and within only hours of being handed implementing regulations promulgated by the Small Business Administration (SBA). They also anticipated the unprecedented and immediate demand, as well as the risk that the pool of funding, available on a first-come first-served basis, would eventually dry up.

What lenders might not have expected, however, is the wave of lawsuits brought by frustrated applicants alleging that the lenders' application guidelines have imposed unlawful restrictions that, in effect, have limited or denied them access to PPP loans for which they are otherwise eligible, and seeking injunctive relief barring the lenders' chosen method of administering PPP loans. To date, Bank of America, Wells Fargo, and Frost Bank have all been sued on this theory.

The plaintiffs take issue with basic gating requirements that these lenders have implemented, such as requirements that an applicant have an existing depository and/or borrowing relationship with the lender or that an applicant not have a loan or credit card with another financial institution. The plaintiffs argue that none of these restrictions are found in the CARES Act or SBA regulations and that an improper purpose behind them—shoring up the bank's balance sheet by supporting preexisting customers—is conspicuous.

The lenders, on the other hand, have responded that prioritizing applications of preexisting customers is reasonable and consistent with the purposes of the CARES Act because lenders are in a better position to determine eligibility and more efficiently process applications for small businesses whose information they already know to ensure that desperately-needed funding flows in a timely manner. The plain language of the CARES Act, which provides that lenders "shall consider" certain specified factors—which are remarkably few in number—in determining eligibility for PPP loans, rather than that lenders "shall only consider" those factors in processing applications, supports the notion that lenders may also consider other information for purposes of determining what applications to accept and in what order to process them. See CARES Act, P.L. 116-136, §11002(a)(2).

On April 13, 2020, in the case of *Profiles Inc. v. Bank of America Corp. et al.*, No. 1:20-cv-00894 (D. Md. 2020), the U.S District Court for the District of Maryland denied the plaintiffs' request for injunctive relief against a PPP lender. The court found that the lender's gating policy to accept PPP applications from only small-business checking customers that either are already borrowers at the bank or aren't borrowers at any other bank "does not run afoul of the CARES Act." Although the CARES Act does lay out certain eligibility criteria for loans, "the statutory language does not constrain banks such that they are prohibited from considering other information when deciding from whom to accept applications, or in what order to process applications it accepts." Even if statutory language in the Act did provide constraints, the court concluded that the small-business plaintiffs wouldn't be able to bring their case, finding that the CARES Act did not provide a private right of action to enforce the law.

The court was also not persuaded that plaintiffs would face irreparable harm without immediate court intervention. The court "does not doubt" that COVID-19 affected the Plaintiffs' businesses, but found that "[s]ince the evidence on the current record shows that there are thousands of institutions participating in PPP, and several that accept loans from new customers, BofA, by definition, has not denied Plaintiffs access to the PPP."

The court concluded that although the lender's eligibility criteria made it "materially harder for some small businesses to access the PPP," an injunction requiring the lender to process more applications could ultimately undermine Congress's goal to maximize relief for small businesses: "If fewer lenders are incentivized to participate in PPP, because they are prohibited from prioritizing their own customers or other entities they believe worthy of expedited consideration, then fewer American small businesses will have access to the pool of readily available PPP funds, and Congress's statutory scheme would be further frustrated, despite the fact that the federal government will ultimately guarantee over \$300 billion in loans." The court chose not to wade into this policy debate, finding that "Congress is better positioned to remedy any defects in the CARES Act, and to pass the supplemental legislation it believes best aimed at ameliorating the effects of the COVID-19 crisis."

Plaintiffs have indicated that they plan to appeal the district court's decision on the temporary restraining order, and it remains to be seen what will happen in the other recently filed cases, or whether Congress will take any further action with respect to PPP eligibility requirements.

These cases highlight the litigation and compliance risks that exist for lenders, and can serve as guidance for others as they implement their programs for offering PPP loans.

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