

Publications

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From Ferraris to Affiliates: DOJ's PPP Enforcement Focus Turns Civil

Key Updates

- The Paycheck Protection Program (PPP) enforcement spotlight has shifted. The early criminal cases involving fancy cars, jewelry and other luxury purchases are giving way to civil False Claims Act (FCA) matters focused on employee headcount, affiliation and foreign corporate families.
- Many investigations now begin with public-data matching and analytics rather than insider knowledge. The Department of Justice's (DOJ) Fraud Oversight through Careful Use of Statistics (FOCUS) initiative expressly recognizes the increased role of data-miner relators in FCA cases.

Why It Matters

- A borrower that appeared eligible on a standalone basis may not have been eligible once domestic and foreign affiliates are counted. But a headcount discrepancy is not automatically an FCA violation. Rule ambiguity and what the applicant actually understood when it certified eligibility play a significant role in FCA defense.

Next Steps

- Companies that received PPP funds should review their ownership, control and employee counts as of each application and forgiveness date; preserve contemporaneous analyses and communications; and assess potential FCA exposure with counsel before responding to a relator allegation, civil investigative demand, subpoena or SBA inquiry.

The Ferraris made headlines, but affiliation rules are now driving a growing wave of civil PPP enforcement. Although the program ended in 2021, DOJ, U.S. Small Business Administration (SBA) and SBA's Office of Inspector General (OIG) continue to use public loan data, corporate records and *qui tam* complaints to revisit threshold eligibility. For multinational borrowers, the key question is not whether the U.S. applicant itself had 300 or 500 employees. It is whether the rules required the applicant to aggregate employees across a multi-tier corporate family.

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Public-Data Analytics and Relators Are Generating Civil Investigations

DOJ's 2026 FOCUS initiative reflects the growing role of "data-miner" relators — private parties that analyze public data and file *qui tam* actions on behalf of the United States. In PPP matters, analytics may flag a U.S. borrower that reported a modest headcount while belonging to a much larger global corporate group. That signal does not resolve affiliation, eligibility, materiality or knowledge. It can, however, trigger an investigation and make the borrower's contemporaneous ownership records, legal analysis and decision-making central to the response.

Two Draws, Two Sets of Rules

First-Draw Loans

The CARES Act generally limited first-draw PPP loans to eligible businesses with no more than 500 employees, subject to statutory and regulatory exceptions. Former 13 C.F.R. § 121.301 required an applicant to count its own employees and the employees of any domestic and foreign affiliates once affiliation was established.

Early PPP materials also referred to employees whose principal place of residence was in the United States, which created uncertainty about foreign employees. In a May 21, 2020, interim final rule, SBA acknowledged "reasonable borrower confusion," clarified that employees of foreign affiliates generally had to be counted, and announced a limited enforcement safe harbor. For an application submitted before May 5, 2020, SBA would not find an inaccurate certification solely because the borrower excluded non-U.S. employees, as long as the borrower and its affiliates had no more than 500 employees whose principal place of residence was in the United States.

Second-Draw Loans

The Second Draw interim final rule generally reduced the ceiling to 300 employees. The pre-May 5, 2020, safe harbor did not reach second-draw applications submitted in 2021. By then, SBA's guidance stated that employees of domestic and foreign affiliates generally counted, absent an exception or waiver.

Even so, identifying the relevant affiliates could remain fact intensive. Former § 121.301 began with the concept of control and then addressed ownership, management, identity of interest and the totality of the circumstances. Its ownership provision focused on an entity that owned or had the power to control more than 50% of the applicant. In multi-tier corporate structures, the text of the rule could generate disputes over whether an indirect parent or remote sister company was an affiliate of the applicant. The answer could depend on the ownership chain, contractual rights, management relationships and other facts bearing on control under the rules then in effect.

In 2023, SBA clarified § 121.301 and explained that the earlier control-based analysis was complex, burdensome, confusing to applicants and lenders, and vulnerable to inconsistent application. That history supports the point that affiliation questions were not always straightforward.

Recent Settlements Put Headcount Front and Center

- **Akris Inc. (D. Mass.):** Akris agreed to pay \$1,823,100 to settle a *qui tam*. The company admitted that it applied for a second-draw loan while it and a foreign affiliate had more than 300 employees.
- **Alice + Olivia, LLC (S.D.N.Y.):** The fashion company agreed to pay \$3.2 million and

admitted that it was ineligible for a second-draw loan because it and its domestic and foreign affiliates employed more than 300 people.

- **LS Cable & System USA, Inc. (E.D.N.C.):** The cable and systems manufacturer agreed to pay \$4 million to resolve allegations that it knowingly misrepresented its employee headcount in connection with more than \$2 million in PPP loan and forgiveness claims.
- **District of South Carolina PPP fraud initiative:** In May 2026, the U.S. Attorney's Office for the District of South Carolina announced more than \$7.9 million in settlements resolving allegations concerning five companies that collectively received more than \$5 million in PPP loans. DOJ alleged that each company understated its headcount by failing to include employees of foreign parents and subsidiaries, received forgiveness of the loan, and thereby violated the FCA. Three of the matters arose from *qui tam* suits filed by private relators.

These matters do not establish that every headcount discrepancy creates FCA liability. The relevant questions include which entities were affiliates under the rules then in effect, whether an exception or safe harbor applied, what the borrower certified and what the borrower actually understood at the time. Companies facing scrutiny should reconstruct the contemporaneous record before responding to the government or a relator.

Recent Defense Decisions Show the Limits of Public-Data Theories

Defendants in PPP FCA cases have challenged public-data theories on both the merits and threshold procedural grounds. Courts have rejected attempts to infer ineligibility solely by comparing a PPP application with W-2 recipient totals, tax filings, historical employee figures associated with acquisitions or other public headcount information. Courts have required allegations connecting the cited data to the borrower's actual employee count when it applied. Where the application or governing materials did not define "employee" or prescribe a single counting method, courts have treated that ambiguity as relevant to whether the relator plausibly alleged falsity. Courts have also dismissed actions at the pleading stage or entered summary judgment where the essential facts underlying the alleged fraud were available through public PPP loan data, tax filings, corporate websites, press releases or news reports and the relator was not an original source with independent knowledge that materially added to those disclosures. In those circumstances, a court may dispose of the action without deciding whether the borrower was actually eligible.

These successes are important, but they do not guarantee a favorable result in another matter. The FCA also is not the government's only potential recovery mechanism. SBA may issue a final loan-review decision finding that a borrower was ineligible for the loan, the amount received or forgiveness, which can create repayment exposure. Unresolved federal debts may be referred for Treasury collection, and, depending on the facts, the government may consider other statutory or common-law remedies. A borrower therefore should assess FCA litigation risk and SBA administrative exposure as related but distinct issues.

The central lesson is that analytics and public-record discrepancies can open an investigation, but they do not substitute for proof. Companies should evaluate the accuracy and context of the underlying data, identify procedural defenses early and reconstruct the contemporaneous eligibility analysis before responding to a relator, DOJ, SBA or SBA's OIG.

Polsinelli's Government Investigations attorneys are representing numerous clients in civil PPP investigations involving employee-count and affiliation issues. The team is prepared to assist with civil investigative demands, subpoenas, relator allegations, SBA loan

reviews and appeals, and retrospective loan-eligibility analyses. For more information, contact Kurt Erskine, Ellen Persons or Alex Beato.