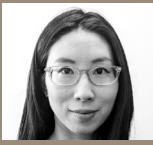


# GOVERNMENT DISASTER RELIEF FUNDS IN A TIME OF COVID-19: RISKS AND RECOVERY OF THE PAYCHECK PROTECTION PROGRAM

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**T**HE unprecedented time of Covid-19 required a swift government response to address the economic impact of the pandemic on businesses and individuals. In March 2020, the United States government declared a national emergency due to the pandemic, and government disaster relief programs were quickly implemented to provide financial assistance in the form of both loans and grants. The biggest program of such type has been the Paycheck Protection Program (the "PPP"), which is implemented by the Small Business Administration (the "SBA") with the assistance of the United States Treasury. State governments have likewise reacted by providing financial loan relief programs such as New York State's Forward Loan Fund. Additional governmental financial assistance plans and relief are currently under consideration.

Government disaster relief programs provide crucial financial assistance to those impacted by a national emergency incident, but it must operate under a compressed timeframe that does not allow for the same due diligence and oversight that can be afforded to similar government programs in non-crisis situations. Responding effectively to these challenges is not a small feat as such programs must balance the need of providing timely, prompt assistance against the need to prevent wasteful and inefficient spending of government resources, which are ultimately borne by tax-payers. When erroneous overpayment of disaster relief funds is identified, the government disaster fund program may

initiate recovery actions against fund recipients. Although Covid-19 is an unprecedented kind of emergency in its scale and scope, disaster relief programs such as PPP may experience similar pitfalls and challenges that previous government disaster relief programs have experienced. Those challenges were met in part with post-disaster recovery actions against the applicants.

## I. THE PAYCHECK PROTECTION PROGRAM

On March 27, 2020, Congress passed the CARES Act in swift response to provide, among other things, economic relief to the millions of individuals and small businesses impacted by the coronavirus pandemic<sup>1</sup>. As part of the Act, the Paycheck Protection Program was established to provide eligible small businesses with forgivable loans in order to pay for up to 8 weeks of payroll costs, interest on rent, utilities, and mortgages. Implemented by the SBA with the assistance of the United States Department of Treasury, qualified small businesses, including independent contractors and self-employed individuals, are eligible to receive up to \$10 million in loans that are guaranteed and, upon application and approval, forgiven by the SBA. Participants must apply for the loan through participating lender institutions and must also submit the application for forgiveness through the institution. As of June 2020, in the span of an almost

two-month period, more than \$520 billion dollars was distributed to over 4.88 million qualified businesses under the Program<sup>2</sup>. The swift disbursement of public funds may have blunted the worst economic scenario for many small businesses but the distribution of large sums of public funds in a short period of time is likely to result in fraud and waste. As the SBA prepares audits of the Program, there will be determinations made that some of the PPP loans should never have been approved because the applicants were ineligible, resulting in erroneous disbursements.

## II. OVERPAYMENT DUE TO INELIGIBILITY

Overpayment of disaster relief funds occurs when the applicant receives disaster relief funds over the amount for which he or she is eligible. Overpayment is commonly the result of ineligibility of the applicant to participate in the disaster relief program. Every program will have a set of conditions and factual circumstances, often required by law or regulation, that must be met in order for the fund applicant to receive public disaster funding. In a disaster relief fund situation, the due diligence normally required to verify an applicant's eligibility may not be able to be completed by the time the funds are disbursed. This is especially true in situations such as the Covid-19 pandemic where applicants are in dire need of emergency assistance. Applicants of a disaster relief program will often be required to certify that they are eligible to participate in the program, and that they will provide additional proof of eligibility after receipt of funding. Applicants who are later determined to no longer meet eligibility requirements may never have been entitled to receive the funds to begin with.

One common type of overpayment occurs as a result of duplication of benefits paid. Specifically, the implementing government agency will take into account other outside sources of disaster relief provided to the applicant in order to calculate the amount of disaster relief funds the applicant is eligible to receive. Government disaster relief programs may require that the applicant certify that the program is the last resort of funding and the applicant must disclose all other sources of related relief<sup>3</sup>. Under such programs, the receipt of funds is contingent upon an ongoing duty to mitigate losses and an ongoing obligation to disclose additional sources of recovery relief to the government disaster relief program.

The challenge of preventing or identifying whether there is a duplication of benefits is that after the disaster funds are disbursed, the applicant may continue to receive other sources of disaster recovery funds from other local and government agencies as well as private

insurance. When calculations of disbursement amounts depend on other outside sources of funding received, the risk of duplicate payments increases as the timing between the initial disbursement of the funds and the subsequent receipt of other disaster relief sources becomes extended. There may be a failure, inadvertent or otherwise, to account for these sources, which will result in an overpayment of funds to the applicant.

This scenario arose frequently in the aftermath of Hurricane Sandy where disaster fund applicants were in significant need of public disaster relief in response to the storm due to the widespread devastation to homes, businesses and other property in New York state<sup>4</sup>. Congress appropriated federal disaster funds through the Department of Housing and Development (HUD) to be disbursed by the State of New York. In certain circumstances, the State may have had information that an applicant received funds from an outside source (i.e. SBA, National Flood Insurance Program and/or an applicant's private flood insurance) for the same purpose that the federal disaster funds were awarded at the time of the application but nonetheless could not verify the receipt of that assistance until after the funds were disbursed. The State was under pressure to disburse funds as quickly as possible due to the detrimental impact the disaster had on its residents. Therefore, the terms of the grant agreements, which applicants were required to enter into, included a duplication of benefits clause. By signing the grant agreements, applicants acknowledged their obligation to reimburse the State for the full amount or a portion of any proceeds or other type of disaster assistance that applicants previously received, subsequently received or would be eligible to receive for the same purpose the federal disaster funds were awarded. Some applicants accepted the federal disaster funds without disclosing duplications of benefits from other sources, or subsequently received duplicate benefits from other sources which resulted in an overpayment. The failure to return the overpaid funds resulted in several lawsuits that are still ongoing today.

Implementation of the PPP faces similar concerns of erroneous overpayment as a result of ineligibility, or duplicate benefits. Although the CARES Act provided the broad contours of eligibility criteria for the PPP, the rules governing eligibility have continued to evolve since the launch of the program in April 3, 2020<sup>5</sup>. Complicated affiliation, income, and taxation requirements<sup>6</sup> that restrict an applicant's eligibility to participate in the program have also added to the confusion and uncertainty with respect to an applicant's eligibility. Furthermore, as part of the PPP loan application, all applicants must certify that they are eligible to participate in the program by representing that: (a) the uncertainty of current economic conditions makes necessary the loan request to support the ongoing

operations of the borrower; (b) the proceeds of the loan will be used for purposes permitted under the program; and (c) the borrower has not received duplicative amounts under the program<sup>7</sup>.

In recognition of the evolving nature of the program, the SBA's interim final rules provide a safe harbor presumption for applicants receiving \$2 million in loans or less, for which they may have misapplied or misunderstood eligibility requirements of the program<sup>8</sup>. For these applicants, the safe harbor presumes that borrowers made the eligibility certifications in good faith if they repay the loan by May 18, 2020<sup>9</sup>. It is unclear, however, whether the safe harbor rule will protect applicants from ineligibility if it is deemed that they failed to satisfy the "necessity" certification. The PPP operates under the auspices of the SBA's traditional Section 7(a) business loan program, which usually requires a loan applicant to show that they have not been able to obtain comparable loan funding on the same terms, also known as the "credit elsewhere test"<sup>10</sup>. Although this "credit elsewhere" requirement has been waived for the PPP, the risk of duplication of benefits may still remain an issue because the SBA requires that all applicants certify that the PPP funds will be "necessary" to support the ongoing operations of the business<sup>11</sup>.

The certification that the PPP loan is "necessary" to the applicant speaks only to the eligibility certification made at the time the borrower applies for the PPP loans and does not address situations in which the SBA, upon an audit, discovers that the applicant had access to other forms of economic aid. Furthermore, applicants with loans over \$2 million would not be given the presumption and could also face recovery actions if the loan is not repaid. So although the "credit elsewhere" test has been waived, the SBA has pronounced in its FAQ dated May 13, 2020 that "if the SBA determines in the course of its review that a borrower lacked adequate basis for the required certification concerning the necessity of the loan request, SBA will seek repayment of the outstanding PPP loan balance. . . if the borrower repays the loan after receiving notification from SBA, SBA will not pursue administrative enforcement or referrals to other agencies. . ." <sup>12</sup>. Commentators have also noted that subsequent comments from the Treasury Department indicating that applicants with the "ability to access other sources of liquidity" may be ineligible if those sources can be accessed "in a manner that is not significantly detrimental to the business"<sup>13</sup>. Such comments arose in the context of the public backlash that arose early on in the program when it was discovered that some publicly traded companies had received millions of dollars in PPP loans while other smaller businesses faced delays in receiving PPP funds<sup>14</sup>. Thus, borrowers, especially those that do not fall under

the safe harbor rules, could be rendered ineligible under the "necessity" requirement and face potential recovery action from the SBA if the loan is not repaid. Indeed, some companies that did not fall under the \$2 million safe harbor threshold have already returned their PPP loans<sup>15</sup>.

### III. RECOVERY AND RECAPTURE OF OVERPAYMENT

When overpayment occurs, the implementing government agency of public disaster relief programs has rights and remedies to seek repayment of the overpaid funds from ineligible applicants. Disaster relief programs have established procedures to notify overpaid applicants and provide pre-litigation options to resolve the overpayment. When it is determined that an overpayment had occurred, the overpaid applicant should be promptly placed on notice of the overpayment and the disaster relief program should request repayment of the overpaid funds. At this point, the applicant may be offered several options to resolve the matter outside litigation. Applicants may be given the opportunity to appeal the determination of overpayment within a given time period, which may entail an informal or formal administrative process. The applicant may also be permitted to demonstrate financial hardship to support an inability to repay the overpayment or negotiate a lower amount of repayment. If a resolution cannot be reached or there are no responses from the applicant, then the government disaster relief program may commence legal action against the applicant to recover the overpaid funds.

Several theories of liability can be alleged for the overpayment of public funds. First, an overpayment is most likely to result in the violation of the statute or regulatory scheme that defines the government public disaster program. Eligibility requirements, such as duplication of benefits rules, may be codified by statute or regulation. The eligibility requirements in the PPP are codified in the CARES Act and the SBA's Interim Final Rules that implement the program. An overpayment caused by the determination of ineligibility will result in a violation of the regulations and trigger the SBA's right to seek repayment of the loan from the individual applicant<sup>16</sup>. If the SBA determines that an applicant was ineligible for the PPP loan, the loan amount obtained, or the loan forgiveness amount, the SBA may seek repayment of the outstanding PPP loan and may institute a recovery action against the applicant.

The SBA has issued regulations, effective August 25, 2020, relating to the administrative appeal and hearing procedures for PPP applicants whose loans were reviewed and found ineligible to receive PPP loans or

forgiveness<sup>17</sup>. The applicant, upon notification that it has been deemed ineligible, may file an appeal of the loan decision with the SBA's Office of Hearing and Appeals ("OHA")<sup>18</sup>. The regulations govern the time periods and format of the hearing before an administrative judge whose decision may be reviewed by the Administrator of the SBA<sup>19</sup>. Once these administrative remedies are exhausted, the matter will be reviewed by the judicial district court<sup>20</sup>.

Borrowers may challenge the SBA's determination of ineligibility and the interim final rules pursuant to the CARES Act, as was the case in some recovery actions associated with HUD grants in the NY Rising Program related to Hurricane Sandy. Generally, judicial review of an agency's actions are given deference under the Chevron standard<sup>21</sup>. If the statute is ambiguous, then the court must "defer to the agency's construction if it is 'permissible'—i.e. 'within the bounds of reasonable interpretation'" <sup>22</sup>. In New York, courts also exercise deference to a government agency's interpretation or application of a statute, especially where it involves "understanding of underlying operational practices or entails an evaluation of factual data" <sup>23</sup>. Although there have been a few cases where plaintiffs have successfully challenged the SBA's eligibility rules<sup>24</sup>, it remains unclear whether challenges to the SBA's interpretation will prevail in post-disaster recovery actions.

Fraud causes of action also play an important role in post-disaster recovery actions. When there has been a knowing or intentional misrepresentation in obtaining the disaster funds, the applicant can face civil and criminal liability. Fraudulent representations by the applicant can result in government prosecution, such as civil liability and treble damages under the False Claims Act and even criminal liability under Federal bank, wire, and mail fraud statutes for the worst offenders. In previous audit reports, the SBA Office of Inspector General ("OIG") has recognized that emergency disaster loans and grants are vulnerable to fraud and losses<sup>25</sup>. The PPP is no exception and in preparation for conducting audits of PPP, the CARES Act more than doubles the SBA OIG's budget request for fiscal year 2021 to \$25 million in funding<sup>26</sup>. There have already been prosecutions that have been announced from the Program against individuals for fraudulent applications and misuse of PPP funds<sup>27</sup>. Recently, the Department of Justice announced charges against an NFL player for mail fraud, wire fraud, and bank fraud for submitting fraudulent PPP loan applications and using the funds for luxury personal purchases<sup>28</sup>.

Civil fraud causes of action are also available under SBA regulations<sup>29</sup>, which have established administrative procedures for program fraud enforcement pursuant to the Program Fraud Civil Remedies Act of 1986, 31 U.S.C.

§§ 3801–3812. The SBA may initiate an administrative hearing via a complaint against any person who makes a "false, fictitious, or fraudulent claim or written statement" to the SBA<sup>30</sup>. In addition to civil liability for the fraudulent claim, the applicant may also face a civil penalty of up to \$11,665 for each statement/ claim and the Attorney General may bring specific actions for collection against such civil penalties and assessments<sup>31</sup>.

State theories of fraud action have also been applied when a state agency implemented the disbursement of government disaster relief funds. When HUD grants for disaster recovery for Hurricane Sandy were disbursed by the State of New York, disaster fund applicants signed grant agreements acknowledging that they would be subject to civil and/or criminal prosecution by federal, state and/or local authorities if they made false, misleading or fraudulent statements and/or omitted or failed to disclose any material fact in connection with getting the funds. If an applicant knowingly withheld information about funds he or she received from outside sources (duplication of benefits) which were later verified by the State of New York, that applicant could be civilly liable for fraudulent inducement or even face criminal prosecution under the New York's penal laws<sup>32</sup>.

An overpayment may also violate the terms of the funding agreement between the disaster relief program and the applicant such that a breach of contract claim can arise. The basic elements of breach of contract are: (1) existence of a contract; (2) performance by the plaintiff; (3) defendant's failure to perform; and (4) resulting damages. A disaster relief loan includes an executed promissory note or loan agreement between the individual borrower and the disaster relief program. When the public disaster relief comes in the form of a grant, the terms of the grant agreement will control and may also contain clauses requiring repayment or clawback in the case of overpayment or otherwise erroneous payment. The terms of the agreement between the applicant and the disaster relief program, whether a loan or grant agreement, should control once the applicant executes the agreement and the disaster funds are disbursed to the applicant. In the case of PPP, applicants are bound by the terms of the promissory note that is issued by the participating lender institution<sup>33</sup>. If a PPP applicant is rendered ineligible and thus received an overpayment, the lending institution and SBA, as guarantor of the PPP loans, may have recourse against the PPP applicant for breach of the note.

Equitable causes of action of conversion and unjust enrichment also provide additional bases for recovery and repayment of the funds. In New York, the elements of conversion are (1) the plaintiff's possessory right or interest in the property; and (2) defendant's

dominion over the property or interference with it in derogation of the plaintiff's rights<sup>34</sup>. An action under an unjust enrichment in New York must establish that (1) that the defendant benefited; (2) at the Plaintiff's expense; and (3) that equity and good conscience restitution<sup>35</sup>. Equitable causes of relief may be appropriate where the right of recovery is not expressly provided for in the statutory or regulatory ambit of the government agency implementing the disaster relief program. They may also be appropriate where the facts surrounding the overpayment may not fit neatly into a breach of contract analysis, such as an overpayment caused by a mistake in part by the administrator of the program. Again, in disaster situations, the need to promptly disburse funds during disaster recovery can lead to errors in due diligence and miscalculation of loans/funds.

The overpaid applicant may raise a defense that the disaster relief program committed the error, but error alone does not entitle the applicant to retain or be enriched by funds to which they do not have rights. An individual borrower who violates the terms of disaster relief regulations is not eligible to receive the public loan/grant that represents government taxpayer funds. In such a case, it may be appropriate to turn to equitable theories on the grounds that the applicant has received funds that they are not eligible or entitled to, has been provided notice of the mistaken payment, and is not responding to requests for repayment or resolution of the matter, and therefore, the fund recipient has knowingly and wrongfully profited from the proceeds.

#### IV. PREVENTING OVERPAYMENT AND MITIGATION ERROR

Although the risk of erroneous disbursement cannot be completely eliminated in the context of these disaster relief programs, mechanisms put into place at the inception of these disaster relief programs and a prompt response to recover overpaid funds will mitigate damage and maximize recovery. The rules and requirement of a disaster recovery program continue to evolve with a crisis when swift response is needed. The following are three goals to consider.

First: the dissemination of timely and accurate information is paramount in order to avoid inadvertent error from both the program participants and the implementing agency. Investing the resources in the initial implementation of disaster recovery to ensure sufficient training for front-line agency workers, establishing procedures for documenting communications with applicants, and fortifying document retention policies will diffuse common arguments from applicants post-recovery that they relied on misinformation from the

agency.

Second: drafting clear language in the loan or grant agreements of the public disaster relief program's right of recovery for any overpayment of a disaster relief loan or grant will bind the applicant to the terms of the agreement under a breach of contract cause of action. To the extent that it is consistent with existing statutory remedies available to the agency, a clause that provides recapture of overpayments and the right of recovery should be included in the terms of the grant or loan agreement.

Third: have mechanisms in place for quick discovery and notification to applicants of the overpayment. In the event of perceived delay on the agency's part, overpaid applicants will raise defenses of laches or detrimental reliance alleging that the agency was dilatory in notifying the applicant who acted in reliance of the disbursed funds. Establishing prompt discovery and notification as soon as error is discovered and continued efforts to resolve the matter with the fund recipient will mitigate such defenses.

Upon notice of error, the agency should make diligent efforts to reach out to the fund recipient in order to resolve the matter through written and oral correspondence. When efforts in-house have been unsuccessful, then outside legal assistance may be obtained to assist in recovery actions. The use of legal letters and legal representation may bring nonresponsive fund recipients more quickly to the table for negotiation. The decision to utilize outside legal assistance should also be determined in a timely manner as statute of limitations can run with respect to the claims. The time it takes to correspond and negotiate with fund recipients is also something to consider when determining when to seek outside legal assistance. The quicker outside legal assistance is retained, the quicker outside counsel will assist in implementing the overpayment strategy and maintain its leverage, without having to run against the statute of limitations for filing recovery actions. The statute varies by states for breach of contract, conversion, and unjust enrichment claims, but can be as short as 2 years from date of the overpayment.

#### V. CONCLUSION

Government disaster fund relief programs face an inherent conflict between the prompt need to disburse the proper funding and the risk of waste and erroneous payment. Compliance with the statute and regulations providing for funding programs will evolve in the midst of a crisis, and when the post-disaster dust settles, recovery actions could be instituted to recoup the

overpayments. Administrators of disaster relief programs should be aware of the legal remedies available to them and anticipate defenses that have commonly been used in recovery actions from previous disaster relief programs. Mechanisms for prompt discovery, notification, and legal mechanisms for resolution are the tools available to resolve disputes and demonstrate responsibility and accountability for funds that are ultimately disbursed and the burden borne by the public.

<sup>1</sup> CARES Act, Pub. L. No. 116-136, § 1102 (March 27, 2020).

<sup>2</sup> U.S. Small Business Administration, Paycheck Protection Program (PPP) Report: Approvals through 06/30/2020 (2020), <https://www.sba.gov/sites/default/files/2020-07/PPP%20Rresults%20-%20Sunday%20FINAL.pdf>.

<sup>3</sup> Congressional Research Service Report, SBA and CDBG-DR Duplication of Benefits in the Administration of Disaster Assistance: Background, Policy Issues, and Options for Congress, July 1, 2016 p.3, Available at: <https://crsreports.congress.gov/product/pdf/R/R44553/3>

<sup>4</sup> Requirements for Receiving Community Development Block Grant Disaster Recover Funds, 78 Fed. Reg. 14329 (March 5, 2013); see also the Stafford Act, 42 U.S.C. § 5121 et seq. The Housing Trust Fund Corporation (“HTFC”) was designated by the State to receive, manage, and disburse the HUD disaster relief funds to eligible applicants through what was called the NY Rising Program.

<sup>5</sup> Under the CARES Act, in order to participate in the PPP, an applicant generally must have fewer than 500 employees whose principal place of residence is in the United States or be a “small business” under applicable NAICS code employee size standard. Business Loan Program Temporary Changes; Paycheck Protection Program; Interim Final Rule, 85 Fed. Reg. 20811, 20812 (April 15, 2020), available at: [https://www.sba.gov/sites/default/files/2020-04/PPP%20Interim%20Final%20Rule\\_0.pdf](https://www.sba.gov/sites/default/files/2020-04/PPP%20Interim%20Final%20Rule_0.pdf).

<sup>6</sup> Id. at 20817.

<sup>7</sup> Id. at 20814; see also Payment Protection Program Borrower Application Form, available at: <https://www.sba.gov/sites/default/files/2020-04/PPP-Borrower-Application-Form-Fillable.pdf>

<sup>8</sup> Payment Protection Program-Second Extension of Limited Safe Harbor, Interim Final Rule, 85 Fed. Reg. 31357 (May 26, 2020)

<sup>9</sup> Id.

<sup>10</sup> 15 U.S.C. § 636(a)(1)(A); 13 C.F.R. § 120.101.

<sup>11</sup> Paycheck Protection Program Loans FAQ 31 (April 23, 2020).

<sup>12</sup> Paycheck Protection Program Loans, FAQ 46 (May 20, 2020).

<sup>13</sup> FAQ 31 and 37 (April 23, 2020).

<sup>14</sup> Victor Reklaitis, As Deadline Passes for Eeturning Small-Business Loans, Public Companies Have Given Back \$500 million and Kept \$900 million,” MarketWatch, May 19, 2020, available at: <https://www.marketwatch.com/story/these-public-companies-are-returning-emergency-loans-meant-for-small-businesses-2020-04-29>

<sup>15</sup> Id.

<sup>16</sup> Paycheck Protection Program-SBA Loan Review Procedures and Related Borrower and Lender Responsibilities, Interim Final Rule, 85 Fed. Reg. 33010 (June 1, 2020).

<sup>17</sup> 13 C.F.R. § 134.1201 (2020) et seq.

<sup>18</sup> 13 C.F.R. § 134.1203.

<sup>19</sup> 13 C.F.R. § 134.1213.

<sup>20</sup> 13 C.F.R. § 134.1216.

<sup>21</sup> Chevron v. U.S.A., Inc. v. Natural Resources Defense Counsel, 467 U.S. 837 (1984). Under this two-step analysis, the court asks whether “Congress has directly spoke on the precise question at issue.” Id. at 842.

<sup>22</sup> City of Arlington v. F.C.C., 569 U.S. 290, 296 (2013).

<sup>23</sup> Matter of 250 Riverside Drive Tenants’ Ass’n v. New York State Division of Housing and Community Renewal, 2013 WL 5526714 at \*2 (Sup. Ct. NY Cnty. 2013).

<sup>24</sup> see DV Diamond Club of Flint, LLC v. United States Small Business Administration, 2020 WL 2315880 (E.D. Mich. May 11, 2020).

<sup>25</sup> U.S. Small Business Administration Office of Inspector General, FY 2018 Congressional Budget Justification, available at [https://www.sba.gov/sites/default/files/2019-08/SBA\\_OIG\\_FY\\_2018\\_CBJ\\_5-17-17.pdf](https://www.sba.gov/sites/default/files/2019-08/SBA_OIG_FY_2018_CBJ_5-17-17.pdf)

<sup>26</sup> CARES Act, Pub. L. No. 116-136, § 1107 (March 27, 2020).

<sup>27</sup> Stacy Cowley, Spotting \$62 Million in Alleged P.P.P. Fraud was the Easy Part,

N.Y. Times, Aug. 28, 2020, available at: <https://www.nytimes.com/2020/08/28/business/ppp-small-business-fraud-coronavirus.html?referringSource=articleShare>

<sup>28</sup> Department of Justice, NFL Player Charged for Role in \$24 Million COVID-Relief Fraud Scheme, Sept.10, 2020, available at: <https://www.justice.gov/opa/pr/nfl-player-charged-role-24-million-covid-relief-fraud-scheme>

<sup>29</sup> 13 C.F.R. § 142.1 et seq. (2020)

<sup>30</sup> 13 C.F.R. § 142.2-142.10.

<sup>31</sup> 13 C.F.R. § 142.1; 13 C.F.R. § 142.39.

<sup>32</sup> Bridgestone/Firestone v. Recovery Credit. Servs., 98 F.3d 13 (2d Cir.1996) (discussing theory of Fraudulent Inducement). Possible criminal charges under the New York penal code could include offering a false instrument for filing (NY PL 175.30, 35) and Grand Larceny (NY PL155.30-42).

<sup>33</sup> The SBA has available a template promissory note for participating PPP lenders and borrowers. Available at: [https://content.sba.gov/sites/default/files/2020-04/040720note.pdf?utm\\_campaign=NEWSBYTES-20200408&utm\\_medium=email&utm\\_source=Eloqua](https://content.sba.gov/sites/default/files/2020-04/040720note.pdf?utm_campaign=NEWSBYTES-20200408&utm_medium=email&utm_source=Eloqua)

<sup>34</sup> Colavito v. New York Organ Donor Network, Inc., 8 N.Y.3d 43, 50 (N.Y. 2006).

<sup>35</sup> Beth Israel Med. Ctr. v. Blue Cross & Blue Shield of New Jersey, Inc., 448 F.3d 573, 586 (2d Cir. 2006).