

Client Alert

DOJ Announces First-Ever False Claims Act Settlement with PPP Lender and Creation of COVID-19 Fraud Strike Force Teams

September 16, 2022

On September 12, 2022, the Department of Justice (DOJ) announced the first-ever settlement with a Paycheck Protection Program (PPP) lender. The lender, Prosperity Bank, agreed to pay \$18,673.50 to resolve allegations it improperly processed a PPP loan on behalf of an ineligible applicant. The announcement coincides with DOJ's creation of three COVID-19 fraud "Strike Force" teams designed to enhanced DOJ's efforts to combat and prevent COVID-19 related fraud.

Pursuant to the Coronavirus Aid, Relief and Economic Security (CARES) Act, lenders who originated PPP loans were entitled to receive a fixed fee from the Small Business Administration (SBA) ranging from 1% to 5% of the loan amount. Prosperity Bank, a regional bank with branches throughout Texas and Oklahoma, was one of those lenders.

In May 2020, Prosperity Bank processed and approved a \$213,400 PPP loan for Woodlands Pain Institute PLLC. According to the DOJ press release, at the time Prosperity Bank processed Woodlands Pain's application, it knew that Woodlands Pain's sole owner, Dr. Emad Bishai, was facing criminal charges stemming from his practice of prescribing opioid medicines.

In order to be eligible for a PPP loan, applicants were required to answer "No" to the question of whether the applicant (or any individual owning more than 20% equity) was subject to an indictment, criminal information, arraignment or other means by which formal criminal charges are brought in any jurisdiction. When completing the PPP application, Dr. Bishai checked the box marked "No" and initialed his name beneath the question.

Despite the alleged knowledge of Dr. Bishai's criminal charges (and therefore his ineligibility for a PPP loan), Prosperity Bank approved Woodlands Pain's application for a \$213,400 PPP loan and received a 5% loan processing fee in the amount of \$10,670 from SBA. According to DOJ, the settlement amount of \$18,673.50, close to double the processing fee, "reflects Prosperity Bank's efforts to cooperate with the government's investigation and provide relevant facts along with its implementation of additional compliance measures."

Though small in dollar value, DOJ's settlement with Prosperity Bank is likely the tip of the iceberg for False Claim Act enforcement actions against PPP lenders. From program inception, SBA stated that it "will allow lenders to rely on certifications of the borrower in order to determine eligibility of the borrower and use of loan proceeds and to rely on specified documents provided by the borrower to determine qualifying loan amount and eligibility for loan forgiveness." See, e.g., First Interim Rule, Business Loan Program Temporary Changes; Paycheck Protection Program, 85 FR 20811, April 15, 2020; Paycheck Protection Program (PPP) Information Sheet Lenders, March 31, 2020. But given the highly chaotic environment in which PPP loans were processed, it is likely that many lenders made mistakes similar to Prosperity Bank's and could find themselves accused of having relied on

certifications that they knew or should have known to be untrue—which could potentially cross the line from negligence to reckless disregard, the FCA’s most basic scienter standard. And the September 14, 2022 announcement of three DOJ “Strike Force” teams is a reminder that DOJ’s enforcement actions in this space are only getting started.

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