

Affiliation renders PPP borrower not small for its \$6.28M PPP loan, resulting in a \$9M FCA settlement

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On October 11, 2023, the Department of Justice announced¹ a \$9 million settlement with Victory Automotive Group Inc. (VAG) to resolve allegations that it violated the False Claims Act (FCA) by knowingly providing false information in support of its Paycheck Protection Program (PPP) loan. This settlement is one of the larger ones to date related to receipt of a PPP loan and one of the first in which affiliation rendered a PPP borrower other than small.

This settlement is a result of a *qui tam* lawsuit, captioned *U.S. ex rel. Jones v. Victory Automotive Group, Inc., et al.*² The defendants in the *qui tam* complaint were VAG, the CEO of VAG, and approximately 40 dealerships for which the complaint alleged the CEO of VAG was the dealerships' officer or registered agent and VAG directly paid the salaries of the dealerships' upper management. The relator had been employed by VAG as Corporate Finance Director in 2013-2014 before being promoted to General Manager of one of the dealerships from which he was terminated in August 2020.

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Per the complaint,³ between April 7 and April 13, 2020, VAG and the dealerships were approved for PPP loans at a collective amount of over \$32 million. The complaint alleged though that common ownership and control rendered VAG and each of the dealerships affiliates. And, while the dealerships could take advantage of the CARES Act waiver of affiliation for franchises, VAG itself did not sell cars or operate under a franchise agreement and, therefore, was not an eligible small business for purposes of its first-draw PPP loan.

The complaint also highlighted that, in May 2020, the Small Business Administration issued an interim final rule capping the amount of PPP loans that a single corporate group could receive at \$20 million and required PPP borrowers to notify lenders if they had received PPP loans in excess of this amount. Because of

this interim rule, the complaint alleged that the defendants could not have accurately certified in forgiveness applications that they were eligible for forgiveness and the four dealerships that received second draw loans could not have accurately certified in the second draw loan application that the first draw loans had been used for an authorized purpose.

DOJ alleged that by May 2021, VAG should have known it was ineligible for a PPP loan because of its size after inclusion of its affiliates.

The DOJ settlement with VAG alleged that VAG had inaccurately certified that it was a small business with fewer than 500 employees for its first draw PPP loan when, in fact, VAG shared common operational control with dozens of automobile dealerships across the country and, in total, VAG and its affiliates had more than 3,000 employees. This rendered VAG ineligible for its \$6,282,362 first draw PPP loan received on April 17, 2020.

Of note, DOJ alleged that by May 2021, VAG should have known it was ineligible for a PPP loan because of its size after inclusion of its affiliates. VAG had nonetheless sought full forgiveness on May 6, 2021, and received full forgiveness of this loan on June 24, 2021.

Of the \$9 million settlement,⁴ \$6,971,256.95 is restitution. The relator is to receive \$1,620,000 of the settlement as well as a separate \$80,000 for fees. The settlement agreement includes a release for VAG's affiliates, raising the question of whether DOJ declined to pursue the relator's theory regarding the corporate group cap of \$20 million and how it impacted all forgiveness applications for the first draw PPP loans as well as the application by four dealerships for second draw PPP loans.

Key takeaway: At this point, most PPP borrowers that sought forgiveness have received it. As we've previously advised, though, the mere fact that SBA initially forgave a loan — such as SBA's 2021 approval of full forgiveness for the VAG first draw PPP loan at issue in this settlement — does not preclude further

inquiry into the question of whether a borrower was eligible for the loan in the first place.

We expect that relator suits — such as the one filed against VAG and its affiliates by a former employee — will be one of the primary methods by which companies face questions related to PPP eligibility in the years to come.

Notes

¹ <https://bit.ly/47ygsxu>

² No. 8:21-cv-1742 (M.D. Fla.).

³ <https://bit.ly/3G1Jrhl>

⁴ <https://bit.ly/40MkvEA>

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