

Federal Program Bribery Law May Reach PPP Loan Recipients

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Across the country, countless businesses large and small have laid off millions of workers as a result of states' mandatory closure orders and social distancing policies brought on by the coronavirus pandemic.

To blunt the adverse economic consequences, Congress enacted the Paycheck Protection Program as part of the \$2.2 trillion stimulus bill known as the Coronavirus Aid, Relief, and Economic Security, or CARES, Act that was enacted into law on March 27. The PPP directs the Small Business Administration to provide forgivable loans to small businesses that meet certain conditions, such as continuing to pay their employees during the crisis.

As of May 21, at least 4.4 million businesses have been approved for PPP funds totaling over \$500 billion.^[1] For many of those applicants, securing a PPP loan will mean the difference between survival and insolvency. But the PPP also carries a hidden risk: potential exposure to criminal liability under the federal program theft and bribery statute, 18 U.S.C. §666.

We discuss the parameters and application of the statute below and further analyze how businesses may attempt to shield themselves from the broad reach of that statute.

Federal Program Theft and Bribery Statute

The statute was adopted as part of the Comprehensive Crime Control Act of 1984.^[2]

The accompanying Senate report is instructive, explaining that the purpose of the statute is "to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving federal monies that are disbursed to private organizations or state and local governments pursuant to a federal program."^[3] Covered entities include any public and private organization, and any state, local or tribal government or agency that accepts federal benefits over \$10,000.^[4]

Under the law, agents of covered entities and certain other individuals can be fined and/or imprisoned for up to 10 years for embezzling, defrauding or stealing from an entity covered under the statute, or engaging in bribery involving any transaction or business the entity conducts, in connection with the covered entity's receipt of over \$10,000 in federal benefits in any one-year period.

The statute is often applied to instances of intra-state government corruption, such as when a teacher for a public school district receiving federal funds fraudulently misuses a district-issued credit card to make personal purchases.^[5]

But the U.S. Supreme Court has held that the statute also extends to private organizations that receive federal benefits funds under the Medicare program.^[6] The rationale behind that decision — that the statute contemplates a broad definition of “beneficiaries” of federal programs, including private organizations — suggests that the statute may reach current PPP borrowers as well.

Fischer v. United States

In 1993, defendant Jeffrey Allan Fischer negotiated a \$1.2 million loan from West Volusia Hospital Authority, an independent municipal agency, to Quality Medical Consultants Inc.^[7] Fischer was the president, and a partial owner, of QMC. A 1994 audit of WVHA's finances led to an investigation of the loan, revealing that the loan had been used to raise the salaries of five QMC co-owners, including Fischer, and to pay a kickback to the WVHA chief financial officer with whom Fischer had negotiated for the loan.^[8]

Because WVHA had received between \$10 million and \$15 million in Medicare funds that same year, Fischer was charged and convicted of defrauding an organization that receives federal benefits under a federal assistance program under Section 666.^[9] After his conviction in the Middle District of Florida in 1996, Fischer appealed to the U.S. Court of Appelas for the Eleventh Circuit, arguing that the statute did not extend to his conduct because WVHA was not covered under the statute.

The core of Fischer's argument was that the Medicare program did not benefit the hospital system, but rather only the hospital's elderly and disabled patients, and accordingly, Section 666 did not apply to the fraud that he perpetrated upon the WVHA.^[10]

In 2000, the Supreme Court rejected his argument, reasoning that “payments are made not simply to reimburse for treatment of qualifying patients but to assist the hospital in making available and maintaining a certain level and quality of medical care, all in the interest of both the hospital and the greater community.”^[11]

While “organizations engaged in purely commercial transactions with the federal government are not subject” to the statute,^[12] Medicare providers “derive significant advantage by satisfying the participation standards imposed by the Government”^[13] such that those providers are deemed beneficiaries for Section 666 purposes.

Applying Fischer to PPP and Its Recipients

Like Medicare, the government will likely contend that PPP is also a federal benefits program that may trigger criminal liability under Section 666.

Similar to the Medicare program, the PPP benefits not only the individual employees who continue to draw a paycheck while workplace restrictions remain in effect during COVID-19, but also their employers, or the business entities that retain a ready workforce. Borrowers can have their debt forgiven if they dedicate all of the PPP loan proceeds to cover payroll costs, mortgage interest, rent and utility costs over an eight-week period after receiving the loan.^[14]

If loan proceeds are applied to other business expenses, the amount of the loan subject to debt forgiveness will be reduced accordingly, and repayment of the outstanding sum plus a 1%, fixed-rate interest charge will come due after two years.^[15]

Loan forgiveness is also reduced in the event that a recipient decreases its full-time employee headcount or reduces salary and wages for any employee earning less than \$100,000 in 2019 without subsequently rehiring furloughed employees and restoring reduced salaries by June 30, 2020.[16]

Borrowers are further required to provide a number of good-faith certifications, including that current economic uncertainty makes the loan necessary to continue business operations, that the funds will be used for the purposes outlined above, and that, among other things, the borrower will provide accurate payroll, mortgage and utility payments information to the loan servicer.[17]

In *Fischer*, the Supreme Court held that on the question of whether a private entity receives benefits under Section 666, “the answer could depend ... on whether the recipient’s own operations are one of the reasons for maintaining the program.”[18]

The continued operation of America’s small businesses is the essential purpose of the PPP.[19] And as with the court’s analysis of the Medicare program in *Fischer*, the PPP is a “comprehensive federal enterprise” aimed at “ensuring the stability” of the nation’s small business economy through a stringent set of federal program requirements.

Borrowers under the PPP may consequently find the government claiming that they are subject to Section 666. The potential application of Section 666 to PPP recipients could mean that any small business entity receiving PPP loans and implicated in any alleged fraud may now be faced with the possibility of criminal investigation, if not also prosecution.

The yet-to-be-litigated question is whether the federal funds provided under the PPP constitute “benefits” for purposes of Section 666. It is important to remember that “not all federal funds constitute ‘benefits’ under the [S]tatute.”[20]

The Supreme Court already made that clear in *Fischer*: “Any receipt of federal funds can, at some level of generality, be characterized as a benefit. The [S]tatute does not employ this broad, almost limitless use of the term. Doing so would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance.”[21]

Looking to standard dictionary definitions, the Supreme Court explained that “the noun ‘benefit’ means ‘something that guards, aids, or promotes well-being,’ such as ‘financial help in time of sickness, old age, or unemployment.”[22] The Supreme Court further explained that in determining whether an entity “receives ‘benefits,’ an examination must be undertaken of the program’s structure, operation, and purpose.”[23]

Thus, the Supreme Court has squarely held that because not all “federal funds” can “be characterized as a benefit,” more scrutiny must be applied to how the funds are spent to determine whether they constitute a benefit under Section 666.

It is not clear that the PPP provides such “benefits.” While it is common knowledge that the PPP was intended to prevent economic collapse and widespread unemployment, it does not do so by putting money in the hands of individuals directly, as is done with unemployment benefits.

Rather, it operates at a broader level of generality in trying to support and promote the economy as a whole and thereby benefit all who participate in the economy. But if that were sufficient, then *Fischer*’s admonition not to construe the statute so broadly as to disrupt the federal-state balance would appear to be violated, as at some level of generality all federal spending statutes do that.

An additional wrinkle may depend on how any particular small business spends its PPP funds. As noted above, Section 666 is applicable only when an entity receives more than \$10,000 in federal benefits within a one-year period.

There is, however, a rarely litigated exception that may be useful to potential defendants: “This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.”[24] If the PPP money is spent as it should be under the PPP, most if not all of the money received may fall within that exception.

Conclusion

Agents, principals and employees of public and private entities receiving funds under the PPP, and others who engage in business transactions with them, should be aware they may be subject to criminal liability under 18 U.S.C. § 666. Section 666 raises a number of legal issues that have divided the lower courts, which experienced counsel may be able to utilize to the advantage of the defense.[25]

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[1] *Paycheck Protection Program*, Small Business Administration, available at <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program>.

[2] Pub. L. No. 98-473, 98 Stat. 1837 (1984).

[3] S. Rep. No. 98-225 at 369.

[4] 18 U.S.C. § 666(b).

[5] *United States v. Ollison*, 555 F.3d 152 (5th Cir. 2009). More recently, the statute was also the basis for charges against one of the so-called Varsity Blues defendants, John Wilson, who allegedly conspired to bribe college officials in exchange for his children's admission to prestigious universities. See U.S. Dep't of Justice, *Investigations of College Admissions and Testing Bribery Scheme*, available at <https://www.justice.gov/usao-ma/investigations-college-admissions-and-testing-bribery-scheme>; see also Fourth Superseding Indictment, *United States v. Sidoo, et al.*, No. 19-cr-10080-NMG-17 (D. Mass. Jan. 14, 2020), available at <https://www.justice.gov/usao-ma/page/file/1234481/download>.

[6] See *Fischer v. United States*, 529 U.S. 667, 681 (2000) ("To determine whether an organization participating in a federal assistance program receives 'benefits,' an examination must be undertaken of the program's structure, operation, and purpose Health care organizations participating in the Medicare program satisfy this standard.") ("Fischer").

[7] *Id.* at 668.

[8] *Id.*

[9] *Id.* at 670.

[10] *Id.* at 676.

[11] *Id.* at 679-80.

[12] *United States v. Copeland*, 143 F.3d 1439, 1441 (11th Cir. 1998).

[13] *Fisher v. United States*, 529 U.S. 667, 678 (2000).

[14] U.S. Treasury Dep't, *Paycheck Protection Program (PPP) Information Sheet: Borrowers*, available at <https://home.treasury.gov/system/files/136/PPP--Fact-Sheet.pdf>.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Fisher*, 529 U.S. at 681.

[19] See Jagoda, Naomi, Mnuchin defends IRS guidance on PPP loans, The Hill, May 4, 2020, available at <https://thehill.com/policy/finance/495996-mnuchin-defends-irs-guidance-on-ppp-loans> (quoting U.S. Senate Finance Committee Chairman Chuck Grassley as saying that “[t]he intent [of the PPP] was to maximize small businesses’ ability to maintain liquidity, retain their employees and recover from this health crisis as quickly as possible.”).

[20] United States v. Bravo-Fernandez, 913 F.3d 244, 247 (1st Cir. 2019).

[21] Fischer v. United States, 529 U.S. 667, 681 (2000).

[22] Id. at 677.

[23] Id. at 681.

[24] 18 U.S.C. § 666(c); see Fischer, 529 U.S. at 678 (explaining that sub-section (c) is used to calculate sub-section (b)); Bravo-Fernandez, 913 F.3d at 247 (same); United States v. Chafin, 808 F.3d 1263, 1272 (11th Cir. 2015) (holding “subsection (c)’s exception applies to subsection (b)’s federal-funds threshold”); United States v. Dubón-Otero, 292 F.3d 1, 7 n.7 (1st Cir. 2002) (same).

[25] Winston attorneys, for example, have been successful in prevailing on legal issues involving Section 666 in several cases. See, e.g., Bravo-Fernandez, 913 F.3d at 248 (obtaining order of acquittal from appellate court due to government’s failure to prove \$10,000 in federal benefits at trial); United States v. Fernandez, 722 F.3d 1 (1st Cir. 2013) (obtaining reversal by persuading the Court of Appeals to break from the majority of circuits and find that Section 666 prohibits only bribery, and not gratuities); United States v. Whitfield, 590 F.3d 325, 346 (5th Cir. 2009) (obtaining reversal of conviction by showing that the “agent” of the federal-funded entity was not acting “in connection with” that role with respect to the charged business or transactions).

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