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Could you face PPP fraud charges? What lawyers are saying about potential risk

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When reality television personality Maurice Fayne, aka Arkansas Mo, was arrested Wednesday on federal bank fraud charges, it was the third such case arising from a Paycheck Protection Program loan. The "Love & Hip Hop: Atlanta" star secured a \$2 million loan for a company called Flame Trucking after certifying that he would use the funds for their intended use — maintaining payroll and paying mortgage interest, leases and utility bills to help deal with the crippling economic effects of Covid-19.

But according to the U.S. Attorney for the Northern District of Georgia, Fayne allegedly used \$1.5 million of the loan to purchase \$85,000 in jewelry, including a Rolex Presidential watch and a 5.73-carat diamond ring, lease a 2019 Rolls Royce Wraith, make loan payments, and pay \$40,000 for child support.

Mark B. Sheppard, a veteran white collar criminal defense lawyer at Klehr Harrison Harvey Branzburg, said the Fayne case and the two other PPP-related fraud cases emanating from the U.S. Department of Justice provide insight into what to expect moving forward.

"They are looking for egregious situations so people know that the prospect of fraud prosecutions is a real one," Sheppard said. "But I think most borrowers can take comfort in that because we are talking about examples of lying or severe misuse of funds. There's not much gray area there. Buying a Rolls Royce the day after you get a loan?"

Local lawyers and bankers say because federal officials emphasized dispensing PPP loans quickly, the program was light on detailed guidelines on the front end. Now that more than 4 million U.S. businesses have secured the loans, the Department of Treasury has been filling in those gaps with 17 pages worth of guidance in its [online FAQ sheet](#) that has been updated in piecemeal fashion for the past month. Some of those rules have led to confusion and fear from borrowers, leaving them wondering if their PPP loan might not be forgiven, or even worse, they could wind up being investigated or charged criminally for providing incorrect numbers or facts.

Sheppard recently co-hosted a webinar for about 500 Klehr Harrison clients to explain the ever-changing guidance and said business owners are "unnerved" about the shifting rules.

"These are not businesses used to doing business with the federal government," Sheppard said. "We are not talking about health care providers or defense contractors are who used to having to make certifications to get federal funds. They are used to giving their employees a clear definition of the rules of the game. And they are concerned because the rules keep shifting. It might not end up being a criminal indictment but there is a reputational concern. What if you get audited and wind up on some list released to the public. People could think you did something wrong when maybe you didn't."

After exhausting the first \$349 billion round of PPP, the Department of Treasury used the 11 days before the second round of funding to introduce new guidance via its FAQ sheet. PPP recipients became fearful after Treasury released an FAQ on April 23 that stated businesses with substantial access to liquidity may not qualify for the loans. Five days later, Treasury Secretary Steven Mnuchin said that the SBA would review all loans in excess of \$2 million to make sure borrowers' self-certification for the loans was appropriate.

Those planned audits will continue and while many larger companies have returned the loans, some smaller firms have followed suit. After Mnuchin's edict, Treasury and the SBA gave businesses an extra week to decide whether to return their



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PPP loans — pushing the deadline from May 7 to May 14. Late Wednesday, the Treasury extended the deadline again, this time to May 18.

The second PPP round opened April 27 and after almost \$160 billion of the \$320 billion was gobbled up in the first week — largely via pent-up demand from the first round — less than \$30 billion was approved in the second week. [Daniel Tahrani](#), a white collar criminal defense lawyer at Morgan Lewis & Bockius, believes part of that had to do with some businesses being hesitant after finding out about the new guidance.

“I think borrowers have to decide whether the risk of investigation is worth it,” Tahrani said. “And that’s probably why they backed up the deadline for returning the money again. The advice I give is to take it seriously and think it through and if you move forward with the program, document everything so your lender and the government see how you spent the money and that you didn’t have an alternative source of liquidity. Also recognize that everything you do now can be second guessed later.”

White collar defense lawyer [Ellen C. Brotman](#) of Brotman Law said the confusion about the terms of the loan and wording in the guidance creates a lot of risk for small business owners, because the loan documents they signed essentially open them up to federal investigation.

“There are always going to be some white collar cases built around intent. I don’t know if anyone knows how they are going to handle instances that are not as clear. And what if the money from the loan is gone and you realized that you were not able to use it exactly in the right way?”

It is not completely clear who is investigating these criminal cases. Lenders have been told they will be held harmless if a borrower commits fraud. But PPP borrowers are updating lenders on how they are using the money during and after the eight-week loan period, at which time the lender determines whether the guidelines have been met for loan forgiveness and makes a recommendation to the SBA, who can conduct its own investigation. Treasury and the IRS can also have roles, as could whistleblowers.

[Bryn Mawr Trust Co.](#) Chief Risk Officer [Patrick M. Killeen](#) said while banks have been cleared by the SBA of conducting much due diligence, he believes there is an ethical responsibility to report suspicious activity.

“If someone provides information in documents but we see something that doesn’t seem right, we feel like we have an obligation to tell the SBA,” Killeen said. “There is nothing in the guidelines that says we do, but that’s just how we feel if there is the prospect of malfeasance.”

In the Fayne case, he was interviewed by federal agents on May 6 and admitted that he submitted a PPP loan application but denied using any of the funds for personal debt or expenses, saying that he used all of the proceeds to pay payroll and other business expenses incurred by the company. But FBI agents searched Fayne’s residence on May 11, seizing approximately \$80,000 in cash, including \$9,400 that Fayne had in his pockets, and the jewelry he allegedly purchased with the PPP funds. Agents also seized approximately \$503,000 in PPP funds after executing seizure warrants for three bank accounts that Fayne owned or controlled.

Also on Wednesday, an engineer from Beaumont, Texas, named [Shashank Rai](#) was charged with wire fraud, bank fraud, false statements to a financial institution and false statements to the SBA for allegedly filing fraudulent PPP applications seeking more than \$10 million dollars from two different banks by claiming to have 250 employees earning wages when, in fact, no employees worked for his purported business.

The first fraud case connected to PPP [was filed May 5 in Rhode Island](#) where two businessmen were charged with fraudulently seeking more than a half-million dollars. Like the case in Texas, the two men reportedly claimed to have dozens of employees earning wages at four different business entities when, in fact, they had none. They were charged with conspiracy to make false statements to influence the SBA and conspiracy to commit bank fraud. In both the Texas and Rhode Island cases, investigators worked with state agencies to determine that the borrowers provided false information.

The DOJ asks anyone with information about potential fraud involving PPP or other Covid-19 relief programs to call its Disaster Fraud Hotline at 866-720-5721 or fill out an [online form](#).

