

When PPP met OBA – An Investigation was Born

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The government cannot take action against abuses of the various aid programs associated with the CARES Act without first *identifying* abuses. In a recent round of inquiries, FINRA sent requests to numerous individuals it has identified as having obtained aid under the CARES Act (e.g., the Paycheck Protection Program (PPP) or Economic Injury Disaster Loan (EIDL)). FINRA has acknowledged the existence of these requests and has stated the focus of the inquiries is the representatives and not FINRA member firms. According to WealthManagement.com, a FINRA spokesperson has said that “FINRA is proactively looking at registered representatives that obtained loans through undisclosed outside business activities.”[1]

Outside business activities (commonly referred to as OBAs) are all business activities outside the scope of a financial adviser’s relationship with his or her member firm. Representatives are required to, at a minimum, notify their firms about their OBAs – if not also obtain written approval of them. FINRA’s use of public information about the PPP loans or the EIDL to flag certain representatives is an interesting approach to identifying and addressing a core requirement – the disclosure of representatives’ outside business activities. But firms and registered representatives should note that the FINRA spokesperson also said, “It is core to FINRA’s mission to detect, deter and investigate potential fraud.” [2] (emphasis added) [3]

In that light, it is noteworthy that FINRA’s requests seek information that goes well beyond what is necessary for examining disclosure practices associated with outside business activities. Take, for example, the following questions:

- For any Aid Program Funds received, describe how the proceeds were used.
- Provide any applications or documents submitted to the Small Business Administration or any other government entity in connection with any request for Aid Program Funds.
- List all compensation you have received since October 1, 2019. Include any salary, bonus, commission, profit sharing, or all other payments from any other source.
- Identify any and all bank or brokerage accounts in which you maintain any beneficial ownership over or which you have or had any control...
- Provide all personal telephone numbers and email addresses you use.

If FINRA’s primary focus was simply addressing disclosure of outside business activities, it would seem to already have the key finding (i.e., nondisclosure) because it targeted representatives that had “*undisclosed* outside business activities.” Thus, in our estimation, FINRA may be searching for fraudulent activity in connection with the disclosure of OBAs but also with respect to representations by representatives in obtaining CARES Act relief.

Practical considerations for individuals targeted by these requests and their firms

Individuals

- Ensure you follow your firm’s policies and procedures with respect to the receipt of regulatory inquiries and responding to them.
- FINRA is collecting information only for its own purposes, but be mindful that FINRA can share information with government agencies. If you have concerns about collateral consequences of the information you would have to provide FINRA, contact an attorney.

Firms

- Communicate with the representative(s) immediately to assess whether they in fact have any ongoing, undisclosed OBA. Document your efforts.
- Review relevant forms such as annual compliance questionnaires completed by the relevant representatives to review assertions about the existence of OBAs.
- Take steps to clearly document when information and documents about OBAs are provided by representatives so as to avoid confusion as to when the firm was notified. Consider having in-house counsel do the review or stamp the copies with unique identifying numbers to trace back to collection during review.

- Consider conducting a review of each relevant representative's electronic communications for the business name(s) identified during this process.
- Discuss whether any of the firm's customers have participated in the OBA in any manner – as investors, lenders, or customers.

[1] <https://www.wealthmanagement.com/regulation-compliance/finra-examining-certain-reps-who-took-ppp-loans>

[2] *Id.*

[3] In addition to serving FINRA's own regulatory purposes, FINRA's collection of information could also create a stockpile of information that the Small Business Administration could use to assess the accuracy of representations made to it in obtaining or seeking forgiveness of a PPP loan.

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