

More Money More Problems? CARES Act Stimulus Comes with Potential for Broad Oversight Investigations, Audits, and Enforcement

April 14, 2020

The Coronavirus Aid Relief and Economic Security Act (CARES Act), is the most expensive piece of legislation ever passed and aims money at businesses to keep them afloat during the COVID-19 pandemic. With nearly \$500 billion available for business, states, and municipalities, how can companies receive these funds without risking future regulatory headaches?

To provide oversight in how the money from the CARES Act is used and to prevent fraud, the law creates the Pandemic Response Accountability Committee (PRAC); a Special Inspector General for Pandemic Recovery within the Treasury Department; and the Congressional Oversight Commission. Additionally, the Department of Justice has announced its intent to aggressively investigate and enforce against civil and criminal fraud related to COVID-19.

With the potential for scrutiny from so many government entities, it is important to understand who these regulators are and to devise strategies for compliance with their expectations.

The Pandemic Response Accountability Committee

The PRAC is comprised of inspectors general from eight government agencies[1]. The PRAC's charge is to police how the \$2.2 trillion relief effort is carried out. The law appropriates significant funding to assist in their regulatory duties. The PRAC will identify major risks cutting across program and agency boundaries, and to coordinate the work of the entire inspectors general community. A major role of the committee will be to ensure transparency of how funds are used. It is mandated to establish a public-facing website by April 27th that will provide relevant information in "user-friendly visual presentations to enhance public awareness of the use of covered funds and the Coronavirus response." This committee will basically be looking at everything other than the Treasury loan fund, which will be subject to the oversight of its own Special Inspector General, described below.

Special Inspector General for Pandemic Recovery



On April 3, President Trump nominated White House lawyer Brian D. Miller to serve as the SIGPR overseeing the Treasury Department's implementation of the new law. The Special Inspector General will monitor fraud, waste, and abuse involving the \$500 billion allocated to the Treasury Secretary for loans intended to support businesses, states, and municipalities affected by the COVID-19 pandemic.

In the wake of the 2008 financial crisis, Congress established a similar watchdog to oversee 2008's version of the CARES Act, the Troubled Asset Relief Program (TARP). The special inspector for TARP enjoyed broad interpretation of its powers and aggressively pursued fraud involving the newly minted TARP stimulus funds. The Special Inspector for TARP is potentially instructive regarding how the Special Inspector of the CARES Act will act and how CARES Act fund applicants and recipients can protect themselves.

The CARES Act Special Inspector's responsibilities are highly similar to the TARP Special Inspector's responsibilities from 2008. Then, the TARP Special Inspector used its powers to conduct investigations and audits that resulted in recovery of \$11 billion as of July 2019. Hundreds of federal criminal convictions for fraud and misuse of the funds also resulted from this effort. TARP investigations and enforcement actions continue today, twelve years later.

The CARES Act Special Inspector's expansive powers come from Section 6 of the Inspector General Act of 1978 and will include the authority to: subpoena documents; conduct testimony; obtain documents and other information from federal agencies; and perform warrantless arrests and searches without first obtaining Attorney General approval. The Special Inspector's budget includes \$25 million, and its authority is limited to five years. The Special Inspector is expected to move aggressively, and quickly, to perform its duties within that time frame.

The Inspector will look to detect fraud committed by individuals and companies who apply for funding; identify wrongdoing by individuals and companies that receive program funds; and identify false statements and other types of fraud in the application and compliance phase of the Act. A potential focus of investigation and litigation may be compliance with the "good-faith certification[s]" that CARES Act recipients must make as a condition of receiving funds. See §§ 4003(b)(4) & (c)(3)(D)(i). Adherence from pre-application through receipt of funds, with this requirement and others in the CARES Act will be critical.

Key Points for CARES Act Fund Applicants and Recipients

Given the amount of money available, the creation of an Accountability Committee and a Special Inspector General in the Treasury Department, and the history of how the TARP Special Inspector aggressively oversaw and enforced its mandate, businesses should expect considerable scrutiny as the price of receiving CARES Act funds.



CARES Act applicants and recipients ought to proactively adopt procedures to decrease their risk of liability if they face an audit or investigation. Below is a list of recommendations for companies to think about before applying and after receiving CARES Act funds. These recommendations will help mitigate risks posed by the CARES Act oversight bodies, the Department of Justice, and the myriad of enforcement initiatives expected from state Attorneys General.

When applying, CARES Act applicants should:

- Be truthful and accurately represent the facts in the application for CARES Act funds. Under the Paycheck Protection Program, small business owners are required to certify facts establishing their eligibility for the program and, again, to certify certain facts for loan forgiveness under the program. Certifications in applications will serve as the basis for audits and investigations of some borrowers by the new oversight authorities to ensure funds are used for their intended purpose, and missteps can lead to criminal prosecutions.
- Carefully identify the strings or restrictions attached to CARES Act funds. For example, CARES Act funds must be used to maintain pre-crisis workforce and compensation levels through September 2020. Also, funds cannot be used to pay dividends or make stock purchases for as long as the federal loan remains outstanding. Ideally, any CARES Act funds would be stored in a separate bank account and not commingled with other business funds.
- Implement internal company policies and procedures to adhere to those restrictions before accepting the funds.
- Create a system of documentation of adherence to CARES Act funds conditions. For example, the Paycheck Protection Program requires the borrower to certify "Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." You should document the basis for this certification at the time of the application and regularly update the information.
- Establish an internal system to identify and address potential fund use that does not comply with the CARES Act.
- Update and consult with official comments from the various oversight bodies and federal departments involved in implementing the CARES Act for advice on what is needed to apply. For example, in an SBA response to frequently asked questions, the SBA stated "Providing an accurate calculation of payroll costs is the responsibility of the borrower, and the borrower attests to the accuracy of those calculations on the Borrower Application Form. Lenders are expected to perform a good faith review, in a reasonable time, of the borrower's calculations and supporting documents concerning average monthly payroll cost...In addition, as the PPP Interim Final Rule indicates, lenders may rely on borrower representations, including with respect to amounts required to be excluded from payroll costs."

After receiving CARES Act funds companies should:

- Use funds for the intended purpose of the Act. The CARES Act seeks to ensure loan funds go to business essentials like rent and payroll. Thus, companies receiving funds should plan to use the money for those purposes and not commingle the CARES Act funds with money for other business ventures.



- Adhere to its internal policies for compliance on fund use, including documentation of compliance.
- Constantly monitor developments and guidance sent out regarding the restrictions and conditions of CARES Act Funds.
- Ensure the internal system for oversight and compliance is followed.

Finally, it is of fundamental importance to take seriously any audit or other interaction coming from the Special Inspector, or any other regulator of CARES Act fund and to respect the broad reach that the Special Investigator may exercise. During TARP enforcement, the Special Investigator pursued companies who had no direct involvement to the submission of false loan applications, but had received funds arising from such applications.

CARE Act funds will be a lifeline to businesses that need help to make payroll and rent. But with more money will come more responsibility and more scrutiny of how it is used. We strongly recommend implementing policies that meet your business needs and ensure compliance for receipt of CARES Act funds.

Moreover, in the wake of the COVID-19 pandemic, the federal government will not be alone in ramping up civil and criminal enforcement related to what it sees as abuses arising out of the crisis. State Attorneys General across the country have announced enforcement initiatives, some of which we will highlight in a Client Alert next week.

If you have questions about applying for, receiving funds, or ensuring compliance to the CARES Act, please contact Susan Gaertner, Jackson Hobbs, Litigation & Dispute Resolution Practice Group Chair Matthew Jacober, or your regular Lathrop GPM contact. Our White Collar Group also focuses on False Claims Act litigation, responding to State Attorney General investigations, and a variety of other compliance work.

[1] The agencies include the Department of Defense, Department of Education, Department of Health and Human Services, Department of Homeland Security, the Department of Justice, the Department of Labor, the Treasury and the Small Business Administration. The law appropriates almost \$120 million in funding to these various agencies and their respective inspector general. So, regulation is also likely to come from these various agencies.