THE CARES ACT: A DOUBLE-EDGED SWORD FOR THE INCAUTIOUS

The opportunity to receive government support as part of the largest stimulus package in US history presents opportunity—and potential risk. Through the Coronavirus Aid, Relief, and Economic Security Act (the "**CARES Act**" or the "**Act**"), the US government authorized roughly $2 trillion in stimulus, and created new oversight mechanisms to protect the integrity of those funds. Another stimulus package followed in late April, and more may still be to come. While the funds can present an attractive opportunity, even a lifeline, companies should be aware that the funds will come with scrutiny and second-guessing, especially when the current crisis subsides.

The CARES Act provides economic assistance to a variety of individuals, businesses, and state and local governments affected by COVID-19. Roughly $500 billion will provide loans and other funding vehicles to corporations, while imposing conditions on loans such as barring stock buybacks. Of the rest of the $2 trillion, approximately $560 billion is for individuals, nearly $400 billion for small businesses—which includes the bank-administered Paycheck Protection Program (the "**PPP**")[1]—and the remainder is designated for public health, state and local governments, and education.[2] On 24 April 2020, President Trump signed into law a bill authorizing an additional $484 billion for small businesses and the healthcare system.

With this assistance comes accountability. As the Comptroller General of the United States and Head of the US Government Accountability Office (the "**GAO**"), a federal watchdog that reports to Congress and federal agencies, explained "[e]xperience tells us that the risk of fraud and abuse grows when large sums are spent quickly, eligibility requirements are being established or changed, and new programs created."

The GAO has "urg[ed] private citizens, government workers, contractors, and others to report allegations of fraud, waste, abuse, and mismanagement" on its "FraudNet" hotline. The US Treasury Secretary similarly cautioned that every loan over $2 million issued under the PPP will be audited and "[a]nybody that took the money that they shouldn't have taken . . . may be subject to criminal liability, which is a big deal." And the US Attorney General and Deputy Attorney General have issued statements that they will prioritize prosecuting fraud in connection with the pandemic—focused in the near term on consumer scams, but equally applicable to fraud relating to the stimulus. The Attorney General's statement directs "[e]very U.S. Attorney's Office . . . to

Key issues

- The CARES Act's Accountability and Enforcement Mechanisms
- What to Expect
- How to Prepare

1 For additional insights on the PPP, please review our previous briefing here.

2 For additional background on the CARES Act, please review our previous briefings here and here.

prioritize the detection, investigation, and prosecution of all criminal conduct related to the current pandemic." The Deputy Attorney General has followed in pursuit of fraud relating to robocalls, fake apps, phishing, social media scams, sales of fake testing kits, and false medical claims, urging US Attorneys to use the various generally applicable federal criminal fraud statutes. The Department of Justice already has announced measures to combat obvious fraud, such as disrupting websites that sell fake treatments and prosecuting individuals who sell fake respirator masks to desperate consumers.

But as we saw during the 2008 financial crisis, the stimulus package will create potential exposure for conduct well beyond selling fake medications or medical supplies. Legitimate businesses that receive stimulus funds or other aid could later face significant scrutiny based on allegations that they did not qualify for aid in the first place or that they did not use it in accordance with the conditions of the program.

The CARES Act's Accountability and Enforcement Mechanisms

The CARES Act creates three arms for oversight and accountability: (1) the Special Inspector General for Pandemic Recovery (the "**SIGPR**"); (2) the Pandemic Response Accountability Committee (the "**PRAC**"); and (3) the Congressional Oversight Commission (the "**Oversight Commission**").

Congress gave the SIGPR broad oversight over any stimulus funds disbursed by the Treasury Department. According to the Chair of the House Committee on Oversight and Reform, the SIGPR will "conduct oversight over stimulus spending by the Department of the Treasury," by "track[ing] all loans, loan guarantees, and other obligations and expenditures made by the Treasury Department under the bill." The SIGPR has audit and subpoena power, and can refer misconduct to US prosecutors.

Congress created the PRAC to "promote transparency and conduct and support oversight of covered funds." The PRAC is comprised of already-serving Inspectors General, including from the Departments of Defense, Education, Health and Human Services, Homeland Security, Justice, Labor, Treasury, the Small Business Administration, the Tax Administration within Treasury, and any other Inspector General determined by the chairperson to be involved with COVID-19 recovery. The PRAC is authorized to conduct investigations, audits, and reviews on its own or in conjunction with any Inspector General to "detect and prevent fraud, waste, abuse, and mismanagement" and "identify major risks that cut across programs and agency boundaries." The PRAC is charged with "expeditiously reporting to the Attorney General any instance in which the Committee has reasonable grounds to believe there has been a violation of Federal criminal law."

Finally, Congress retained oversight authority over the disbursement of funds through the Congressional Oversight Commission. Comprised of five members, this bipartisan commission is charged with assessing the impact of any disbursements under the CARES Act to financial markets and institutions, and for assessing the transparency of those disbursements. The CARES Act authorizes the Commission to hold hearings, take testimony, and receive evidence to conduct oversight. To enable Congress to track the Commission's activity, it will submit reports to Congress every 30 days.

The CARES Act also supports and funds several existing accountability mechanisms, including authorizing $20 million to the GAO to report to Congress on all expenditures of funds under the CARES Act.

While much of the work of these accountability mechanisms involves ensuring that the machinery of government appropriately disburses the stimulus funds in accordance with congressional mandates, they also create enforcement risk for fund recipients, as any of the SIGPR, the PRAC, the Oversight Commission, or the GAO could directly or by holding hearings, conducting audits, or issuing reports bring misconduct to the attention of prosecutors.

Continued Enforcement Under Existing Laws

One should not forget the False Claims Act (the "**FCA**"). The FCA provides for civil and criminal actions to recover government funds obtained through false claims and will likely apply to obtaining funds under the CARES Act. In addition, private citizens can bring private lawsuits ("*qui tam"* actions) under the FCA raising allegations of fraud—with the incentive of receiving up to 30% of any successful recovery. Penalties for violations of the FCA are often significant; DOJ reported that in the past fiscal year, it brought in "more than $3 billion in settlements and judgments from civil cases involving fraud and false claims against the government" through various programs such as Medicare and Medicaid. *Qui tam* actions accounted for over $2 billion of that figure, of which roughly $265 million went to the whistleblowers.

Although the FCA requires knowledge of a false or fraudulent claim, a reckless disregard for the truth satisfies the scienter element, raising potential exposure for companies with inadequate compliance systems and controls. As a result, any attestations, claims, or certifications relating to funding under the CARES Act will likely face government scrutiny under the FCA.

In addition to the FCA, US prosecutors have a whole arsenal at their disposal to combat fraud, including statutes criminalizing mail fraud, computer fraud, healthcare fraud, false statements, and conspiracy to commit fraud, as the Deputy Attorney General reminded them with specific respect to the pandemic.

What to Expect

Similarity to 2008 Stimulus Package and Associated Enforcement Actions

In light of the statutory and prosecutorial commitment to oversight and accountability, companies should focus on compliance when applying for and administering any funds related to the CARES Act. While we will monitor developments closely going forward, potential trends are evident from the experience of the 2008 Great Recession.

The 2008 Recession resulted in the Troubled Asset Relief Program ("**TARP**"), created as part of the Emergency Economic Stabilization Act of 2008 (the "**EESA**"). TARP was a $700 billion program (which the Dodd-Frank Act reduced to $475 billion) that provided funds to stabilize the banking, auto, and insurance industries; to restart credit markets; and to help families avoid foreclosure.

To monitor the use of TARP funds, Congress established the Special Inspector General for the Troubled Asset Relief Program (the "**SIGTARP**"), which "is a federal law enforcement agency and an independent audit watchdog that targets financial institution crime and other fraud, waste and abuse related to TARP." SIGTARP has authority "to investigate all organizations and individuals involved in TARP programs" to accomplish its purpose. According to the Congressional Research Service, Congress modeled the SIGPR on the SIGTARP, as the "SIGPR is similar in purpose and legal authorities to . . . the Special Inspector General for the Troubled Asset Relief Program."

The SIGTARP investigated an expansive range of activity before and after companies received TARP funds—the misuse of TARP funds, the provision of TARP funds to ineligible companies, and malfeasance—ensnaring a litany of financial institutions, consulting firms, and investment banks. Over a decade after the enactment of the EESA, SIGTARP continues working with prosecutors on significant investigations, recovering approximately $900 million and obtaining eighteen convictions in the 2019 fiscal year alone. Altogether, the SIGTARP's work has been responsible for recovering "more than $11 billion," and sentencing "300 defendants, including 76 bankers and 92 bank borrowers" to prison.

While many of these prosecutions have related to garden-variety fraud, the SIGTARP also focused on financial institutions that did not use the TARP funds for their stated purpose or mismanaged those funds, or companies that were not eligible or made false statements before and after receiving TARP funds. For instance, when announcing a $320 million settlement and non-prosecution agreement with one mortgage bank, the SIGTARP stated in a press release that the bank had mismanaged its distribution of funds to homeowners seeking mortgage relief under TARP's Home Affordable Modification Program ("**HAMP**"). The focus of the investigation was broad: the SIGTARP and the Attorney General emphasized the importance of the settlement not only in redressing the immediate harms to homeowners, but also in "forcing institutions to change their culture" and "hold[ing] financial institutions accountable."

The decade-long overhang of SIGTARP enforcement on recipients of TARP funds serves as a warning for companies benefitting from the CARES Act. We expect the SIGPR will follow the SIGTARP's example and aggressively investigate allegations of fraud or misuse of CARES Act funds for years to come.

How to Prepare

Now is the time to implement and enhance procedures and controls to ensure compliance with the CARES Act and other funding regimes and minimize the risk and pain of later enforcement.

Here are six tips to help reduce potential enforcement exposure:

- Establish procedures for appropriate supervision of the submission of claims or certifications, including confirmation of eligibility for the government-provided funds or program, and to ensure that any government-provided funds are used for their stated purpose and subject to appropriate systems and controls. Controls that require the use of the "four-eyes principle" and supervising the use of funds at an appropriate management level, for instance, may help ensure accountability and reduce potential misconduct.
- Confirm that your ethics and compliance program is equipped to monitor any CARES Act-related activity—in particular, that the compliance function

is "in the loop" and is empowered to ensure compliance company-wide and by business partners.

- Coordinate with internal audit to ensure the inclusion of CARES Act-related activity in the audit cycle and to ensure that audit findings and follow up are appropriately reported to management, addressed, and documented.
- Review and internally publicize your whistleblower policy and procedures, including the whistleblower hotline, and encourage company-wide participation while emphasizing the importance of integrity and compliance. An effective whistleblower program affords you the opportunity to investigate allegations and remediate any issues in the first instance, before they become a bigger problem (such as a *qui tam* FCA claim). To that end, also review and communicate measures to maintain confidentiality and preempt potential retaliation.
- Revisit training programs and consider requirements for training relevant to the Act. Review how training is delivered and documented, especially given the reduction in face-to-face interactions among employees during the crisis.
- Review your document retention policies and harmonize the policies among your compliance, internal audit, and IT teams.

Clifford Chance will continue to monitor how the CARES Act and related COVID-19 developments may affect your business, and our global network of government enforcement and healthcare experts is available to assist. Our briefings on "Coronavirus: The Economic Stabilization Provisions of the Coronavirus Aid, Relief, and Economic Security (CARES) Act" and other COVID-19 materials can be found here.

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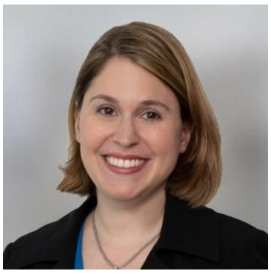

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