



## Strings Attached: Preparing for and Mitigating Risk Associated with COVID-19 Stimulus

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**04.06.2020**

Schools are closed, employees work from home and businesses have suspended operations. For now, business leaders are properly focused on the health and safety of their employees and on running their businesses under extremely challenging circumstances. For many, the \$2.2 trillion "Coronavirus Aid, Relief, and Economic Security Act" or the "CARES Act" is a potential lifeline, offering financial assistance to a broad swath of families, businesses, employees, independent contractors and so called "gig workers." However, just as with the American Recovery and Reinvestment Act (2009 Recovery Act) and the Troubled Asset Relief Program (TARP), there will be significant government oversight and a new Inspector General with a broad mandate and subpoena power. There is no such thing as "free" money from the government.

As the federal government and states roll out various programs to inject money into the flagging economy, businesses that anticipate and mitigate risk will be well served in the future. Whether an entity receives a direct cash payment, a loan, debt forgiveness or some other benefit, there will be strings attached and significant government oversight, investigations, audits and enforcement actions.

The False Claims Act (FCA) and its state analogs, as enforced by state Attorneys General, are the most common tool used to address waste, fraud and abuse. Given the amount of money the CARES Act will inject into the economy, it's just a matter of time before unscrupulous actors will try to game the system, unwitting businesses will fall prey to fraudsters, disgruntled and/or furloughed employees will allege a myriad of transgressions and others will make false certifications in an attempt to secure government funds. So, what should we expect, and how do we address it?

### **Aggressive Enforcement**

Already the Department of Justice is mobilizing its resources and appointing seasoned federal prosecutors to investigate and prosecute fraud associated with COVID-19. In a March 30, 2020 **column** in the *Richmond Times-Dispatch*, the United States Attorney for the Eastern District of Virginia, Zac

Terwilliger, penned a column highlighting the government's first enforcement actions, including the charges filed by the Department of Justice in a wire fraud scheme in which alleged scammers claimed availability of nonexistent "vaccine kits" to prevent infection.

While criminal charges will certainly be brought in some cases, we will likely see a dramatic increase in civil enforcement actions across the country. Section 4018 of the CARES Act establishes a new special inspector general for pandemic recovery, or SIGPaRc. On March 3<sup>rd</sup> the President announced his intention to nominate Brian Miller as the first SIGPaRc Inspector General. Mr. Miller formerly served as federal prosecutor in the Eastern District of Virginia and for nearly ten years as the Inspector General for the Government Services Administration. Should Mr. Miller be confirmed, unlike many others in state or federal government, he will have an outward facing focus and the ability to subpoena private parties and companies, not just investigate the activities of his own agency. Although part of the Department of the Treasury, the new SIGPaRc has a mandate to investigate anyone and any entity that could impact the federal programs, including loans, loan guarantees and grants. Because this office will be outward facing, it will be incentivized to assist the government in recovering federal monies and will likely do so in conjunction with the Department of Justice, federal prosecutors in US Attorneys' Offices and even state authorities.

### **New Targets**

The Department of Justice releases annual reports that include the amount of money recovered in FCA cases. On January 9, 2020, the Department **announced** that in fiscal year 2019 it exceeded \$3 billion in FCA recoveries. Approximately 90% of these recoveries came from the healthcare and pharmaceutical sectors. Significant recoveries also resulted from fraud in the Federal procurement process. However, given the number of dollars involved and the number of sectors that potentially benefit from the CARES Act, we should anticipate new business lines to come under scrutiny. Employers of all kinds are eligible for benefits, not just government contractors, health care providers and pharmaceutical companies who are usually the recipients of most of the government dollars at issue. Airlines, hotel chains, franchises, independent restaurants, not for profits, manufacturers and a host of professional service providers will all find themselves similarly situated with companies much more accustomed to navigating government programs and the complex regulatory regime that accompanies accepting government funds. The banks that administer loans will also have increased exposure. For many, this will be a new, daunting and potentially risky endeavor. By way of example, some borrowers must certify they will use loans to retain 90% of their workforce. Is that a reasonable demand? Is it prudent for all applicants to make that representation to the government in their haste to stabilize their businesses and to support their workforce? For others, feeling they are in dire straits, there may be the temptation to pad what they request, with potentially significant consequences.

Knowing the differences between and the eligibility for the \$350 billion available for "Paycheck Protection Program" loans (PPP Loans) and Economic Injury Disaster Loans (EIDLs), each made by the Small Business Administration (SBA), is critical. Among the many Williams Mullen **COVID-19 client alerts** is one on **this important distinction**.

Recent news reports include multiple stories about how atypical industries are shifting their focus to address supply chain gaps. This is laudable, but do garment manufacturers appreciate government

contracting and the risks of noncompliance with strict government requirements and standards? Does a company that quickly develops, manufactures and sells ventilators to a government agency out of a sense of duty fully appreciate the risks it takes on by becoming a government contractor? Perhaps companies as sophisticated as Tesla and Dyson are well positioned, but not all companies have similar resources.

Individuals and companies that are recipients of government benefits should be careful about the representations they make in accepting relief. Just as after TARP, there will invariably be investigations of any issues related to the express or implied certifications to the government. Identification theft and fraud in securing benefits for ineligible individuals will certainly be on the rise too.

Finally, it is likely that claims and investigations related to asserted stock manipulation will increase as a result of the massive instability in the public investment markets. Investors have suffered severe losses due to the recent stock market crash related to COVID-19 and the oil price war, but given the size of the losses there will be an intense focus on determining if there were specific representations or omissions possibly connected directly or indirectly to the risks realized in this downturn that caused or contributed to investor losses. There is likely also to be a focus on whether investor losses may have been caused by a financial advisor or broker's investments advice or alleged failures to timely execute sell orders.

## **CONCLUSION**

While the early focus will likely be on companies receiving the largest amount of aid, the FCA and other state fraud statutes allow the government (and private sector whistleblowers) six to ten years to initiate an enforcement action. Therefore, all parties should educate themselves about compliance with the requirements, regulations and other strings attached to participating in any aspect of the CARES Act and the other forms of relief which may emerge in the months ahead. Failure to do so may well lead companies to increased FCA exposure at a time when life, the economy and their businesses have just returned to normal.

*Please note: This alert contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not meant to be and should not be construed as legal advice. Readers with particular needs on specific issues should retain the services of competent counsel.*

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