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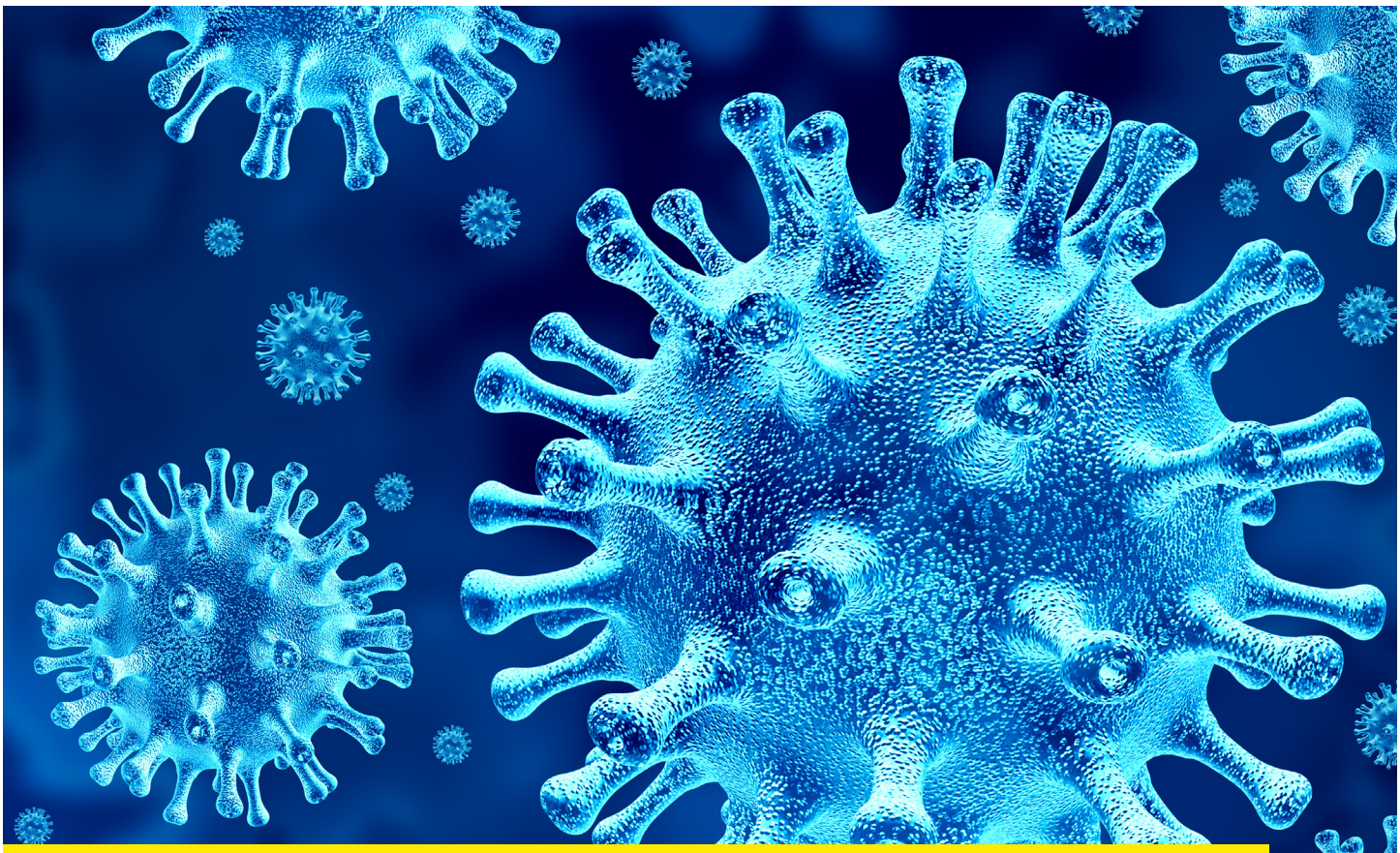

A BUSINESS GUIDE:

CARES Act Compliance and Enforcement

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In late March, Congress passed the $2.2 trillion stimulus package known as the Coronavirus Aid, Relief, and Economic Security Act[1] (the CARES Act or the Act) as part of its effort to counteract some of COVID-19's disruption of the economy. The CARES Act provides federal stimulus money to organizations of all types and sizes. Shortly after passing the CARES Act, Congress bolstered it with an additional $484 billion in funding to programs established under the Act through the Paycheck Protection Program and Healthcare Enhancement Act (PPPHEA)[2]. Organizations receiving CARES Act funding must not only meet the requirements to be eligible for initial relief under the Act, but after receiving funding, they must maintain ongoing compliance to ensure that they abide by the continuing requirements of the Act and related regulations. Failure to maintain proper compliance could subject organizations to government enforcement actions and significant consequences. Thus, it is important for all organizations that receive CARES Act funds to examine whether their existing compliance programs are sufficient to ensure that the organization properly adheres to the CARES ACT requirements for the receipt and retention of CARES Act funding. This will require organizations either to create compliance programs or to reexamine existing programs.

This white paper provides a brief introduction to relief funding and program requirements provided by the CARES Act, discusses the oversight mechanisms that will monitor recipients' compliance with CARES Act requirements, reviews oversight mechanisms in the Troubled Asset Relief Program created in response to the 2008 financial crisis as a predictor of future enforcement of CARES Act requirements, and addresses the critical role compliance programs will play in assisting entities with meeting with CARES Act requirements.

I. BACKGROUND – OVERVIEW OF CARES ACT STIMULUS FUNDS

The $2.2 trillion in relief funding provided by the Act is available to organizations of all sizes and operating in all sectors of the economy. Funds are available to various businesses and non-profits. Highlights of the available funding include:

- $659 billion[3] to small businesses, sole proprietors, independent contractors, and certain self-employed individuals meeting eligibility standards through federally-backed loans.[4] These loans will be administered through private banking institutions and the Small Business Administration (SBA) 7(a) loan program, with expanded eligibility as compared to the existing program.
- $60 billion[5] in small business loans through the SBA's economic injury disaster loan program. The Act also expands eligibility for this program.[6]

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1 Coronavirus Aid, Relief and Economic Security Act, H.R. 748, 116th Congress (2020).

2 Paycheck Protection Program and Health Care Enhancement Act, H.R. 266, 116th Congress (2020).

3 This amount includes $310 billion in additional funding provided through the PPPHEA.

4 *Id.* at Division A, Sections 1102 & 1103.

5 This amount includes $50 billion in additional funding in provided through the PPPHEA.

6 *Id.* at Section 1103.

- $500 billion for organizations that do not qualify for small business relief, including $35 billion to go to passenger air carriers, $4 billion for cargo air carriers, and $17 billion for businesses related to national security.[7] The $500 billion will be administered through the Department of the Treasury's Economic Stabilization Fund, with $454 billion allocated for lending to other eligible businesses that qualify under certain criteria to flow through programs or facilities created by the Federal Reserve.[8]

- $175 billion[9] in relief funding for health care providers to support expenses or revenue loss related to the COVID-19 crisis, to be administered through the Department of Health and Human Services.[10]

- $150 billion in funding for state, Tribal, and local governments.[11] The amount to be provided to each state will be determined based on population proportions. The funds are to be used only to cover costs necessary for expenditures incurred between March 1, 2020 and December 20, 2020 to respond to the COVID-19 crisis.

- $200 million invested into the Federal Communications Commission's support of telehealth, through investments in services and devices.[12]

- $25 billion in funding for food assistance, with $16 billion earmarked for the SNAP program and almost $9 billion earmarked for Child Nutrition Programs.[13]

- $80 million in funding to the Food and Drug Administration for the development of medical treatments and vaccines for COVID-19, as well as supervision of medical product supply chains.[14]

- $31 billion in funding will be deployed to develop an education stabilization fund through the Department of Education.[15]

- $25 billion in emergency relief funding is earmarked to provide direct assistance to transit agencies to make up for lost revenue due to COVID-19.[16]

The requirements and certifications required for each program of funding vary. For example:

- The Act requires that potential participants in the expanded SBA 7(a) loan program meet certain size requirements, and make a good faith certification that the loan is necessary due to the uncertainty of current economic conditions caused by COVID-19, that funds will be used to retain workers and payroll, lease and utility payments, and that recipients are not also receiving funds for the same uses from another SBA

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7 *Id.* at Section 4003.

8 *Id.*

9 This amount includes $75 billion in additional funding in provided through the PPPHEA.

10 *Id.* at Division B, Title VIII.

11 *Id.* at Division A, Sec. 5001.

12 *Id.* at Division B, Title V.

13 *Id.* at Title I.

14 *Id.*

15 *Id.* at Title XIII.

16 *Id.* at Title XII.

program.[17] Recipients are eligible for loan forgiveness for certain expenses, including payroll expenses, paid using loan funds over an eight-week period.[18] To be eligible for forgiveness, the expenses must be verified through documentation to the lender; forgiveness amounts are to be reduced based on any reduction in employees retained compared to the prior year. Eligible payroll costs may not include compensation above $100,000 in wages for an individual.

- The Act authorizes a healthcare provider relief fund, pursuant to which the Department of Health and Human Services (HHS) already has begun distributions of $30 billion in funds directly to certain healthcare providers based on the amounts they received in Medicare fee-for-service reimbursements in 2019.[19] HHS has established terms and conditions related to the use of these funds. Distributions will not require repayment so long as funds are used for stipulated purposes. To keep funds already received, providers must agree not to seek collection of out-of-pocket payments from a COVID-19 patient and certify to a list of detailed terms and conditions, including that the provider billed Medicare in 2019, provides or provided diagnoses, testing, or care for individuals with possible or actual cases of COVID-19, is not currently terminated from participation in Medicare, is not currently excluded from participation in Medicare, Medicaid, and other Federal health care programs, and does not currently have Medicare privileges revoked.[20] The terms and conditions further include a certification that the funds "will only be used to prevent, prepare for, and respond to coronavirus" and that the funding will reimburse the recipient "only for health care related to expenses or lost revenues that are attributable to coronavirus." The terms and conditions not only apply to the recipient, but also apply to sub recipients and contractors under grants.

- The CARES Act also provides $500 billion in funding to the Treasury's Exchange Stabilization fund to provide loans, loan guarantees, and other investments, including specified amounts for air carriers and businesses critical to maintaining national security, with $454 billion allocated to support the Federal Reserve's lending facilities to eligible businesses.[21] The Treasury Department will be responsible for application requirements related to the loans, but the Act contains specific requirements regarding limitations and recipient eligibility. The Act requires the following related to loans and loan guarantees distributed through the program: 1) the borrower must be a business that does not have reasonably available access to alternative financing; 2) borrowers and affiliates cannot engage in stock buybacks, unless contractually obligated, or pay dividends until the loan is no longer outstanding or one year after the date of the loan; 3) borrowers must maintain employment levels as of March 24, 2020 until September 30, 2020 to the extent practicable and retain at least 90% of employees as of March 24, 2020; and 4) borrowers must certify they are domiciled in the United States and their employees are predominantly located in the United States. The Act further prohibits direct lending recipients of Treasury Exchange Stabilization Fund funding from increasing any officer or employee compensation, where such officer or employee's total compensation exceeds $425,000, or offering such employees severance pay or other benefits upon termination

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17 *Id.* at Division A, Section 1102.

18 *Id.* at Section 1106.

19 *Id.* at Division B, Title VIII; Department of Health and Human Services, CARES Act Provider Relief Fund website (https://www.hhs.gov/coronavirus/cares-act-provider-relief-fund/index.html).

20 Department of Health and Human Services, Relief Fund Payment Terms and Conditions (https://www.hhs.gov/sites/default/files/relief-fund-payment-terms-and-conditions.pdf)

21 Coronavirus Aid, Relief and Economic Security Act, H.R. 748, 116th Congress (2020), Division A, Section 4003.

exceeding twice the maximum total amount of annual compensation of that employee, until one year after the loan or loan guarantee is no longer owing. In addition, officers or employees earning more than $3 million in the past year are prohibited from earning more than $3 million plus 50 percent of the amount their compensation in the past year exceeded $3 million.

As the three above examples illustrate, the programs provided under the Act require different certifications and come with conditions and requirements that dictate whether and how program funds may be distributed to, used, and in some cases, kept without repayment, by recipients. These requirements will change over time, as new regulations and sub-regulatory guidance is issued. For example, after the expanded SBA 7(a) loan program began distributing funding, the Treasury Department issued guidance in a Frequently Asked Questions publication, where it clarified the certification required of applicants, that current economic uncertainty makes the loan request necessary, likely could not be made by "a public company with substantial market value and access to capital markets . . . in good faith" and such company "should be prepared to demonstrate to the SBA, upon request, the basis for its certification." [22] Apparently acknowledging public outrage that large companies had received funding under this program while large numbers of small businesses had received no assistance, the Treasury Department guidance further provided that any borrower that applied for a loan under the program prior to the issuance of the guidance and "repays the loan in full by May 7, 2020" shall be "deemed by SBA to have made the required certification in good faith." *Id.* An important consideration is that for much of the funding available, receipt of CARES Act funds is dependent on meeting certain conditions as a prerequisite of receiving the funds. To the extent a recipient does not initially or is unable to continue to meet these conditions, such recipient effectively becomes ineligible for the funding in the first place.

Given the speed at which organizations are applying for funds and the reactionary nature of governmental guidance related to relief programs, it is critical that organizations applying for relief funds take the time to ensure that their representations and certifications made in applying for such funds are accurate and complete. As will be further discussed below, noncompliance with CARES Act requirements can result in severe consequences.

II. CARES ACT OVERSIGHT AND ENFORCEMENT

Governmental dialogue around the CARES Act foreshadows rigorous government oversight and enforcement. For example, Attorney General William Barr announced on March 20 that the U.S. Department of Justice (DOJ) will make investigating and prosecuting fraud claims related to COVID-19 a priority.[23] This oversight and enforcement will come from existing government enforcement avenues as well as the Act's own enforcement mechanisms. The key enforcement mechanisms are summarized in turn below:

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22 U.S. Dep't of Treasury, Paycheck Protection Program Loans Frequently Asked Questions (Apr. 28, 2020), https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf?mod=article_inline). The Treasury Department guidance provided that any borrower that applied for a loan under the program prior to the issuance of the guidance and "repays the loan in full by May 7, 2020" shall be "deemed by SBA to have made the required certification in good faith." *Id.*

23 Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Attorney General William P. Barr Urges American Public to Report COVID-19 Fraud (Mar. 20, 2020), https://www.justice.gov/opa/pr/attorney-general-william-p-barr-urges-american-public-report-covid-19-fraud

Existing Enforcement Mechanisms

The DOJ has committed to focusing resources on fraud related to COVID-19.[24] Attorney General Barr further directed U.S. Attorneys to appoint a Coronavirus Fraud Coordinator in each district charged with coordinating enforcement efforts and also established a national system for whistleblowers to report suspected fraud to the DOJ. [25]

As part of its COVID-19 related enforcement efforts, the DOJ has publicly committed to pursuing violations of the False Claims Act (FCA)[26] "especially during this critical time."[27] The FCA is an existing enforcement mechanism of which applicants for, and recipients of, relief under the Act must be especially cognizant. The FCA broadly provides for civil liability for any person that knowingly defrauds a federal program, by presenting a false claim for payment or making or causing to be made a false statement that is material to a false claim. The FCA provides for a penalty of up to $23,331 per false claim,[28] and that the government may recover treble damages. The FCA also has whistleblower provisions that allow a whistleblower bringing a *qui tam* action on behalf of the federal government to recover up to 30 percent of a settlement or judgement. Whistleblower claims often are brought by former employees, and high levels of employment loss related to the COVID-19 crisis may increase the risk of *qui tam* actions by whistleblowers.

The DOJ also will likely use traditional law enforcement agents as an enforcement mechanism. For example, the FBI, Health and Human Services Office of Inspector General (OIG), Department of Defense OIG, Defense Criminal Investigative Service, and Department of Veteran Affairs OIG brought charges in federal district court in Newark, New Jersey against a Georgia man for orchestrating a scheme to defraud health care benefit programs related to COVID-19 testing.[29] The criminal complaint in that case alleges that the defendant stated to a cooperating witness that "the govt okayed all copays and deductables [sic]" for COVID-19 testing at a time when members of Congress were developing variations of the bills that ultimately became the CARES Act. As another example, on May 5, 2020, the FBI, IRS-Criminal Investigation, SBA OIG, and FDIC-OIG brought the first in the nation charges against two individuals with fraudulently seeking CARES Act SBA Paycheck Protection loans. The two men applied for more than half a million dollars in forgivable loans "claiming to have dozens of employees earning wages at four different business entities when, in fact, there were no employees working for any of the businesses."[30]

In addition, the DOJ is partnering with state and local governments to form task forces to combat COVID-19 related fraud. For example, the U.S. Attorney for the District of New Jersey, the New Jersey State Attorney

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24 U.S. Dep't of Justice, Memorandum from Attorney General William P. Barr (Mar. 16, 2020), https://www.justice.gov/ag/page/file/1258676/download

25 Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Attorney General William P. Barr Urges American Public to Report COVID-19 Fraud (Mar. 20, 2020), https://www.justice.gov/opa/pr/attorney-general-william-p-barr-urges-american-public-report-covid-19-fraud

26 31 U.S.C. § 3729.

27 Lydia Wheeler, Bloomberg News, Coronavirus False Claims Task Force Urged at Justice Department (Mar. 17, 2020), https://news.bloomberglaw.com/health-law-and-business/coronavirus-false-claims-task-force-urged-at-justice-department.

28 31 U.S.C. § 3729; 85 Fed. Reg. 85, 208 (January 3, 2020).

29 *United States v. Santos,* Criminal Complaint, Mag. No. 20-9096 (CLW) (D.N.J. Mar. 26, 2020).

30 U.S. Dep't of Justice, Press Release – U.S. Attorney's Office District of Rhode Island (May 5, 2020), https://www.justice.gov/opa/pr/two-charged-rhode-island-stimulus-fraud

General, and the New Jersey Acting Comptroller on March 30, 2020 announced a federal-state COVID-19 Fraud Task Force.[31] The newly-formed task force "will marshal the collective investigative power of federal and state law enforcement agencies by forming joint investigative and prosecution teams to quickly address fraud complaints."[32]

Further, other federal agencies may have jurisdiction over enforcement activity related to receipt of CARES Act funds depending on the facts and circumstances. For instance, the Securities and Exchange Commission (SEC) has stated that it will continue to monitor "markets for frauds, illicit schemes and other misconduct affecting U.S. investors relating to COVID-19 . . . [and] will issue trading suspensions and use enforcement tools as appropriate." Public companies must; therefore, carefully consider whether their disclosures regarding the receipt and use of CARES Act funds are accurate as well as whether they have adequately disclosed issues related to potential CARES Act liability or compliance. In addition, the IRS could investigate failures to report the receipt of CARES Act funds on tax returns. The IRS Criminal Investigative Division investigates potential criminal violations of the Internal Revenue Code and related financial crimes. With a broad mandate to investigate tax fraud, the division expects significant enforcement activity related to misuse of CARES Act funds.

CARES Act Enforcement Mechanisms

In addition to the existing enforcement mechanisms, the Act establishes the following three new enforcement mechanisms:

- **Pandemic Response Accountability Committee**. The Act allocates $80 million to provide for the establishment of the Pandemic Response Accountability Committee, to operate until September 30, 2025.[33] The Pandemic Response Accountability Committee is currently composed of 20 Inspectors General from across agencies that receive funds or are otherwise involved in the government's response to the COVID-19 crisis.[34] The Pandemic Response Accountability Committee will conduct oversight of funds to prevent and detect fraud by conducting and coordinating audits and investigations. Further, the Committee has the power to conduct public hearings and issue subpoenas related to documents and testimony from private entities and individuals. The Committee's jurisdiction is broad—as it is charged with "mitigat[ing] major risks that cut across program and agency boundaries." The committee will be required to provide public reporting through Oversight.gov on findings.
- **Special Inspector General for Pandemic Recovery**. The Act provides for the establishment of a Special Inspector General for Pandemic Recovery, or SIGPR, within the Treasury Department to operate for a five-year period.[35] The SIGPR is charged with conducting, supervising and coordinating audits and investigations of the "making, purchase, management and sale of loans, loan guarantees and other investments made by the Secretary of the Treasury under any program established by the Secretary" under the Act, "and the management by the Secretary of any program" established under the Act. The SIGPR may refer matters to the Department of Justice for criminal and civil investigation. President Trump has nominated Brian D. Miller for the role of SIGPR. The

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31 U.S. Dep't of Justice, Press Release – U.S. Attorney's Office District of New Jersey (Mar. 30, 2020), https://www.justice.gov/usao-nj/pr/us-attorney-carpenito-ag-grewal-acting-comptroller-walsh-announce-federal-state-covid-19

32 *Id.*

33 Coronavirus Aid, Relief and Economic Security Act, H.R. 748, 116th Congress (2020), Division B, Title V.

34 Council of the Inspectors General on Integrity and Efficiency, Pandemic Response Accountability Committee, https://pandemic.oversight.gov/about.

35 Coronavirus Aid, Relief and Economic Security Act, H.R. 748, 116th Congress (2020), Division A, Section 4018.

SIGPR may report to Congress if requests for information are denied by government agencies.

- **The Congressional Oversight Commission**. The Act establishes a Congressional Oversight Commission, consisting of five members chosen by majority and minority leadership from the U.S. House and Senate.[36] The Commission will have the authority to conduct oversight of the Treasury and Federal Reserve's implementation of the Act and will operate until September 30, 2025. The Commission will have authority to conduct hearings, hear testimony, receive evidence and draft reports

These enforcement mechanisms are independent bodies but it can be expected that all enforcement agencies will collaborate with respect to CARES Act enforcement. For example, the Pandemic Response Accountability Committee has its own audit and investigation authority, but is directed to refer suspected abuses to the inspector general for the agency that disbursed the covered funds, and is directed to report to the Attorney General whenever it suspects a violation of federal criminal law. Further, this committee is composed of inspectors general from a large number of government agencies, which will promote increased communication and coordination between these agencies. The SIGPR is charged with independently investigating programs established under the CARES Act, but also will serve on the Pandemic Response Accountability Committee. The SIGPR may refer suspected misconduct to the Department of Justice for enforcement.

III. LESSONS LEARNED FROM "TARP"; POTENTIAL LIABILITY UNDER THE CARES ACT

In response to the 2008 financial crisis, Congress passed the Emergency Economic Stabilization Act of 2008 (EESA), which authorized the Treasury to establish the Troubled Asset Relief Program (TARP) and provided $700 billion in relief funding (later reduced to $475 billion[37]).[38] Similar to the CARES Act, the EESA also established a special inspector general to oversee TARP activities and report to Congress (SIGTARP). SIGTARP sought to protect the interests of the American people "by working across jurisdictions to investigate all organizations and individuals involved in TARP programs."[39] SIGTARP enforcement has remained active since 2008, and in 2019 recovered nearly $900 million through its activities.[40] SIGTARP enforcement has resulted in a total of 380 criminal convictions and civil fines, including "300 defendants, including 76 bankers and 92 bank borrowers" having been sentenced to prison time. [41] The enforcement body has recovered more than $11 billion since it began activities.[42]

In large part, enforcement in connection with the use of TARP funds focused on (i) fraud in obtaining or using stimulus funds, (ii) fraud in general business dealings, and (iii) false statements intended to cover up the foregoing fraud. As a law enforcement authority, SIGTARP special agents ferreted out fraud by reviewing business records, interviewing corporate "insiders," and analyzing complex financial transactions. As SIGTARP agents developed

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36 *Id.* at Section 4018.

37 https://www.treasury.gov/initiatives/financial-stability/TARP-Programs/Pages/default.aspx#

38 Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343 (2008).

39 U.S. Dep't of Treasury, TARP Programs, https://www.sigtarp.gov/Pages/aboutus.aspx

40 *Id.*

41 Office of the Inspector General for the Troubled Asset Relief Program, Financial Institution Crimes & Fines Database, https://www.sigtarp.gov/Pages/wd9er7g.aspx

42 *Id.*

a case against an individual or corporation, they referred the investigation to federal prosecutors at DOJ and/or the various U.S. Attorneys' Offices to work collaboratively in directing the investigation further. If the prosecutor concluded that the investigation would likely result in criminal prosecution, SIGTARP agents and other law enforcement agents utilized a number of criminal investigative law enforcement tools, such as issuing grand jury subpoenas for documents and grand jury testimony, executing search warrants authorizing agents to seize records or freeze bank accounts, or conducting electronic surveillance, such as consensually recording and monitoring telephone calls with cooperating witnesses or confidential informants. Investigators uncovered institutions that had applied for TARP funds keeping false books and records or falsifying material in securities filings. Agents also discovered that many executives lied to regulators in an effort to conceal the fraud.

As noted previously, a number of individuals were ensnared in the crosshairs of SIGTARP criminal investigations, resulting in numerous convictions of high-ranking corporate executives. For example, the DOJ charged Sean Clark Cutting, the former Chief Executive Officer of Sonoma Valley Bank, with numerous crimes, including bank and wire fraud. The government charged that Mr. Cutting had engaged in fraud at the bank, and concealed that fraudulent activity while applying for and receiving $8.6 million in TARP funds. A jury convicted Mr. Cutting of conspiracy to defraud the United States, bank fraud, making false bank entries, embezzlement, making false statements to the FDIC, wire fraud, and engaging in monetary transactions in property derived from unlawful activity. The court sentenced him to eight years and four months' imprisonment.[43] Similarly, the DOJ charged Darryl Lane Woods, former Chairman and Chief Financial Officer at Mainstreet Bank, with misleading investigators regarding the bank's use of TARP funds. The government charged that Mr. Woods orchestrated a scheme by which he used TARP funds to purchase a luxury condominium in Florida. Mr. Woods pleaded guilty to all charges, and the court sentenced him to one year of home confinement, two years' probation, a $10,000 fine, $96,977 in restitution, and banned him from participating in the affairs of any financial institution.[44] Other comparable criminal cases are summarized in SIGTARP's Crimes & Fines database which reveals many significant criminal sentences of bank CEO's, presidents, senior vice presidents, and the like, including 23-, 17-, 11-, and 10-year prisons sentences, just to name a few. The theory of prosecution typically involved conspiracy to commit wire or bank fraud, 18 U.S.C. § 1349; wire fraud, 18 U.S.C. § 1343; bank fraud, 18 U.S.C. § 1344; false bank entries, 18 U.S.C. § 1005; and conspiracy to commit fraud against the United States, 18 U.S.C. § 371.

Similar to SIGTARP's focus, law enforcement authorities, including the newly created SIGPR, will concentrate their efforts on false statements made by CARES Act funds recipients in obtaining those funds, fraud in using those funds, and illegal efforts to conceal the illicit activity. Upon referral to DOJ, law enforcement most assuredly will rely on the use of grand jury subpoenas, search warrants, and requests for employee interviews in furthering their investigations.

In addition to criminal investigation, SIGTARP has—and continues—to work coextensively with the DOJ and the SEC in civil enforcement actions against financial institutions and other corporations that engaged in fraud with respect to TARP funds. For example, in a pre-suit settlement with the SEC, Martins Enterprises admitted to submitting false TARP claims for cleanup work performed in blighted areas. Specifically, the company

43 *United States v. Cutting*, 14-cr-139, 17-cr-139 (N.D. Cal.); https://www.justice.gov/usao-ndca/pr/former-ceo-and-chief-loan-officer-failed-sonoma-valley-bank-and-borrower-s-california.

44 *United States v. Woods*, 13-cr-4035 (W.D. Mo.); https://www.justice.gov/usao-wdmo/pr/bank-chairman-pleads-guilty-using-public-funds-purchase-luxury-vacation-condo.

admitted to dumping contaminated debris into demolition holes that it had been contracted to fill with clean dirt. The company agreed to pay a $61,000 fine for submitting false claims, and $800,000 to excavate the contaminated debris.[45] In another example, the SEC charged Western Asset Management Co. with misuse of TARP funds for engaging in cross-trades that were prohibited by the terms of the company's receipt of TARP funds. This conduct defrauded the company's clients out of $6.2 million. The company agreed to pay more than $21 million to settle the charges.[46]

In addition to the above examples, civil Enforcement Action monetary penalties have been staggering: $13 billion, $5.06 billion, and $5 billion, respectively, for just three of the 24 enforcement actions brought by the federal government. Those enforcement actions have typically been brought under the False Claims Act, 31 U.S.C. § 3729, *et seq.*; Program Fraud Civil Remedies Act, 31 U.S.C. § 3801, *et seq.*; and the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. § 1833a. Although civil enforcement actions do not involve execution of search warrants or the issuance of grand jury subpoenas, investigators nevertheless can gather information from the use of Civil Investigative Demands (CIDs). If past is prologue, SIGPR and other law enforcement authorities in conjunction with civil attorneys with DOJ and/or the U.S. Attorneys' Offices will pursue civil enforcement actions under the False Claims Act and similar statutes. Those investigations likewise will utilize CIDs compelling the production of documents, interrogatory responses, and/or sworn oral testimony related to the documents or information requested.

As noted above, it is expected that the government will vigorously oversee and enforce use of CARES Act stimulus funds. Accordingly, it is critical for organizations that have applied for, or already received, CARES Act funds to evaluate their existing compliance programs or implement a compliance infrastructure that will ensure compliance with the legislation and mitigate risks in participating in CARES Act funding.

IV. COMPLIANCE PROGRAMS IN THE ERA OF COVID-19 STIMULUS FUNDS

Why Compliance Programs are Necessary

Compliance programs are an essential tool for organizations to ensure and document compliance with the laws and regulations that apply to their activities. For organizations receiving federal funds, such as those distributed pursuant to the CARES Act, an effective compliance function will help to ensure that:

- the organization makes accurate certifications and representations when applying to receive relief and makes accurate statements to investors,
- the organization continues to comply with any requirements tied to receipt of funds, including reporting requirements,
- compliance is sufficiently documented, and assists the organizations to identify instances of noncompliance.

Proper documentation of compliance with CARES Act requirements will prove crucial if the organization undergoes an audit or investigation related to its participation. Further, some of the programs providing CARES Act relief allow organizations to retain funds distributed without paying back the funding provided that certain requirements are met. Organizations will need to maintain and track compliance with these requirements.

45 https://www.sigtarp.gov/Press%20Releases/Martin_Enterprises_Press_Release.pdf

46 https://www.sigtarp.gov/Press%20Releases/Western_Asset_Settlement_Press_Release.pdf

The current business climate raises the compliance stakes for organizations seeking CARES Act funding. First, the immediacy of the need for relief, the speed at which applications are being submitted, and the reactionary nature of governmental guidance related to relief programs increase the chances that an organization may submit inaccurate information or suddenly no longer become eligible for a particular program. Secondly, organizations seeking to cut costs may be reducing their compliance budgets and/or key compliance personnel, or personnel with the institutional knowledge necessary for accurate applications for CARES Act relief. Rapidly changing business structures could affect information to be disclosed in applications. Further, whistleblower actions, as discussed above, tend to be brought by former employees. In the wake of layoff activity related to the COVID-19 crisis, it is a reasonable expectation that whistleblower activity will significantly increase. In addition, the current economic situation may cause organizations who have no experience with receiving government funds to receive these funds for the first time. For these organizations—especially those without existing compliance programs—any inaccuracies in books and records that existed prior to the COVID-19 crisis will need to be identified and corrected. These circumstances, both individually and in the aggregate, will affect an organization's ability to accurately complete and review the complex and detailed applications for funding under the Act.

The need for a compliance program is further underscored by a review of the potential consequences for noncompliant organizations as outlined above. Directors, officers, and employees also may be subject to enforcement actions for a failure to comply with applicable laws and regulations. Individuals have received significant prison time for misconduct related to TARP programs since 2008. Further, liability for noncompliant activity can extend to shareholders and owners of organizations, as illustrated by recent enforcement activities against private equity funds holding equity positions in portfolio companies.[47]

Well-functioning compliance programs allow organizations to provide evidence to enforcement bodies that the organization has identified the laws and regulations that it must adhere to and has made a good faith effort to comply with the same. These programs also reduce and help prevent losses from employee and management misconduct such as participation in illegal kickback activity. The existence of an effective compliance program may be taken into account by the DOJ Criminal Division when it investigates an organization, determines whether to bring charges, and as it negotiates pleas and other agreements.[48] Further, the United States Sentencing Guidelines provide that consideration should be given to the existence of an effective compliance program in the calculation of an organizational criminal fine.[49] For true effectiveness, these programs should be customized to the organization and focus on preventing and identifying the misconduct for which the organization is most at risk.

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47 *See, e.g. United States ex rel. Martino-Fleming v. S. Bay Mental Health Ctr., Inc.*, Civil Action No. 15-13065-PBS (D. Mass. Sep. 21, 2018).

48 In keynote remarks at the 2020 Advanced Forum on False Claims and Qui Tam Enforcement, Deputy Associate Attorney General Stephen Cox noted "a key element of the False Claims Act is scienter, and a robust compliance program executed in good faith could demonstrate the lack of scienter. (On the other hand, a 'paper tiger' compliance program could demonstrate just the opposite.)". U.S. Dep't of Justice, Remarks as Prepared for Delivery by Stephen Cox (Jan. 27, 2020), https://www.justice.gov/opa/speech/deputy-associate-attorney-general-stephen-cox-provides-keynote-remarks-2020-advanced; U.S. Dep't of Justice, Criminal Division, Evaluation of Corporate Compliance Programs (April 2019) (https://www.justice.gov/criminal-fraud/page/file/937501/download).

49 U.S.S.G. §§8B2.1, 8C2.5(f), and 8C2.8(11).

Considerations for Designing a Well-Functioning Compliance Program

The United States Sentencing Guidelines lay out basic requirements for an effective compliance and ethics program.[50] The existence of an effective compliance program may reduce criminal fines and penalties assessed against an organization following a conviction of a federal crime. The key elements of an effective compliance program are set forth in the Guidelines as follows:

- established standards and procedures "to prevent and detect criminal conduct;"
- definition of governance roles and authorities, including the assignment of a specific individual assigned overall responsibility for the compliance program;
- sufficient due diligence on any personnel with "substantial authority;"
- communication and training related to compliance conducted throughout the organization;
- the organization must take "reasonable steps" to achieve compliance using proper monitoring and auditing, periodic evaluation of the compliance program, and to provide a system for reporting suspected misconduct;
- promotion and enforcement of the compliance program throughout the organization, including through using appropriate disciplinary measures;
- the organization must take reasonable steps to address misconduct and prevent future similar conduct (including providing restitution to victims and self-reporting/cooperation with authorities, as appropriate).

These items should form the basic foundation of any organization's compliance program.

Best Practices for CARES Act Compliance

In light of the considerations outlined in this white paper, organizations receiving relief under the CARES Act should consider implementing the following best practices:

- **Develop/Revise/Strengthen Current Compliance Program.** Organizations that do not currently have a compliance program in place should develop and implement one tailored to their unique organization. Organizations that have an existing compliance program should take this opportunity to review and revise it in light of changes in their organizations due to COVID-19. Such programs should be specifically tailored to ensure compliance with applicable loan provisions related to CARES Act stimulus funds. In addition, these organizations should also ensure they have adequate reporting mechanisms in place for the reporting of suspected misconduct throughout the organization.
- **Assign a "CARES Act" Compliance Specialist.** Organizations should consider designating a specific individual or committee to lead compliance efforts with respect to the CARES Act, to keep current with changes in the guidance and regulations published pursuant to the Act, and to monitor and document the organization's compliance with CARES Act requirements in real time.

50 U.S.S.G. §§8B2.1.

- **Keep Organized Records.** Organizations should take care to ensure their books and records are accurate and in good condition, both before applying for relief under the Act and after receiving any relief funding. Such records should memorialize the steps taken to secure funds including certifications made by authorized loan signatories. This is especially important for organizations that have not previously had a compliance program in place.

- **Keep Abreast of Government Guidance.** Guidance and new regulations implementing the CARES Act relief programs is coming out quickly and changing frequently. It is crucial that organizations track changing requirements for the programs they participate in, including whether there are any changes to criteria or to the organization's circumstances that may affect eligibility for certain types of relief.

- **Familiarize the Organization with CARES Act Requirements.** Organizations should consider training their compliance staff and other employees on CARES Act requirements that are relevant to the organization and its operations.

- **Engage With Outside Counsel.** Organizations that do not have a current compliance program in place should consider working with outside counsel to develop a program; organizations with compliance programs should consider engaging outside counsel to undertake a review of these programs to identify any gaps. Outside counsel also can be of assistance reviewing application forms and certifications required by CARES Act programs. Finally, in the event an organization comes under investigation related to suspected misconduct in relation to a CARES Act relief program, it should engage outside counsel for representation through the investigation and any proceeding.

The CARES Act provides much-needed relief for a range of business organizations suffering from the coronavirus pandemic. While making accurate representations and maintaining compliance with requirements are crucial responsibilities for participating in federal relief programs, such requirements should not discourage organizations from seeking available relief. Adequate investment in and attention to developing and maintaining an effective compliance program will help to mitigate the compliance and enforcement risks that come with receiving CARES Act funding.

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