

“SHOW ME THE MONEY (BUT DON’T TAKE IT BACK!”)

A Primer on CARES Act Funds, Compliance and Government Enforcement

September 2, 2020

Presented by: Jonathan Ferry

01

Overview: The CARES Act

02

CARES Act Business Relief Programs

- Paycheck Protection Program
- HHS Provider Relief Program
- Main Street Lending Program

03

Enforcement

- Environment/Stakes
- Lessons from Past
- Enforcement Agencies
- Criminal Enforcement
- Civil Enforcement

04

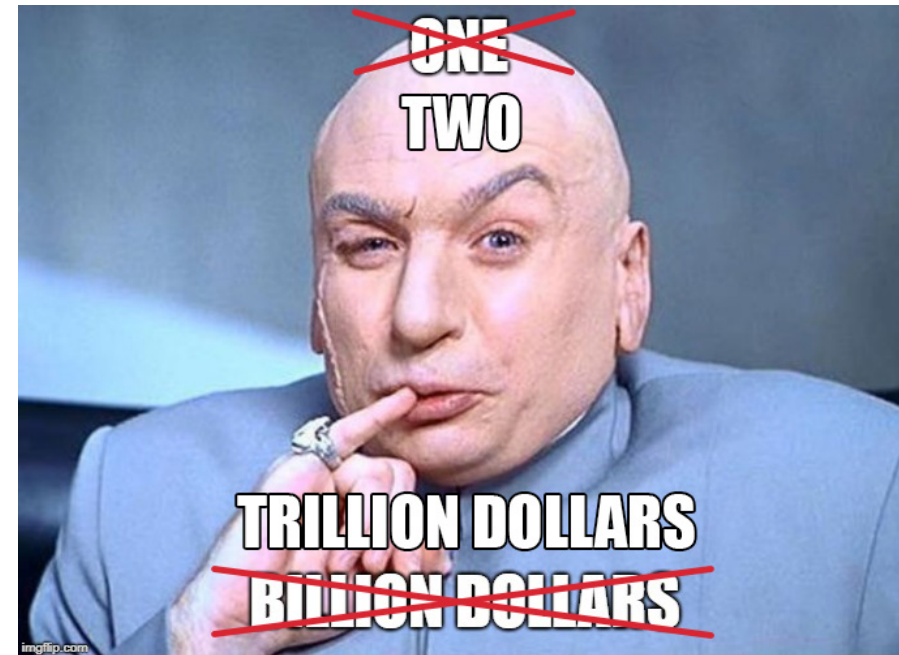
Enforcement Actions

- Audit vs. Investigation
- Civil/Criminal/Parallel
- Responding to Enforcement

Agenda

The CARES Act: Overview

- CARES Act was Phase III of pandemic relief from Congress, but dwarfed previous measures
- Signed into law on March 27, 2020
- \$2.2 TRILLION in appropriations
 - \$349 billion for the Paycheck Protection Program
 - Increased to \$650 billion by subsequent legislation
 - \$100 billion grants for healthcare providers (Provider Relief Fund)
 - Increased to \$175 billion by subsequent legislation
 - \$500 billion for distressed companies (Main Street Lending Program)
 - \$250 billion in direct payments - \$1200 per person
 - \$260 billion in unemployment benefits
 - \$150 billion to assist states and localities



Paycheck Protection Program: The Basics

- Eligibility
 - 500 or fewer employees unless exempted
 - Good faith need for money to continue operations
- Amount
 - 2.5 times average monthly payroll costs
- Use of Funds
 - Payroll, Mortgage Interest, Rent, Utilities
- Forgiveness
 - Money used within 24 weeks or December 31, 2020
 - Reduction in forgiveness for certain action (discussed later)

Paycheck Protection Program

Summary of cumulative Paycheck Protection Program data as of 5:00 PM EDT on Aug 4, 2020.

Approved Loans	Approved Dollars	Average Loan Size	# of Participating Lenders
5,116,182	\$522,203,213,059	\$102,069	5,461

As of July 31, 2020

- North Carolina 126,557 loans amounting to \$12,218,361,926
- Over half of loans are under \$50K; average loan size is \$118k
- On average SBA guarantees about \$23 billion a year under the 7(a) program (23x increase in two month period)
- \$128,230,777,853 still remaining in program

Healthcare Provider Relief Funds

- Basics
 - General Distributions \$50 Billion
 - Targeted Distributions
 - Rural Hospitals \$10 Billion
 - High Impact Areas \$12 Billion
 - Skilled Nursing Facilities \$4.9 Billion
 - IHS (Tribal Hospitals) \$500 Million
 - Safety Net Hospitals \$10 Billion
 - Targeted Medicaid and CHIP \$15 Billion



Main Street Lending Program

- Meant to reach medium-sized business that were not eligible for PPP
 - Good financial standing before the pandemic
 - No more than 15,000 employees
 - 2019 revenues of less than \$5 billion
 - Significant operations and majority of employees in the United States
- Between \$250,000 and \$300 million depending on facility
- Loans that are not forgivable
- Fed SPV purchases up to 95% of the loan from the lending bank
- Five-year maturity, principal payments deferred for two years
- 15-15-70 amortization years three, four and five

Restrictions and Certifications

- Companies required to make multiple certifications, and reports
- Restrictions on uses of funds
- Restrictions on corporate action (Main Street Lending)
- Guidance changes frequently
 - FAQs for PPP and Provider Relief Funds



PPP Loan Forgiveness

- Eligible Uses
 - Payroll – includes salary, wage, vacation, parental, family, medical or sick leave
 - Rent, Mortgage Interest
 - Utilities
- Expenses must be incurred over 24 Weeks or before December 31, 2020
- 60% of loan must be used for payroll costs or there is a reduction in forgiveness
- Must maintain number of employees on payroll
 - Subject to exemption for good faith effort to rehire
- Must maintain 75% of salary
- Grace period to rehire or reinstate pay decreased below 75% (between February 15, 2020 and April 26, 2020) up until December 31, 2020.

From Crisis to Enforcement

- *Four Phases of Large Big Government Relief Programs*
 - *Enthusiasm*
 - *Disillusionment*
 - *Blame*
 - *Punishment*



The CARES Act Works for All Americans

The CARES Act provides fast and direct economic assistance for American workers and families, small businesses, and preserves jobs for American industries.

By TBy Chris Matthews

April Assistant Attorney General Brian Benczkowski leads the criminal probe

coronavirus crisis.

35

The Stakes

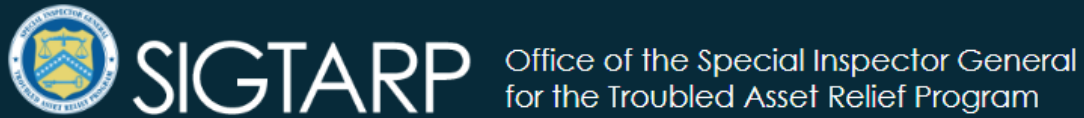


- False Statements 18 USC § 1001
- False Statements to SBA: 15 USC § 645
- False Statement to Banks: 18 USC § 1014
- Mail and Wire Fraud: 18 USC §1341 and §1343
- Bank Fraud: 18 USC §1344



- False Claims Act Liability of Three Times the Amount Paid by the Government plus penalties of \$11,000 to \$22,000 per claim
- FIRREA: \$1 million per violation, \$5 million for continuing violation, or amount of gain or loss
- Criminal Monetary Penalties

Enforcement Lessons from the Past



- SIGTARP
 - Created during the 2008-09 financial crisis to audit and investigate use of TARP funds and institutions that received TARP funds
 - 384 criminal convictions
 - Enforcement actions against 24 banks
 - Recovered over \$11 billion
 - Continues today: Fiscal Year 2020
 - Recovered \$81.6 million
 - 9 criminal charges

Enforcement Agencies

- Offices of the Inspectors General
 - Treasury
 - Small Business Administration
 - Health and Human Services
- Department of Justice
- United States Attorney's Offices
 - Task forces in the 93 USAOs – local focus
 - Federal Bureau of Investigation
- Pandemic Response Accountability Committee PRAC
 - \$80 million budget
 - Broad mandate over relief funds
 - Biannual Reports to President and Congress
 - Independent investigative authority, subpoena power, public testimony

Early Criminal Enforcement

- Focused on Egregious Cases
- Healthcare – fraudulent COVID testing/remedies
- PPP Program – fake Companies, fake employees, misuse of funds
 - Maurice Fayne (reality TV star of Love and Hip Hop: Atlanta) charged with criminal fraud on PPP Program
 - Obtained \$3.75 million PPP Loan
 - Claimed he had 107 employees
 - Used money to:
 - Pay child support
 - Lease a Rolls Royce
 - Pay co-conspirators
 - \$80,000 cash in his home and nearly \$10,000 in his pockets when arrested.

False Claims Act

- Key Provisions
 - False statement or violation of material regulations to obtain money from or to avoid paying money to the government can result in liability
 - Treble Damages and Penalties
 - Does NOT require criminal scienter for finding of fraud
 - Whistleblower provisions
 - Can still be stuck with lawsuit even if government doesn't pursue the case

False Claims Act as Enforcement Tool

- U.S. Department of Justice False Claims Act Recoveries Weighted Heavily Toward Healthcare:
 - 2019: \$3 billion recovered, \$2.6 billion in healthcare
 - 2018: \$2.8 billion recovered; \$2.5 billion in healthcare
 - 2017: \$3.7 billion recovered; \$2.4 billion in healthcare
 - 2016: \$4.7 billion recovered; \$2.5 billion in healthcare
 - 2015: \$3.5 billion recovered; \$1.9 billion in healthcare
 - 2014: \$6 billion recovered; \$2.3 billion in healthcare

Coming Civil Enforcement

- Violations of the Certifications and Restriction can be basis for liability
- Department of Justice Press Release of June 26, 2020

The CARES Act's provider relief fund is another example. Over the past several months, HHS has been distributing billions of dollars to health care providers, including those on the front lines of the COVID crisis. Providers who receive funds must agree to a number of terms and conditions. Providers must attest, for example, that they have provided or are providing care to individuals with actual or possible cases of COVID-19. They must also agree to restrictions on balance billing actual or presumptive COVID-19 patients. Where a provider knowingly violates these requirements, the False Claims Act may come into play.

Speech to the Institute for Legal Reform, U.S. Chamber of Commerce

Coming Civil Enforcement

- HHS-OIG Work Plan

The screenshot shows the top navigation bar of the HHS-OIG website with the logo and 'U.S. Department of Health and Human Services Office of Inspector General'. Below the navigation bar are links for 'About OIG', 'Reports', 'Fraud', 'Compliance', 'Exclusions', 'Newsroom', 'Careers', and 'COVID-19 Portal'. The main content area features a sidebar with 'Work Plan Home', 'Recently Added', 'Active Work Plan Items', and 'Work Plan Archive'. The main title is 'Audit of CARES Act Provider Relief Funds—General and Targeted Distributions to Hospitals'. Below the title is a 'Share this Summary' section with social media icons for Facebook, Twitter, Email, and LinkedIn.

targeted distributions. Our objective is to determine whether providers that received PRF payments complied with certain Federal requirements, and the terms and conditions for reporting and expending PRF funds.

Announced or Revised	Agency	Title	Component	Report Number(s)	Expected Issue Date (FY)
August 2020	Centers for Medicare and Medicaid Services	Audit of CARES Act Provider Relief Funds—General and Targeted Distributions to Hospitals	Office of Audit Services	W-00-20-35855	2021

Enforcement Actions

- Audit vs. Investigation
 - Audit is paperwork – looking for mistake, non-compliance
 - End it there by being organized and prepared
 - Audit authorities can make referrals to law enforcement
 - Law enforcement conducts investigations looking for civil or criminal wrongdoing
 - Enforcement is a an entirely different headache
 - Subpoena power for business records, emails, etc.
 - Looking for intent
 - Beware of whistleblowers

Enforcement Actions

- How does the government target
 - Audits gone bad – referrals to law enforcement
 - Analytics
 - Hotline complaints
 - Whistleblowers
 - New articles
 - Political attention

Enforcement Actions

- Civil vs. Criminal
 - Different atmosphere in criminal and civil investigations
 - Criminal is often covert until last minute
 - Criminal investigations have more covert tools
 - Grand Jury or search warrant means criminal
 - Target of civil may know about investigation for years
 - More negotiation
 - Be aware of “Parallel Proceedings”
 - Both criminal and civil investigation
 - DOJ policy to pursue both when appropriate

Enforcement Actions

- Criminal Process
 - Grand Jury Subpoenas
 - Documents
 - Testimony
 - No counsel present at testimony
 - Health Care Subpoenas
 - Documents
 - Testimony about the documents
 - Search Warrants
 - Read the warrant/call defense counsel
 - Beware of making statements
 - Consider a policy for this

Enforcement Actions

- Civil Processes
 - Civil Investigative Demands (CIDs)
 - False Claims Act, Antitrust, SEC
 - Authorized by specific statutes
 - Can demand documents, answers to interrogatories and investigative depositions (different than civil litigation deposition)
 - Counsel can be present at deposition
- Parallel Proceedings
 - Documents can be shared between civil and criminal (exception for Grand Jury information)
 - Enforcement authorities work in tandem
 - Implications for civil and criminal resolution

Enforcement Actions

- Cooperation
 - Decision whether to cooperate with government
 - DOJ Policy on Cooperation (Justice Manual, Yates Memo, Rosenstein Remarks)
 - Factors
 - Identifying individuals substantially involved in or responsible for the misconduct
 - Disclosing relevant facts and identifying opportunities for the government to obtain evidence relevant to the government's investigation that is not in possession of entity
 - Preserving and collecting documents and information beyond legal obligations
 - Identifying individuals aware of relevant information
 - Making entity officers and employees for meetings, interviews, deposition or testimony
 - Disclosing relevant facts from company internal investigation
 - Providing facts relevant to potential misconduct by third parties

Enforcement Actions

- Compliance program to track CARES Act Funds
 - Understand obligations/restrictions
 - Procedures in place to monitor compliance
 - Documentation of compliance
 - Reporting system for non-compliance
- Responding to Enforcement
 - Advance policies on how to respond to government process
 - Involve in-house counsel immediately
 - Consider experienced defense counsel
 - Internal investigation and response to government
 - Decide on cooperation

Questions



Jonathan Ferry
jferry@bradley.com
704.338.6011
Charlotte, NC