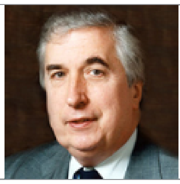
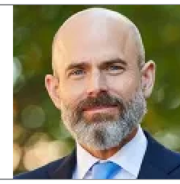


Wall Street CARES!: Who Gets the Hidden Subsidies Under the CARES Act?

3 *By John C. Coffee, Jr.*

How Banks and Fintechs Can Help Small Businesses Survive COVID-19

By Todd H. Baker and



Bankruptcy's Role in the COVID-19 Crisis

1

By Edward R. Morrison and Andrea C. Saavedra

THE CLS BLUE SKY BLOG

COLUMBIA LAW SCHOOL'S BLOG ON CORPORATIONS AND THE CAPITAL MARKETS

Skadden Discusses Enforcement Risks and the CARES Act

By Boris Bershteyn, Jamie L. Boucher, Christopher J. Gunther, Ryan D. Junck and David Meister May 20, 2020

Comment

The Coronavirus Aid, Relief, and Economic Security Act, or the CARES Act, which was signed into law on March 27, 2020, provided for the establishment and expansion of a range of economic assistance programs designed to help U.S. businesses manage the financial consequences of the ongoing COVID-19 crisis. While these programs may provide a much-needed lifeline to U.S. businesses, the CARES Act also created oversight and enforcement functions, which, along with existing authorities, raise enforcement risks for businesses that choose to participate in the act's programs. The CARES Act has already been the subject of intense scrutiny, particularly with respect to the Paycheck Protection Program (PPP) administered by the Small Business Administration (SBA) and the Department of the Treasury (Treasury). Additionally, the Department of Justice (DOJ) has already brought its first criminal charges for alleged fraud associated with the PPP. Businesses should expect that participation in CARES Act programs may be subject to considerable public scrutiny and should be prepared for possible investigations and enforcement actions by U.S. authorities, including standing committees of Congress, the U.S. Government Accountability Office (GAO) and multiple oversight entities created by the CARES Act.

Department of Justice

The DOJ has made clear that the COVID-19 crisis is a law enforcement priority, including with respect to CARES Act programs. The department has already opened related investigations of individuals and businesses, including investigations concerning the PPP. The first investigation to result in criminal charges was announced on May 5, 2020, and involved an alleged scheme by two individuals to obtain forgivable loans guaranteed by the SBA. According to the DOJ, these individuals allegedly claimed to have dozens of employees earning wages at four different business entities when, in fact, no employees were working for any of the businesses. The charges against them include conspiracy to make a false statement to influence the SBA and conspiracy to commit bank fraud.

Assistant Attorney General Brian A. Benczkowski indicated in a recent interview with The Wall Street Journal that in addition to the PPP, the DOJ would be scrutinizing the lending programs administered by the Treasury and the Board of Governors of the Federal Reserve System (Federal Reserve), including the activities of any banks involved with disbursing funds for certain programs. Businesses should expect that the DOJ will maintain a robust criminal enforcement posture throughout the lifecycle of the various CARES Act programs. For certain programs, such as the PPP, businesses should exercise caution not only with respect to initial loan applications, including the certification of need, but also with respect to subsequent applications for loan forgiveness. The PPP application specifically warns of criminal penalties for various crimes, including false statements under 18 U.S.C. § 1001, 15 U.S.C. § 645 and 18 U.S.C. § 1014.

In addition to criminal enforcement, False Claims Act risks are also associated with participation in CARES Act programs. The False Claims Act provides for treble damages against any person defrauding the federal government who knowingly presents, or causes to be presented, a false claim for payment or approval or who knowingly makes, uses, or causes to be made or used a false record or statement material to a false or fraudulent claim. The False Claims Act authorizes qui tam actions, in which private parties can sue on the U.S. government's behalf, to incentivize whistleblower reporting, and we expect that both the DOJ and private parties will bring cases related to the CARES Act.

Inspectors General

Inspectors general for the various federal agencies that are involved in CARES Act programs have jurisdiction to review CARES Act programs within their respective purviews. Inspectors general have the power to request information or assistance from any federal, state or local government agency; to issue subpoenas to compel the production of documents; and to administer oaths and affirmations. Inspectors general can function as independent federal law enforcement agents within their respective agencies and may be authorized to carry firearms, make arrests and execute search warrants.

Inspectors general are likely to scrutinize the various CARES Act programs. The inspector general for the SBA, for example, has already started reviewing the PPP, including the disbursements of loans, and may also review any subsequent forgiveness. The authority of the inspectors general for the various federal agencies is in addition to the authority of the special inspector general, which was created under the CARES Act and is discussed below in detail.

Federal and State Banking Regulators

Federal and state banking regulators may also review participation in certain CARES Act programs by regulated financial institutions, such as participation in the PPP through loan origination. Federal and state banking regulators have broad authority with respect to the safety and soundness of the financial institutions that they supervise, and they could potentially examine how these financial institutions have participated in CARES Act programs. For example, federal and state banking regulators could review how financial institutions determined which customers would receive loans under the PPP, an area that has been the subject of scrutiny in the news media and in recently filed private litigation.

CARES Act Oversight and Enforcement Functions

The CARES Act created new oversight and enforcement functions, including the Pandemic Response Accountability Committee (PRAC), the Congressional Oversight Commission (the commission), and the Special Inspector General for Pandemic Response (SIGPR), each with specific powers and areas of responsibility. Additionally, the House of Representatives created a special oversight and investigative entity known as the Select Subcommittee on the Coronavirus Crisis.

Pandemic Response Accountability Committee

The PRAC is a committee established within the Council of the Inspectors General on Integrity and Efficiency, an existing institution, to promote transparency and conduct oversight to detect and prevent waste, fraud, abuse, and mismanagement and to mitigate major risks that cut across program and agency boundaries. The PRAC's mandate covers not only funds made available to any nonfederal entity under the CARES Act, but also funds made available to any nonfederal entity under certain other laws related to the coronavirus response. In connection with the committee's duty to review the programs, operations and expenditures relating to the covered funds, it has the power to issue subpoenas to compel the production of documents; to compel testimony, including testimony at public hearings; and to administer oaths and affirmations.

The PRAC is required to submit certain reports to the president and Congress, including biannual reports summarizing the committee's findings. The PRAC must also submit to Congress other reports as the committee considers appropriate concerning the use of covered funds. The PRAC must make its reports publicly available on its website, although it may redact certain portions that would be exempt from disclosure under the Freedom of Information Act.

The PRAC is currently comprised of 20 inspectors general and is chaired in an acting capacity by DOJ Inspector General Michael E. Horowitz. The committee appointed Robert A. Westbrooks, a former inspector general of the Pension Benefit Guaranty Corporation, as its executive director.

Congressional Oversight Commission

Like the 2008 legislation establishing the Troubled Assets Relief Program (TARP), the CARES Act created the Congressional Oversight Commission to conduct oversight of implementation of certain provisions of the law. In contrast to the PRAC's broad mandate, the commission's mandate is focused on administration of certain CARES Act programs by the Treasury and the Federal Reserve. The commission has the power to hold hearings, take testimony and receive evidence; hire a staff; and obtain information from any federal agency or department upon the request of its chairperson. The commission will make reports to Congress every 30 days.

The commission is comprised of five members. Consistent with the CARES Act, the speaker of the House, the House minority leader, the Senate majority leader and the Senate minority leader have each appointed one member of the commission. Their appointees are Rep. Donna Shalala (D-Fla.), Rep. French Hill (R-Ark.), Sen. Pat Toomey (R-Pa.) and Bharat R. Ramamurti, respectively. Mr. Ramamurti is a former aide to Senator Elizabeth Warren, who herself chaired the TARP Congressional Oversight Commission until her election to the Senate in 2012. The final commission member will be chosen jointly by the speaker of the House and the Senate majority leader to serve as chairperson.

Special Inspector General for Pandemic Response

The SIGPR is an independent federal law enforcement agency established by the CARES Act within the Treasury, which is modeled after the Office of the Special Inspector General for TARP (SIGTARP). The SIGPR is responsible for conducting, supervising and coordinating audits and investigations of the making, purchase, management and sale of loans, loan guarantees and other investments made by the Treasury under any program established by the secretary of the Treasury through the CARES Act. Similar to SIGTARP, the CARES Act provides that SIGPR agents will be federal law enforcement officers authorized to carry firearms, make arrests and execute search warrants.

The SIGPR has the power to issue subpoenas to compel the production of documents and to administer oaths and affirmations. The agency is also authorized to request information from other government agencies, and the CARES Act requires it to report to Congress "without delay" any refusal of such a request that in the judgment of the SIGPR is unreasonable. When signing the act into law, President Trump issued a statement saying that he would not permit the SIGPR to issue reports to Congress without presidential supervision — a position consistent with those taken on similar legislative provisions by other recent administrations.

While SIGTARP investigations were generally concentrated in particular sectors of the economy, such as financial services, SIGPR investigations will likely cover a much broader range of businesses, given the broader range of sectors that may accept loans, loan guarantees and other investments made by the Treasury under covered programs. Like the SIGTARP, the SIGPR might view its mandate as an opportunity to engage in wide-ranging probes of the conduct of businesses that accept investments made by the Treasury under covered programs. We note that the SIGTARP has proven to be a formidable law enforcement agency, with investigations that resulted in 384 criminal convictions, including 302 defendants sentenced to terms of imprisonment on charges including bank fraud, securities fraud, money laundering, mortgage fraud and conspiracy.

On April 6, 2020, President Trump nominated Brian D. Miller to serve as the SIGPR. Mr. Miller was at the time of his nomination a senior associate counsel to the president in the Office of White House Counsel. He previously served as inspector general for the General Services Administration from 2005 through 2014. Mr. Miller's nomination was approved by the Senate Banking Committee and is pending Senate confirmation.

House Select Subcommittee on the Coronavirus Crisis

By adoption of a resolution on April 23, 2020, the House of Representatives established an investigative subcommittee empowered to issue subpoenas and take depositions on all matters related to the coronavirus. The subcommittee is authorized to conduct a full and complete investigation regarding the use of taxpayer funds and relief programs to address the coronavirus crisis, including through federal agencies; state and local government entities; financial institutions and other private businesses; contracts; grants; loans, loan guarantees and investments; cooperative agreements; and any other means. Further, the subcommittee is directed to investigate reports of waste, fraud and abuse, price gouging, profiteering, or other abusive practices related to the coronavirus crisis.

Government Accountability Office

The GAO is an independent, nonpartisan agency used by Congress to investigate how federal funds are spent. At the request of congressional committees, the GAO will audit a federal agency or program to determine whether federal funds are spent appropriately and as Congress intended. At the conclusion of an audit, the GAO typically prepares a public report of its findings and recommendations and may present the report as testimony before a congressional committee.

Conclusion

Like financial institutions and auto manufacturers under the TARP program a decade ago, businesses that receive assistance under the CARES Act may be subject to enhanced scrutiny of their actions — even if not directly related to CARES Act assistance. Such scrutiny may last after CARES Act assistance is terminated and may continue under a different administration with different enforcement priorities. In general, however, Congress, the DOJ, inspectors general, federal regulators, state authorities, private litigants and the media can all be expected to review facets of CARES Act programs. Both financial institutions involved in administering CARES Act programs and businesses receiving CARES Act assistance should ensure that they have appropriate measures in place to maintain compliance with all applicable rules and regulations.

This post comes to us from Skadden, Arps, Slate, Meagher & Flom LL. It is based on the firm's memorandum, "Enforcement Risks and the CARES Act," dated May 14, 2020, and available here.