WITH GREAT FUNDING COMES GREAT RESPONSIBILITY: OVERSIGHT AND ENFORCEMENT PROVISIONS WITHIN THE CARES ACT

Posted on April 28, 2020 by Michelle F. Schwerin

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On April 21, 2020, Treasury Secretary Steve Mnuchin, expressed concern that large companies - not the intended Paycheck Protection Program ("PPP") participants - had applied for and received PPP loans.

He unequivocally showed that the government will closely scrutinize representations made by PPP Loan borrowers as they apply for loan forgiveness *and* that the government would be actively reviewing and investigating PPP activities.

Specifically, the PPP loan application requires the borrower to certify that: "urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant."

The government will examine this certification. Mnuchin stated:

> *"I just want to clarify, because certain people on the PPP may have not been clear in understanding the certification... But there are severe consequences for people who don't attest properly to a certification."*

A few days later, the government added Question 31 to its ever-growing PPP Program FAQs. FAQ 31 stated, in essence, that any PPP loan borrowers **who did not meet the requirements for participation could return the funds before May 7, 2020, and no further questions would be asked**. The Treasury's actions have triggered a flurry of publicly traded companies scrambling to give back their PPP loan funds.

This episode demonstrates just one example of anticipated government oversight and enforcement regarding the CARES Act and other Corona-virus related federal spending programs.

CARES Act Oversight Provisions

CARES Act Resource Center

The CARES Act is a stimulus program of unprecedented magnitude. With so much spending, fraud is almost certain. In enacting the various programs, Congress included several oversight provisions, designed to prevent fraud and identify individuals and companies who abuse the programs.

These provisions direct the creation of oversight bodies, including:

Congressional Oversight Commission

- The Commission is to consist of five members, appointed by Congressional leadership, and is charged with overseeing the implementation of the CARES Act and reporting its findings to Congress.
- The Commission may hold hearings, consider evidence and request data from any federal department or agency, must submit periodic reports to Congress, and exists through September 30, 2025.

Special Inspector General for Pandemic Recovery ("SIGPR")

- Appointed by the President upon advice and consent of the Senate, this position will last five years.
- The SIGPR is charged with conducting, supervising, and coordinating audits and investigations relating to loans, guarantees and obligations under the CARES Act.
- The SIGPR will have the authority to subpoena, take testimony under oath, make arrests and execute warrants.
- In addition, the SIGPR can request information or cooperation from the head of any federal department or agency. The SIGPR will report to the Attorney General violations of federal criminal law.

Pandemic Response Accountability Committee

- This Committee, consisting of independent Inspector Generals from at least nine agencies, will coordinate audits and investigations into fraud, waste, and abusive behaviors in connection

with spending under the CARES Act, the Families First Coronavirus Response Act, and any other act that makes appropriations for Coronavirus-related spending.
- The Committee will also ensure that each department's Inspector General has the resources necessary to conduct department-level oversight, including access to records, testimony and data.
- The Committee is authorized to issue subpoenas, take testimony under oath, and hold public hearings, and its authority extends beyond government-employees.
- Like the Special Inspector General, the Committee is directed to report to the Attorney General if it develops a reasonable belief of a violation of federal criminal law.

CARES Act Additional Funding

The CARES Act also provides additional funding for many existing oversight bodies, including the Government Accountability Office ("GAO") and various Offices of Inspector Generals ("OIG"s) for oversight.

The Act allocates $20 million to the GAO to be used, in part, for audits and investigations, and another approximately $120 million to various Inspectors General offices for audits and investigations concerning activities carried out using CARES Act funds.

What does this mean for CARES Act Program Participants?

With several new oversight entities and additional funding for existing ones, we expect aggressive investigations into companies and individuals abusing CARES Act programs.

While the CARES Act provisions haven't been around long enough for us to see them in action, we expect the oversight activities to lead to additional criminal prosecutions. Which criminal statues apply depend on the facts of each situation and the preferences of the prosecutors, but we would expect to such allegations as Bank Fraud, Wire Fraud, False Statements (under section 1001 of Title 18), False Claims, and Conspiracy.

Federal Agencies Cracking Down on Coronavirus-Related Criminal Behavior We have already seen the Government move against Coronavirus-related misdeeds. As these oversight entities collect and convey information on violations to prosecutors, we should expect even more robust enforcement actions into alleged fraud and other criminal activities.

Participants in CARES Act programs and recipients of funds should be careful to assure that they remain compliant with the terms of the programs, account for their use of funds, and review their obligations regarding the certification requirements.