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Enforcement Risks Under the CARES Act Loan Programs: What Borrowers Need to Know

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Bonni J. Perlin

Chief of Affirmative Civil Enforcement
U.S. Attorney's Office, Eastern District of New York

Bonni Perlin is the Chief of Affirmative Civil Enforcement at the U.S. Attorney's Office for the Eastern District of New York. She has investigated, prosecuted, and supervised a wide variety of civil matters against both individuals and entities involving financial fraud, government contract and grant fraud, and consumer fraud and protection. Bonni also serves as EDNY's Elder Justice Coordinator for the Civil Division. Before serving as ACE Chief, Bonni was EDNY's Bankruptcy Coordinator and supervised the office's civil bankruptcy litigation practice.

Prior to joining the EDNY, Bonni was a civil trial attorney at the Tax Division, U.S. Department of Justice. She graduated from the Washington College of Law and the Kogod School of Business (M.S. in Accounting) at American University, and Binghamton University.

Camille C. Bent

Senior Associate
BakerHostetler

Camille is a Senior Associate in BakerHostetler’s Bankruptcy and Creditors’ Rights practice group, concentrating in the areas of corporate bankruptcy, financial restructuring and commercial litigation. She has significant experience in disputes and transactions arising out of corporate insolvencies and sounding in fraud, including asset sale, fraudulent transfer, negligent misrepresentation, and wrongful redemption cases. Camille has represented debtors, creditors, trustees, committees, and other interested parties, and her practice is industry agnostic.

Camille is a member of the Bankruptcy & Restructuring Committee at the New York City Bar Association, where she serves as Co-Chair to the Voidable Transactions Subcommittee. She also serves as Director-At-Large for the International Women’s Insolvency & Restructuring Confederation.

George A. Stamboulidis

Partner, Co-Leader of White Collar team
BakerHostetler

George Stamboulidis is Managing Partner of BakerHostetler's New York office and co-leader of BakerHostetler's White Collar, Investigations and Securities Enforcement and Litigation practice, which is ranked in Chambers USA: America's Leading Lawyers for Business. He is a seasoned litigator and has tried dozens of complex federal jury trials as a prosecutor and as a defense attorney. Recognized for his experience in the areas of white collar and business defense, George is regularly engaged by corporations, directors, and officers to advise and defend in complex federal grand jury and regulatory investigations, and has been appointed a federal monitor five times by the DOJ.

George counsels and successfully represents Fortune 100 companies on FCPA issues, including conducting reviews to make best practice policy enhancements to corporate compliance policies, revise and optimize corporate training programs, and conduct testing to ensure that the policy enhancements are followed. He is a nationally recognized lecturer on corporate criminal liability and the use of proactive defense tactics, and he regularly presents to members of the financial services, insurance, pharmaceutical, energy, construction, and real estate industries, among others.

Peter F. Grupe

Director
Protiviti

Peter is a Director in the Protiviti Forensic practice at Protiviti, a global risk and business consulting firm. He has over thirty years of experience in risk consulting, law enforcement, crisis management and corporate finance.

He has spent the past nine years providing consulting services to corporations and individuals around the world. Protiviti Forensic is responsible for conducting complex white collar crime investigations of financial crime, bribery and misconduct, FCPA program compliance and investigations, assisting clients with anti-bribery and corruption programs, fraud risk assessments, background investigations, acquisition due diligence, physical security assessments and crisis management.

Peter has also held various executive management roles with the Federal Bureau of Investigation. He retired in 2011 after 24 years of service as the Assistant Special Agent in Charge of the largest White Collar Crime Branch of the FBI (New York Office). In that capacity, Peter had direct supervision over approximately 1500 pending investigations, 200 Special Agents, 40 Forensic Accountants, 15 Intelligence Analysts and 40 Professional Support employees. He was responsible for all investigative, financial and administrative functions associated with every investigative program. These investigative programs included Financial Institution Fraud, Corporate and Securities Fraud, Anti-Money Laundering, Public Corruption, Foreign Corrupt Practice Act, Health Care Fraud and Bankruptcy Fraud. He is credited with successfully managing the largest Ponzi scheme investigation in history and the largest insider trading investigation in history, in addition to sensitive investigations of elected and appointed public officials. He was also a senior member of the New York SWAT Team responsible for all high-risk operations around the world.

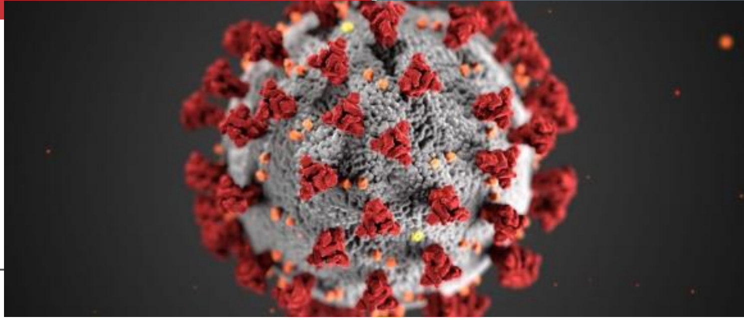
Patrick T. Campbell

Partner
BakerHostetler

Patrick Campbell is a member of BakerHostetler's White Collar, Investigations and Securities Enforcement and Litigation team. He focuses his practice on white collar criminal and civil regulatory matters and internal investigations, specifically in the areas of securities, construction, corruption, asset forfeiture, and money laundering. He represents clients in highly-sensitive federal and state investigations conducted by the DOJ, SEC, CFTC, FTC, and NY DFS. Patrick also regularly counsels clients on "best practices" for corporate governance and ethics and compliance matters.

Patrick is the Chair of the New York City Bar Association's Compliance Committee.

Agenda

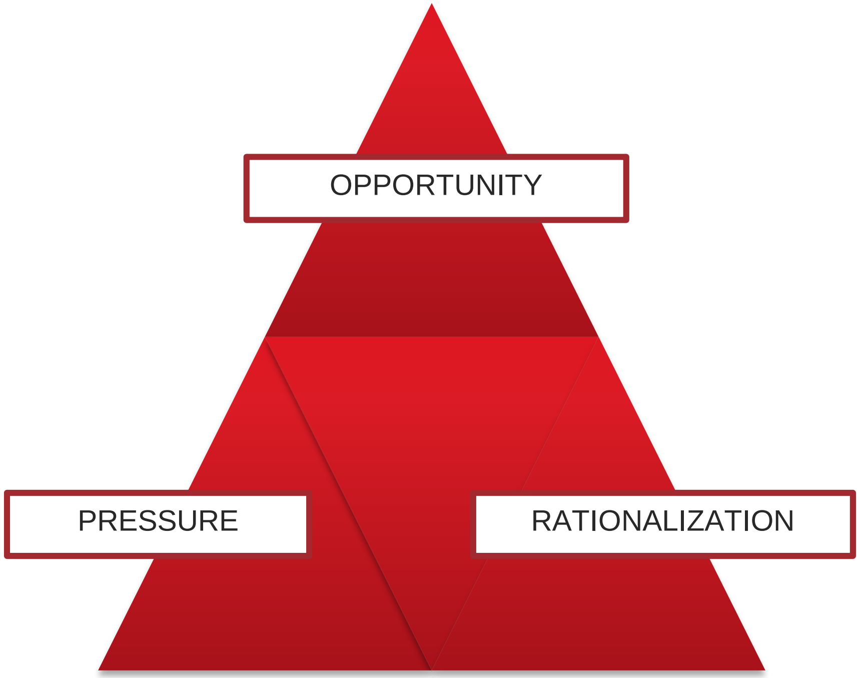


- Past is Prologue
- Key CARES Act Lending Programs
- CARES Act Oversight
- Enforcement Risks and Trends
- Risk Mitigation Steps
- Key Takeaways

“We will hold accountable and bring to justice those who improperly take or use [CARES Act] money, which is meant to support the Nation’s economic health and recovery.”

– Brian D. Miller, Special Inspector General for Pandemic Recovery, October 2, 2020

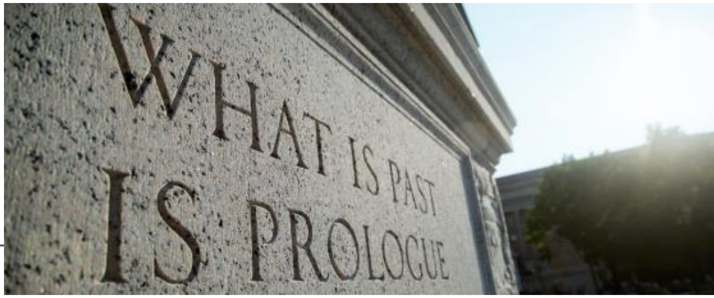
The Fraud Triangle



- Developed by criminologist Donald Cressy in 1971, "Other People's Money: Study in the Social Psychology of Embezzlement"
- Pressure: i.e. need or greed, often caused by economic stress or distress
- **Perceived** opportunity to commit fraud without being caught
- Rationalization, often abandoned after the initial act

Source: Association of Certified Fraud Examiners

Past is Prologue

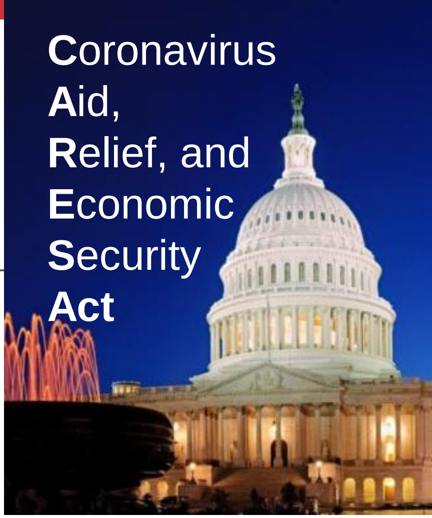


- **Hurricane Katrina**
  - Billions of dollars in federal disaster relief funds spent in Gulf Coast Region
  - DOJ Katrina Fraud Task Force formed (became Disaster Fraud Task Force)
  - Through September 2011, federal prosecutors brought 1,439 disaster fraud-related actions against companies and individuals, including numerous False Claim Act cases
- **2008 Financial Crisis**
  - Significant financial recovery legislation
    - Economic Stimulus Act of 2008 – $152 billion
    - Troubled Asset Recovery Program – $475 billion
    - American Recovery and Reinvestment Act of 2009 – $840 billion
  - DOJ Financial Fraud Enforcement Task Force formed
  - Troubled Asset Relief Program (TARP) and special inspector general who investigated fraud related to TARP (SIGTARP) established
    - Since inception has collected over $11 billion and secured 389 criminal convictions
    - On October 22, 2020, individual indicted on four counts of making false claims to obtain federal mortgage assistance funds from TARP's billion-dollar Hardest Hit Fund

Past is Prologue
Disaster Response Parallels

- Specific response and focus
- Use of existing enforcement resources
- Special IGs also established
- Broader than just federal enforcement
  - State AG offices and local DA offices involved
- Extensive criminal and civil investigations and enforcement for obtaining federal stimulus benefits under false pretenses

CARES Act Overview



- Enacted on March 27, 2020
- Authorized over $2 trillion in relief, $377 billion appropriated for small businesses
- Key CARES Act lending programs:
  - **Paycheck Protection Program (PPP)**: $349 billion in forgivable loans to small businesses
  - **Economic Injury Disaster Loan Program (EIDL)**: $10 billion for expansion of existing program
  - **Main Street Lending Program**: up to $600 billion in funding available
- Updates following CARES Act enactment:
  - On April 24, 2020, Congress enacted the **Paycheck Protection Program and Health Care Enhancement Act (PPPHCE Act)**
    - Additional $310 billion for PPP
    - $10 billion for EIDL
  - On June 5, 2020, Congress enacted the **PPP Flexibility Act**, which makes certain borrower-favorable amendments

Paycheck Protection Program (PPP): *Overview & Program Highlights*

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- CARES Act enacted March 27, 2020
- PPPHCE Act enacted April 24, 2020
- PPP Flexibility Act enacted June 5, 2020
- PPP closed on Aug. 8, 2020, forgiveness portal opened

PPP Highlights:

- Small businesses are eligible
- Loans carry 1% interest rate and are either forgiven (a non-taxable event), or they mature in two years (if issued before June 5, 2020) or five years (if issued after June 5, 2020)
- No loan payments until either: forgiveness application is processed or 10 months after coverage period ends
- No collateral or personal guarantees required
- Loan covers expenses for 24 weeks from loan origination date
- Must use 60% on payroll and employee benefit costs
- PPP closed to new applicants on August 8, 2020

Paycheck Protection Program (PPP): *Eligible Businesses versus Borrowers by Industry*

Eligible Businesses

- Small businesses with less than 500 employees
- Restaurant, hotels, other businesses in the “Accommodation and Food Services” category
- Independently owned franchises with less than 500 employees
- Tribal businesses
- 501(c)(19) veteran organizations
- 501(c)(3) non-profits
- Sole proprietors, independent contractors, gig economy workers, and self-employed individuals
- Must have been in operation on Feb. 15, 2020
- Must not have 20% equity owner incarcerated or on probation or parole

Borrowers by Industry

- Healthcare & Social Assistance
- Professional, Scientific, and Technical Services
- Construction
- Manufacturing
- Accommodation and Food Services
- Retail Trade
- Wholesale Trade
- Transportation and Warehousing
- Real Estate and Rental and Leasing
- Finance and Insurance
- Educational Services
- “Unclassified Establishments”
- Arts, Entertainment & Recreation
- Agriculture, Forestry, Fishing & Hunting
- Mining
- Public Administration
- Utilities

Paycheck Protection Program (PPP): *Key Certifications*

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Lenders permitted to rely on various borrower good faith certifications when approving PPP loan applications and are not required to conduct their own verifications:

- Borrower is eligible to participate in the PPP
- Borrowers must provide accurate calculation of payroll costs and apply affiliate rules properly
  - Payroll costs can include salary, tips, employee leave, group health care benefits, etc.
  - Interim Rule has clarified that independent contractors of borrower do not count for purposes of borrower's PPP loan amount or forgiveness calculations
- "Current economic uncertainty makes [the] loan request necessary to support the ongoing operations of the Applicant"
  - SBA guidance:
    - Underscores that applicants must assess their "ability to access other sources of liquidity sufficient to support their ongoing operations"
    - It is "unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith"
- Funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments, as specified under PPP rules
- Authorized representative of borrower understands that knowingly making false statements to obtain guaranteed loan from SBA is punishable by federal law

Paycheck Protection Program (PPP): *Use Restrictions*

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- PPP loans may be used for:
  - Payroll costs (capped at $100,000 on annualized basis for each employee)
  - Healthcare related costs and insurance premiums
  - Rent, mortgage interest, utilities, interest on certain other debt, and refinancing of certain other SBA loans
  - Other permissible uses under Small Business Act
- At least 60% of loan proceeds must be used for payroll costs

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Paycheck Protection Program (PPP): *August 8, 2020 SBA Report*

Small Business Administration (SBA) released several reports since the CARES Act was enacted, disclosing borrower identity and other information for PPP loans over $150,000.

- Over $525 billion in loans were distributed as of the report date. 87.4% of PPP loans were for less than $150,000; such loans accounted for only 28.2% of total loans; these percentages trended upwards since June and July.
- Average loan size was $101,000. More than 3.5 million loans were for $50,000 or less, while about 82,200 loans were for more than $1 million.
- Across 50 states, PPP loans covered 72% to 96% of estimated small business payroll (according to the June 30, 2020 report).
- Among industries:
  - Health care received most money – $67.8 billion.
  - Professional, scientific, and technical services received the largest number of loans – 681,111.
  - Construction, manufacturing, accommodation and food services, and retail sectors each received more than $40 billion in loans.

PPP loans are supporting about 51.1 million jobs, as much as 84% of all small business employees, according to the June 30, 2020 report and based on U.S. Census calculations that report small businesses employing around 59.9 million workers in the United States.

Paycheck Protection Program (PPP): *Recent Developments*

- July 4, 2020 – President signs extension of PPP to August 8, 2020
- July 6, 2020 – SBA disclosed borrower identity and other information for loans over $150,000
- August 4, 2020 – SBA issued new FAQs on loan forgiveness
- August 8, 2020 – PPP closed, with $130 billion in unused funds remaining in the program
- August 10, 2020 – SBA opens its loan forgiveness portal
- September 2020 – Preliminary report released by Select Subcommittee on the Coronavirus Crisis
- October 13, 2020 – SBA issued updated FAQs on loan forgiveness

Paycheck Protection Program (PPP): *Loan Forgiveness*

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- SBA opened its forgiveness portal for PPP loans in August 2020
  - Applications routed through lender; SBA remits to lender portion of forgiven loan
  - Borrower responsible for unforgiven portion at 1% interest
  - If borrower defaults, SBA reimburses lender and seeks repayment from borrower

- Partial forgiveness an option even if 60% payroll cost threshold not met
- Borrowers have up to 10 months after the covered period to apply for loan forgiveness without having to make any payments on the loan; borrower can elect at that time not to apply for forgiveness, and use the funds as a 1% interest loan
- SBA has already released two simplified forgiveness forms for certain categories of borrowers (one for independent contractors, sole proprietors, self-employed individuals, and the other for companies that received $50,000 or less)
- **SBA intends to supplement loan forgiveness application for PPP borrowers with loans of over $2 million with new form to assess good faith certification of loan necessity**
- Banks and borrowers reportedly delaying

Economic Injury Disaster Loan (EIDL) Program: *Overview*

- EIDL program pre-dated COVID-19 (unlike other programs)
- As of October 19, 2020, more than 3.6 million loans approved, for more than $191 billion; SBA currently accepting applications
- Loan Amounts
  - Originally available for up to $2 million
  - Subsequently reduced to $150,000 due to demand
- EIDL Advance Program
  - Provided advance to EIDL applicants up to $10,000 while applicants awaited loan decisions; could be kept whether loan was granted or not
  - On July 11, 2020, SBA announced conclusion of advance program, which distributed more than $20 billion in advance funds to 6 million small businesses that employed 30.5 million people

Economic Injury Disaster Loan (EIDL) Program: *Key Provisions*

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- Applicant must qualify as small business
- Applicant must certify "substantial economic injury" from COVID-19
- Funds can be used to cover wider array of working capital and normal operating expenses, including health care benefits, rent, utilities, and fixed debt payments
- Funds cannot be used to refinance debt incurred prior to pandemic, repair physical damage, or pay dividends
- EIDL and PPP funds cannot be used for same purpose

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Main Street Lending Program

- Federal Reserve established MSLP to support lending to small and medium-sized businesses that were in sound financial condition before onset of COVID-19 pandemic
- As of October 30, 2020, made almost 400 loans totaling $3.7 billion
- On October 30, Federal Reserve adjusted terms of program to better target support to smaller business that employee millions of workers and are facing revenue shortfalls due to COVID-19
  - Lowered minimum loan size to $100,000
  - PPP loans of up to $2 million may be excluded from determining maximum loan sizes, subject to certain requirements
- Key requirements:
  - Eligible Borrowers must be "businesses that are created or organized in the United States or under the laws of the United States and that have significant operations in and a majority of its employees based in the United States"
  - Eligible Borrowers must commit to following compensation, stock repurchase, and capital distribution restrictions
  - Eligible Borrower "should make commercially reasonable efforts to maintain its payroll and retain its employees during the time the Eligible Loan is outstanding"

CARES Act Oversight: *Special Inspector General for Pandemic Recovery (SIGPR)*

- SIGPR authorized to “conduct, supervise and coordinate audits and investigations” of funds disbursed under CARES Act; special agents are authorized to carry firearms, make arrests, and execute warrants
- On June 2, 2020, Brian D. Miller confirmed as Special Inspector General by Senate
  - Served as federal prosecutor for 15 years
  - Was Inspector General for General Services Administration from 2005 – 2014
- In August 3, 2020 report to Congress, noted initial investigative focus on Treasury’s Exchange Stabilization Fund, including relief to airlines and distressed industries, businesses important to maintaining national security, and Federal Reserve lending and liquidity facilities designed to support eligible businesses, states, municipalities, and critical financial markets, including Main Street Lending Program
- Expressed concerns about “Multiple-Dipping” from multiple CARES Act funding programs, which increases risk of fraud and abuse; questioned whether “multiple-dippers” could reasonably certify to an inability to secure credit elsewhere

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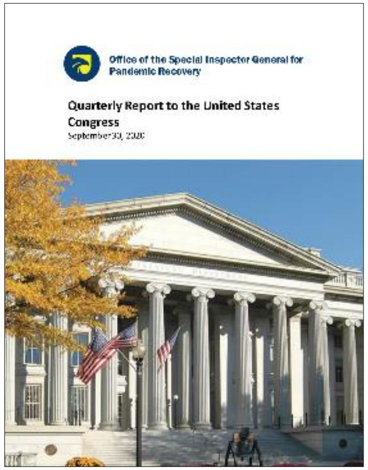
CARES Act Oversight: *SIGPR's First Quarterly Report to Congress*

- SIGPR's first quarterly report to Congress was issued on September 30, 2020. Highlights from the report include:
  - SIGPR gearing up and entering into partnerships with other IGs, FinCEN, DOJ, and SEC
  - SIGPR expanded its partnerships with and outreach to the private sector – for example, SIGPR has arranged an information-sharing agreement with FINRA
  - SIGPR launched a website to facilitate the reporting of information on suspected waste, fraud, and abuse by whistleblowers
  - SIGPR reported 21 preliminary investigations into allegations of improper activity – seven of which have been referred to other IGs and one being worked in partnership with a U.S. Attorney's Office
  - SIGPR concluded that it remains unclear whether SIGPR has jurisdiction over the PPP and has invited Congress to clarify lingering ambiguities



CARES Act Oversight: *Pandemic Response Accountability Committee (PRAC)*

- PRAC responsible for promoting transparency of coronavirus response funds; the coordinated oversight of the U.S.' coronavirus response to prevent and detect waste, abuse, and mismanagement of funds disbursed under CARES Act and other related legislation; and to identify and mitigate major risks that cross program and agency boundaries
- DOJ Inspector General Michael Horowitz is acting PRAC chair
- Consists of 21 OIGs, including DOJ, Board of Federal Reserve and CFPB, DOE, DHS, HUD, Treasury, DOA, TIGTA, HHS, NSF, FDIC, SIGPR, VA, DOD, DOL, SBA, and USPS
- Issued semiannual report to Congress on October 29, 2020
- Other reports include "Top Challenges Facing Federal Agencies: COVID-19 Emergency Relief and Response Efforts" (June 17, 2020); key challenges identified include:
  - Financial Management – weaknesses in agency internal controls and financial reporting as well as improper payments under CARES Act programs
  - Grant and Guaranteed Loan Management – closely related to financial management, difficult in ensuring grantees use funds solely for authorized purposes and maintain appropriate documentation

PANDEMIC RESPONSE
ACCOUNTABILITY COMMITTEE

CARES Act Oversight: *Other Oversight Bodies*

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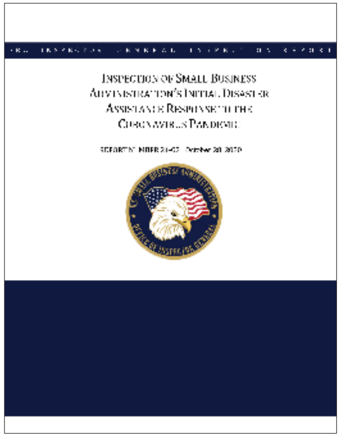
- **Congressional Oversight Commission**
  - Focused on administration of Main Street Lending Program and other programs by Treasury and Federal Reserve
  - Issues monthly reports
- **U.S. Government Accountability Office**
  - Issues bi-monthly audit reports through first year of CARES Act
  - Critical of PPP and recommended that SBA Administrator develop and implement plans to address potential fraud
- **House Select Subcommittee on Coronavirus Crisis**
  - Among other things, examines reports of waste, fraud, price gouging, profiteering, or other abusive practices related to coronavirus crisis
  - Also critical of PPP; on October 30, issued interim staff report that found more than 22,500 loans worth $4 billion may have been subject to fraud

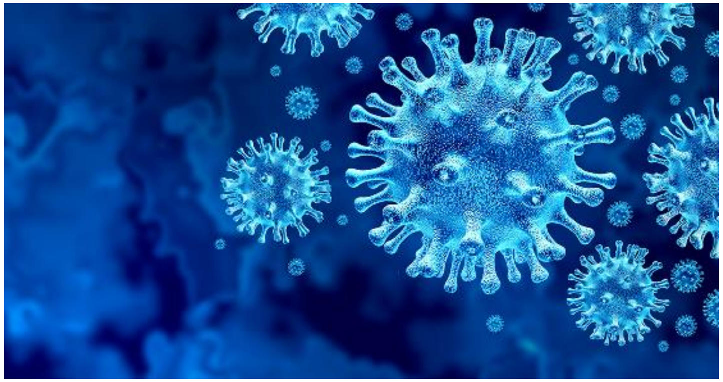
CARES Act Oversight: *SBA OIG's October 28, 2020 Report*

- Report presents results of SBA OIG's inspection of SBA's initial disaster assistance response to the pandemic, focusing on EIDL program loans.
- As of July 31, 2020, SBA had received over 14 million EIDL applications, and approved 3.2 million EIDL applications (total of $169.3 billion).
- To put this in perspective, SBA approved:
  - $11 billion in EIDLs in connection with Hurricane Katrina, and
  - $2.6 billion after Hurricane Sandy.
- SBA OIG Inspection Findings:
  - SBA approved $14.3 billion in EIDLs to accounts that differed from original bank accounts listed on applications; $62.7 billion in multiple EIDLs to applicants with the same IP addresses, email addresses, bank accounts or physical addresses; and $1.1 EIDLs and emergency advance grants to potentially ineligible businesses.
  - Strong indications of ongoing fraudulent activity.
  - Law enforcement agencies have already seized over $450 million from more than 15,000 fraudulent EIDLs; more than 5000 EIDLs are under investigation and additional investigations opened daily.
  - Noted that FTC had received 223,995 reports involving fraud, identity theft, and other complaints associated with the government's pandemic response as of October 14,2020; likelihood that when one loan is obtained through identify theft, other loans or grants have been obtained with the same stolen information.



COVID-19 Fraud
General Enforcement Updates

- DOJ issued October 15, 2020 press release outlining steps it has taken since March to combat COVID-19 fraud
- Warned public about "criminals that fabricate businesses and steal identities in order to defraud federal relief programs"
- Deputy Attorney General Jeffrey A. Rosen stated, "A pandemic is a time when people should come together to pursue the common good, but sadly there are some who instead use it as an opportunity to deceive and thieve"
- On March 18, DAG Rosen directed NCDF to take COVID-19 related complaints from the public and facilitate sharing with law enforcement
- To date, NCDF has received more than 76,000 COVID-19 related complaints
- Department charged its first COVID-19 fraud case on March 25, and filed charges in an additional 33 criminal cases involving scam vaccine and treatments, or testing or price gouging; 11 civil enforcement actions have been filed to enjoin fraudulent schemes targeting consumers, including scam treatments
- With respect to CARES Act related funding programs, the department has criminally charged 65 defendants in 50 cases related to the PPP and EIDL, involving intended losses of more than $227 million; thus far, cases involve:
  - Egregious conduct – defendants fabricated businesses named after "Game of Thrones" characters, and spent money on exotic cars, boats, and jewelry
  - Alleged criminal rings that have engaged in organized activity to commit loan fraud, including individuals filing fake loan applications for others for kickbacks
- Department will aim to deter and prevent attempts by wrongdoers to prey on victims based on the potential enactment of new disaster relief bills that extend or expand on CARES Act relief



Affirmative Civil Enforcement *Overview*

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- United States can pursue both civil and criminal investigations simultaneously (Parallel Proceedings)
- Civil statutes generally provide longer SOLs (6-10 years) than criminal statutes
- Investigative subpoenas for documents/testimony and interrogatories
- Large scope of remedies ranging from multiple damages to penalties to injunctions and equitable relief – can seek relief under multiple statutes in one proceeding
- Lower standard of proof than criminal cases and different scienter (reckless disregard or willful blindness)
- Statutes which authorize the United States to file civil cases arising from fraudulent conduct include False Claims Act, FIRREA, Fraud Injunction Statute

Affirmative Civil Enforcement
The False Claims Act

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False Claims Act, 31 U.S.C. § § 3729 to 3733

- Establishes liability concerning false claims for payment from the United States.
- The most commonly used provisions impose liability where a person:
  - Knowingly presents or causes to be presented, a false or fraudulent claim for payment or approval, § 3729(a)(1)(A); and
  - Knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim, § 3729(a)(1)(B).
- Section 3729(b): “Knowing” and “Knowingly” defined.
  - “No proof of specific intent to defraud is required.” The Government only needs to show that a defendant:
    - had “actual knowledge of the information;” or
    - “act[ed] in deliberate ignorance of the truth or falsity of the information;” or
    - “acted in reckless disregard of the truth or falsity of the information.”

Affirmative Civil Enforcement
The False Claims Act

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- A person who violates the FCA is liable for civil penalties ranging from $11,665 to $23,331 per claim, plus treble damages.
- Treble damages obtained by the government in CARES Act cases involving significant government funds may deter others from engaging in similar conduct.
- Qui tam provisions of the FCA permit suits by private persons “for the person and for the United States Government.” The person bringing such a suit is referred to as the “relator.” The relator can get share of recovery ranging from 15 percent to 30 percent.
- The relator files a qui tam complaint. The government investigates the allegations contained in the qui tam complaint while case remains under seal and then makes a decision about whether to intervene, usually by filing its own complaint.
- Government can also file its own complaint under FCA.
- Burden of proof is preponderance of evidence.
- U.S. Attorney can issue civil investigative demands for documents, testimony, and interrogatories.

Affirmative Civil Enforcement

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA)

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FIRREA, 12 U.S.C. § 1833a

- Civil action to recover penalties for violation of certain criminal statutes including
  - Mail/wire fraud affecting a federally insured financial institution
  - Bank fraud
  - False statements to influence financial institution
  - False statements to influence the SBA
- Maximum Penalty generally \$2.05 million, or \$10.24 million for a continuing violation, or gain or loss, whichever is greater
- For violations creating gain or loss: Penalty may exceed these amounts up to the gain to “any person” derived from the violation or the loss suffered by “a person other than the violator” resulting from the violation
- Possibility of government obtaining multi-million dollar or greater penalties in CARES Act fraud cases involving only smaller dollar government damages
- Burden of Proof is preponderance of evidence
- U.S. Attorney may issue administrative subpoenas for documents or testimony
- Can use grand jury information
  - 18 U.S.C. § 3322(a)(2)
- Statute of Limitations: 10 years

Affirmative Civil Enforcement
The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA)

- Pursuant to the Financial Institutions Anti-Fraud Enforcement Act of 1990 (FIAFEA), 12 U.S.C. §§ 4201 to 4247, whistleblowers can file with the Attorney General a declaration of a violation giving rise to prospective FIRREA claims
- Must include one factual element unknown to the government
- Declarant can get share of government recovery up to $1.6 million
- Unlike FCA whistleblower, FIRREA declarant does not file a complaint – filed by United States or can be referred by Attorney General to private counsel

Affirmative Civil Enforcement
Fraud Injunction Statute (18 U.S.C. § 1345)

- Actions to preliminarily and permanently enjoin certain ongoing criminal acts including mail and wire fraud, mail or wire fraud conspiracy, false statements to the United States, and false claims to the United States
- Burden of proof is probable cause at TRO and preliminary injunction stages
- Among other things, United States may seek to enjoin fraudulent conduct, use of fraudulently acquired CARES Act funds, or participation in government programs; may also seek restitution
- Could be used to enjoin upfront fee scams related to CARES Act programs

COVID-19 Fraud

Possible Future FCA, FIRREA or Fraud Injunction Actions

- Future civil enforcement actions may be brought based on:
  - False claims for CARES Act funds for non-functioning or fictional businesses, or based on stolen identities
  - Failure to disclose criminal history, bankruptcy, debarment, delinquent federal loans, or other disqualifying information in loan applications
  - Circumventing single-loan and maximum amount requirements by submitting multiple applications for same business
  - False statements concerning ability to secure credit from other sources
  - False certification that U.S. is primary residence of employees
  - Improper use of funds (e.g., personal and luxury items)
  - Advance fee schemes related to CARES Act relief programs

Risk Mitigation

- Borrowers now faced with completing the PPP Loan Forgiveness Application, SBA Form 3508.
  - Form 3508 is an application, worksheet and certification.
- False statements are punishable pursuant to Title 18, USC § 1001 and can also result in civil enforcement.
- In addition, tax documents are required and must align with documents received by the IRS.
- By comparison, the PPP Application, Form 2483, is two pages and includes a similar certification.
- Borrowers should prepare for an audit which may be years away:
  - Document, Segregate and Preserve all records related to application, receipt of funds, and use of funds, and ensure appropriate internal controls (Segregation of Duties).
  - Funds must be accounted for and used for their intended short term, current needs.
- Consider seeking professional support from an attorney or accountant.

Five Key Takeaways

- Stay informed of the latest developments
- Study and comply with the rules
- Carefully complete loan and loan forgiveness applications
- Establish controls over use of loan funds
- Maintain documentation

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