

Audit, Audit, Read All About It! Treasury Announces Planned Reviews of PPP Loan Borrowers

By: Catherine Gorman on April 29, 2020 on graydon.law

The CARES Act authorized over \$2 trillion dollars towards COVID-19 pandemic-related relief efforts and the money is already flowing. The purpose of the money is to provide relief for workers, families, businesses, states, and municipalities in the wake of the COVID-19 pandemic. However, the disbursement of funds under the CARES Act is accompanied by the inherent risk of fraud and misuse.

The CARES Act was drafted with this inherent risk in mind - more money means increased regulation and scrutiny. The CARES Act created various sources of regulation, including the Pandemic Response Accountability Committee, the Congressional Oversight Commission, and the Office of the Special Inspector General for Pandemic Recovery.

In addition, the Department of Justice and State Attorneys General have both announced initiatives for investigations and enforcement.

The Pandemic Response Accountability Committee is tasked with promoting transparency and conducting and supporting oversight of covered funds and the COVID-19 response to prevent and detect fraud, waste, abuse, and mismanagement; and mitigating major risks that cut across program and agency boundaries. (Sec. 15010(b)).

The Congressional Oversight Commission is tasked with conducting oversight of the implementation of the CARES Act and generating reports. (Sec. 4020(a)-(b)).

The Office of the Special Inspector General for Pandemic Recovery is established within the Department of Treasury. (Sec. 4018(a)). Brian D. Miller was appointed as the Special Inspector General, who previously served as inspector general of the General Services Administration for nearly 10 years.

In 2008, Congress, through the Troubled Asset Relief Program (TARP), authorized around \$700 billion to help the economy. The responsibilities of the Special Inspector General for TARP are similar to that of the Special Inspector General for the CARES Act. The TARP

Special Inspector General conducted investigations and audits that resulted in recovery of nearly \$11 billion dollars and hundreds of convictions for fraud and misappropriation.

If the aggressive nature of the TARP Special Inspector General is any indication of how the CARES Act Special Inspector General will interpret its broad responsibilities under the CARES Act, then it is necessary for applicants and recipients under the CARES Act to insure compliance at all costs.

The responsibilities of the Special Inspector General under the CARES Act, in accordance with section 4(b)(1) of the Inspector General Act of 1978 (5 U.S.C. App.), are to conduct, supervise, and coordinate 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 CARES Act, and the management by the Secretary of any program established under the CARES Act, including by collecting and summarizing various information related to the CARES Act. In effect, this gives the Special Inspector General the power to monitor fraud and misuse of the \$500 billion allocated to the Treasury Secretary for loans to support businesses, states and municipalities. (Sec. 4018(c)).

The CARES Act allocates \$25 million to the Special Inspector General to carry out its responsibilities and the office of the Special Inspector General terminates 5 years from the date of the CARES Act. (Sec. 4018(g)(1)).

Part of the Special Inspector General's investigation is likely to include monitoring compliance with the certifications set forth in Section 4003(c)(3)(D)(i). Section 4003(c)(3)(D)(i) sets forth various certifications that recipients of funds must make in order to receive funds under the CARES Act. For example, that the uncertainty of economic conditions as of the date of application makes necessary the loan request to support the ongoing operations of the recipient and that the funds it receives will be used to retain at least 90% of the recipient's workforce, among others.

The Treasury Secretary has already announced regulatory action in the wake of growing concern that the limited funds are going to companies that do not need the assistance. On April 28, 2020, Treasury Secretary Steven Mnuchin told CNBC that the government plans to audit any company that takes out more than \$2 million from the PPP loan program. In the interview with CNBC, Mnuchin noted that the PPP loan program was designed for small businesses and that it was not a program designed for public companies with liquidity.

Mnuchin also stressed the importance that applicants certify in good faith that their loan

request is necessary and noted further the unlikelihood that a public company with substantial market value and access to capital markets would be able to make a good faith certification that their loan request is indeed necessary.

What does this mean for you and your business? It is crucial as an applicant and/or recipient of funds to adhere to the rules, certifications and restrictions set forth in the CARES Act to avoid liability.

The following is a non-exhaustive list of recommendations for applicants and recipients to consider in monitoring compliance with the CARES Act:

- Maintain honesty in the application process;
- Familiarize yourself with the permitted uses of the funds;
- Familiarize yourself with the restrictions and strings attached to the funds - i.e. what the funds can and can't be used for. For example, among other restrictions:
 - Funds cannot be used to pay dividends or make stock purchase for as long as the federal loan remains outstanding. (Sec. 4003(c)(3)(D)(i)(VII)).
 - Recipient cannot outsource or off-shore jobs for the term of the loan and 2 years after completing repayment of the loan. (Sec. 4003(c)(3)(D)(i)(VIII)).
 - Recipient cannot abrogate existing collective bargaining agreements for the term of the loan and 2 years after completing repayment of the loan (Sec. 4003(c)(3)(D)(i)(VIII));
- Establish a separate bank account to avoid commingling funds received under the CARES Act with unrelated business funds;
- Create and implement internal policies to ensure compliance with the restrictions and monitor/document how funds are used;
- Implement systems to ensure adherence with those internal policies; and
- Keep an eye out for new developments/guidance related to the CARES Act.

For more information on the strings attached to the CARES Act and how to monitor your compliance, please contact a Graydon attorney.