

# NOW +

# NEXT

CORONAVIRUS STIMULUS AND RELIEF ALERT | NIXON PEABODY LLP

MARCH 27, 2020



## Managing risks that come with federal funds

By Christopher Hotaling and Adam Tarosky

Passage of the CARES Act means that \$2 trillion in federal loans and grants will be issued soon.<sup>1</sup> Federal funds come with associated responsibilities for the recipient, which create potential criminal and civil liability if not properly handled. This alert examines the issues that recipients of federal funds confront and suggests best practices for mitigating risk.

### Investigatory oversight under the new CARES ACT

On March 27, 2020, the president signed into law the “Coronavirus Aid, Relief, and Economic Security Act” or the “CARES Act.” This massive bipartisan stimulus bill provides approximately \$2 trillion in relief to address the widespread economic harm caused by the COVID-19 pandemic. This follows enactment of two previous coronavirus relief bills—an \$8.3 billion measure for health agencies signed in early March and a roughly \$100 billion bill aimed at, among other things, providing free coronavirus testing, some paid leave, and unemployment benefits—as well as additional Medicaid funding and food assistance (signed on March 19, 2020).

### The oversight provisions of the CARES Act and comparisons to TARP

One of the key components of the CARES Act is the availability of \$500 billion that the Treasury Department can provide in the form of loans, loan guarantees, and investments. That portion of the bill—called the Coronavirus Economic Stabilization Act—specifically allocates \$25 billion in assistance for passenger air carriers, \$4 billion for cargo air carriers, and \$17 billion for companies that work in the national security industry. The Treasury Department is afforded wide discretion to distribute the rest of the roughly \$454 billion as loans to businesses, states, and municipalities.

As expected, however, Congress has not allowed the Treasury Department to loan all of this money without providing for a significant amount of oversight—both by Congress and a new executive office with a \$25 million budget. Specifically, the new law mandates the appointment of an independent special inspector general for pandemic recovery within the Treasury Department, who will be appointed by the president and confirmed by the Senate. Under the Act, the special inspector general is tasked with conducting, supervising, and coordinating audits and investigations

---

<sup>1</sup> We have reported on business implications of The Act: See [“Stimulus provides relief for businesses during coronavirus crisis,”](#) and [“CARES Act includes several Employee Benefits-related provisions.”](#)

of the making, purchase, management, and sale of loans, loan guarantees, and other investments made by the Treasury Secretary. Additionally, the special inspector general is required to file quarterly reports with Congress that provide the details of all loans, loan guarantees, and other investments. In addition to the creation of this new special inspector general, the act also establishes a five-person congressional oversight commission responsible for conducting oversight of the Treasury Department, the Federal Reserve, and the agencies' implementation of the CARES Act.

So, what does this mean for companies who want to take advantage of these government-backed loans? An answer can be found by looking back to the 2008 financial crisis when Congress created the Troubled Asset Relief Program (TARP) to administer up to \$700 billion in aid to the financial services sector. Just as envisioned in the new law, a special inspector general (SIGTARP) was created to monitor, audit, and investigate TARP-related activities, including those of the Treasury Department in the administration of the program, and provide regular reports to Congress. SIGTARP has taken its oversight and investigatory mandate seriously. To date (Yes, SIGTARP is still up and running almost twelve years after it was authorized.), SIGTARP has conducted hundreds of audits and investigations and initiated criminal proceedings that have resulted in charges brought against 438 individuals and the recovery of over \$11 billion in fines and penalties.<sup>2</sup> The Treasury Department has referred other matters to the Department of Justice, including those implicating the False Claims Act. In 2015, for example, the Department of Justice settled a False Claims Act lawsuit alleging that a bank holding company and its president made false claims about the financial condition of the bank to induce the Treasury Department to invest over \$17 million in TARP funds.<sup>3</sup>

As with TARP, applicants for Coronavirus Economic Stabilization Act financial relief must be prepared to make a host of certifications to the Treasury Department that may be material to their receipt of federal assistance. Depending on the type of applicant and nature of the financial relief sought, required certifications may include, *inter alia*, that a majority of the applicant's employees are based in the United States, that certain elected officials and their immediate relatives lack controlling interests in the applicant's business, and that uncertain economic conditions make the requested loans necessary for the applicant's ongoing operations. Such certifications, and records provided in support of them, should be closely scrutinized before submission; after all, they constitute statements to the government that, if knowingly false, could expose the submitting company to False Claims Act liability under 31 U.S.C. § 3729(a)(1)(B), and criminal liability under 18 U.S.C. § 1001 and similar criminal statutes.

The Treasury Department will also likely require certifications about an applicant's future intentions; for example, that the recipient of a government-backed loan or investment will retain at least 90% of its workforces at full compensation and benefits through September 30, 2020; will refrain from outsourcing or offshoring jobs for the term of the loan and two years thereafter; will not pay dividends on its common stock or repurchase public equity securities of eligible businesses or any parent company; will not abrogate existing collective bargaining agreements during the term of the loan and for two years thereafter; and will remain neutral in any union organizing effort for the term of the loan. Such statements about an applicant's present intent to perform (or refrain

---

<sup>2</sup> Information taken from the official website of SIGTARP, [www.sig tarp.gov](http://www.sig tarp.gov).

<sup>3</sup> See <https://www.justice.gov/opa/pr/united-states-settles-false-claims-act-action-against-estate-and-trusts-layton-p-stuart-4>

from performing) future acts can be false for purposes of the False Claims Act. *See, e.g., United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 917 (7th Cir. 2005) (“[F]ailure to honor one’s promise is (just) breach of contract, but making a promise that one intends not to keep is fraud.”). Accordingly, applicants for CARES Act relief should involve counsel to assure that they have carefully considered all of the conditions attached to Coronavirus Economic Stabilization Act loans, loan guarantees, and investments, and truthfully certified their present intention and ability to comply with all of them.

TARP turned out to be a great investment for the federal government and the American taxpayer. The program’s success was ensured, in significant part, by the rigorous oversight of SIGTARP. If the CARES Act is to be similarly successful—and we hope that it is—the special inspector general for pandemic relief should be expected to play an equally active audit and enforcement function.

## **Takeaways**

As just discussed, the special inspector general for pandemic recovery and his or her team will undoubtedly make enforcement a key priority by conducting vigorous investigations into the practices of those companies that receive government loans. With that expectation in mind, here are some key considerations:

### ***Establish appropriate compliance systems early***

If a company expects that it is going to apply for one of these government-backed loans, we recommend that internal compliance protocols be in place. In fact, it would be advisable that the company designates one compliance officer or dedicated internal resource (or more than one depending on the size of the company and the size of the anticipated loan) whose primary responsibility is ensuring compliance with the Treasury Department regulations issued in connection with the loan program. As we know, following TARP, these regulations will be complex, and it is important that someone is designated as the internal expert so that the company will not get cross-wise with Treasury, the Special Inspector General, or the Department of Justice.

### ***Work early and often with outside counsel***

Following up on the last point, it would be wise to engage outside counsel for assistance throughout the entire loan process. On the front end, outside counsel can evaluate and review the compliance protocols to ensure there will be no gaps or pitfalls that could cause problems down the line with investigators, and carefully vet the statements, certifications, and supporting documentation that is submitted to the government. And if trouble should arise, it is critical that you reach out to counsel right away so that the issue can be identified, investigated, and mitigated. We at NP stand ready to help at any time.

For more information on the content of this alert, please contact our [Coronavirus Response team](#), your Nixon Peabody attorney, or:

- Christopher Hotaling, 312-977-4418, [chotaling@nixonpeabody.com](mailto:chotaling@nixonpeabody.com)
  - Adam Tarosky, 202-585-8036, [atarosky@nixonpeabody.com](mailto:atarosky@nixonpeabody.com)
-