

Caution: Obtaining COVID-19 Relief Through Federal Programs and Knowing Your Responsibilities

Many small businesses and nonprofits are rushing to file for loans under the Coronavirus Aid, Relief and Economic Security Act (CARES Act), and larger businesses are gearing up to take advantage of other government stimulus packages. While these government programs provide needed emergency relief to businesses adversely affected by the COVID-19 pandemic, there are some warnings that come with taking these funds.

The CARES Act authorized an unprecedented \$2 trillion in federal funds to be spent on new programs. With that massive amount of spending are provisions that ensure that the federal funds are being used correctly. There are two new government authorities with audit and compliance oversight responsibilities to make sure these federal funds are spent properly. First, the CARES Act establishes a Special Inspector General for Pandemic Recovery within the Department of Treasury (referred to as the SIGPaRc). This new position has been granted the same powers as other inspector generals of federal agencies, including the power to investigate and issue subpoenas. Second, the CARES Act establishes a pandemic response accountability committee which is also charged with oversight. This committee will include the inspector generals of eight other government agencies¹. Its powers are broad and include the power to subpoena.

The applications for CARES Act programs require the submission of information and calculations by the borrower. For example, for the Paycheck Protection Program (PPP), small business owners need to calculate their average monthly payroll costs. The law and regulations about how to compute those costs are not clear. In an SBA response to frequently asked questions, the SBA stated "Providing an accurate calculation of payroll costs is the responsibility of the borrower, and the borrower attests to the accuracy of those calculations on the Borrower Application Form. Lenders are expected to perform a good faith review, in a reasonable time, of the borrower's calculations and supporting documents concerning average monthly payroll cost...In addition, as the PPP Interim Final Rule indicates, lenders may rely on borrower representations, including with respect to amounts required to be excluded from payroll costs."

In addition, programs available under the CARES Act require additional certifications by the applicants. For instance, under the PPP, small business owners are required to certify facts establishing their eligibility for the program and, again, to certify certain facts for loan forgiveness under the program.

These certifications in an application will serve as the basis for audits and investigations of some borrowers by these new oversight authorities to ensure federal funds were properly used. In addition, these certifications, if not accurate, create the basis for liability under the False Claims Act (FCA). This act provides that a claim for federal funds payment is false when it rests on a false representation of compliance with the program's requirements. The act allows the government or a whistleblower to bring an action against the organization for making a false representation. Liability under the FCA can include a payback of the federal funds plus substantial penalties and fines.

This oversight structure has strong parallels to what was done during the financial crisis in 2008. When Congress passed the Troubled Asset Relief Program (TARP), a special inspector general was appointed (referred to as the SIGTARP). The SIGTARP's office is still active in its investigation of 2008 funds distributed under TARP. It has conducted hundreds of audits and investigations and has recovered more than \$10 billion in returned funds, fines and penalties.

¹ the Department of Defense, Department of Education, Department of Health and Human Services, Department of Homeland Security, the Department of Justice, the Department of Labor, the Treasury and the Small Business Administration

If your organization is applying for federal funds under the CARES Act or other stimulus programs, here are the responsible actions you should take to ensure that you protect your organization from potential audits, subpoenas or FCA actions:

1. Pay close attention to the information provided and certifications made in an application. Read the language carefully and be sure you know everything necessary to make the certification. In some cases, the certification is also made by owners of 20 percent more of the organization. The same care should be taken for those certifications.
2. Document, as necessary, the basis behind certifications and calculations. For instance, in the PPP, the borrower must certify “Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” You should document the basis for this certification at the time of application.
3. Make sure there are personnel charged with understanding the requirements of the program. The regulations for these programs are complex and additional regulations may be added. Your organization is responsible for understanding the rules and following them.
4. Develop a compliance protocol. Most federal programs have detailed requirements for the use of the funds and how the funds may not be used. You should develop a process to track when the funds were received and how they were used. This documentation should be retained in a safe manner so that it can be accessed in case a government auditor comes knocking.
5. Check with your professional partners – lawyers and/or accountants – if you have any questions about the program’s rules and how they apply to you.

Given the unprecedented amount of federal funds that will be doled out to organizations and the new oversight agencies the CARES Act creates, organizations will need to be careful they are complying with all applicable laws and regulations. The actions outlined above will help organizations exercise the care necessary to stay protected from audits, investigation and FCA suits in the future.

The attorneys at Bond, Schoeneck and King are available to assist you in navigating any applicable pricing laws during this emergency. If you have any questions regarding this Information Memo, please contact [Gail Norris](#) or the attorney at the firm with whom you are regularly in contact.



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