



PROGRAM MATERIALS

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No Free Lunch: Analysis of the CARES Act and Enforcement Risks

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No Free Lunch: Analysis of the CARES Act and Enforcement Risks

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Introduction

- CARES Act and responses to COVID-19 Create a lot of new opportunities to seek government relief
- Government assistance comes with conditions
- Government has been clear that it takes enforcement seriously
- Being vigilant from the beginning is the key to success

Agenda

- Key Substantive Areas of the Law
- Government Tools for Compliance
- DOJ Guidance and Task Force formation
- Lessons Learned from TARP
- Review of Likely Enforcement Statutes
- Types of Certification and Conditions that could be Material to Payment
- Hypotheticals
- Practical Guidance
- 10 Deadly Sins of Non-Compliance
- Conclusion

Key Substantive Areas in the Law

- (1) Hospitals and health care systems
 - Suspends Medicare “sequestration”
 - Would have reduced reimbursement by 2%, from 5/1/20 to 12/31/20
 - Had reduced reimbursement by roughly \$15 billion in FY 2020
 - *Increases* Medicare reimbursement to hospitals
 - 20% add-on payment for COVID-19 inpatient treatment
 - \$1.32 billion to community health centers in supplemental funding
 - Halts a scheduled payment reduction for durable medical equipment
 - Authorizes various types of telehealth coverage under Medicare

Key Substantive Areas in the Law

- (2) Distressed industries
 - \$500 billion to “severely distressed economic sectors”
 - \$61 billion for aviation section
 - (1) \$29 billion in loans and loan guarantees for air carriers, Part 145 aircraft repair stations, and ticket agents;
 - (2) \$32 billion in payroll protection grants for air carriers and their contractors; and
 - (3) relief to air carriers from federal excise taxes that apply to transporting passengers and cargo and the purchase of aviation jet fuel.
 - To qualify for a loan or loan guarantee under the Act, airlines must be an “air carrier” (as defined under 49 U.S.C. § 40102 (the “Transportation Code”))

Key Substantive Areas in the Law

- Loan Certifications for Aviation Sector
 - The borrower must certify:
 - (1) that it is created or organized in the United States (or under U.S. laws) and
 - (2) maintains significant operations in, and a majority of its employees are based in, the United States.
 - The borrower must agree to maintain its existing employment levels as of March 24, 2020, and not reduce these levels by over 10 percent through September 30.
 - No stock buybacks, dividends, or other capital distributions for 12 months after the date on which the loan or loan guarantee is no longer outstanding

Key Substantive Areas in the Law

- To qualify for Aviation Sector Payroll Protection Grants, until September 30, 2021, air carriers and contractors must not:
 - Conduct any involuntary furlough or reduce pay rates or benefits;
 - Repurchase its own stock; or
 - Pay a dividend or make other capital distribution
- Air carriers federal excise taxes holiday
 - Excuses certain taxes and fees on airline passenger tickets, the cost of carrying cargo, and the purchase of aviation jet fuel.
 - Began on March 27, 2020 and ends on January 1, 2021.

Key Substantive Areas in the Law

- (3) Small businesses
- The Act has three Small Business Administration provisions:
 - (1) the Economic Injury Disaster Loan Program (“EIDL”),
 - (2) the Paycheck Protection Program (“PPP”), and
 - (3) Loan Forgiveness Provisions.
- EIDL loans
 - Interest rate of 3.75 %; Maximum term of 30 years.
 - The CARES Act removed the requirement for personal guarantees on loans under \$200,000 and requirements that the borrower not be able to secure credit elsewhere or have been in business for at least one year, as long as it was in operation on January 31, 2020.

Key Substantive Areas in the Law

- \$349 billion for Paycheck Protection Program
 - Loans up to \$10 million to certain qualified small businesses.
 - *Forgivable if the borrower maintains employees and otherwise complies with the CARES Act.*
 - A “qualified small businesses” is one that:
 - Has less than 500 employees;
 - Has more than 500 employees but meets other criteria specified in the current SBA size standards;
 - Certain large businesses in Accommodation and Food Service; or
 - Is an approved SBA franchise; or
 - Has received financing from a Small Business Investment Corporation.
 - The maximum loan amount is set by formula.

Key Substantive Areas in the Law

- Loan forgiveness for PPP borrowers
 - **EQUALS**: the amount spent by the borrower in the eight-week period after the loan origination date on the following items (not to exceed the loan's original principal amount)
 - Payroll costs (not to exceed \$100,000 of annualized compensation per employee); **PLUS**
 - Interest payments on any mortgage loan incurred before February 1, 2020; **PLUS**
 - Payment of rent on any lease in force before February 15, 2020; and payment on any utility for which service began before February 15, 2020.
 - The amount forgiven is not considered taxable income to the borrower.

Government Tools for Compliance

- *First*, CARES Act § 4018 creates a “Special Inspector General for Pandemic Recovery” (“SIGPR”) to conduct focused oversight of the funds;
- *Second*, Cares Act § 4020 creates a “Congressional Oversight Commission” (terminating by Sept. 30, 2025) to oversee implementation by the Treasury Department and the Federal Reserve System’s Board of Governors;
- *Third*, CARES Act § 15010 creates the “Pandemic Response Accountability Committee” (“PRAC”) charged with promoting transparency and oversight of covered funds and the Coronavirus response

COVID-19 Fraud Cases are Being Reported and Task Forces Formed

- On March 24, 2020, U.S. Attorney General William Barr outlined a task force approach in a memorandum, “Department of Justice COVID-19 Hoarding and Price Gouging Task Force”;
- The same day, Deputy Attorney General Jeff Rosen issued a memorandum, “Department of Justice Enforcement Actions Related to COVID-19,” that also anticipates close interagency and state coordination to address fraud and other misconduct related to the Coronavirus Pandemic.

Lessons Learned from TARP

- To forecast the enforcement risks for those suspected of fraud and misconduct by grant or loan recipients under the CARES Act, it helps to discuss what happened after funds were provided through the Troubled Asset Relief Program (“TARP”) to stave off the “Great Recession” in 2008;
- The sheer magnitude of the monies being provided under the CARES Act dwarfs the hundreds of billions funded through TARP and will be disbursed to a much broader group, which heightens the risks.

Lessons Learned from TARP

- **TARP**
 - The 2008 Act created a Financial Stability Oversight Board” to report suspected fraud, misrepresentation, or malfeasance to the SIGTARP or U.S. Attorney General. Investigations resulted in over \$11 billion recovered through civil False Claims Act or criminal enforcement actions, including 438 charges and 381 convictions (with 300 sent to prison of which 76 were bankers).

TASK FORCE APPROACH

- **COVID-19 Fraud Cases are Being Reported and Task Forces Formed**
 - DOJ has a history of using task forces to address problems in times of crisis
 - “Coronavirus Task Forces” will be formed in hotspots for fraud, and work in multi-disciplinary teams (special agents or investigators from IGs involved with PRAC, criminal and civil Assistant U.S. Attorneys, and state liaisons) looking to make news

TASK FORCE APPROACH

- **Price Gauging and Hoarding Task Force**
 - On March 24, 2020, Attorney General Barr outlined using a task force approach in a memorandum, “[Department of Justice COVID-19 Hoarding and Price Gouging Task Force.](#)”
 - Also recently-announced are industry-specific tasks forces, such as the Government Procurement and Long-Term Care Task Forces.

Review of Likely Enforcement Statutes Used

- **Criminal**

- *Bank Fraud*
- *False Statements*
- *Mail & Wire Fraud*
- *Conspiracy*
- *Aiding & Abetting*
- *Money Laundering*
- *False Statement to the SBA.*
- *Forfeiture*

- **Civil**

- *False Claims Act*
- *Common Law Claims*
 - *Money had & Received*
 - *Unjust Enrichment*
 - *Contract Breach*
- *Forfeiture*

Types of Certification and Conditions that could be Material to Payment

- Certifications
 - Overt-- (I certify under penalty of perjury...)
 - Implied (By filing this claim, I understand I comply with all ...)
- General-Material Conditions of Payments
 - Agency web-site terms and conditions relating to payments

Types of Certification and Conditions that could be Material to Payment

- When an individual or a business seeks government funding, the request or claim requires some kind of certification. Some are ***implied***; more often, they are ***express***.
 - Implied certifications: A claimant is deemed to certify that they meet, and will continue to meet, the conditions or eligibility for the benefits received.
 - Express certifications: The certification language is set out in the claim form or is required to access and use the online portal to do business with the government agency.

Types of Certification and Conditions that could be Material to Payment



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Award Condition: Coronavirus Emergency Supplement Funding (CESF) Program -- Additional program-specific requirements (including reporting)

The following award condition is incorporated by reference into OJP Coronavirus Emergency Supplemental Funding (CESF) Program awards. (Please refer to the terms and conditions that accompany the award document.)

Award Condition:

1. Use of Funds for Purposes Unrelated to Coronavirus Prohibited

Award funds may be used for only the following purposes: to prevent, prepare for, and respond to coronavirus. Applicable law, the "Emergency Appropriations for Coronavirus Health Response and Agency Operations" law (Public Law 116-136), restricts the use of CESF Program award funds for any purpose unrelated to coronavirus.

■ <https://www.ojp.gov/secret-test-page> ■

Hypotheticals

- CARES Act contains aid relevant to a number of industries
- Still awaiting detailed guidance and instruction for many programs
- Hypotheticals may not be precise to the eventual statute and regulations—but highlight the types of issues that may arise

Hypotheticals

- Example 1: ABC Airlines seeks assistance as it operates in an identified distressed industry. In its application, ABC Airlines certifies to a number of issues, including that most of its employees are located within the United States. The project officer relied upon last year's HR data to make the certification, as he was unable to access more recent data since the specialist who would have put the data together was infected with Coronavirus. While based on the last year's data, the company certification was true, if 2020 data had been used it would not have been.

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- Example 2: Data analytics tracking hospital systems in the mid-Atlantic region identified a hospital during the crisis as having a 40% higher amount of “COVID-19” related inpatient care claims than another hospital of similar size in a six-state area. The Office of the Inspector General (“OIG”) for the Department of Health and Human Services audits patient claims to analyze what was considered “COVID-19 related” for making the claims and finds that a large number of patients’ files lack documented test results or other findings to support the COVID-19 relationship.

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- Example 3: Company A seeks relief under the SBA Loan Forgiveness Program. It opens a second company, company B, and transfers some employees to the EIN established for the new company. Company A's officers also are the managing officers of Company B. Company A then files for loan forgiveness, while Company B files for a new SBA Loan. Both certify to having less than 500 employees.

Practical Guidance

- Prepare for the inevitable regulatory scrutiny
- Develop written standards for your company's participation in federal program
- Train employees on program requirements
- Audit compliance with program requirements
- Take prompt corrective action as needed when non-compliance detected through audit or otherwise
- Know where to seek program guidance and document it
- Avoid unnecessary risks (Hypo 1)

Practical Guidance

- Develop written standards for company's participation in federal program
 - Eligibility criteria for program (Hypo 1)
 - Conditions to receive federal funds
 - Corporate commitment to compliance
 - Consequences for company and employees in the event of non-compliance
 - Mechanisms for reporting non-compliance
 - Non-retaliation policy for reporting non-compliance

Practical Guidance

- Develop written standards for company's participation in federal program – Example (hypo 2)
 - Criteria to receive 20% add-on for inpatient services related to COVID-19 treatment
 - Consequences for company and employees in the event of non-compliance: obligation to return overpayments, liability for knowingly making false claim for payment
 - Obligation of employees to report non-compliance with criteria for add-on payment

Practical Guidance

- Train employees on program requirements
 - Train at start of program
 - Focus on employees involved in program
 - Written training materials
 - Qualified trainers
 - Document who received training and when
 - Provide training regarding
 - eligibility for program,
 - compliance standards to receive federal funds,
 - reporting of non-compliance

Practical Guidance

- Train employees on program requirements – Example (hypo 2)
 - Train employees regarding criteria to qualify for add-on payment
 - Highlight need for clinical documentation that treatment relates to COVID-19
 - Written training materials regarding the criteria for add-on payment and consequences of non-compliance

Practical Guidance

- Periodically audit compliance with program requirements
 - Need audit standards to measure compliance (Hypo 3)
 - Use qualified auditors
 - Document audit findings
 - Document any corrective action taken, e.g., change in procedures, employee discipline, return of any resulting overpayments

Practical Guidance

- Audit compliance with program requirements – Example (hypo 2)
 - Need audit standards to measure compliance, e.g., review medical records, diagnosis codes, condition codes
 - Use auditors qualified to test whether inpatient services related to COVID-19
 - Document any corrective action taken, e.g., change in procedures to prevent recurrence of incorrectly billing as COVID-19 service, return any overpayments

Practical Guidance

- Seeking program guidance regarding ambiguous program standards
 - Look for agency memos/alerts (Hypo 3)
 - Check agency's website
 - Phone inquiries to agency staff
 - Need to document attempts to clarify program requirements (Hypos 1 and 3)
 - Look for regulations forthcoming
 - Legal counsel as needed

Practical Guidance

- Seeking program guidance regarding ambiguous program standards – Example (hypo 2)
 - Look for CMS memos/alerts regarding 20% add-on
 - Phone inquiries to CMS staff to clarify what clinical factors indicate COVID-19 services
 - Need to document attempts to clarify 20% add-on program requirements

Practical Guidance

- Take prompt corrective action as needed
 - Discipline employees
 - Re-train employees
 - Revise procedures
 - Update internal compliance guidelines
 - Return any overpayments (all three Hypos)
 - Periodically re-audit to confirm efficacy of corrective action

Practical Guidance

- Take prompt corrective action as needed – Example (hypo 2)
 - Re-train employees who are not complying with clinical documentation and billing criteria; discipline for recurring non-compliance
 - Revise internal procedures as needed to prevent incorrect billing for add-on payment
 - Return any overpayments for services not qualifying for 20% add-on

10 Deadly Sins of Non-Compliance

1. Misstating or withholding information relevant to eligibility for federal programs;
2. Misstating or withholding information about compliance with program requirements;
3. Making false records or statements to conceal non-compliance with program requirements;
4. Failing to adopt written standards for the company's participation in a federal program;
5. Failing to communicate those standards and train employees about them;

10 Deadly Sins of Non-Compliance

6. Failing to clarify ambiguous program requirements with regulators;
7. Failing to stay updated on evolving program standards;
8. Failing to periodically audit the company's compliance with program requirements;
9. Failing to take timely and effective corrective action if non-compliance is detected;
10. Failing to return any overpayments received from a federal program

Question?



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