

# Braving a perfect storm: Avoiding legal and reputational risk associated with CARES Act oversight and investigations

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Businesses across the United States have been battered by the COVID-19 crisis and many companies have been the recipients of unprecedented levels of economic assistance and tax relief under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). We expect to see equally unprecedented government oversight and investigations into waste, fraud, and abuse in connection with the use of these funds. The potential for both legal and reputation harm for program participants is significant. Indeed, many companies have already found themselves on the front-page of the newspaper or in the crosshairs of investigators.

CARES Act funds recipients will be scrutinized by a wide array of congressional committees and agency oversight bodies:

- **CARES Act required oversight**

- **Pandemic Response Accountability Committee.** Consisting of Inspectors General of at least nine federal agencies, this committee will conduct oversight to (1) prevent and detect fraud, waste, abuse and mismanagement of CARES Act funds and (2) mitigate risks that cut across agencies and programs. Congress has authorized the committee to conduct its own investigations, hold public hearings, issue subpoenas for records and testimony, and refer matters to the Department of Justice (DOJ) for criminal or civil investigation.
- **Special Inspector General for Pandemic Recovery.** This newly created office is reminiscent of the Special Inspector General for the Troubled Asset Relief Program created during the financial crisis in 2008, which, over the past decade, has produced 380 convictions of individuals and 24 enforcement actions against corporations and recovered US\$11 billion of misspent funds. Armed with broad investigative powers, the special inspector general is responsible for conducting audits and investigations of the making, purchase, management and sale of loans, loan guarantees and other investments by the Department of the Treasury.
- **Congressional Oversight Commission.** Finally, the CARES Act creates a bipartisan commission tasked with overseeing the Treasury Department and

Federal Reserve. It will have broad authority to conduct oversight and investigations, including holding hearings and taking testimony.

- **Government Accountability Office (GAO).** The CARES Act allocated US\$20 million for the GAO to investigate a diverse array of matters, and the GAO expects to initiate at least 30 reviews and audits by the end of April.
- **Congressional committees.** A strictly party line vote created the Coronavirus Select Investigative Subcommittee within the House Oversight and Reform Committee on 24 April, providing the new body with a US\$2 million budget and subpoena power. In addition, at least 11 congressional committees so far have been involved in oversight activities related to the federal response to the pandemic.
- **Offices of Inspectors General.** The CARES Act appropriated more than US\$148 million to Offices of Inspectors General in 14 agencies and authorized them with expanded powers, including the ability to compel testimony.
- **Department of Justice.** Attorney General William Barr has directed all United States Attorneys to prioritize the investigation and prosecution of COVID 19-related fraud schemes, and Deputy Attorney General Jeffrey Rosen has directed each United States Attorney to name a coronavirus fraud coordinator to investigate and prosecute fraud and abuse under the False Claims Act.

Yet legal risk is not the only risk that CARES Act program participants face in this polarized era. In the past week we have observed multiple companies return lawfully received funds having decided that the threat to their brand equity was greater than the possible liquidity shortages the funds would have covered. Importantly, these decisions were made before any organized public shaming campaigns materialized in the wake of recent congressional action.

Companies large and small should thus expect additional scrutiny related to their participation in CARES Act programs. We recommend companies consider taking the following steps to mitigate both the legal and reputational risks in this environment:

- **Carefully and thoroughly review all applications to the federal government.** Companies should vet each representation, attestation, and certification and consider the possible civil and criminal risks associated each statement made, making sure to also review previous filings with the government to ensure consistency. Any statement that could be construed as a misrepresentation or inconsistency will trigger considerable scrutiny by Congress at the very least and could result in civil enforcement liability under the False Claims Act and criminal prosecution as a false statement to a government agency. Also, as certain loan applications and other documents filed with the government will be subject to Freedom of Information Act (FOIA) requests, companies should assume that government regulatory authorities, watchdog groups, and the media will attempt to identify and shame potential "bad actors" that participated in CARES Act programs.
- **Ensure that any interactions with governmental entities abide by relevant ethics rules.** Because some interactions with federal agencies might implicate lobbying laws, we recommend that companies review applicable conflict-of-interest and ethics rules. We anticipate a particular focus by the media and oversight authorities on funding decisions or regulatory action that might be viewed as tainted by some sort of ethical impropriety.
- **Consider being proactive in sharing your story of good stewardship with the public's funds.** Political bodies conducting oversight can be thought of as more Kabuki

theater than determined fact-finders. In such a politically charged atmosphere, the most important thing CARES Act participants must do, in addition to close adherence to all legal requirements, is proactively communicate and foreclose the possibility of becoming a prop in a political play. Companies would be well advised to aggressively (but accurately) communicate how they have been a good steward of the public's money, using the funds to save jobs, save lives, or otherwise enhance the public good. Doing so affords the benefit of telling your story before it can be mischaracterized.

- **Assess compliance programs and amend if necessary.** Companies need to ensure that they comply with any requirements associated with CARES Act programs. In particular, those companies that have contracted with the federal government in response to the pandemic may face increased compliance obligations. Therefore it is important upon the receipt of CARES Act funds to have policies, procedures, and controls in place to ensure compliance with the conditions and to demonstrate that funds were used as intended. In certain cases it may make sense to appoint an individual or a team to monitor whether the existing protocols are working to ensure compliance.
- **Monitor all corporate actions after receiving federal assistance.** Recipients of federal funds during the 2008-2009 financial crisis were harshly criticized for hosting lavish parties, paying bonuses and moving jobs overseas. Similar activities will again come under scrutiny and may be used to portray the company and its executives in an unfavorable light. By accepting federal funds, companies should expect to be held to a higher standard of conduct.
- **Retain outside counsel with experience in these types of investigations.** The time to search for, vet, interview, and retain outside counsel and communications expertise is not when an investigation letter lands on your CEO's desk. Outside counsel is crucial for responding to these investigations for a number of reasons. Expertise is key in the high stakes world of investigations, with a need for both the extensive relationships and understanding of the government's end-game that comes with seasoned government relations lawyers, and the expertise of litigation counsel in negotiating the scope of document requests, working with vendors to collect the requested documents and emails, reviewing the documents for responsiveness and privilege, and producing the documents in the requested format. This expertise should be completed with an experienced team to manage the media and communications message. One combined team, all working under attorney-client privilege and a coordinated strategy, is ideal.

The Hogan Lovells experienced team of government relations and public affairs lawyers, strategic communications experts, and white collar defense and investigations lawyers is prepared to help you handle the increased oversight and investigations that will accompany receipt of CARES Act funds.

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