

\$2T Relief Bill Carries Big Fraud Risks, White Collar Attys Say

By **Jody Godoy**

Law360 (April 7, 2020, 6:34 PM EDT) -- White collar and government investigations attorneys expect the more than \$2 trillion in COVID-19 relief funds to lead to unprecedented fraud, and are urging businesses seeking funds to protect themselves from future risk in what they expect to be a new decade of government investigations.

Tai Park, a partner at White & Case LLP and former federal prosecutor, said that if past bailouts are any guide, "it's very clear what's going to happen here."

"It's hard to overstate for corporate management that the decisions and the conduct they are undertaking right now are absolutely going to be subject to scrutiny later on," Park said.

According to one study, growth of in-house compliance spending has slowed recently after companies built up their capacity over the past decade.

Park said that sticking to compliance mechanisms that are already in place is the best way for companies to protect themselves from the risk of investigations down the road.

"It's just critical that those processes not be shunted to the side in the name of keeping the business going," Park said.

The Coronavirus Aid, Relief, and Economic Security, or CARES, Act is widely viewed as similar in many ways to the U.S. Treasury's Troubled Asset Relief Program, only on a much grander scale. Passed in 2008, TARP had built-in oversight mechanisms including a special inspector general to oversee the hundreds of billions handed out to banks.

That inspector general's office, known as the SIGTARP, pursued investigations that led to 24 enforcement actions against banks and other organizations and the conviction of 291 individuals, including 76 bankers, according to the office.

The effort has recovered some \$11 billion, including \$900 million in 2019, more than 10 years after the bailout began.

Erin Rodgers Schmidt, a partner at Morgan Lewis & Bockius LLP in Philadelphia, said that companies receiving funds from the pandemic package should be aware that the investigative efforts to crack down

on waste and abuse are likely to last just as long.

"These risks and the government's interest in how money is used have a really long tail," Rogers Schmidt said. "The time window for the government to really take a hard look at the decisions that led to a claim for federal funds is probably a 10-year period."

Rogers Schmidt said that companies should make the time to document their decisions to apply for funding, including facts known at the time and copies of governmental guidance that was relied on and may have changed by the time the decision is being scrutinized.

The CARES Act provides three separate oversight mechanisms: a bipartisan Congressional Oversight Commission, a Pandemic Response Accountability Committee made up of inspectors general who oversee various government agencies, and a special inspector general for pandemic recovery, or SIGPR. On Monday, President Donald Trump nominated Brian D. Miller for the SIGPR role.

In addition, House Speaker Nancy Pelosi has also floated a temporary select committee to oversee the early stages of the bailout.

There is concern, however, that the SIGPR may be hampered in its work.

Neil Barofsky, the former SIGTARP who is now a partner at Jenner & Block, said in a recent interview that he believes the SIGPR is underfunded.

The bill also allows the SIGPR to report to Congress if other government agencies deny requests for information. When he signed the bill, Trump said that the SIGPR's reports to Congress are subject to "presidential supervision." Barofsky said that "could strip one of the most important tools that an inspector general has in obtaining information."

"Information is the currency of success for oversight. You can't have transparency if you have an inspector general who can't get information," Barofsky told Bill Moyers in an interview published on the journalist's site.

On the other hand, government investigators won't be the only ones to uncover fraud. Attorneys say whistleblowers are also sure to emerge at companies that avail themselves of bailout funds.

Shawn Rabin, a partner at Susman Godfrey LLP, represents whistleblowers and said he expects them to play a key role in monitoring how government funds are spent, just as they did after Hurricane Katrina and other disasters.

"Whistleblowers played a large role in bringing things to the attention of the government," Rabin said.

While claims filed soon may not have merit to them, Rabin said he expects that as the programs mature and funds start to be paid out, insiders may start to detect fraud and abuse.

Attorneys say that even well-intentioned companies need to take precautions. Preston L. Pugh, a former prosecutor and attorney at Miller & Chevalier Chtd. who handles internal investigations and False Claims Act suits, said that companies receiving government funds — including contractors — need to be on guard now against what he called Monday morning quarterbacking.

"Hindsight makes noncompliance that occurred in the moment look like it was intentional. A lot of times it is not," Pugh said.

For example, Pugh pointed out that it is harder to account for labor time spent on a government project when employees are working from home.

Another hurdle facing contractors now is the potential blind spots created when employees and their respective knowledge are siloed off while working from home, decreasing chances for them to help catch problems in performing a contract.

"You may not see how your peer is complying with the contract. That is an issue I can see coming up," Pugh said.

He said that while government investigations and whistleblower suits were likely, he hoped future investigators would account for shifting circumstances and even differences in guidance from one contracting official to another.

"My hope is that folks who sat in the seat I sat in a long time ago at the U.S. attorney's office do take into account the various contextual factors the contractors and contracting officers are dealing with," Pugh said.

--Additional reporting by Andrew Kragie. Editing by Brian Baresch and Alanna Weissman.