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When CARES Act Aid Triggers Criminal Liability

Unprecedented in size and scope, the CARES Act makes available over $2 trillion in economic aid. But the governmental nature of CARES Act assistance could trigger liability under a number of statutes.

BY ERIC NITZ AND EMILY DAMRAU

Government officials have sent strong signals that they will rigorously enforce requirements for receiving assistance under the Coronavirus Aid, Relief and Economic Security Act. In late April, Treasury Secretary Steven Mnuchin promised that any company seeking forgiveness of over $2 million in loans would be audited by the Small Business Administration, threatening criminal liability for any company that improperly accepted the assistance. And in early May, federal prosecutors in Rhode Island initiated the first fraud prosecution for misconduct associated with the receipt of government benefits under the CARES Act, charging two individuals with seeking payroll assistance loans for employees that did not exist. That prosecution is the first salvo of an enforcement effort that will likely last many years.

U.S. House Speaker Nancy Pelosi, a Democrat from California signs the H.R. 748, Coronavirus Aid, Relief, and Economic Security (CARES) Act, during a ceremony at the U.S. Capitol in Washington, D.C., U.S., on Friday, March 27, 2020. The House approved the largest stimulus package in U.S. history Friday as part of the response to the economic crisis caused by the coronavirus pandemic, sending the measure to President Donald Trump for his signature. Photographer: Sarah Silbiger/Bloomberg

Unprecedented in size and scope, the CARES Act makes available over $2 trillion in economic stimulus, aid, loans and relief to individuals, state and local governments, and businesses and corporations, both big and small. That assistance, however, comes with many strings—a complex web of requirements, conditions and prerequisites that govern who can receive assistance and what must be done with the money.

Because the CARES Act involves federal money, prosecutors investigating misconduct have a broad array of statutory tools that can be used to punish misconduct and fraud. Of course, the frequently charged mail- and wire-fraud statutes may apply. But the governmental nature of CARES Act assistance could trigger liability under a number of other statutes as well.

False Statements and Concealment: A favorite of prosecutors, 18 U.S.C. §1001 criminalizes knowing and willful false statements of material fact, made in any matter within the jurisdiction of the executive branch. Even concealment of a material fact can trigger liability under the statute where there is a legal duty to disclose the concealed information. A recipient of CARES Act assistance thus might run afoul of §1001 where statements made on their assistance application are untrue.

The Criminal False Claims Act: An individual or business violates the criminal provisions of the False Claims Act by making or presenting a claim against the United States, "knowing such claim to be false, fictitious, or fraudulent." Significantly, a claim can be "false, fictitious or fraudulent" when someone falsely certifies compliance with regulatory requirements or prerequisites. The CARES Act requires many such certifications. For example, small businesses applying for loans under the Act must certify, among other things, that the loans will be used to retain workers or make certain overhead payments.

Bank Fraud: 18 U.S.C. § 1344 criminalizes fraud on a financial institution. Because many of the loans made available under the CARES Act are originated by a commercial lender, and only guaranteed by government agencies like the SBA, fraud in connection with those loan applications can lead to prosecution under the bank fraud statute. While garden-variety mail and wire fraud are punishable by 20 years in prison, a bank fraud charge triggers a 30-year maximum prison sentence. And even when bank fraud is not formally charged, the involvement of a financial institution in the criminal activity can lead to sentencing enhancements upon conviction of other crimes.

Emergency Benefit Fraud: On March 13, President Donald Trump, by letter to the several Cabinet Departments, declared a national emergency under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. The CARES Act created a $45-billion disaster relief fund to provide assistance under that declaration. These actions create the distinct possibility that misconduct associated with those funds would be prosecuted under 18 U.S.C. §1040, which criminalizes fraud and false statements in connection with major disaster benefits. Section 1040 makes it illegal to falsify, conceal or cover up a material fact by means of a trick, scheme or device. It also criminalizes materially false, fictitious or fraudulent statements or representations. Unlike more generally applicable false statement and fraud statutes, conviction under §1040 requires that the fraudulent conduct or false statement relate to a matter involving benefits paid in connection with a national emergency declaration. Like bank fraud, a conviction under §1040 carries a 30-year maximum prison term and can trigger sentencing enhancements even when other crimes are charged, but §1040 is not.

The CARES Act delivers much needed relief to American businesses as they confront the economic challenges presented by the coronavirus. With money available on an expedited basis and distributed over a very short period of time, opportunities abound for fraud, waste and abuse. And even well-meaning, well-intentioned individuals can find themselves or their companies in the crosshairs of a federal criminal investigation if they are not careful.

For many businesses, the CARES Act may be the first time they have accepted federal money. While the need for the assistance may be pressing, businesses should fully understand the regulatory regime that accompanies that assistance. Given the potentially criminal consequences of false statements and misrepresentations—under criminal fraud statutes, the False Claims Act, and others—businesses and individuals should carefully consider the representations and certifications in their applications for federal aid and ensure that any certifications are true and accurate. While unintentional errors typically do not amount to a criminal violation, such mistakes may nonetheless draw the unwanted attention of federal regulators and investigators.

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