

CARES ACT: Compliance Considerations & Enforcement Trends

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COVID-19'S ECONOMIC IMPACT

June 2020 unemployment rate: **13.3 % (dropped from 14.7)**

- DOL notes that number is likely closer to 16% - down from nearly 20% due to a classification error (i.e., some workers on temp layoff were classified as “employed but absent from work” rather than unemployed)
- 21 million out of work

Trending upward?

- Jobs added in May 2020: **2.5 Million**

By Comparison:

- **October 2009:** 8.7 million jobs lost; unemployment peaked at 10%
- **Great Depression:** Unemployment peaked at 25%

See; <https://www.washingtonpost.com/business/2020/06/05/may-2020-jobs-report/>;
<https://www.washingtonpost.com/business/2020/06/05/may-2020-jobs-report-misclassification-error/>
 (last visited June 17, 2020)

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COVID-RELATED LITIGATION RISKS

- Ghosts of Christmas Present:
 - *Government Enforcement Actions*
 - *SBA/PPP Fraud Risk*
- Ghosts of Christmas Past:
 - *September 11, 2001*
 - *Hurricane Katrina*
 - *2008 Financial Crisis*
- Ghosts of Christmases Yet to Come:
 - *Whistleblower Resurgence*
 - *DOJ's Compliance Guidance*
 - *Internal Investigations*



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THE HERE & NOW

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A TOXIC EQUATION

Deteriorated economic conditions



\$2 trillion stimulus package



Highest unemployment since Great Depression



AN ENVIRONMENT RIPE FOR FRAUD

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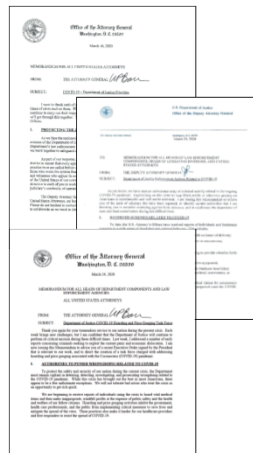
DOJ'S RESPONSE, ENFORCEMENT PRIORITIES

3/16/20 Memo from AG Barr (directing USAOs to prioritize COVID-19 prosecutions)

3/24/20 Memo from DAG Jeffrey Rosen (summarizing COVID-19 schemes to date and setting forth statutory prosecution framework)

- fraudulent offers to sell PPE
- social media scams soliciting banking info. for fake donation funds
- sales of fake testing kits
- threats to intentionally infect others
- hoarding PPE categorized as "scarce"
- price-gouging

3/24/20 Memo from AG Barr (creating hoarding & price gouging task force)



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MULTI-AGENCY ENFORCEMENT COLLABORATION



- DOJ – HHS task force on price gouging
- IRS – FBI collaboration on fraudulent IRS stimulus payment domains
- FBI – National Cyber Investigative Joint Task Force (NCIJTF) collaboration on COVID-19 cybercrime
- FTC – DOJ joint statement reducing the burdens associated with antitrust reviews of collaborations between businesses
- Nationwide USAO intra-jurisdictional task forces drawing members from FBI, DHS, FDA, FTC, HHS, CBP, USPIS, OIGs, SBA, and the Secret Service
- Fed / state collaboration

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SIGNS OF FRAUD EPIDEMIC ALREADY APPARENT

Recent Federal Prosecutions

United States v. Stavely (D.R.I. 5/4/20)

- **Fraudulently obtaining CARES Act paycheck protection loans**

United States v. Gindt (W.D. Pa. 5/4/20)

- **Fraudulent sale of stolen COVID-19 test kits**

United States v. Marschall (W.D. Wash. 4/29/20)

- **Falsely claiming drugs could prevent COVID-19**

United States v. Stevenson (N.D. Cal. 4/28/20)

- **Fraudulent (non)sale of N95 masks**

United States v. Parris (D.D.C. 4/10/20)

- **Attempted fraudulent sale of masks to VA valued at \$750M**

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SIGNS OF FRAUD EPIDEMIC ALREADY APPARENT

And Even More Recent Federal Prosecutions

United States v. Schena (N.D. Cal. 6/9/20)

- **Medical Technology President Charged in Scheme to Defraud Investors and Health Care Benefit Programs in Connection with COVID-19 Testing**

United States v. Middlebrook (C.D. Cal. 6/12/20)

- **Investment fraud scheme centering on bogus claims of COVID-19 cure**

United States v. Shah (N.D. IL 6/16/20)

- **Business owner charged with COVID relief fraud**

United States v. Wamsley (W.D. Wash. 6/17/20)

- **Veteran's Affairs respiratory therapist charged with stealing COVID-19 related medical supplies and selling them on eBay**

United States v. Crawford Technology Group (D.N.J. 6/17/20)

- **Chinese Manufacturer charged with exporting defective and misbranded masks falsely purporting to be KN95 respirators**

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AREAS OF INCREASED FRAUD RISK

- Stimulus check fraud
- PPP / SBA fraud
- Fake cures or tests
- Fake or nonexistent supplies
- Public health scams
- Fake charities
- Threats to infect others
- Business email compromise
- Healthcare fraud
- Ransomware
- Insider trading
- Misbranded products
- Price-gouging or hoarding
- Image: *The Miami Herald*



... and whistleblower claims

<https://www.miamiherald.com/news/coronavirus/article241586006.html> (last visited on Mar. 30, 2020)

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SBA / PPP FRAUD RISK FOR BORROWERS

Potential ***borrower*** liability

- Borrowers bear burden of “good faith” certification of necessity for loan funding
- Based upon perception of access to other sources of liquidity
- Highly subjective assessment clarified with presumption of good faith for loans <\$2M (which are unlikely to be audited)
- **But** this is not blanket immunity
 - SBA doesn’t speak for other agencies
 - SBA guidance is non-binding
 - Several other trip wires exist (borrower not eligible, loan used for unauthorized purposes, more than one loan received during 2020, bank fraud)
- All loans >\$2M get automatic audit (if not necessary, then repayment avoids SBA enforcement)

Document unavailability of other liquidity sources; books and records on how money spent

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SBA / PPP FRAUD RISK FOR LENDERS

Potential **lender** liability

- Lender entitled to rely upon good faith certification of borrower
- **But:**
 - Lender itself must conduct “good faith review” of some borrower representations
 - Cannot turn a blind eye to improper applications / certifications that can be detected with reasonable due diligence
 - Vicarious corporate criminal liability for the acts of employees (if in scope of employment and for employer’s benefit)

Continue to follow standard compliance best practices (BSA / AML) and KYC policies

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LESSONS LEARNED

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FEDERAL DISASTER RELIEF RESPONSE

September 11th Attacks

- Victim Compensation Fund
 - Smattering of Arrests/Prosecutions
- No coordinated federal law enforcement response

Hurricane Katrina

- 2005 Fraud Task Force
 - 93 USAOs
 - FTC, SEC
 - State/local officials
- 907 prosecutions in first 3 years



FEMA

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THE FULL AWAKENING... 2008 FINANCIAL CRISIS

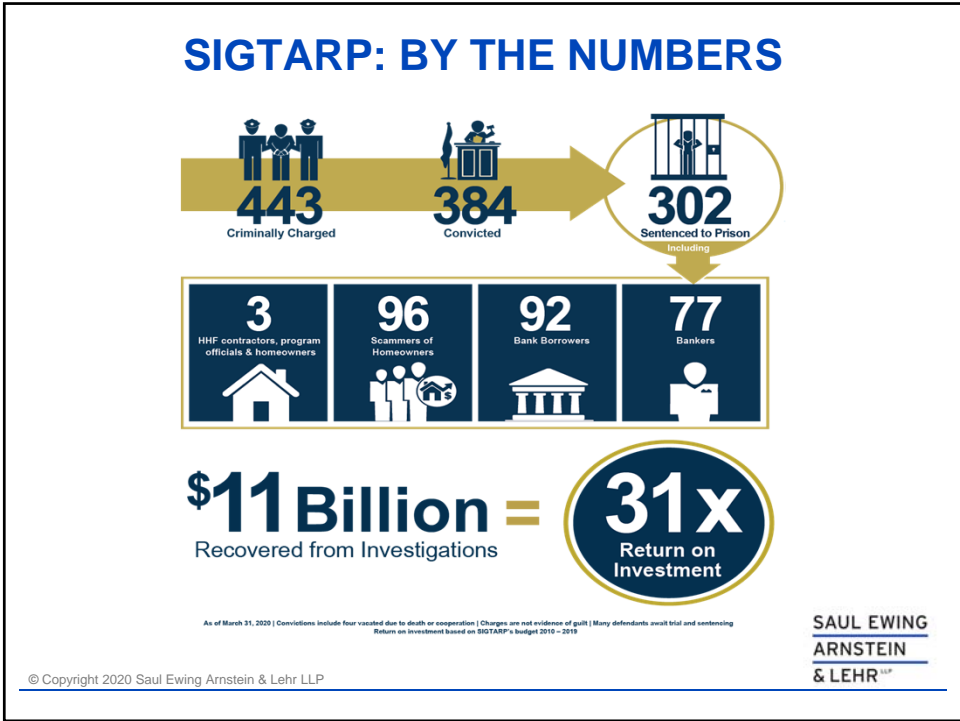
The Troubled Asset Relief Program (TARP):

- Office of Special Inspector General created
- SIGTARP's Mission: to monitor and investigate "financial institution crime and other fraud, waste, and abuse..."



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CARES ACT FRAUD PREVENTION

CARES Act creates:

- (1) Special Inspector General for Pandemic Recovery
 - Duty 1: audit and investigate DOT Secretary's loan provision
 - Duty 2: report "expeditiously" to AG whenever "reasonable grounds to believe there has been a violation of Federal criminal law"
- (2) Pandemic Response Accountability Committee
 - \$80 million in funding
 - Chief purpose: "to promote transparency and conduct and support oversight of covered funds and the Coronavirus response to . . . prevent and detect fraud, waste, abuse, and mismanagement[.]"
 - Coordinates with OIGs
 - Must report to AG if reasonable grounds to believe federal law violation
- **Both have subpoena, arrest, warrant, oath powers**



It's like déjà vu, all over again.

-Sig Bata

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IF PAST IS PROLOGUE...

What can CARES Act recipients learn from SIGTARP?

- Enforcement may continue long after COVID is gone
- Be prepared for government-issued RFIs within months
- The Government's tentacles may reach beyond CARES and into other aspects of your company



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THE ROAD AHEAD

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BEWARE!!!

There is a great incentive for employees (and former employees) to become whistleblowers

- Pursuant to the CARES Act, the government has provided trillions of dollars of funding
- Increased unemployment/reductions in workforce
- Potential for substantial recovery

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SEC Whistleblower Program 2019 Annual Report to Congress

- In FY 2019, the Commission received its second largest number of whistleblower tips in a fiscal year
- In FY 2019, the SEC awarded approximately \$60 million in whistleblower awards to eight individuals whose information and cooperation assisted the Commission in bringing successful enforcement actions
- Since the beginning of the whistleblower program, the Commission has awarded approximately \$387 million to 67 individuals

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The False Claims Act is the Federal Government's Primary Tool for Combating Fraud

- With an increase in government spending comes and increase in FCA enforcement actions
 1. The government can bring an action seeking treble damages and civil penalties against businesses and individuals who submit materially false claims
 2. It allows private plaintiffs (relators) to bring *qui tam* actions

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WHAT CAN YOU DO?

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Minimize Compliance Risk

- Understand Program Rules
- Develop Reasonable Interpretations
- Communicate that Understanding to the Government
- Keep Records
- Have an Effective Compliance Program

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A ROBUST COMPLIANCE PROGRAM: THREE FUNDAMENTAL QUESTIONS

- Is the Corporation's compliance program well designed?
- Is the program being applied earnestly and in good faith?
- Does the Corporation's compliance program work in practice?

See JM 9-28.800.

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COVID-19 IMPLICATIONS FOR INTERNAL INVESTIGATIONS

- Timing (can it wait?); all or nothing now?
- Atmospherics
 - *Upjohn* warnings
 - How many lawyers is too many?
 - Easier / harder witness access?
- Web-based alternatives
 - Privacy, privilege
 - Sharing exhibits with witness (screen share / password protect email in advance?)
 - Data privacy laws
 - Screenshots
 - Video / audio recording
 - Possible cybersecurity flaws
 - Limited access to printed documents



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COVID-19 IMPLICATIONS FOR INTERNAL INVESTIGATIONS (CONT'D)

- Greater delay before gov't investigation?
 - Federal priority on minimizing in-person interactions
 - Possible deprioritization or staleness / SOL of current existing investigations (no grand juries)
 - → Possible incentive to delay voluntary disclosures?



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Questions?



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As a former police officer and federal prosecutor, Natashia Tidwell offers a practical real-world approach to her work leading internal investigations for a variety of clients involving federal and state constitutional issues. Natashia helps individuals and institutions navigate government enforcement actions, including responses to grand jury subpoenas, civil investigative demands, and interview and deposition requests. When institutional clients face allegations of misconduct from within, Natashia stands ready to apply her substantial internal investigations experience to conduct a thorough and objective assessment of potential violations and to provide recommendations for mitigation of risk and reputational damage.

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