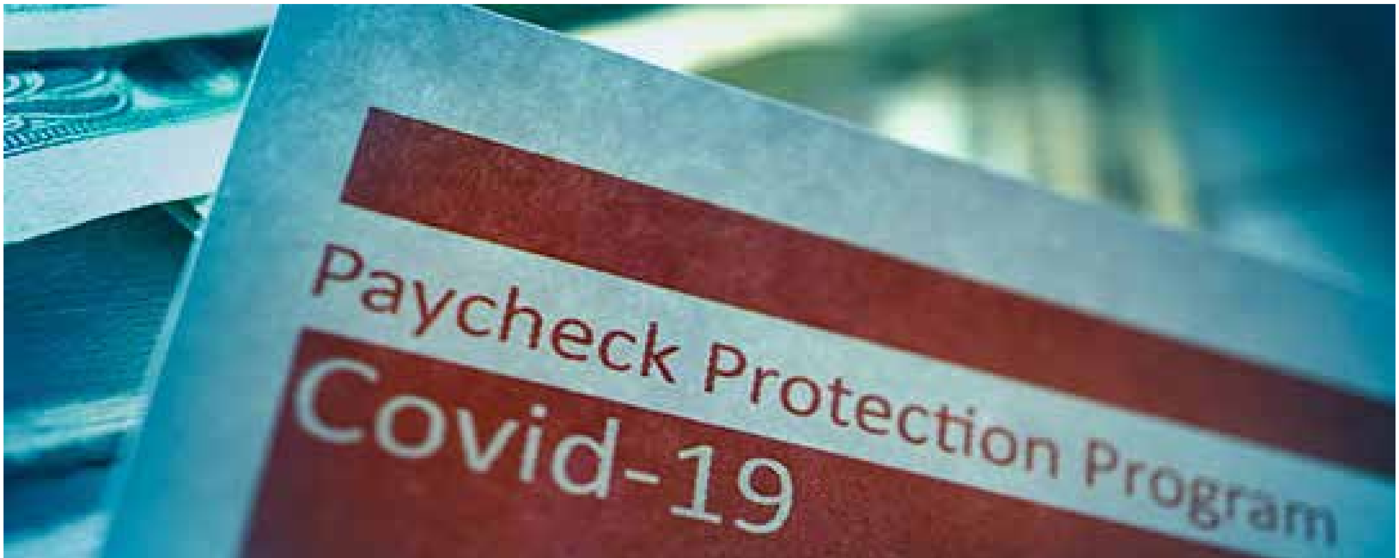
One Firm Worldwide®



WHITE PAPER

October 2020

Six Months of COVID-19 Relief: Enforcement and Litigation Trends for Borrowers

An uptick in fraud prosecutions and litigation has historically followed federal crisis relief programs. In addition to this historical trend, the attention fraud related to the novel coronavirus ("COVID-19") has garnered from the U.S. Department of Justice ("DOJ") and United States Attorneys' Offices ("USAOs") signals that there will be an increase in fraud investigations and prosecutions for years following the coronavirus pandemic. Likewise, COVID-19 relief funding—and the potential to allege abuses relating to such funding—will likely result in an increase in private civil lawsuits.

Since the COVID-19 outbreak, Jones Day released a number of publications outlining issues concerning COVID-19-related fraud and surveying the nationwide regulatory, enforcement, and litigation landscape[1]. This Jones Day *White Paper* focuses on what has happened within that landscape during the first six months since the Coronavirus Aid, Relief, and Economic Security ("CARES") Act was enacted. Recipients of federal crisis relief funds in all industries should consider proactive steps to prepare for any government inquiries and private suits, including understanding the requirements imposed by COVID-19 funding programs.

TABLE OF CONTENTS

IMPLEMENTATION OF THE COVID-19 ECONOMIC RELIEF PROGRAMS

Just over six months ago, on March 27, 2020, the CARES Act[2] was enacted into law, creating a number of avenues for businesses to seek relief from economic hardships resulting from COVID-19. In looking back at enforcement and litigation over the first six months, three CARES Act programs stand out in particular. First is the Paycheck Protection Program ("PPP"), administered by the Small Business Administration ("SBA"), distributing forgivable loans to qualifying small businesses for payroll and other eligible expenses. Second are Economic Injury Disaster Loans ("EIDL"), also administered by the SBA, which provide both advances (grants) and long-term, low-interest, direct loans that can be applied to a wide range of working capital and normal operating expenses, including health care benefits, rent, utilities, and fixed debt payments. Third is the Main Street Lending Program ("MSLP"), established by the Federal Reserve for certain businesses that do not qualify for PPP loans; on July 28, 2020, the Federal Reserve Board announced an extension through December 31 of its lending facilities that were scheduled to expire on or around September 30, which includes the MSLP[3].

The COVID-19 relief funding programs have been implemented at a staggering scope. At the close of the PPP loan application window on August 8, 2020, more than 5.2 million PPP loans were approved by a total of 5,460 lenders—with a sum of more than $525 billion loaned[4]. Borrowers span a wide swath of industries, including health care, retail, construction, manufacturing, accommodation and food services, and professional, scientific, and technical services[5]. SBA and the Treasury Department have published loan-level data—including business names, addresses, industry classification codes, zip codes, business types, demographic data, nonprofit information, lender names, jobs supported, and loan amount ranges—for all PPP loans at or above $150,000[6]. For loans below $150,000, SBA and the Treasury Department have released all of the above information except for business names and addresses[7].

Separately, as of August 24, 2020, more than 3.57 million EIDL loans, totaling more than $188 billion, have been approved[8]. The last of the $20 billion earmarked for EIDL grants was disbursed in July 2020[9]. And the MSLP has a $600 billion lending capacity—though as of August 19, 2020, a mere $496.8 million in MSLP loans had been issued[10].

SYSTEMIC OVERSIGHT AND ENFORCEMENT EFFORTS

To ensure the funding provided to combat the effects of the pandemic is both allocated and spent according to the myriad federal requirements, the CARES Act established three oversight and enforcement entities to investigate and pursue fraud and perceived abuse of CARES Act and other coronavirus relief funds: the Special Inspector General for Pandemic Recovery ("SIG-PR")[11], the Congressional Oversight Commission[12], and the Pandemic Response Accountability Committee (the "PRAC")[13]. Additionally, the House has established the Select Subcommittee on the Coronavirus Crisis to oversee the response to the pandemic[14], and Senate Majority Leader Mitch McConnell has appointed an oversight coordinator[15].

Each of these new oversight and enforcement bodies is still in a period of early development. In these early stages, the newly created entities are sorting through jurisdictional, logistical, and interpretive challenges associated with the CARES Act and its related rules and regulations. It is important to note, however, that substantial investigative work to date has been done by preexisting entities like the Federal Bureau of Investigation, the U.S. Secret Service, the IRS Criminal Investigation Division, and the DOJ, in some cases supported by leads from the Financial Crimes Enforcement Network ("FinCEN"). Further, the SBA Inspector General has already begun conducting investigations into COVID-19 relief fraud, in conjunction with other oversight entities, after having received more than 1,000 complaints of potential fraud[16]. And on April 28, 2020, Treasury Secretary Steven Mnuchin and SBA Administrator Carranza announced that the Treasury Department and SBA will review all loans in excess of $2 million to ensure that those loans truly went to businesses in need[17].

LEARNING FROM HISTORY: COMPARISON TO 2008 FINANCIAL CRISIS

The oversight and enforcement mechanisms created by the CARES Act largely copy those implemented by the Troubled Asset Relief Program ("TARP"), which was established by the Emergency Economic Stabilization Act of 2008 in order to combat the 2008 financial crisis[18]. Like the CARES Act, TARP created a number of financial relief programs, all with their own eligibility requirements and limitations on the use of the funds[19].

Given their similarities, the history of TARP-related fraud enforcement provides an instructive example of the fraud enforcement risks that may accompany federal COVID-19-related crisis relief funds. In the years since TARP was established, 300 defendants, including 76 bankers and 92 bank borrowers, have been sentenced to prison and more than $11 billion has been recovered[20]. Despite more than a decade having passed since TARP was enacted, fraud and abuse actions stemming from the program continue into today. In 2019 alone, the Special Inspector General for TARP recovered nearly $900 million[21]. The vigorous enforcement in the years following the passage of TARP produced record totals for recoveries by the DOJ[22].

This historical data alone indicates that investigations and prosecutions under the CARES Act will abound, but there are several potentially significant differences between TARP and the CARES Act that suggest the CARES Act will see even more widespread and aggressive fraud prosecutions. First, the CARES Act's oversight mechanisms go beyond those of TARP by creating the PRAC, which should result in a higher level of scrutiny. Second, the scope of the coronavirus pandemic and its life-or-death nature may increase the priority of fraud investigations and prosecutions due to potentially greater public furor over fraud and abuse of pandemic relief funds compared to funds to alleviate a financial crisis. Third, the CARES Act provides relief funding to businesses and individuals that may not have experience with government funding, or compliance infrastructure, comparable to that of financial institutions involved with TARP. Finally, the CARES Act involves an amount of funding multiple times that of TARP, which increases the profile of the program and, naturally, any related fraud.

DOJ PRIORITIZATION OF COVID-19-RELATED FRAUD INVESTIGATION AND PROSECUTION

Not only is history an indicator, but abundant fraud prosecutions are already resulting from the CARES Act funding. Even before the CARES Act was signed into law, Attorney General William Barr directed all U.S. attorneys to prioritize the investigation and prosecution of coronavirus-related fraud schemes[23]. This was quickly followed by Deputy Attorney General Jeffrey Rosen's direction that each U.S. attorney appoint a Coronavirus Fraud Coordinator for their federal judicial district[24].

Beyond press releases and appointments of coordinators, the actions that have already been taken against alleged fraud by federal enforcers[25] demonstrates the prioritization of prosecuting COVID-19-related fraud. Recent months have seen increased coordination between Main Justice and individual USAOs, as well as collaboration between the civil and criminal divisions of those offices. Prosecutors and investigative agencies are working together closely, with prosecutors having direct access to consumer complaint databases. And because of the concerted enforcement efforts nationwide, theories of prosecution reflected in charges brought in one federal district can quickly be replicated in others.

EXAMPLES OF COVID-19 RELIEF FRAUD PROSECUTIONS TO DATE

On September 10, 2020, Acting Assistant Attorney General Brian Rabbitt announced that to date, the DOJ's Criminal Division had charged 57 people who allegedly committed fraud to obtain PPP funds[26]. The charged cases involve alleged attempts to defraud the PPP out of more than $175 million, with claimed actual losses to the federal government of more than $70 million[27]. And the cases have been filed in no fewer than 19 federal judicial districts[28].

These early prosecutions represent "the smallest, tiniest piece of the tip of the iceberg," according to SBA Inspector General Hannibal Ware, because they reflect the easiest fraud schemes to spot[29]. Prosecution theories have already grown more sophisticated with time, and even more sophisticated theories are likely to develop. What follows is not an exhaustive list of all prosecutions stemming from COVID-19 economic relief program fraud, but rather is a sampling of the prosecution theories that have emerged across the country[30]. These theories are not mutually exclusive; indeed, the charged cases commonly bear multiple hallmarks of fraud.

The Inflated Employment Expenses Cases. The most common type of prosecution involves defendants who allegedly exaggerated or inflated business expenses in order to get higher loan amounts approved. For example, a suburban Chicago businessman allegedly submitted PPP loan applications with exaggerated payroll expenses; the investigating agent cross-referenced the loan applications with the business's IRS filings, noting that the IRS filings reflected significantly lower payroll expenses than the PPP loan applications did[31]. As another example, a Michigan man allegedly submitted identical wage information and employee count records in support of several companies' PPP and EIDL loan applications, even though one company allegedly has not been operational since 2015[32]. And in Dayton, Ohio, a woman allegedly certified that she had 73 employees working for her private investigation and security services business[33]. Under Ohio law, licensed Class A private investigation and security services are required to register employees of their business with the state; this particular business, however, had no other registered employees[34]. Moreover, when investigators interviewed four "employees" listed on the business's loan certifications, all four denied working for the company—and three of those "employees" stated they had never even heard of the company[35].

The Fake Company Cases. Several individuals have been prosecuted for forming or purchasing fake companies in order to apply for COVID-19 relief loans, even though the companies never conducted any business. Some individuals have already pleaded guilty to such a scheme. A defendant in the Middle District of North Carolina pleaded guilty to purchasing "aged, off-the-shelf" corporations (i.e., companies that had been incorporated previously but never actually conducted business) and using those companies to obtain approximately $35,000 in EIDL funds from the SBA, before additional fund disbursements were blocked by federal law enforcement[36]. Similarly, a Detroit resident pleaded guilty to submitting fake employee information, payroll expense information, and supposed tax filings to obtain a $5900,000 PPP loan, when in fact the application was for a company that had "no employees, no payroll expenses of any kind, and was not an operational business"[37].

Other cases remain pending. In one pending case, for example, two Miamians allegedly submitted EIDL applications purporting to be "farmers," but the listed business addresses were single family residential homes on small lots—a fact the investigating agent found "wholly incongruous with large scale farming," according to the probable cause affidavit[38]. Likewise, an Arkansas man allegedly certified in his PPP application that his business was operating as of February 15, 2020 (as required by the CARES Act), but an investigation revealed the company was not formed until April, days before he began applying for loans[39]. There, the investigating agent's probable cause affidavit filed in support of the criminal complaint relied on a search of the defendant's email account to establish the fraudulent scheme[40].

In a variation on this scheme, individuals have allegedly stolen the "identities" of bona fide businesses—which those individuals do not own—to apply for loans.

The Impermissible Use of Funds Cases. In this unsophisticated fact pattern, individual defendants are alleged to have misused PPP funds in extravagant, ostentatious ways, rather than for payroll, mortgage/lease, and/or utility payments as certified in the loan applications. These prosecutions have gained the most media attention for their blatant examples of greed. For example, a prosecution in Miami, Florida, involves a man who allegedly used PPP funds to buy a Lamborghini[41]. Similar prosecutions involve a Los Angeles-area man who allegedly used funds to gamble in Las Vegas and make risky stock market bets[42], and a North Florida man who allegedly used funds to buy a $689,417 catamaran boat[43]. These cases can be prosecuted either on a theory that the defendant applied for the funds under false pretenses—never intending to use them for the purposes identified by the program—or on a theory that the defendant thereafter submitted a claim for loan forgiveness that included false statements about the spending of the funds.

The Kickback Scheme Cases. Another series of prosecutions involves individuals who allegedly prepared fraudulent PPP loan applications for multiple companies in their business network, in exchange for kickbacks from loan proceeds. Prosecutions in Ohio and Florida tell of a ring of talent management agents who allegedly used their network of business contacts to recruit co-conspirators—including a National Football League player—and allegedly file at least 90 fraudulent applications seeking more than $24 million in PPP loans, with the defendants allegedly receiving approximately 25% of loan proceeds as kickbacks[44]. This scheme is comparatively more sophisticated, and the criminal complaints' probable cause affidavits rely not only on comparisons of falsified bank and payroll statements but also on statements from cooperating confidential witnesses.

Looking toward the future, additional prosecution theories are likely to emerge. While it is unclear now how the fact patterns allegedly supporting those prosecutions will unfold, it is clear the prosecutions will continue.

CIVIL LITIGATION: RECENT DEVELOPMENTS AND PREDICTIONS FOR WHAT'S AHEAD

Likewise, with history as an indicator, civil litigation resulting from COVID-19-related loan programs will abound. Indeed, mere months after the PPP was rolled out, the first wave of PPP-related securities class actions hit the courts. And the suits had an impact: subsequently-filed securities complaints alleged that many of these banks saw a share price decline of up to 5%—a real and immediate financial impact from these lawsuits[45]. Since the first set of cases, suits have continued to pour in against lenders, mostly in the form of claims regarding loan prioritization (as described above) and suits to compensate agents of the borrowers. While less prevalent at this stage, significant litigation activity is expected against borrowers as well, primarily focusing on the False Claims Act ("FCA") and the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). The following sets forth the currently pending suits in more detail.

Civil Litigation for PPP Lenders. Plaintiffs have brought two main categories of PPP-related suits against lenders: suits claiming that lenders allegedly failed to administer PPP loans on a "first come, first served" basis (the "loan prioritization cases"), and suits asserting that lenders allegedly failed to pay fees owed to "agents" of borrowers under the PPP (the "agent-fee cases").

In agent-fee cases, an agent, such as an accountant or a consultant, provided assistance to a lender with originating and preparing a loan application. Agents now allege that banks unlawfully withheld fees owed to the agents for assisting in the application process, bringing claims under the CARES Act as well as state law claims for unfair business practices, violation of consumer protection laws, and unjust enrichment.

On August 20, 2020, the first major court decision in a PPP agent-fee case dealt a victory to lenders. In *Sport & Wheat, CPA, PA v. ServisFirst Bank, Inc.*, the Northern District of Florida held that the CARES Act and its implementing regulations do not require lenders to pay a portion of the loan processing fees they receive from the SBA to agents that helped borrowers obtain PPP loans[46]. The plaintiff, a small accounting firm that assisted borrowers in obtaining PPP loans, sued several lenders and claimed that, as an agent, it was entitled to a portion of the loan processing fees paid by SBA to the lenders. The agent did not allege that it or the borrowers had agreements with the lenders requiring payment of agent fees. Absent such an agreement, the district court held that the CARES Act itself provides no recourse for agents[47]. This holding is consistent with Treasury Secretary Mnuchin's comments during the June 30, 2020, hearings before the House of Representatives, in which he stated that the agent-fee guidance provided "was intended to be based on a contractual relationship between the agent and the bank"[48].

The second main category of cases are loan prioritization cases, which allege that lenders prioritized "bigger" small businesses for PPP loan approval, to the detriment of many "smaller" small business owners, because the lenders financially benefitted from servicing the bigger customers that applied for larger loans[49]. The smaller borrowers have brought putative class claims relying on the SBA interim final rule (which contains a "first come, first served" reference) and the PPP Information Sheet for Lenders, as well as claims of unfair competition, false advertising, misrepresentation, concealment, fraud, negligence, unjust enrichment, promissory estoppel and breach of fiduciary duty, among others[50]. These cases generally are still in the early stages of litigation. In several cases, the lenders have moved to compel arbitration based on binding arbitration provisions in the applicable account agreement[51]. The borrowers oppose arbitration as being allegedly unsupported by the pleadings and the terms of the agreements; in California, the borrowers also argue in the alternative that the arbitration agreements are unenforceable[52].

In addition to the above described cases, it is likely that plaintiffs will continue to press new theories of civil liability against lenders, including theories of negligent misrepresentation, discrimination (including under the Equal Credit Opportunity Act), fraud, deceptive acts and practices, and negligence, among others.

FCA and FIRREA Claims Are A Near Certainty for Borrowers. At this stage, government enforcement actions against borrowers are the most frequent occurrence; however, qui tam and whistleblower suits under the FCA and FIRREA will likely propagate with time. Like many federal programs, participation in the PPP requires an extensive series of certifications that could expose borrowers to liability under the FCA and FIRREA.

FCA Liability for Borrowers. Courts are likely to see an uptick in FCA claims against borrowers based on PPP-based certifications. Liability under the FCA is premised on the knowing submission of a false claim, or causing another to submit a false claim, for money to the federal government. The FCA broadly defines the term "knowingly" to include actions taken with "deliberate ignorance" or "reckless disregard" of the truth of a claim[53]. The cost of an FCA violation is substantial. The government can recover: (i) a civil penalty between $11,665 and $23,331 for each false claim, (ii) triple the damages sustained by the government, and (iii) the costs of any civil action the government brings to recover a penalty or damages. In addition, the FCA's "qui tam" provision allows private persons to bring whistleblower actions on behalf of the government and allows such private persons to recover between 15% and 30% of any recovery, depending upon whether the government intervenes in the case and the quality of the whistleblower's assistance. Qui tam actions are frequently brought by disgruntled employees, and hence, the qui tam provision is a particular risk for PPP borrowers with displaced employees.

The PPP loan and loan forgiveness applications include several certifications which could trigger FCA liability. For example, a borrower must certify that it needs the loan to "support ongoing operations" due to the uncertainty of current economic conditions, and that it will use the funds to retain workers and maintain payroll, and that not more than 25% of the forgiven amount would be for non-payroll costs. Additional PPP certifications that may trigger FCA liability include the requirement that the borrower: (i) report the dollar value of its payroll and non-payroll costs, and (ii) data concerning any reductions it made to the number of its full time equivalent employees and the salary and wages paid to employees. Inaccuracies in these certifications could lead not only to government investigations and prosecutions as detailed above but also to FCA civil litigation exposure.

FIRREA Liability for Borrowers. FIRREA imposes civil penalties if the government can prove by a preponderance of the evidence that the defendant committed a violation of one of the 14 specified criminal statutes that involve or impact financial institutions and government agencies[54]. FIRREA does not create new prohibitions or requirements but imposes fines for criminal acts under a lower burden of proof than in a criminal case. FIRREA gives the government broad civil subpoena power in order to investigate these claims and also permits whistleblower suits. The whistleblower provisions are distinct from the FCA, however, in that the award for a FIRREA whistleblower is capped at $1.6 million, and if the government declines to intervene, the whistleblower may only proceed if the government affirmatively contracts out to the whistleblower to bring the lawsuit[55]. FIRREA claims have a government-friendly, 10-year statute of limitations, and the statute was used frequently following the 2008 financial crisis[56].

Of the 14 predicate offenses, nine specifically relate to banks or other financial institutions (such as bank fraud, 18 U.S.C. § 1344), and therefore the government is not required to prove any additional element beyond a violation of the predicate offense itself[57]. For the remaining five predicate offenses, which encompass general claims such as false statements and mail/wire fraud, the government must also prove that the violation of the underlying criminal statute was one "affecting a federally insured financial institution"[58]. In a 2013 decision from *United States v. The Bank of New York Mellon*, the U.S. District Court for the Southern District of New York issued the first judicial interpretation of the phrase "affecting a federally insured financial institution" as used in FIRREA[59]. The Court rejected the Bank's argument that a federally insured financial institution may be "affected" by a fraud only if it were a victim or an innocent bystander, not the perpetrator itself[60]. Instead, the Court found that Congress intended FIRREA to apply in circumstances when a federally insured financial institution was "affected" by the fraud, not just a "victim" of the fraud[61]. In the COVID-19 relief context, whistleblowers may press broad interpretations of the "affected" element to support their claims.

Much of the guidance issued by SBA and the Treasury Department has placed the liability on the borrower of PPP loans, not the lender[62]. At the highest level, potential FIRREA claims could arise under PPP for fraudulent behavior—including bank fraud, wire fraud, and false statements[63]. These false statements could be made in connection with the various certifications borrowers need to make in connection with their PPP loan applications (described above)[64].

CONCLUSION AND BEST PRACTICES

Federal relief funding can help entities weather the challenges created by the novel coronavirus pandemic. These funds, however, come with requirements, government scrutiny, and the risk of government investigation for fraud. Moreover, the application and approval processes for these funds can spur private litigation sounding in fraud, misrepresentation, discrimination, negligence, and CARES Act statutory construction (such as in the agent-fee cases).

While all of the lasting impacts of COVID-19 are yet to be seen, one aspect is certain—prosecutions of fraud related to COVID-19 will remain a nationwide priority for years to come, and the plaintiffs' bar is likely to follow suit with waves of civil actions. As such, those potentially implicated should consider developing necessary compliance programs. One such measure to consider is documentation—as history has proven, maintaining records of decisions surrounding the funds, reasons for these decisions, and a breakdown of spending can promote accountability and may establish good faith efforts for any potential scrutiny surrounding the funds down the road.

COVID-19 relief loan borrowers should also consider the regular review of their applications and document the basis for any loan requests, the uses for any loan proceeds, and the basis for any forgiveness request. Borrowers who have had difficulty retaining employees as planned should consult counsel to ensure that they appropriately handle efforts to rehire or retain employees. And of course, any borrower that receives audit requests from SBA or any inquiries from the DOJ should consult counsel before responding.

In addition to proactive planning and organization, it is important to stay abreast of the ever-changing legal landscape. Lenders and borrowers alike should focus on areas of likely inquiry, but should not wait for a problem to arise to follow good practices, ensure compliance, and keep proper documentation. Staying informed as to new prosecution theories and civil allegations, as well as regulatory updates and oversight activities, will maximize preparedness and minimize surprises.

LAWYER CONTACTS

Bethany K. Biesenthal
Chicago
+ 1.312.269.4303
bbiesenthal@jonesday.com

Michael P. Conway
Chicago
+ 1.312.269.4145
mconway@jonesday.com

Robert S. Huie
San Diego
+ 1.858.314.1123
rhuie@jonesday.com

Cristina Pérez Soto
Miami
+ 1.305.714.9733
cperezsoto@jonesday.com

Fernand A. Lavallee
Washington
+1.202.879.3486
flavallee@jonesday.com

Joan E. McKown
Washington
+ 1.202.879.3647
jemckown@jonesday.com

Associates Taylor M. Grode, Freddi Mack, and Kirsten E. Moran assisted in the preparation of this White Paper.

ENDNOTES

1 *See e.g.,* Rebecca Martin, Joan McKown, & Heather O'Shea*, Federal, State COVID-19 Anti-Fraud Efforts Ramp Up,* JONES DAY (April 2020), https://www.jonesday.com/en/insights/2020/04/covid19-antifraud-efforts-ramp-up; Yaakov M. Roth*, The "Bridgegate" Ruling Has Implications for COVID-19 Fraud,* JONES DAY (May 2020), https://www.jonesday.com/en/insights/2020/05/the-bridgegate-ruling-has-implications-for-covid19-fraud-bloom-berg-law; Steve Sozio, Rebecca Martin, Rajeev Muttreja, & Mark Rotatori, *Defending FCA Actions Related to Pandemic Programs* (June 2020), https://www.jonesday.com/en/insights/2020/06/defending-fca-actions-related-to-pandemic-programs.

2 CARES Act, Pub. L. No. 116-136 (2020), https://www.congress.gov/116/plaws/publ136/PLAW-116publ136.pdf [hereinafter "CARES Act"].

3 Federal Reserve Press Release (Jul. 28, 2020), https://www.federalreserve.gov/newsevents/pressreleases/monetary20200728a.htm.

4 SBA, Paycheck Protection Program (PPP) Report: Approvals through 8/8/2020 at 1, https://www.sba.gov/sites/default/files/2020-08/PPP_Report%20-%202020-08-10-508.pdf.

5 *Id.* at 8.

6 U.S. Dep't of the Treasury, *SBA Paycheck Protection Program Loan Level Data*, https://home.treasury.gov/policy-issues/cares-act/assistance-for-small-businesses/sba-paycheck-protection-program-loan-level-data; *see also* SBA, *SBA and Treasury Announce Release of Paycheck Protection Program Loan Data* (July 13, 2020), https://www.sba.gov/article/2020/jul/13/sba-treasury-announce-release-paycheck-protection-program-loan-data.

7 *Id.* The disclosure requirements for these smaller loans remain a subject of debate. *See, e.g.*, Cezary Podkul & Ryan Tracy, *SBA Accused of Skirting Financial Disclosure Rules*, The Wall Street Journal, Aug. 25, 2020, https://www.wsj.com/articles/sba-accused-of-skirting-financial-disclosure-rule-11598353200.

8 SBA, *Disaster Assistance Update Nationwide EIDL Loans* (Aug. 24, 2020), https://www.sba.gov/sites/default/files/2020-08/EIDL%20COVID-19%20Loan%208.24.20-508.pdf.

9 *See, e.g.*, Zachary Mider & Jason Grotto, *Phantom Companies Got More Than $1 Billion in Coronavirus Aid*, Bloomberg Businessweek, Aug. 26, 2020, https://www.bloomberg.com/news/articles/2020-08-26/small-business-administrationsends-1-billion-to-places-it-shouldn-t-have-gone.

10 *See* Congressional Oversight Commission, *The Fourth Report of the Congressional Oversight Commission* (Aug. 21, 2020) at 5, https://coc.senate.gov/sites/default/files/2020-08/COC%204th%20Report__08.21.2020%20with%20Appendix%208-27%20update.pdf.

11 *See* CARES Act § 4018.

12 *See id.* § 4020.

13 *See id.* § 15010(b).

14 *See* H.Res. 935, 116th Cong. (2020), *available at* https://www.congress.gov/bill/116th-congress/house-resolution/935.

15 Press Release, Senate Majority Leader's Press Office (Apr. 17, 2020), https://www.republicanleader.senate.gov/newsroom/press-releases/mcconnell-announces-oversightplans-for-historic-cares-act-.

16 *See, e.g.*, Aaron Gregg, *Scathing SBA watchdog report details "pervasive" fraud in coronavirus disaster-loan program*, The Washington Post, July 28, 2020, https://www.washingtonpost.com/business/2020/07/28/scathing-sba-watchdog-report-details-pervasive-fraud-coronavirus-disaster-loan-program/.

17 *See* U.S. Dep't of the Treasury, *Joint Statement by Secretary Steven T. Mnuchin and Administrator Jovita Carranza on the Review Procedure for Paycheck Protection Program Loans* (Apr. 28, 2020), https://home.treasury.gov/news/press-releases/sm991, *also available at* https://www.sba.gov/article/2020/apr/28/joint-statement-secretary-steven-t-mnuchin-administrator-jovita-carranza-review-procedure-paycheck; *see also* Alan Rappeport, *Treasury Vows to Recoup Virus Relief Aid Claimed by Big Companies*, The New York Times, Apr. 28, 2020, https://www.nytimes.com/2020/04/28/us/politics/coronavirus-treasury-payment-protection-program.html; Lauren Hirsch, *Small business loans above $2 million will get full audit to make sure they're valid, Mnuchin says*, CNBC, Apr. 28, 2020, https://www.cnbc.com/2020/04/28/small-business-loans-above-2-million-will-get-full-audit-to-make-sure-theyre-valid-mnuchin-says.html.

18 *See* Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343 (2008), https://fas.org/sgp/crs/secrecy/RL34740.pdf [hereinafter "EESA"]; *see also* Mark A. Kasten, Jason R. Parish, & Adam M. Saltzman, *Oversight Provisions in the CARES Act*, Buchanan, Ingersoll, & Rooney (Apr. 3, 2020), https://www.bipc.com/oversight-provisions-in-the-cares-act.

19 For more information on TARP requirements, *see* EESA.

20 Office of the Special Inspector General for the Troubled Asset Relief Program, Financial Institution Crimes & Fines Database, https://www.sigtarp.gov/Pages/wd9er7g.aspx.

21 Office of the Special Inspector General for the Troubled Asset Relief Program, About Us, https://www.sigtarp.gov/Pages/aboutus.aspx.

22 U.S. Dep't of Justice, *Justice Department Recovers Nearly $5 Billion in False Claims Act Cases in Fiscal Year 2012* (Dec. 4, 2012), https://www.justice.gov/opa/pr/justice-department-recovers-nearly-5-billion-false-claims-act-cases-fiscal-year-2012.

23 U.S. Dep't of Justice, Office of Att'y Gen., *COVID-19 – Department of Justice Priorities*, (March 16, 2020), https://www.justice.gov/ag/page/file/1258676/download.

24 U.S. Dep't of Justice, *Attorney General William P. Barr Urges American Public to Report COVID-19 Fraud* (March 20, 2020), https://www.justice.gov/opa/pr/attorney-general-william-p-barr-urges-american-public-report-covid-19-fraud.

25 Investigations by State attorneys general relating to federal COVID economic relief programs (as distinct from, for example, state unemployment programs) are less likely to occur but may still be possible, for example, in the fraud and consumer contexts.

26 U.S. Dep't of Justice, *Acting Assistant Attorney General Brian Rabbitt Delivers Remarks at the PPP Criminal Fraud Enforcement Action Press Conference* (Sept. 10, 2020), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-brian-rabbitt-delivers-remarks-ppp-criminal-fraud.

27 *Id.*

28 *Id.*

29 *See* Stacy Cowley, *Spotting $62 Million in Alleged PPP Fraud Was the Easy Part*, The New York Times, Aug. 28, 2020, https://www.nytimes.com/2020/08/28/business/ppp-small-business-fraud-coronavirus.html?action=click&module=Top%20Stories&pgtype=Homepage.

30 This sampling focuses on alleged abuse of COVID relief programs for businesses. It does not include alleged consumer fraud schemes, such as those involving the marketing of false pandemic-related products, nor schemes to steal personally identifiable information ("PII") in order to obtain COVID-19 stimulus checks for individuals.

31 U.S. Dep't of Justice, *Suburban Chicago Businessman Charged With COVID-Relief Fraud* (June 16, 2020), https://www.justice.gov/usao-ndil/pr/suburban-chicago-businessman-charged-covid-relief-fraud.

32 U.S. Dep't of Justice, *Michigan Man Charged with COVID-Relief Fraud* (Sept. 1, 2020), https://www.justice.gov/opa/pr/michigan-man-charged-covid-relief-fraud. Similarly, a Massachusetts man has been charged with applying for PPP loans for closed businesses; his alleged co-conspirator has already agreed to plead guilty. *See* U.S. Dep't of Justice, *One Person Indicted, Second Person to Plead Guilty in COVID-19 Stimulus Fraud Investigation* (Sept. 3, 2020), https://www.justice.gov/usao-ri/pr/one-person-indicted-second-person-plead-guilty-covid-19-stimulus-fraud-investigation.

33 U.S. Dep't of Justice, *Dayton business owner charged with COVID-relief fraud* (June 24, 2020), https://www.justice.gov/usao-sdoh/pr/dayton-business-owner-charged-covid-relief-fraud.

34 *See id.*

35 *See id.*; *see also* Affidavit in Support of an Application for a Criminal Complaint, *United States v. Ohaebosim*, No. 1:20-mj-03573-JB (S.D. Fla. Sept. 14, 2020), ECF No. 1 at 7 (recounting law enforcement interviews with purported employees who stated that they never received pay from subject company and had either never heard of the company or never worked for same).

36 U.S. Dep't of Justice, *North Carolina Man Pleads Guilty to COVID-19 Relief Fraud Schemes* (Aug. 31, 2020), https://www.justice.gov/opa/pr/north-carolina-man-pleads-guilty-covid-19-relief-fraud-schemes.

37 Plea Agreement, *United States v. Baker*, No. 2:20-cr-20355-LJM-EAS (E.D. Mich. Sept. 11, 2020), ECF No. 17; *see also* U.S. Dep't of Justice, *Detroit Resident Pleads Guilty in COVID-19 Fraud Scheme* (Sept. 11, 2020), https://www.justice.gov/usao-edmi/pr/detroit-resident-pleads-guilty-covid-19-fraud-scheme.

38 *See* Complaint, *United States v. Stanley*, No. 1:20-mj-03470-AOR (S.D. Fla. Aug. 26, 2020), ECF No. 3; *see also* SDFLA Blog, *"The Department of Justice has been casting a wide net charging these SBA loan fraud cases, and I look forward to discovering if this is an example of that net having been cast too wide."* (Aug. 27, 2020), http://sdfla.blogspot.com/2020/08/the-department-of-justice-has-been.html.

39 U.S. Dep't of Justice, *Arkansas Project Manager Charged in Oklahoma with COVID-Relief Fraud* (June 4, 2020), https://www.justice.gov/opa/pr/arkansas-project-manager-charged-oklahoma-covid-relief-fraud.

40 *See id.*

41 U.S. Dep't of Justice, *Florida Man who Used COVID-Relief Funds to Purchase Lamborghini Sports Car Charged in Miami Federal Court* (July 27, 2020), https://www.justice.gov/opa/pr/florida-man-who-used-covid-relief-funds-purchase-lamborghini-sports-car-charged-miami-federal.

42 U.S. Dep't of Justice, *West L.A. Man Charged with Fraudulently Obtaining about $9 Million in COVID-Relief Loans, Some of Which He Gambled Away in Las Vegas* (July 16, 2020), https://www.justice.gov/usao-cdca/pr/west-la-man-charged-fraudulently-obtaining-about-9-million-covid-relief-loans-some.

43 U.S. Dep't of Justice, *Fort Myers Business Owner Arrested And Charged With COVID Relief Fraud* (Sept. 2, 2020), https://www.justice.gov/usao-mdfl/pr/fort-myers-business-owner-arrested-and-charged-covid-relief-fraud.

44 *See, e.g.*, Internal Revenue Service, *Nine charged with $24 million COVID-relief fraud scheme* (Aug. 6, 2020) https://www.irs.gov/compliance/criminal-investigation/nine-charged-with-24-million-covid-relief-fraud-scheme; U.S. Dep't of Justice, *Nine Charged with $24 Million COVID-Relief Fraud Scheme* (Aug. 6, 2020) https://www.justice.gov/opa/pr/nine-charged-24-million-covid-relief-fraud-scheme; U.S. Dep't of Justice, *NFL Player Charged for Role in $24 Million COVID-Relief Fraud Scheme* (Sept. 10, 2020), https://www.justice.gov/opa/pr/nfl-player-charged-role-24-million-covid-relief-fraud-scheme.

45 *See, e.g.*, Class Action Complaint for Violations of the Federal Securities Laws, *Ma v. Wells Fargo & Co.*, No. 3:20-cv-03697-RS (N.D. Cal. June 4, 2020), ECF No. 1.

46 See Order Dismissing Amended Complaint, *Sport & Wheat, CPA, PA v. ServisFirst Bank, Inc.*, No. 20-05425 (N.D. Fla. Aug. 17, 2020), ECF No. 87.

47 *Id.*

48 Graham H. Ryan, *INSIGHT: PPP Litigation Trends Signal Court Battles Ahead for Banks*, Bloomberg Law (July 30, 2020), https://news.bloomberglaw.com/banking-law/insight-ppp-litigation-trends-signal-court-battles-ahead-for-banks.

49 *See, e.g.*, Plaintiff's Original Petition, *DNM Contracting, Inc. v. Wells Fargo Bank, N.A.*, No. 4:20-cv-01790 (S.D. Tex. May 22, 2020), ECF No. 1-3; Class Action Complaint for Damages and Equitable Relief, *Karen's Custom Grooming LLC v. Wells Fargo & Co.*, No. 3:20-cv-00956-LAB-BGS (S.D. Cal. May 22, 2020), ECF No. 1.

50 *See id.*

51 *See, e.g.*, Wells Fargo Bank, N.A.'s Motion to Compel Arbitration and Dismiss Plaintiff's Complaint, *DNM Contracting, Inc. v. Wells Fargo Bank, N.A.*, No. 4:20-cv-01790 (S.D. Tex. Aug. 28, 2020), ECF No. 12; Defendants' Memorandum of Points and Authorities in Support of Motion to Compel Arbitration or Dismiss for Failure to State a Claim, *Karen's Custom Grooming LLC v. Wells Fargo & Co.*, No. 3:20-cv-00956-LAB-BGS (S.D. Cal. Aug. 28, 2020), ECF No. 16-1.

52 *See* Plaintiff's Opposition to Defendants' Motion to Compel Arbitration or to Dismiss for Failure to State a Claim, *Karen's Custom Grooming LLC v. Wells Fargo & Co.*, No. 3:20-cv-00956-LAB-BGS (S.D. Cal. Sept. 24, 2020), ECF No. 21; Plaintiff's Response in Opposition of Defendant's Motion to Compel Arbitration and Dismiss Plaintiff's Complaint, *DNM Contracting, Inc. v. Wells Fargo Bank, N.A.*, No. 4:20-cv-01790 (S.D. Tex. Sept. 17, 2020), ECF No. 13.

53 31 U.S.C. § 3729(b)(1).

54 12 U.S.C. § 1833a.

55 *Id.* §§ 4201 *et seq.*

56 *Id.* § 1833a(h).

57 *Id.* § 1833a(c)(1), (3).

58 *See id.* § 1833a(c)(2); *see also* Antonio F. Dias & Courtney Lyons Snyder, *FIRREA Civil Money Penalties: The Government's Newfound Weapon Against Financial Fraud,* JONES DAY (May 2013), https://www.jonesday.com/en/insights/2013/05/firrea-civil-money-penalties-the-governments-newfound-weapon-against-financial-fraud.

59 *See* Opinion, *United States v. The Bank of New York Mellon,* No. 11-06969 (S.D.N.Y. Oct. 4, 2011), ECF No. 54.

60 *Id.*

61 *Id.*

62 *See, e.g.*, U.S. Dep't of the Treasury, FAQS, https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf?, at Question: 31 (published April 23, 2020) (stating that "[l]enders may rely on a borrower's certification regarding the necessity of the loan request").

63 As detailed above, the DOJ has already begun filing criminal complaints and indictments related to PPP and other COVID-19-related federal aid. False statements or forged documents regarding any of the certifications—*e.g.*, number of employees, payroll expenses—could also be the basis for a civil FIRREA claim. *See* Lynn Fiorentino, M. Scott Peeler, & Susan Tran, *The Risks Are Real: What We Know and Can Predict About CARES Act Financial Fraud Enforcement*, JDSupra (June 29, 2020), https://www.jdsupra.com/legalnews/the-risks-are-real-what-we-know-and-can-88963/.

64 *See also* Elizabeth H. Evans & John ReVeal, *COVID-19: Understanding the Borrower Certification Requirements under the Paycheck Protection Program,* Nat. L. Rev. (May 19, 2020), https://www.natlawreview.com/article/covid-19-understanding-borrower-certification-requirements-under-paycheck-protection.