

INSIGHTS

Federal Stimulus Money is Coming Soon – Increased Federal Enforcement Won't Be Far Behind

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By: [Robert J. Wagman Jr.](#) and [Matthew G. Nielsen](#)

Many companies will naturally want a piece of the \$2 trillion federal stimulus package aimed at combating the economic consequences of the coronavirus pandemic currently making its way through Congress. However, be careful what you wish for. History teaches that whenever the government spends a lot of money in a short amount of time, increased government criminal and civil enforcement always follows.

We've been here before. For instance, Congress enacted the American Recovery and Reinvestment Act of 2009 ("ARRA") in response to the "Great Recession," injecting approximately \$787 billion in federal funds into the economy. At the same time grants and contracts were being awarded, government enforcement agencies ramped up their efforts to detect and prosecute fraud flowing from the increased federal spending. Over the following few years, there was a noticeable increase in federal civil and criminal enforcement activity. For example, the Civil False Claims Act (31 U.S.C. §§ 3729 to 3733) "is the Government's primary litigation tool for recovering losses resulting from fraud." *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 267 (5th Cir. 2010). In 2009, the Department of Justice recovered approximately \$2.4 billion under the False Claims Act. By 2012, that amount had more than doubled to over \$5 billion. Similarly, the number of proposed debarments—the government's administrative remedy to exclude persons from federally funded contracts and programs—jumped from 750 in 2009 to 2,241 in 2014. The government also pursued a number of criminal prosecutions related to ARRA fraud, as well as other government programs stemming from the 2009 recession, like the 2009 Troubled Asset Relief Program ("TARP").

Enhanced federal enforcement will certainly go hand-in-hand with the current federal stimulus package, just as it did with the 2009 stimulus programs. While there were certainly a number of true bad actors, numerous unwary companies and individuals were also caught up in the enforcement wave. Anyone doing business with the federal government—whether through contracts, grants or other funding mechanisms—knows that federal money comes with numerous strings attached. However, ARRA in particular attracted many first time participants to the federal marketplace; many of them were unprepared to address the additional regulatory requirements that are attached for federal dollars. Many firms learned the hard way that certain practices that are acceptable in the commercial marketplace can be considered fraudulent in the government space. The same will likely be true with the current stimulus package. The draft legislation provides the Treasury Department with \$500 billion to make loans, loan guarantees, and investments, most of which is not industry specific but rather

within the wide discretion of the Treasury.

If your company is considering seeking federal funds under the pending stimulus package and is not experienced in doing business with the federal government, there are a few steps you should take now to prepare and mitigate some of the unique risks –

1. **Understand the ethics and compliance requirements.** While corporate compliance is expected by the government in the commercial marketplace as a best practice, it is required when doing business with the government. (See 48 C.F.R. § 52.203-12, 2 C.F.R. § 200.113.) Economic pressures and job insecurity can create incentives to commit workplace fraud. Therefore, it is important to reduce or eliminate the opportunities. Companies that seek government funds need to review their anti-fraud and accounting policies, procedures, and internal controls to identify and fix gaps, especially for functions that seek, use, and report on federal funds.
2. **Review the standard required certifications.** Representations and certifications to the federal government take on enhanced importance because any false certification can be a crime (see 18 U.S.C. § 1001) and/or pursued as civil fraud. Too often, in the rush of preparing proposal or application, adequate attention is not paid to those representations, and the consequences can be disastrous. Reviewing the standard certifications required for federal contracts found at 48 C.F.R. Subpart 4.12 in advance will enable you to have a process to ensure accurate representations.
3. **Understand the unique risks.** The government imposes a number of performance requirements that are not typically seen in the commercial marketplace. For example, government contracts often include domestic sourcing requirements, small business compliance obligations, enhanced cyber security requirements, and HR policies. The requirements and risks can vary depending on the industry. Reviewing current solicitations or grant announcements in your industry can help identify the likely risks your firm will face, and allow adequate time to implement appropriate processes to address those risks.