

Coronavirus Stimulus Fraud May Be A Target For State AGs

By **Jeff Tsai** (April 9, 2020, 5:09 PM EDT)

With the president's signature on March 27, the government passed into law the Coronavirus Aid, Relief, and Economic Security, or CARES, Act, the largest economic stimulus package in American history. Passed in response to the COVID-19 pandemic, the CARES Act will have an enduring impact on the country for years to come, particularly so for the industries and businesses eligible for stimulus relief funds.

The massive scale of the CARES Act immediately calls to mind questions about how the government will respond in its attempt to prevent fraud, waste and abuse in carrying out the stimulus.

The closest relative to the current economic stimulus is the financial crisis relief funding created in 2009 through the American Recovery and Reinvestment Act and the Troubled Asset Relief Program. Along with such funding, the government created a watchdog agency, and regulators across the board — from federal agencies to state attorneys general — focused civil and criminal resources on recovery-related fraud prevention, investigations and prosecutions.

For companies and industries likely to see relief from the new stimulus necessitated by COVID-19, several lessons learned from the 2009 Recovery Act may be important guides to navigating what will assuredly be a complex regulatory environment going forward.

The COVID-19 Stimulus and the Echo From the 2009 Recovery Act

As has recently been reported in numerous outlets, the COVID-19 stimulus package includes \$500 billion for the U.S. Department of the Treasury's Exchange Stabilization Fund for loans, guarantees and investments, as well as \$454 billion to support the Federal Reserve's lending facilities for certain businesses, states and municipalities.

The stimulus package includes the creation of a Treasury Department office that will oversee the distribution of funds and the installment of a special inspector general and oversight board. The special regulatory oversight finds its roots in the government's last extraordinary economic stimulus — the 2009 Recovery Act. In passing the \$800 billion in relief following the financial crisis, the Recovery Act also created the Recovery Accountability and Transparency Board for oversight, and provided \$84 million in enforcement funding.

But the government focus was not limited to the recovery board. The Troubled Asset Relief Program also created a special inspector general position. And, in significant part, these programs were matched by the creation of a multiagency task force referred to as the "largest coalition ever brought to bear in confronting fraud."^[1]

Led by the U.S. Department of Justice and composed of more than 25 federal agencies and state attorneys general, the Financial Fraud Enforcement Task Force represented a whole of government effort — at the combined federal and state levels — to both combat financial crisis fraud and address potential fraud stemming from the Recovery Act's massive stimulus.



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A Renewed Regulatory Environment Led by State Attorneys General

While the circumstances which necessitated the governmental intervention differ, the financial crisis brought a wave of increased financial fraud enforcement. And the COVID-19 stimulus may replicate it or lead to similar enforcement activities.

Already at the federal level, the DOJ is mobilizing its resources much in the way it did following the financial crisis. Fraud coordinators are being appointed in U.S. attorneys' offices across the country, and the DOJ just days ago announced what it described as its "first action in federal court to combat fraud related to" COVID-19.[2] Rather than a criminal prosecution, however, the DOJ filed a civil consumer protection complaint against an alleged fraudster selling sham COVID-19 vaccine kits.

The DOJ's first COVID-19 case may be a harbinger of what's to come from a myriad of enforcement agencies, many of whom played key roles in the Recovery Act-era Financial Fraud Enforcement Task Force. However, the most impactful of these enforcers may not be one from the federal agencies. Rather, state attorneys general from across the country are expected to again take a large role in anti-fraud COVID-19 stimulus enforcement.

Using the significant authority vested in them through their states' consumer protection laws, state attorneys general played a central role in the enforcement landscape after the financial crisis. Acting in their individual capacities and together in multistate actions, they have brought enforcement matters in a range of industries and subject areas.

Now, in the context of the COVID-19 stimulus, the extraordinary infusion of government funds for distribution by states to the private sector may lead state attorneys general — emboldened from their experiences in crisis-era enforcement and the Recovery Act stimulus — to seek out fraud, waste, and abuse related to COVID-19 stimulus funds in their own states.

What to Watch for in Post-Coronavirus State Attorney General Enforcement

For companies that find themselves receiving COVID-19 stimulus funding in direct or indirect ways, they may expect to see a growing state attorney general presence in a number of ways:

Civil False Claims and Government Contracting Fraud

As a result of significant funds that states will distribute from block grants, state attorneys general will be on the front lines in rooting out fraud in connection with these funds. One of the strongest tools available to a majority of state attorneys general will be their own state false claims acts. In some states, enforcement can also be brought by other state enforcement agencies — from statewide insurance commissioners to county district attorneys.

Invigorated Privacy Enforcement

In recent years, data security and privacy enforcement has become an increasingly important priority for state attorneys general. Routinely characterized as a consumer protection mission, privacy has also become a core state enforcement issue in the absence of federal lawmaking.

In an era of COVID-19 stimulus, state attorneys general are expected to take a harder look at companies' efforts to secure and protect their customers' privacy and data. Instead of backtracking on enforcement of stringent laws like the California Consumer Privacy Act in the wake of a nationwide lockdown, attorneys general in states like California are likely to move ahead with enforcement plans — albeit perhaps in a more modulated way — as a means of protecting consumers. And such enforcement will likely only strengthen when COVID-19 stimulus finds its way to the states.

Core Consumer Protection Efforts Will Be Redoubled

Armed with their states' unfair and deceptive trade practices laws, state attorneys general are poised to enhance their core consumer protection efforts in the face of COVID-19. For everyday consumers, this work will often reveal itself through price-gouging enforcement.

Although many states already have specific price-gouging laws on the books, other states have empowered their attorneys general through gubernatorial executive order to prosecute price-gouging activity. But COVID-19-related consumer protection efforts may also take root in other forms — for example, through strengthened fraud enforcement against nonprofit entities (which are typically supervised by state attorneys general) taking advantage of consumers, as well as anti-competitive/collusion activity (such as bid rigging or price fixing) in connection with stimulus funding.

Joining Forces Among State Attorneys General and Federal Partners

The 2009 Recovery Act's multiagency enforcement efforts laid out a blueprint for collective enforcement action that state attorneys general are likely to follow with the COVID-19 stimulus. This will be especially true if the COVID-19 stimulus, like the Recovery Act, statutorily empowers state attorneys general to bring enforcement matters for violations of law.

Although acting in concert with federal agencies like the DOJ or the Federal Trade Commission has served to increase the leverage of any individual state attorney general, state enforcers have also found their own success in bringing multistate investigations and actions.

And, already, state attorneys general have taken prominence. Multiple attorneys general are reported to have initiated investigations or actions, and attorneys general in states like California, Connecticut and Oklahoma have issued consumer alerts warning their residents about deceptive trade practices and false advertising related to COVID-19 testing kits and alleged cures.[3]

Avoiding a State Attorney General's COVID-19 Enforcement Crosshairs

For businesses that might compete for a share of federal or state-based COVID-19 stimulus funds, they are encouraged to look carefully at the steps they take now to avoid enforcement risk in the future.

Focus on Partnerships

State attorneys general are their states' chief law enforcement officers, but they are also policymakers. As a result, state attorneys general often rely upon effective public-private partnerships as a means to avoid the need for law enforcement actions.

And in the context of COVID-19, many state attorneys general are already pursuing the partnership path. In the past several days, a 33-member coalition of state attorneys general joined together to urge business to target price-gouging. For companies who sell products to consumers (or even to governments themselves), affirmatively seeking out a cooperative partnership with a state attorney general may help ensure that they are staying within the boundaries of the law in uncertain times.

Maintain Strong Compliance

Whether we are facing an unprecedented pandemic or an economic boom, state attorneys general will be looking for failures or gaps in a company's compliance when evaluating enforcement.

Whether in the context of privacy and data security related to consumers' personal information or lawful bidding for a government contract, state attorneys general generally expect companies to maintain robust compliance during turbulent conditions — and maybe even more so. In the event of a compliance failure, an effective compliance program may go a long way to a favorable resolution with a state attorney general's office.

Keep an Eye on Enforcement Priorities

Like every regulator, state attorneys general will each begin to prioritize their enforcement goals as COVID-19 runs its course and the upcoming stimulus trickles throughout the economy into the states. Companies are encouraged to keep a watchful eye on information announced by their state attorney general's office and to ensure their team keeps up to date with enforcement priorities as they evolve. Staying ahead of the curve is the best way to avoid enforcement problems later.

Conclusion

With the CARES Act now law, the upcoming COVID-19 stimulus funds will likely bring about many of same enforcement agencies and priorities that arose with the 2009 Recovery Act. When that happens, state attorneys general are poised to become among the country's most aggressive COVID-19 law enforcement agencies.

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[1] See Statement of B. Jones and R. Adkins, at 2, Hearing on the Oversight of the Financial Fraud Enforcement Task Force, Subcommittee on Admin. Oversight and the Court – Committee on the Judiciary, U.S. Senate (June 30, 2011).

[2] See "Justice Department Files Its First Enforcement Action Against COVID-19 Fraud," Press Release (Mar. 22, 2020), U.S. Department of Justice, available at <https://www.justice.gov/opa/pr/justice-department-files-its-first-enforcement-action-against-covid-19-fraud>.

[3] See "Attorney General Becerra Issues Consumer Alert Regarding False Advertising Related to Coronavirus," Press Release (Mar. 23, 2020), California Attorney General's Office, available at <https://oag.ca.gov/news/press-releases/attorney-general-becerra-issues-consumer-alert-regarding-false-advertising>; "Attorney General Tong, DCP Commissioner Seagull Warn Consumers, Medicare and Medicaid Beneficiaries of Fraudulent Covid-19 At-home Testing Kits," Press Release (Mar. 24, 2020), Connecticut Attorney General's Office, available at <https://portal.ct.gov/AG/Press-Releases/2020-Press-Releases/AG-TONG-COMMISSIONER-SEAGULL-WARN-CONSUMERS-OF-FRAUDULENT-COVID-19-AT-HOME-TESTING-KITS>; "Attorney General Hunter Issues Consumer Alert on At-home Coronavirus Testing," Press Release (Mar. 24, 2020), Oklahoma Attorney General's Office, available at www.oag.ok.gov/attorney-general-hunter-issues-consumer-alert-on-at-home-coronavirus-testing.