



LIABILITY RISK MANAGEMENT UNDER THE STIMULUS BILL

PRESENTED BY

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STIMULUS CONFLICTS & CHALLENGES

1. The appropriated money will provide the greater stimulus the faster it gets into American commerce.
2. Many of the programs receiving Stimulus funding are not designed for the appropriated amount of those funds, or there are no programs for the funding purposes.
3. As a consequence of factors 1 and 2, the standards, rules and requirements for many of the funding programs will be evolving as the funds are distributed and used.
4. The Administration's policy and the text of the statute impose an unprecedented level of accountability and transparency, not merely for detecting failures, but for "preventing" fraud, waste and abuse.

PRIMARY SOURCES OF LIABILITY RISK FOR STIMULUS RECIPIENTS

- ARRA Accountability & Transparency Provisions
- “JOE”
- Programmatic Uncertainty & Change
- Existing Federal Enforcement Powers
- State IGs
- Watchful Eyes

ARRA ACCOUNTABILITY & TRANSPARENCY PROVISIONS

- Recovery Accountability & Transparency (“R.A.T.”) Board
- The Recovery Independent Advisory (R.I.A.) Board
- Recovery.gov
- Special Whistleblower Provision
- State certifications

THE R.A.T. BOARD (1)

- The overall Inspector General;
- Audit and review all Stimulus funding activities;
- Use Agency IGs and the Board's own investigations;
- Oversee the competence and training of Agency Stimulus staff;
- Transmit flash, monthly, quarterly and annual reports to Congress;
- Recommend actions the funded Agencies must take in 30 days;
- Post audits, investigations and other information on Recovery.gov.

THE R.A.T. BOARD (2)

- Chair – Earl Devaney, former Interior IG and Secret Service Agent
- Biden: “We’re going to be more intrusive.”
- IGs of at least 10 Agencies:
 - Agriculture - Commerce - Education
 - Energy - HHS - Homeland Security
 - Justice - Transportation - Treasury
 - Treasury IG for Tax Administration
 - Any other IG of an agency expending or obligating Stimulus funds and appointed by the President

JOE'S ADVISORY BOARD

- Recovery Independent Advisory (R.I.A.”) Board
 - To advise the R.A.T. Board;
 - To hold hearings;
 - To obtain results of IG investigations relating to Stimulus funds;
 - To publicize the Administration’s commitment to accountability, transparency and effectiveness of the Stimulus Bill.
- Joe Biden’s disapprobation pulpit

RECOVERY.GOV

- Run by the R.A.T. Board.
- 3,000 hits per second at launch.
- Includes:
 - A portal for public “feedback” about the use of Stimulus funds – it’s already receiving 3,000 hits per second;
 - Posting of audits, reports and announcements of all Stimulus Agency IGs;
 - Agencies’ funding plans and programs;
 - Detailed data on all funded grants, contracts, loans and loan guarantees;
 - Agencies’ reports on use and application of Stimulus funding;
 - Reports on the effectiveness of specific projects to create and retain jobs.

SPECIFIC ARRA WHISTLEBLOWER PROVISION (1)

- Defines a protected whistleblower as anyone disclosing any of the following concerning covered funds to any state or federal law enforcement or regulatory agency, any IG, Congress, or any employer supervisor or CCO:
 - Gross mismanagement or waste
 - Danger to public health
 - Abuse of authority
 - Violation of provisions of the funding instrument

SPECIFIC ARRA WHISTLEBLOWER PROVISION (2)

- The whistleblower's complaint goes to the IG of the involved Agency
- The IG has 180 days to make a determination, but can extend by consent or up to another 180 days
- IG has judicially enforceable power to order action by the employer
- Whistleblower may sue in federal court if Agency relief is denied or is not taken within 210 days or the extended period – there are some exceptions

STATE CERTIFICATIONS

- Before receiving any infrastructure investment,
- State and local governments must first certify:
- That the investment has been given the “full review and vetting required by law,” and
- That the state or local official accepts responsibility that the investment is “an appropriate use of taxpayer dollars.”

PROGRAMMATIC UNCERTAINTY & CHANGE

- Broad Funding Descriptions without an existing program, e.g.:
 - \$4.5 Billion for electrical grid enhancement
 - \$2.5 Billion to the Energy Efficiency & Renewable Energy Office
- Required generic guidance for considering, awarding and tracking Stimulus funds will be issued by OMB, but only over time.
- Requirement to get the money out and have programs in place May 1, while mitigating and preventing fraud, waste & abuse.
- Hence, program rules and requirements will evolve as and after the money is distributed.

EXISTING FEDERAL ENFORCEMENT POWERS

- False Claims Act
- Department of Justice:
 - FBI Investigations
 - Grand jury investigations
 - Civil enforcement
- SEC
- Existing whistleblower protections

STATE IGs

- The ARRA expects at least one in each state.
- States have incentives to assign a single IG to Stimulus projects.
- ARRA appropriates funds for the expense of state records and reporting.
- State IGs will coordinate with federal authorities.

WATCHFUL EYES

- Prospecting *qui tam* relators
- Other creative Private Plaintiffs
- Investigative Journalists and Bloggers
- Competitors

WHISTLEBLOWER “COVERED FUNDS”

- Any contract, grant, loan, loan guarantee or any other payment to a private employer, where:
 - The federal government provides any portion of the funds or property, and
 - The funds are appropriated under the ARRA.

NAVIGATING THE RISKS (1)

- Recognize:
 - The Agency has an intense conflict between getting the money out and avoiding criticism for fraud, waste or abuse
 - The program rules, requirements, guidance and oversight will vary
 - Under scrutiny, the Agency will blame the recipient

NAVIGATING THE RISKS (2)

- Segregate all Stimulus functions, funds, accounting and compliance.
- Create and keep supportive records.
- Assign a competent, confident and fully empowered compliance officer for Stimulus funds.
- Propose the design and details of contracts, grants, loans & loan guarantees.

NAVIGATING THE RISKS (3)

Maintain constant contact with:

- The staff administering the funds
- The ultimately responsible Agency officials
- Your congressional delegation