

Government Contract Legal Developments Driven by COVID-19

June 10, 2020

Moderator:

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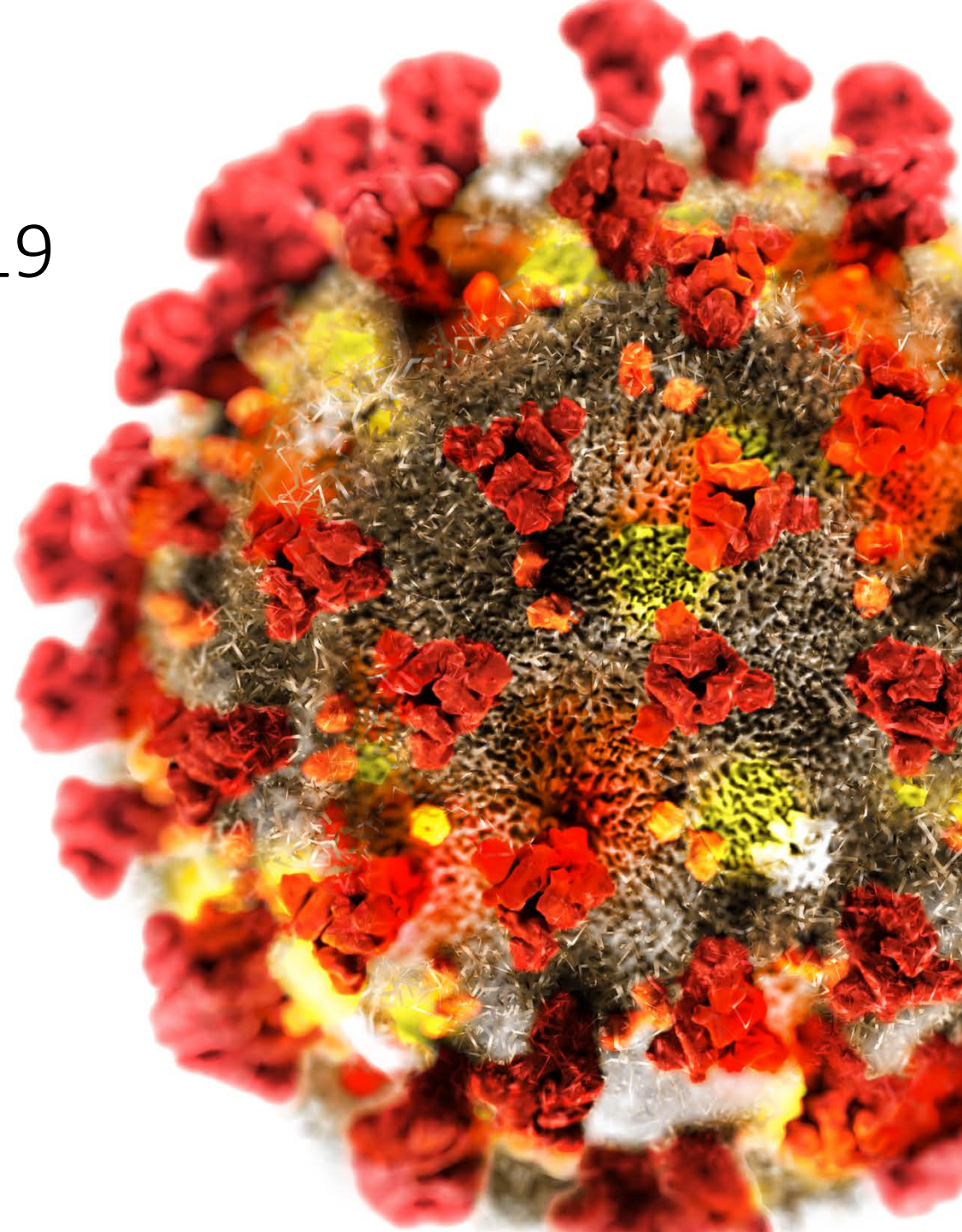
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Bicoastal Government Contracts Speakers

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Speakers



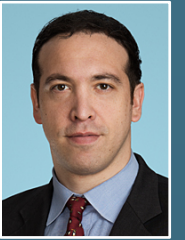
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The Paycheck Protection Program: The Evolution of Congress' Great Small Business Stimulus Experiment

CARES Act § 1102 – Paycheck Protection Program

Amended § 7(a) – Business Loans – of the Small Business Act

- Loans available to small business concerns, 501(c)(3) nonprofits, tribal organizations
- Eligible if applicant (including *affiliates*) is small under existing SBA rules *or*
 - 500 or fewer employees
 - 500 or fewer employees *per location* if in accommodation or food services industries (NAICS Sector 72)
- Certain affiliation waivers, including Sector 72 companies of fewer than 500 employees.
- Loan Amount:
 - 2.5 X annualized average monthly payroll cost up to \$10 Million.
- SBA given 15 days to issue initial regulations.

CARES Act § 1106 – PPP Loan Forgiveness

Maximum Loan Forgiveness

- Based on loan amounts used during eight-week period after loan disbursement

Forgiveness Amount Reduced For Cuts in FTEs or Salaries/Wages

- FTE-based forgiveness reduction = percentage reduction in FTEs
- Salary-based forgiveness reduction = percentage reduction of total salary/wages of more than 25% for employees making less than \$100,000 in 2019

Safe Harbor

- FTE and salary/wage reductions between 2/15/2020 and 4/26/2020 disregarded if restored by 6/30/2020

But what did the SBA say?

- **Regarding Use of the Loan Proceeds**

- Forgiveness will be reduced proportionally unless at least 75 percent of the loan proceeds used for payroll expenses.
- Actually, a borrower must use the loan in at least this proportion or risk being accused of an unauthorized use of the loan (85 Fed. Reg. 20811, 20814 (4/15/2000)).
 - So much for using the money all on rent and utilities!
 - What about companies whose employees physically could not work because of quarantines?

- **Regarding the Employee Count**

- Early FAQ that was repeated in Interim Final Rule: “You are eligible for a PPP loan if you have 500 or fewer employees whose principal place of residence is in the United States.” (?!)

But what did the SBA say? *(cont.)*

- **Regarding the Employee Count *(cont.)***
 - May 5 FAQ: “For purposes of the PPP’s 500 or fewer employee size standard, an applicant must count all of its employees and the employees of its U.S and foreign affiliates, absent a waiver of or an exception to the affiliation rules.”
 - Due to “borrower confusion,” SBA will not find any borrower that applied for a PPP loan prior to May 5, 2020 to be ineligible based on the borrower's exclusion of non-U.S employees from the borrower's calculation of its employee headcount if the borrower (together with its affiliates) had no more than 500 employees whose principal place of residence is in the United States. (85 Fed. Reg. 30835 (5/21/2000)).

But what did the SBA say? *(cont.)*

- **Regarding Loan Necessity:** Borrowers were required to certify that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”

FAQ No. 31 (April 23): “Borrowers must make this certification in good faith, taking into account their current business activity **and their ability to access other sources of liquidity** sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business. For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification.

Lenders may rely on a borrower’s certification regarding the necessity of the loan request. Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith. Later May 14, then May 18.

But what did the SBA say? (cont.)

- **FAQ No. 46 (May 13):** PPP Loans > \$2 million per affiliate group to be audited.
 - “Any borrower that, together with its affiliates, received PPP loans with an original principal amount of less than \$2 million will be deemed to have made the required certification . . . in good faith.”
 - “If SBA determines in the course of its review that a borrower lacked an adequate basis for the required certification concerning the necessity of the loan request, SBA will seek repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for loan forgiveness. If the borrower repays the loan after receiving notification from SBA, SBA will not pursue administrative enforcement or referrals to other agencies based on its determination with respect to the certification concerning necessity of the loan request.”

Loan Forgiveness Formula

- On May 15, 2020 the SBA issued a copy of the loan forgiveness application form and followed with the forgiveness regulations on May 22. Most complicated aspect of the regulations is the mechanics of any forgiveness reduction:
 - ***FTE-Based Forgiveness Reduction.*** Ratio where the numerator is an applicant's average number of FTEs during the Covered Period and the denominator is the applicant's average number of FTEs over, at the applicant's election, the period from February 15 to June 30, 2019, or January 1 to February 29, 2020 (or May 1, 2019 to September 15, 2019 for seasonal employers).
 - But this FTE-based reduction will ***not*** apply where an applicant laid-off or reduced an employee's hours, but then the applicant made a documented offer to rehire the employee for the same salary and number of hours, or to restore a reduction in hours, and the employee declined the offer (and the rejection was reported to the state unemployment office within 30 days). Also no FTE reduction for an employee who is fired for cause, voluntarily resigns or voluntarily requests a reduced schedule during the Covered Period.

Loan Forgiveness Formula

- ***Salary-Based Forgiveness Reduction.*** An applicant's forgiveness also may be reduced on a dollar-for-dollar basis with respect to any employee whose annualized average salary of \$100,000 or less has decreased by more than 25 percent as compared to the period from January 1 to March 31, 2020. The regulations specify, however, that the salary-based reduction "applies only to the portion of the decline in employee salary and wages that is *not* attributable to the FTE reduction," so that "borrowers are not doubly penalized."
- ***Safe Harbor.*** An applicant that has reduced its FTE count or salaries may be subject to a safe harbor, and therefore exempt from a loan forgiveness reduction, if two conditions are met: (1) the applicant reduced its FTE levels or any individual employee's salary in the period beginning February 15, 2020, and ending April 26, 2020; and (2) the applicant then restored its FTE levels or any individual employee's salary by not later than June 30, 2020, to its pre-February 15, 2020 level.

PPP We Hardly Knew Ye

- President signed the Paycheck Protection Program Flexibility Act on June 5.

The Act:

- Extends Covered Period to use loan funds, while still qualifying for forgiveness, from June 30 to earlier of 24 weeks after disbursement or December 31, 2020. But borrowers who already have received loans can opt to rely on the original 8-week Covered Period.
- Extends re-hiring and salary cut reversal deadline to December 31.
- Appears to adopt SBA's forgiveness reduction relief related to good faith efforts to rehire employees. Adds that a borrower will not be subject to a forgiveness reduction for complying with HHS, CDC or OSHA guidance on sanitation and safety.

PPP We Hardly Knew Ye *(cont.)*

- Changes the 75/25 formula to 60/40 “*to receive loan forgiveness.*”
 - Could that be interpreted as an implicit rejection of the SBA’s requirement for *loan use*?
 - Relatedly, is >60% loan use a prerequisite to any forgiveness or will there be a proportional decrease?
 - June 8 Statement by Treasury Secretary: “If a borrower uses less than 60 percent of the loan amount for payroll costs during the forgiveness covered period, the borrower will continue to be eligible for partial loan forgiveness, subject to at least 60 percent of the loan forgiveness amount having been used for payroll costs.”
- Minimum loan term changed to 5 years, from the 2-year maturity date imposed by SBA.



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Knock, Knock: Guess Who?

What to Know Before the Auditors Come Knocking

“Déjà Vu All Over Again”

- History Repeats Itself
 - Iraq
 - Afghanistan
 - Hurricanes
- Government: Mr. Nice Guy
 - Don't Worry
 - We are Here to Help
 - We Want To Do Whatever It Takes

“Déjà Vu All Over Again”

- Government: No More Mr. Nice Guy
 - Audits Every Contractor Possible
 - Pound of Flesh — Contractors Got Wealthy
 - Already Starting to Happen
 - Increased IG Budgets—e.g., SBA \$25M
- Government Out in Front This Time
- Both PPP and 3610 Recovery Notable For Amount of Detail/Support Government will Require

PPP Audits: *Know the Process*

- Audit Process: Forgiveness
 - Lender—Makes Initial Decision on Forgiveness Within 60 days
 - IF Lender denies forgiveness—Borrower may request SBA review within 30 days
 - SBA Has 90 days to review and Make payment after receiving Lender Decision
- SBA Audit
 - SBA “may review any PPP loan, as the Administrator deems appropriate.”
85 Fed. Reg 33010, 33012 (June 1, 2020).
 - SBA’s discretion to review at any time—e.g., if loan documentation indicates a borrower may be ineligible for a loan, loan amount or forgiveness
 - Documentation retention for 6 years—from date of forgiveness or date loan is paid in full
 - SBA may use DCAA or Hire Outside Accounting Firm

PPP Audits: *Know the Process*

- “Automatic” Audit: Over \$2M PPP Loans
 - Treasury Guidelines: Automatic “Safe Harbor” as to “necessity” for loans less than \$2M (Question #46)
 - Treasury Secretary has Publicly Stated that All PPP Loans Over \$2M “would be audited.”
 - Mistaken View that No Audits of PPP Loans less than \$2M

PPP: Audit Subjects

**SBA May Review “Any” PPP Loan as “Appropriate”
(85 Fed. Reg. 33010, 33012 (6/1/2000))**

- PPP Flex Act signed June 5: instigated significant changes—
Mnuchin Statement 6/8/20
“SBA, in consultation with Treasury, will promptly issue rules and guidance, a modified borrower application form, and a modified loan forgiveness application implementing these legislative amendments to the PPP.”
- Eligibility: Based on CARES Act provisions, rules and guidance “available at the time of the borrower’s PPP loan application,” certifications & terms of the loan application and/or forgiveness application form
- Loan Amounts and Use of Proceeds: Correct calculation, allowable uses per CARES Act

PPP: *Audit Subjects*

- Entitlement to Loan Forgiveness Amounts:
 - 60% Payroll/40% Non-Payroll (PPP Flex Act Change—Initially 75/25)
 - Calculation of Reduction Amounts (See PPP Flex Act Modification)
 - 24 weeks (PPP Flex Act Change—Initially 8 weeks)
 - Payroll Costs: Incurred AND paid
 - Non-payroll costs; paid OR incurred.

Forgiveness: *Contractor Must Submit Following*

- Payroll Costs

- Bank account statements, 3rd party payroll service provider reports documenting cash compensation paid
- Tax Forms – (or equivalent 3rd party payroll service provider reports)
 - Payroll tax filings that will be reported to IRS
 - State quarterly business and employee wage reporting and unemployment insurance tax filing
- Payment Receipts, cancelled checks, or account statements documenting the amount of any employer contributions to employee health insurance and retirement plans (that were included in forgiveness amount)

- FTE Calculation

- Documentation showing (at election of borrower): Average number of FTE employees per month between 2/15/19-6/30/19 *or* 1/20/20 and 2/29/20

Forgiveness Documentation: *Contractor Must Submit*

- Nonpayroll Costs:
 - *Business mortgage interest rates:* lender amortization schedule and receipts or cancelled checks; or lender account statements verifying eligible payments from CP verifying interest amounts and eligible payments
 - *Business rent/lease payments:* current lease agreement and receipts or cancelled checks verifying eligible payments from covered period
 - *Business utility payments:* invoices from February 2020 and those paid during covered period and receipts, cancelled checks or account statements verifying payments

Best Practices

- Obvious: Follow Directions
 - Submit the Documents Required by Regulations/Applications
 - Keep the Documents for 6 years
- Don't Be a Trickster Re: Use of Funds
- Know the Regulations or Ask for Help
- Do not Assume You Have “Get out of Jail Free” Card because Loan Less than \$2M

Potential Risks of Non-compliance

- Certifications
 - PPP (Loan Application and Forgiveness Application)
 - 3610 Request Unclear
 - Safe Harbor: Under \$2M Presumed in GF
- PPP Non-Forgiveness due to: Lack of Documentation, Certification
- Negative Past Performance
- Serious Risks
 - DOJ Investigation
 - FCA Charges—Civil and Criminal
 - Suspension and Debarment
- Bad Press—Public Relations Nightmare
- Special Inspector General for Pandemic Recovery
 - He Must Justify His Position



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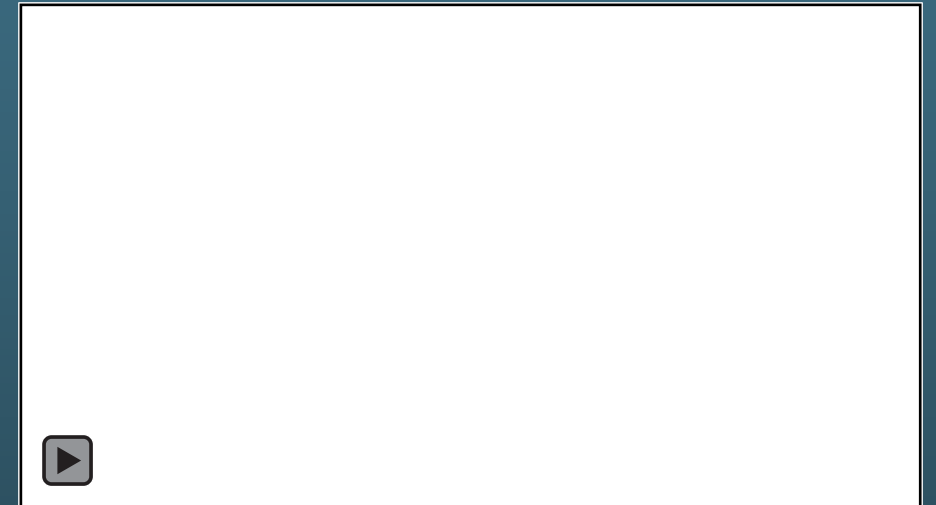
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CARES Act Enforcement and Compliance

Special Inspector General Sends Clear Message – *Expect to be Investigated!*

- Mr. Miller is the recently confirmed SIG to oversee the taxpayer-funded coronavirus pandemic recovery fund
- “I’m by nature suspicious—and especially suspicious of people who may be trying to benefit personally from a government program instead of doing what’s right for taxpayers and for the American public.”
- “Situations where companies are spending the money for profits and laying off workers seems to be a situation that I would want to investigate.”



Indeed, There Already Has Been Enforcement Activity

- 1) PPP loan recipients allegedly applied for an SBA loan under the PPP, but never intended to use PPP funds to pay their employees salaries
 - DOJ, *Two Charged in Rhode Island with Stimulus Fraud*, Press Release, May 5, 2020
- 2) PPP loan recipient allegedly used more than \$1.5 million of PPP loan proceeds to purchase \$85,000 in jewelry and to pay \$40,000 for child support
 - DOJ, *Reality TV Personality Charged with Bank Fraud*, Press Release, May 13, 2020
- 3) PPP loan applicant allegedly attempted to obtain more than \$20 million in PPP loans, by claiming that his companies had hundreds of employees, when the applicant was the only employee of his companies
 - DOJ, *Chinese National Arrested For \$20 Million Scheme To Fraudulently Obtain Loans Intended To Help Small Businesses During COVID-19 Pandemic*, May 21, 2020
- 4) The SEC has recently sent letters of inquiry and requests for documents to PPP loan recipients based on review of public documents and SEC filings
 - Washington Post, *SEC Is Scrutinizing Public Companies Granted Virus Relief Funds*, May 28, 2020

These are just a few examples

PPP Loan Application Warns Applicant

- Certifications and Representations
 - “All SBA loan proceeds will be used **only for business-related purposes** as specified in the loan application and consistent with the Paycheck Protection Program Rule”
 - “Current economic uncertainty makes this loan request **necessary to support the ongoing operations of the Applicant**”
 - “I understand that if the funds are knowingly **used for unauthorized purposes**, the federal government may hold me legally liable, such as for charges of fraud”
 - “I further certify that the information provided in this application and the information provided in all supporting documents and forms is **true and accurate** in all material respects”
- Penalties Enumerated in the PPP Loan Application
 - False Statement, 18 U.S.C § 1001: Imprisonment up to five years or a fine of up to \$250,000, or both
 - False Statement to Obtain a Loan, 15 U.S.C § 645: Imprisonment up to two years or a fine of up to \$5,000, or both; and
 - False Statement on Loan Application, 18 U.S.C § 1014: Imprisonment up to 30 years or a fine of up to \$1,000,000, or both

Other Possible Penalties

- Civil Penalties
 - The False Claims Act, 31 U.S.C. §§ 3729-3733
 - Up to \$23,331 penalty per false claim plus three times the amount of damages that the government sustained because of the alleged false claim
 - The Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812
 - \$11,180 civil penalty per false claim, plus an assessment of twice the amount of any unlawful claim that has been paid
- Criminal Penalties
 - Conspiracy to Defraud the Government with Respect to Claims, 18 U.S.C § 286: Imprisonment up to 10 years or a fine of up to twice the pecuniary loss, or both
 - False Claim to a Federal Agency, 18 U.S.C § 287: Imprisonment up to five years or a fine of up to twice the pecuniary loss, or both

Suspension & Debarment Overview

- Government-wide Debarment, Executive Order 12549 (Feb. 12, 1986)
- Government may pursue violations of the PPP by taking suspension or debarment action against the contractor
- S&D act to exclude a contractor from receiving new gov't contracts and subcontracts above \$35K
- Excluded contractors often have existing contracts terminated by customers
- Excluded individuals cannot serve as an agent or representative of a contractor
- Exclusion accomplished by sending contractor a notice and posting name on a public website (SAM)
- S&D, by one agency, has government-wide effect
- Many collateral consequences: broad reputational harm and contraction of credit facilities

Make Sure Your Ethics & Compliance Program is in Order!

- Make sure you are prepared for Government scrutiny of your overall compliance
- PPP investigations are but one source of investigations against contractors
- Contractors are a frequent focus of Government scrutiny
- Indeed, just 8 months ago, DOJ announced the Procurement Collusion Strike Force (“PCSF”) on November 5, 2019—designed to focus on antitrust crimes
- Focus will extend beyond antitrust, and will lead to increased sensitivity by procurement officials and increase their communication with prosecutors
- Indeed, the DOJ release provides “PCSF will train and educate procurement officials nationwide to recognize and report **suspicious conduct in procurement**, grant and program funding processes”
- Better believe that during PPP audits and investigations, the Government will not overlook or ignore other indicators of fraud and misconduct

Best Practices in Ethics & Compliance

- Values-based ethics programs
- Compliance policies tailored to risks
- Live ethics and compliance training tailored to job risks and roles
- “Tone at the bottom” just as important as “tone at the top”
- Performance evaluations that consider ethics, compliance, and values promotion
- Incentive programs to encourage and motivate behavior consistent with core values
- Installing an Ethics & Compliance Officer for day-to-day management of program
- Reinforcing reporting channels to employees
- Maintaining an Ethics Helpline that allows for anonymous reporting
- Maintaining investigative policy and procedures for responding to reports (privilege)
- Disclosure policy and procedures to ensure compliance with disclosure obligations
- Periodic audits and monitoring to ensure compliance and to identify gaps
- Disciplinary program with consistent enforcement
- Periodic culture surveys to assess morale and risk areas

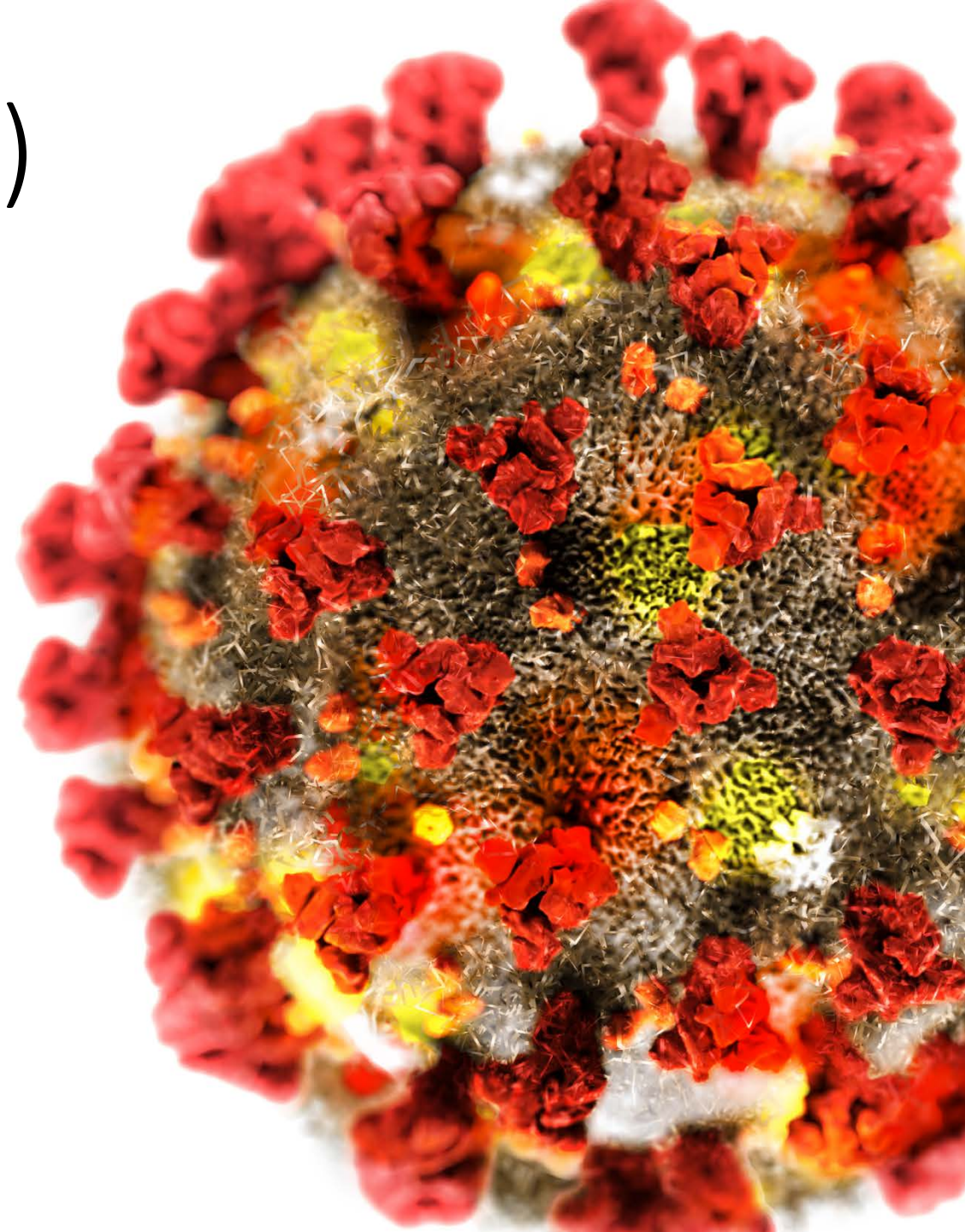
COVID-19 (Coronavirus)

If you have questions about how the 2019 Novel Coronavirus impacts you or your business, please contact us.

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