Hickory, dickory, dock, payment verification deadlines are running out the clock: COVID-19 benefits in Canada

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Recipients of COVID-19 benefits may soon be contacted by the Canada Revenue Agency (CRA) regarding their eligibility to receive such financial relief.

On Dec. 6, 2022 Canada's auditor general Karen Hogan tabled Report 10 on Specific COVID-19 Benefits (the Report). This performance audit was conducted by the Office of the Auditor General of Canada (OAG) pursuant to requirements under Bill C-2 *An Act to provide further support in response to COVID-19*.

The Report reviewed the government's spending on COVID-19 programs and benefit payments including the Canada Worker Lockdown Benefit, Canada Recovery Benefit, Canada Recovery Sickness Benefit, Canada Recovery Caregiving Benefit, Canada Emergency Response Benefit including the Employment Insurance Emergency Response Benefit and the Canada Emergency Wage Subsidy (collectively the "COVID-19 Benefits" or "Program (s)").

Key takeaways

- The Report found that $4.6 billion in COVID-19 Benefits overpayments were issued to ineligible individuals and organizations due to insufficient pre- and post-payment verifications by the CRA and Employment and Social Development Canada (ESDC).
- The CRA and ESDC must complete post-payment verifications within 36 months of payment to comply with the *Canada Recovery Benefits Act* (the Act). The window for verification is extended to 72 months where fraud or misrepresentation is suspected.
- The Report emphasizes that the CRA is running out of time to verify eligibility for most recipients of COVID-19 Benefits, including time constraints for cases where the CRA suspects fraud or misrepresentation.
- There is disagreement surrounding methods of calculating the $15.5 billion paid to potentially ineligible employers who received the Canada Emergency Wage Subsidy. The Commissioner of the CRA has also stated that it "wouldn't be worth the effort" for the CRA to probe into all cases where a potentially ineligible

individual or entity received a benefit and that doing so would not align with the CRA's "risk-based" approach to enforcement.[1]

Overview

The auditor general found that $4.6 billion of overpayments were made to ineligible individuals and resulted from the "department and agency's approach to limit pre-payment controls, as well as the lack of timely data at the time of application."[2] Furthermore, the auditor general estimated that at least $27.4 billion of payments to individuals and employers should be subject to further investigation.[3]

The Report provides doubt that the CRA and ESDC will recover significant portions of the $27.4 billion in COVID-19 Benefit payments recommended for further investigation, stating "significant unrecoverable amounts are likely to materialize."

The CRA disagrees with the amounts stipulated in the Report, claiming that they are exaggerated. CRA minister Diane Lebouthillier further suggested that the numbers in the Report were the product of political pressure and gamesmanship.[4] For its part, the CRA says that it is actively engaged in investigating overpayments, having sent out more than 825,000 notices of redetermination, and continues to discover fraudulent payments tied to identity theft.[5]

COVID-19 Benefits eligibility requirements

Applicants were required to meet certain eligibility requirements to receive COVID-19 Benefits.[6] Each Program, to varying degrees, required an individual or business to be impacted by the COVID-19 pandemic in a way that resulted in economic loss. Applicants could also be eligible for COVID-19 Benefits under more specific eligibility requirements, such as by holding an active payroll account or payroll remittances.

As Programs progressed, additional pre-payment controls were implemented based on the availability of tax return information and follow-up requests. However, the Report found that the addition of new controls was often ineffective and targeted data that was irrelevant to eligibility (such as speed of processing applications) or did not use controls that could have verified eligibility (such as historical GST/HST data).

The Report further suggests that the CRA and ESDC have made minimal progress in conducting verifications or audits with respect to COVID-19 Benefits.[7]

Audit timelines

Deadlines are fast approaching as most of the COVID-19 Benefit payments were made between early 2020 and mid-2022.

Section 36 of the Act prevents the CRA from reconsidering COVID-19 Benefits, or imposing a related penalty, after 36 months have passed since the date of payment.[8] Under s. 30(5) of the Act, the timeframe for a reconsideration could be extended to a maximum of 72 months in cases where the CRA suspects fraud or misrepresentation.

The language of s. 30(5) is notably broad, requiring only the CRA's "opinion" that an applicant for COVID-19 Benefits made a false or misleading statement.[9]

The CRA and ESDC will likely have difficulty in completing these post-payment verifications within the allotted timelines.[10] For example, if there are no allegations of fraud or misrepresentation, the latest date to complete a post-payment verification for a payment made in August 2020 is August 2023.

Eligibility vs. expediency

The Report acknowledges that the COVID-19 Benefits achieved the objectives of helping Canadians in a timely manner and meaningfully supported Canada's economic recovery. The Report has also resulted in significant media attention largely driven by the impact of the decision to "trade-off between expediency and confirming eligibility."

Emphasizing expediency, the CRA and ESDC had "minimal controls" in place to confirm whether applicants met criteria for these Programs before issuing benefit payments.[11] However, the Report suggests that it was the sacrifice of thorough verification processes for the sake of expediency that caused overpayments to ineligible self-attesting recipients.

The Report makes the following recommendations to the CRA and ESDC to address potential overpayments:

- Update post-payment verification plans to include all activities to identify payments to ineligible recipients of COVID-19 benefit programs, taking into account the legislated time frames.
- Increase the extent of post-payment verifications for Programs for individuals to include all cases identified as being at risk of being ineligible.

The CRA and ESDC assert that they will investigate ineligible recipients while considering the time and resources it would take to make such inquiries worthwhile, noting that "[i]t would not be cost effective nor in keeping with international and industry best practices to pursue 100 per cent of all potentially ineligible claims."[12]

Given the time constraints as legislated under the Act, the CRA may rely on the relatively broad language of s. 30(5) of the Act to extend the period for reconsidering payments to many recipients of COVID-19 Benefits based on suspicions that the recipient made a false or misleading statement on their application.

Looking forward

The Report places pressure on the CRA to reconsider COVID-19 Benefit payments and issue penalties before the expiry of the 36-month deadline. The CRA can take many avenues to collect business and individual COVID-19 subsidy overpayments. For businesses, the CRA may issue a requirement to pay to a third party, issue a set-off to redirect funds owed from the government to the business to pay the debt, register liens on assets, seize and sell assets, transfer property to an individual or corporation that is non-arm's length, or issue a non-compliance of a requirement to pay.

If you would like to discuss how you or your organization can prepare for COVID-19 Benefits reassessments, or disclose ineligible payments through the voluntary disclosure program, please contact the authors of this bulletin or a member of BLG's Investigations & White Collar Defence Group or BLG's Tax Disputes Group.

Footnotes

[1] Minutes - PACP (44-1) - No. 45 - House of Commons of Canada (ourcommons.ca).

[2] Report at 10.17.

[3] These numbers are estimates only and more definitive numbers will be defined following the completion of department post-payment verifications.

[4] COVID-19 benefit report: CRA minister under fire for criticizing AG | CTV News

[5] CRA clawing back $3.2B from suspect COVID-19 aid payments | National Post

[6] C-13, *An Act respecting certain measured in response to COVID-19*, 1st sess, 43rd Parl, 2020 (assented to 25, March 2020) SC, 2020.

[7] Report at 10.110 & 10.111.

[8] Report at 10.86; See also, *Canada Recovery Benefits Act*,s. 30(1).

[9] *Canada Recovery Benefits Act*, s. 30(5).

[10] Report at 10.95.

[11] Report at 10.85.

[12] Report at 10.101.

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