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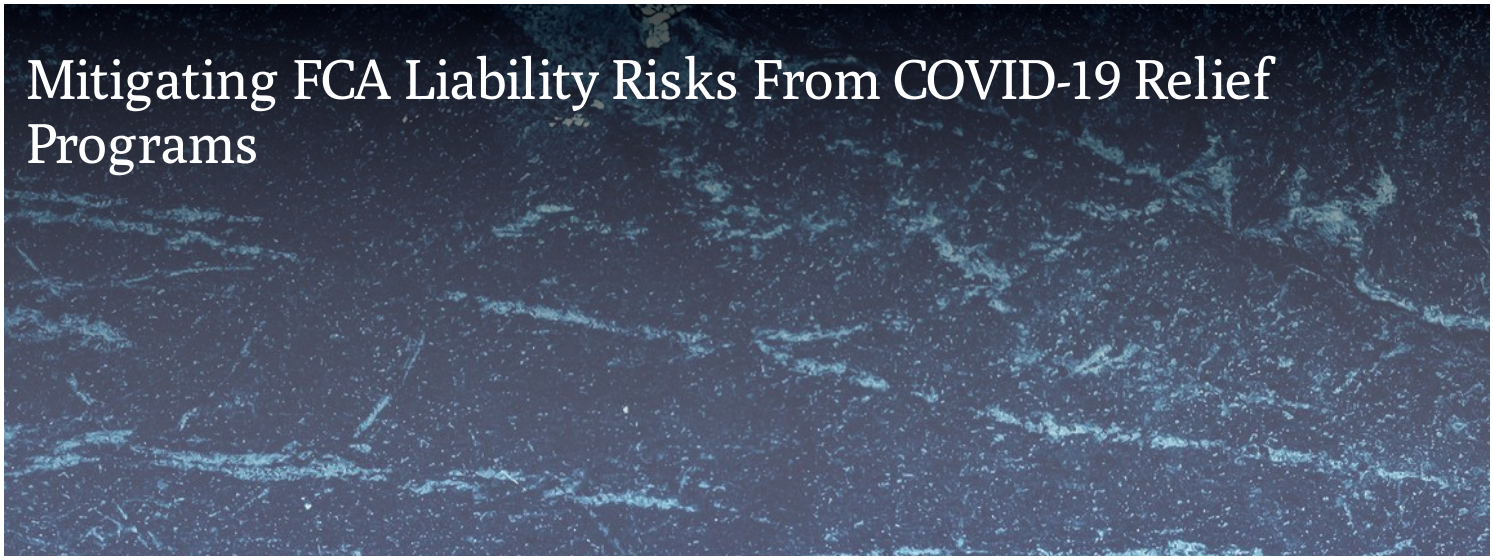

Mitigating FCA Liability Risks From COVID-19 Relief Programs

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With the passage of the Coronavirus Aid, Relief and Economic Security Act (CARES Act) on March 27, 2020, the risk that individuals and organizations may find themselves in the government's crosshairs has increased exponentially. Offering more than $2 trillion in emergency relief, the CARES Act provides eligible businesses across numerous industries with immediate financial assistance through federal funds, loans, grants and rebates, as well as potential opportunities to enter into government contracts.

While understandably focused on navigating the current crisis, individuals and organizations receiving federal funds must be mindful that their conduct may be scrutinized under one of the government's most powerful enforcement tools, the False Claims Act, which subjects a violator to the potential of having to pay treble damages, among other serious penalties.

Indeed, over the past decade, the government and whistleblowers have recovered nearly $40 billion dollars under the FCA. Therefore, it is critical that all those seeking to take advantage of the various government programs that have been launched to address the COVID-19 health crisis be familiar with the FCA. In particular, it is essential that individuals and organizations understand the theories of FCA liability and how to minimize the risk of being at the center of an FCA investigation or becoming a defendant in an FCA litigation.

Rigorous and Expanding FCA Enforcement

The FCA provides for treble damages and statutory penalties ranging from $11,463 to $23,331 for each claim submitted to the government based on the new rates published by the U.S. Department of Commerce in Jan. 2020 (see 85 Fed. Reg. 208 (Jan. 3, 2020)), plus attorneys' fees and costs and potential exclusion from participation in government programs. The passage of the CARES Act will likely result in a significant increase in FCA investigations and enforcement actions, including those that target individuals and organizations that are new to the world of doing business with the government. Where significant amounts of federal funds are at issue, the government can be expected to engage in thorough and unforgiving scrutiny of the conduct of recipients of those funds.

Investigations

Following Hurricane Katrina and the 2008 financial crisis, there was a deluge of FCA investigations and litigations against those who were beneficiaries of newly established federal relief programs. This trend is likely to continue in the aftermath of the Covid-19 crisis, especially in view of announcements by the U.S. Department of Justice and agencies of initiatives to ferret out and prosecute Covid-19-related fraud schemes and the establishment of new oversight committees charged with policing the use of federal funds.

Specifically, the DOJ has made several announcements regarding its commitment to prioritizing its efforts and resources for rooting out Covid-19-related fraud schemes. On March 16, 2020, Attorney General William Barr issued a memorandum to all U.S. Attorneys stressing the importance of remaining "vigilant in detecting, investigating, and prosecuting wrongdoing related to the crisis." In a follow-up memorandum, the DOJ directed U.S. Attorneys to appoint a "Coronavirus Fraud Coordinator" in each district and establish a national system for whistleblowers "to report suspected fraud." And on March 17, 2020, the DOJ publicly reaffirmed its commitment to prosecute and investigate violations of the FCA. Further, HHS Secretary Alex Azar warned that there will be significant anti-fraud and auditing work done by the agency in connection with the disbursement of federal funds under the CARES Act, highlighting the certifications required from recipients regarding the use of the funds.

Oversight Bodies

These enforcement efforts will be supplemented by the CARES Act's creation of new oversight bodies, further signaling the federal government's commitment to police the use of federal funds. The Pandemic Response Accountability Committee, comprised of various agency Inspectors General, has the broadest oversight and enforcement powers of the newly created oversight committees.

With an $80 million appropriation, PRAC has auditing and reporting responsibilities, can refer matters to the DOJ for criminal or civil investigation, and is also authorized to issue subpoenas and conduct independent investigations. Additionally, the Special Inspector General for Pandemic Recovery, established within the Treasury Department with a budget of $25 million, is responsible for reviewing and performing audits and investigations of loans, loan guarantees, and other investments by the secretary of the Treasury under any program established under the CARES Act.

Whistleblowers

Whistleblowers will play a critical role in assisting with the enforcement of the FCA in the context of Covid-19 related fraud. The FCA incentivizes whistleblowers to report fraud by allowing them to receive up to 30 percent of any FCA recovery. Recent statistics show that the government's recovery efforts under the FCA are highly dependent on whistleblowers bringing fraud allegations to the government's attention.

Last year, 636 (82%) of the 782 new FCA actions were filed under the FCA's whistleblower, or qui tam, provisions. Qui tam actions also led to a significant amount of the total FCA recoveries in fiscal year 2019. Of the more than $3 billion total FCA recoveries this past year, more than $2.2 billion (72%) was received in connection with qui tam lawsuits. Further, even where the DOJ declines to intervene in a filed qui tam action due to a lack of investigative resources, lack of merit, or otherwise, recent trends reflect a greater willingness of qui tam whistleblowers to continue to pursue the litigation against a defendant even if the U.S. does not join the active litigation of the case.

Heightened FCA Enforcement for All Industries

The CARES Act provides financial assistance and funding to individuals and organizations across a wide array of industries. For example, in the form of industry-specific lending programs, the CARES Act makes nearly $46 billion available to passenger air carriers, cargo air carriers, and businesses critical to maintaining national security. The act also authorizes $349 billion in forgivable loans to small businesses, nonprofits, and certain tribal entities under the Paycheck Protection Program, as well as $10 billion in emergency grants to eligible small businesses.

These are just a few examples. Thus, the FCA will be used as an anti-fraud enforcement tool across a wider array of industries than those that have been traditional targets, such as the health care and financial industries. Simply put, any company that is contracting with the government, receiving government funding, or taking advantage of government-backed or guaranteed loans is subject to potential liability under the FCA.

Given the broad reach of the CARES Act, many individuals and organizations unaccustomed to doing business with the government will find themselves in unchartered and potentially treacherous waters as they seek to take advantage of the offered programs. Doing business with the government is very different from doing business in the private sector. For example, in the private sector, "wining and dining" a customer would not raise any concerns. But doing the same for a government customer could trigger an FCA investigation based on assertions that the resulting claims submitted to the government are tainted by bribery, kickbacks, or regulatory violations.

There are numerous expectations, limitations, and conditions that apply to doing business with the government that do not necessarily apply when doing business with those in the private sector. The old adage that one "must turn square corners when they deal with the government" is an important reminder of the extra care that should be taken in order to minimize the risk of exposure under the FCA. *Rock Island, A. & L. R. Co.*, 254 U.S. 141, 143 (1920).

FCA Liability Theories Relevant to CARES Act Participation

The FCA imposes civil liability on any person or entity that submits to the government a false claim for payment. A claim can be deemed "false" under the FCA under myriad theories, some of which go beyond the notion that the claim submitted simply includes a misrepresentation. New and experienced participants in the government contracting environment are receiving inflows of government funds that are tied to attestations of compliance with the terms and conditions under the CARES Act, among other things. Although there are several theories of liability under the FCA, companies contracting with the government or receiving federal funds under the CARES Act should pay special attention to three theories of liability.

False Certification

The false certification theory of liability arises when a company obtains funds from the government while failing to comply with governing statutes, regulations, or contractual terms. A certification can either be "express," meaning that in connection with submitting a claim for payment, there is an explicit certification of compliance with governing statutes, regulations, or contractual provisions; or "implied," meaning that by submitting a claim for payment, the individual or organization is impliedly certifying compliance with governing statutes, regulations, or contractual provisions, even if no express certification of compliance has been made.

Reverse False Claim

Liability for a violation of the FCA based on a reverse false claim may arise where an individual or entity conceals or avoids an obligation to pay the government or return funds to the government, or otherwise makes a misrepresentation in connection with an obligation to pay or return funds to the government.

Fraudulent Inducement

The fraudulent inducement theory of liability arises when the government awards a contract or provides some other benefit (i.e., grant, loan, or rebate) on the basis of a false or misleading statement.

Steps to Minimize Risks

As the government continues to implement stimulus packages and roll out programs created by the CARES Act to address the current crisis, those who are receiving federal funds, or seeking government-backed grants, loans, or other assistance should take steps to minimize the risk of FCA liability.

Consult with Counsel at the Outset

Given the broad reach of the CARES Act across countless industries, companies that are unaccustomed to doing business with the government should consult with counsel to make sure they fully understand and indeed comply with governing statutes, regulations, contractual provisions, and program requirements, including certifications that they may be making expressly or impliedly in connection with receiving federal funds. Although many individuals and organizations are doing their best to quickly and effectively address the current crisis, it is critical to take the time needed to develop a thorough understanding of all that is required to qualify for federal financial assistance and/or contracting opportunities. If the applicable requirements and/or necessary certifications are ambiguous or complicated, seek clarification and guidance before proceeding and memorialize any discussions with government representatives in writing.

Do Not Cut Corners

Despite the ongoing pandemic, there must be complete compliance with all legal, regulatory and contractual obligations, including loan, grant, and/or program requirements, absent clear and written authorization otherwise from the government. While companies may be inclined to pay less attention to specific legal, contractual, and/or program requirements in an attempt to respond to the crisis at a quicker pace, doing so can increase the risk of exposure to FCA liability, resulting in potentially far greater costs and problems down the line. Given the various certifications of compliance required under the CARES Act, and other potentially applicable statutes and regulations, companies should maintain proof of compliance with the government's terms and conditions to mitigate the risk of negative scrutiny of their use of federal funds.

Maintain a Strong Compliance Program

Now, more than ever, it is crucial to have a strong compliance program in place with an effective reporting system. Additionally, companies should consider specific training for employees on new obligations as the recipient of federal program funding (e.g., Anti-Kickback Statute training, etc.). Whistleblowers are often disgruntled current or former employees. With the prospect of layoffs and salary cuts during these uncertain times, there is a greater risk of dissatisfaction and resentment among employees and an increased likelihood that personnel may fail to do all that is required in connection with government business.

Companies, and specifically management, should take steps to encourage and remind employees to be vigilant about complying with government obligations and to report any allegations or complaints of wrongdoing internally. Management should reiterate to employees the importance of maintaining an ethical and compliant workplace. Taking these steps will allow the company to investigate and remediate any issues prior to the commencement of an FCA investigation or litigation, or the filing of a whistleblower complaint. It will also demonstrate the proper "tone from the top" and the company's strong commitment to compliance and ethics.

Stay Current on Changing Rules and Regulations

With new federal funding and programs being rolled out at a rapid pace, changes in federal and agency rules and regulations can be expected to follow. It is important to monitor relevant regulatory announcements and implement appropriate procedures to ensure compliance.

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