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Fraud and the Risk of FCA Litigation in the Time of COVID-19

By Jeetander T. Dulani and Thomas C. Hill*

The massive amount of government funds set aside for loans to small, medium, and large businesses in the CARES Act stimulus package makes False Claims Act compliance more crucial than ever for U.S. companies. The authors of this article explain the risks and offer steps to take to mitigate the risks of investigations and litigation.

Any entity that receives government funds may face claims under the False Claims Act ("FCA") if those funds are misused and/or government requirements and conditions are not followed. With such massive amounts of government funds at stake, companies will want to make sure FCA compliance plans are up to date and being properly implemented. A robust compliance program will not only help prevent fraud, but may also help minimize potential liability under the FCA if fraud is later discovered. This article discusses the risks of FCA enforcement and the critical role that compliance can play in mitigating those risks.

THE FCA REMAINS THE MOST POWERFUL ANTI-FRAUD TOOL IN THE GOVERNMENT'S ARSENAL

The most potent weapon in combatting corporate fraud against the U.S. government has been the False Claims Act.[1] That fraud most often involves false statements and false or fraudulent claims for payment from the government.[2] There is also a "reverse false claims act" provision, which imposes liability for improper conduct aimed at avoiding paying the government or improper retention of an overpayment by the government.[3] Since 1987 the government has recovered over $59 billion, with $3 billion being recovered in 2019.

Under the FCA, the U.S. government may recover treble damages and civil fines for such fraud. Nearly 90 percent of these cases are now initiated under the

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[1] 31 U.S.C. §§ 3729-3733.

[2] 31 U.S.C. § 3729(a)(1).

[3] 31 U.S.C. § 3729(a)(1)(G).

FCA's *qui tam* provision which permits private plaintiffs (known as relators) to sue in the name of the United States. Relators who are successful (either at trial or through settlement) are entitled to up to 30 percent of any recovery, and their counsel are entitled to attorney's fees. These provisions have created a thriving and active plaintiff's bar, and they incentivize anyone, especially employees (and disgruntled former employees) and even competitors, to bring a *qui tam* action in the case of suspected fraud. In this situation, where the government is issuing loans with a range of conditions and requirements—some of which are essential to have the debt forgiven—there is a substantial risk that failure to meet those conditions could give rise to a "reverse false claims act" *qui tam* action. For example, a company that receives funds by making certain representations or certifications that were true at the time of the loan may violate the FCA by failing to return the money if certain conditions are no longer met or change.

In the aftermath of past crises, the U.S. Department of Justice ("DOJ") and *qui tam* relators have aggressively brought FCA claims against entities that benefited from government spending. There is no reason to believe that the COVID-19 crisis will be any different. In fact, DOJ[4] has already directed U.S. Attorneys to "prioritize the investigation and prosecution of Coronavirus-related fraud schemes" and urged "the public to report suspected fraud schemes related to COVID-19 (the Coronavirus) by calling the National Center for Disaster Fraud (NCDF) hotline (1-866-720-5721) or by e-mailing the NCDF at disaster@leo.gov."

With such massive amounts of government funds at stake, companies will want to make sure that their FCA compliance plans are up to date and being properly implemented. A robust compliance program will not only help prevent any fraud from occurring, but may also help minimize potential liability under the FCA if fraud is later discovered.

THE POWER OF ROBUST COMPLIANCE

Compliance programs are an essential tool to minimize potential liability. Weak or nonexistent compliance programs allow plaintiffs to argue that the defendant(s) acted with deliberate ignorance or reckless disregard of any allegedly unlawful conduct. Strong and well-implemented compliance programs, however, allow a defendant to argue that even if some unlawful conduct occurred, it was carried out without company knowledge or acquiescence.

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[4] https://www.justice.gov/opa/pr/attorney-general-william-p-barr-urges-american-public-report-covid-19-fraud.

Indeed, earlier this year Deputy Associate Attorney General ("AG") Stephen Cox reiterated how critical compliance programs were[5] in his Keynote Remarks at the 2020 Advanced Forum on False Claims and Qui Tam Enforcement in New York. AG Cox noted that the Cooperation policy, which was announced in May 2019, "is the first of its kind in the False Claims Act space, but it builds on other department policies designed to incentivize corporate self-policing, cooperation, and compliance." He went on to explain that "[u]nder our new policy, corporate defendants can earn credit—and a reduction in penalties and damages—by voluntarily disclosing misconduct, cooperating with our investigations, and taking remedial measures such as improving corporate compliance programs." A compliance program is integral to detecting problems early. Moreover, if a company provides "maximum cooperation" the DOJ is able to reduce damages down to single damages (instead of treble), "plus lost interest, costs of investigation, and, in a *qui tam* case, the share that must go to the whistleblower." DOJ may also notify "the relevant regulatory agency about the company's cooperation" and may also assist "in resolving *qui tam* litigation with the relator."

Beyond all of this, Deputy AG Cox also explained that DOJ is "willing to take into account the nature and effectiveness of a company's compliance system in making the determination of whether the False Claims Act is the appropriate remedy." Such a determination can have far-reaching consequences, such as risk of debarment, that go beyond the financial cost of an FCA case.

NINE STEPS TO TAKE TO MINIMIZE THE RISK OF FUTURE FCA INVESTIGATIONS AND LITIGATION

As government stimulus to address the COVID-19 crisis expands, any entity that receives stimulus funds or government funds should consider the following steps to minimize the risk of future FCA investigations and litigation:

1. Stay informed about regulations, conditions, and any developments which may change as the crisis evolves.
2. Adopt or maintain best practices for ensuring compliance with government requirements.
    a. Risk management and auditing procedures.
    b. Effective controls regarding any certifications of what the government is funding or paying for.
3. Do not unilaterally fail to comply or complete any government

[5] https://www.justice.gov/opa/speech/deputy-associate-attorney-general-stephen-cox-provides-keynote-remarks-2020-advanced.

requirements. Obtain clear written government authorization to forego such requirements.

   a. Consider announcing publicly any waivers or changes to government requirements and your reliance on those waivers or changes.

4. When participating in any COVID-19 relief program (loan or grant), ensure that the requirements are met and any representations to the government are accurate and documented.
5. Implement or ensure that you have effective reporting systems in place to discover potential compliance issues and have an organizational structure in place that will take those concerns seriously. This includes:
   a. Regular and recurring training regarding the FCA, anti-fraud, and anti-kickback policies and the obligation of all employees to report potential wrongdoing to the lead compliance officer or through the employee hotline.
      i. Establish an outside anonymous whistleblower phone hotline and/or email system.
      ii. Ensure that employees have access to and familiarity with a company compliance handbook or compliance policies.
   b. Require managers or others with decision making authority to certify FCA compliance for their business units and regularly audit business systems.
      i. Require agents, vendors, business partners, distributors, affiliates and potential acquisition targets to abide by the same compliance standards as the company.
6. Ensure you have a lead compliance officer at the senior management level.
   a. Have management deliver a consistent message about the importance of compliance.
7. Regularly follow up on all internal/anonymous reporting and whistleblowing tips.
8. Implement and advertise strong anti-retaliation policies toward whistleblowers.
9. Avoid all anti-competitive conduct. DOJ has announced that it is on high alert for collusive practices related to COVID-19. Such investigations can also form the basis of related FCA claims.