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Diligence and discipline during a crisis: Managing and mitigating the risk of qui tam *actions in the wake of COVID-19*

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Part three in our False Claims Act (FCA) series explores the use of qui tam actions, which empower private persons to prosecute FCA violations on behalf of the U.S. government.

The FCA was enacted during the Civil War to combat wartime profiteering by unscrupulous providers of goods and services who were engaged in rampant fraud against the Union Army. In the near future, *qui tam* actions to enforce the FCA are likely to spike in response to false claims submitted in connection with federal 2019 novel coronavirus (COVID-19) aid, and contracts between the government and providers of emergency goods and services.

Last month, the U.S. Congress began taking unprecedented measures to mitigate the economic crisis caused by the COVID-19 pandemic, including passing a $2.2 trillion stimulus package. To ensure that these vital funds are not misappropriated, the U.S. Department of Justice (DOJ) announced it will prioritize the investigation and prosecution of COVID-19-related fraud, and expressly encouraged members of the public to blow the whistle on fraudsters and potentially collect a sizeable monetary reward in return.

Accordingly, businesses contracting with the federal government to provide goods or services used in addressing the current crisis and/or applying for and accepting federal aid, must take heed and exercise care when entering into federal contracts or applying for federal funds.

What is a *qui tam* action?

The FCA is a powerful tool with which the DOJ can investigate, prosecute and recoup funds for the federal government. The FCA also allows private persons and entities with evidence of fraud against federal programs and contracts to sue the alleged wrongdoer on behalf of the government. These are called *qui tam* actions. We get the term *qui tam* from the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur,*" meaning "Who brings the action for the King as well as for himself."

Under the FCA, the private party who initiates a *qui tam* action is called a relator. In 1986, Congress strengthened the FCA by increasing monetary incentives for relators, more commonly known as whistleblowers, to file lawsuits alleging false claims. If the *qui tam* action is successful, the relator can receive up to 30 percent of the recovery. 31 U.S.C. § 3730 (d). According to the DOJ, in fiscal year 2019 relators filed 633 *qui tam* lawsuits, leading to the recovery of more than $2.1 billion.[1]

While some relators pursue *qui tam* actions for altruistic reasons, oftentimes relators are disgruntled or former employees who see an opportunity to reap a financial windfall. Given the mass furloughs, layoffs and jobless claims caused

[1] https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019

by the economic crisis associated with the COVID-19 pandemic, there is a target-rich environment for *qui tam* plaintiffs' lawyers.

Disaster relief funding, fraud and FCA enforcement

Prior articles in this FCA series have examined the FCA primarily in the context of health care fraud (*e.g.*, Medicare, Medicaid). However, it is important to remember that the FCA applies to any government contract or benefit program. Indeed, the FCA constitutes the primary vehicle used by the DOJ to pursue recovery from any government contractor who defrauds a federal agency. The danger for fraudulent or otherwise improper claims is heightened whenever Congress authorizes relief funding — and Congress' authorization of stimulus funds in response to the COVID-19 pandemic is no different.

The Coronavirus Aid, Relief, and Economic Security (CARES) Act was passed by Congress and signed into law on March 27, 2020. This $2.2 trillion economic stimulus package is reportedly the largest stimulus bill ever enacted in the U.S. Keenly aware of the potential for false claims, Congress created the Office of the Special Inspector General for Pandemic Recovery (SIGPR) as part of the CARES Act. The SIGPR will lead a new inspector general office within the U.S. Department of the Treasury (Treasury), and will have a $25 million budget and a five-year mandate to "conduct, supervise, and coordinate audits and investigations" of the making, purchase, management and sale of loans, guarantees and other investments made under the CARES Act.[2]

Moreover, U.S. Attorney General William Barr has directed all U.S. Attorneys to prioritize the investigation and prosecution of COVID-19-related fraud schemes. To aid the government, Attorney General Barr has urged the public to report suspected fraud schemes related to COVID-19 and has created a national COVID-19 whistleblower hotline.[3]

These actions reflect the government's commitment to combatting the fraudulent procurement and misappropriation of COVID-19 relief funds, and those contracting with the government in connection with COVID-19 relief efforts should expect increased scrutiny as auditors keep a close eye on how funds are spent. Given Attorney General Barr's edict to U.S. Attorneys and public plea for help, we can say with near certainty that there will be a flood of investigations and litigation for violations of the FCA arising from the misuse of CARES Act relief funds in the coming months and years. Indeed, we need only look back 15 years to find examples of FCA litigation arising from other disaster relief efforts.

Fraud after 9/11

In 2006, a whistleblower sued FedEx, alleging that the company violated the FCA by submitting invoices that included misuses of the security delay and other delivery exception codes reflecting that increased security measures at government facilities were causing delays in the timely delivery of overnight FedEx packages. *U.S. ex rel Garofolo v. Federal Express*, *et al.*, No. 06-0815-EGS (D.D.C.). According to the complaint, FedEx started using security delay codes immediately after Sept. 11, 2001, but continued using the codes even after heightened security measures were lifted or became a normal part of doing business. The purpose of the false coding practice was to avoid paying penalties for late deliveries. FedEx ultimately settled the *qui tam* lawsuit, agreeing to pay the U.S. $8 million. As a result of the settlement, the relator received $1.44 million of the government's recovery.[4]

Fraud after Hurricane Katrina

In 2007, a former Jacquet Construction Services (JCS) employee filed a *qui tam* action against her former employer, alleging FCA violations arising from a government contract for maintenance and deactivation of manufactured homes and trailers used by the U.S. Federal Emergency Management Agency (FEMA) in response to Hurricane Katrina. *United States ex rel. Jacquet Construction Services, LLC, et al.*, No. 2:07-cv-03584 (E.D. La.). Specifically, the relator alleged that JCS defrauded the government by submitting invoices for work that it knew had not been performed. In 2011, the government intervened, and in 2012, the parties settled the FCA lawsuit for an undisclosed sum.

[2] Congressional Research Service, *Special Inspector General for Pandemic Recovery: Responsibilities, Authority, and Appointment,* dated April 13, 2020, available at https://crsreports.congress.gov/product/pdf/IN/IN11328

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

[4] https://oig.justice.gov/reports/press/2011/2011_05_03.pdf

TARP fraud after the financial crisis of 2007-08

In 2015, the U.S. sued the estate of the former owner and president of One Financial Corporation and its subsidiary to recover Troubled Asset Relief Program (TARP) funds obtained by Layton Stuart under false pretenses and used for improper purposes in violation of the FCA. *United States v. Estate of Layton P. Stuart, et al.,* No. 1:15-cv-01044-RDM (D.D.C.). During the course of a two-year investigation, the government discovered that Stuart made false statements about the bank's financial condition and about the intended use of the TARP funds. Specifically, Stuart used the TARP funds to conceal a long-running fraud scheme by Stuart and other executives and directors that included the diversion of bank funds for personal use. Ultimately, the case settled resulting in the recovery of $4 million by the U.S.[5]

How to avoid opportunistic *qui tam* actions and FCA liability in the COVID-19 era

For the foreseeable future, conditions will be ripe for a new wave of *qui tam* actions arising from the alleged misappropriation of COVID-19 relief funds. With trillions of dollars in aid up for grabs, and organizations across all sectors of the economy struggling to survive, everyone is hoping to receive a share of that money.

But as history shows, there are those who see this as an opportunity to take advantage of the system. For example, a disgruntled former employee could file a meritless *qui tam* complaint in the hopes of collecting a portion of a sizeable settlement. As another example, medical providers who obtain patient information for COVID-19 testing and then use that information to fraudulently bill for other tests and procedures would violate the FCA.

Accordingly, company management must be mindful of the need to maintain the same levels — and, perhaps, increased levels — of internal controls and oversight when applying for relief aid and entering into contracts with the federal government. Failure to do so exposes the company to serious consequences should second guessing take hold.

Intense scrutiny of the use of COVID-19 relief funds and an uptick in FCA enforcement is likely in the months and years to come. Although it may be tempting for health care providers and businesses to relax internal oversight measures due to extraordinary and urgent financial needs, recipients of COVID-19 relief funds must remain vigilant and meticulous in their documentation and communication concerning the legitimate use of funds.

Seven steps to mitigate your FCA litigation risks

Any business or entity that financially benefits from the CARES Act and/or any other government-backed disaster relief funding should consider the following steps to reduce the prospect of future FCA litigation:

1. Establish a central documentation repository

To the extent possible, recipients should keep all documents and correspondence related to COVID-19 relief funds in one place. This should include applications, approvals, authorizations, waivers, guidance, audits, and internal and external communications regarding the use of relief funds. Maintaining a central repository helps ensure that key documents (*e.g.*, correspondence with the government or compliance with the advice of counsel) can be easily located if the propriety of the company's conduct is questioned years later.

2. Stay on top of changing governmental requirements

Ask for clarification in writing when the requirements are unclear, and comply with all governmental requirements concerning both eligibility to receive funds and the use of funds. Additionally, companies should carefully review program requirements (*e.g.*, statutes, regulations, FAQs, guidance documents, contracts) to ensure that they are eligible for funds, and to understand any certifications that they are making.

3. Document, document, document

In order to establish liability under the FCA, the government must prove that a defendant knowingly broke the law. In the rush to secure needed aid, it is imperative that businesses memorialize any clarification, modification or waiver of the CARES Act requirements received from the government.

[5] https://www.justice.gov/opa/pr/united-states-settles-false-claims-act-action-against-estate-and-trusts-layton-p-stuart-4

Likewise, it is critical to document all internal decision-making rationales and steps taken to comply with government requirements in case those decisions are questioned in the future. Memories will fade, and the failure to properly and comprehensively document will make it more difficult to credibly argue that a company acted in good faith when subjected to later scrutiny. Moreover, if a company informs the government, in writing, of its understanding of (vague) guidance and its reliance on such guidance in using relief aid in a particular way, it is more difficult for the government to prove that it was defrauded.

4. Apply standard auditing procedures to COVID-19 relief funds

Again, documentation is key. Take appropriate accounting steps to establish that all federal funds were deployed for approved purposes. Companies should also consider incorporating measures relating to COVID-19 grants into any formal compliance programs already in place.

5. Take internal whistleblower complaints seriously

Internal whistleblowers are management's first line of defense. Listen to them, and take appropriate steps to determine whether the concern raised has merit. To the extent possible, management should tell the whistleblower what it determined and why. History shows that internal whistleblowers who are ignored or feel slighted are prime candidates to become *qui tam* relators. Never retaliate against internal whistleblowers, as it further incentivizes whistleblowers to take legal action and can result in additional liability for the organization.

6. Seek advice of counsel

Sound advice from an attorney with regulatory experience in the relevant sector, such as health care or government contracting and lending, is irreplaceable. Documentation of legal advice can provide another line of defense in the event a company is second-guessed or accused of fraud.

7. Uphold safeguards

Recipients of COVID-19 relief funds should revisit systems and safeguards already in place and determine whether measures need to be enhanced or implemented with an eye towards defeating allegations of fraud or misuse of government funds in violation of the FCA.

Take advantage of aid if you qualify, but manage your risk

In the heat of the COVID-19 pandemic, federal relief is available for businesses and organizations in need to use for approved purposes. Given the essential nature of certain products or services, other companies may be able to grow and flourish — legitimately — by ramping up production and providing needed resources in these trying times. At the same time, if history is any predictor, recipients of federal aid should expect at least some of their decisions to be questioned down the road. This should not deter any organization from claiming and using aid to which it is entitled. Taking measures like those discussed above will help best position any organization should enhanced scrutiny come.