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The Underbelly of the CARES Act: Certifications and False Claims Act Risks

By Renee Howard, Matthew D. Diggs, and Robert G. Homchick*

When the dust settles, and a sense of normalcy returns, robust enforcement will follow any misrepresentations, lies, or half-truths related to grants of CARES Act funds. The authors of this article discuss potential enforcement actions and offer best practices for grant recipients.

The Coronavirus Aid, Relief, and Economic Security ("CARES") Act made available an initial $2.2 trillion in government funds to mitigate the economic effects of COVID-19. Government agencies have been immediately tasked with quickly responding to a flood of funding requests. During the initial frenzy, it is prudent to remember that government enforcement always has the benefit of hindsight and fund recipients should anticipate exacting scrutiny of their compliance with CARES program funding requirements.

When the dust settles, and a sense of normalcy returns, robust enforcement will follow any misrepresentations, lies, or half-truths related to grants of CARES Act funds. In the wake of financial crises, the Department of Justice ("DOJ") historically has been aggressive in pursuing what it perceives to be abuse of the government's largess.[1] We should anticipate that DOJ's post COVID-19 enforcement will follow a similar pattern and rely in large measure on the federal False Claims Act.

FALSE CLAIMS ACT BACKGROUND

The federal False Claims Act ("FCA"),[2] creates civil liability for any person who knowingly defrauds a federal program. Originally enacted by Congress in 1863 to address corruption and fraudulent claims submitted to the Union Army during the Civil War, the FCA is sometimes known as the "Lincoln Law."

An FCA case can arise in any situation involving a federal program or grant. FCA claims are common in the healthcare industry (arising from the

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[1] In the wake of the 2008 financial crisis, the Office of the Special Inspector General for the Troubled Asset Relief Program ("SIGTARP") recovered over $11,000,000,000 in civil penalties and referred criminal charges against over 430 individuals.

[2] 31 U.S.C. § 3729 *et seq.*

submission of claims to federal healthcare programs such as Medicare and Medicaid) and are also asserted in connection with government contracts and procurement activities. However, the increased availability of funds across a wide array of industries pursuant to the CARES Act will likely expand the traditional scope of FCA targeted industries.

At its core, the FCA prohibits knowingly presenting or causing to be presented a false claim for payment of government funds, or knowingly making or causing to be made a false statement material to a false claim.[3] The FCA imposes liability against entities and individuals who submit materially false claims for payment to the government, whether done knowingly, in reckless disregard of, or with deliberate ignorance of the truth or falsity of the claim.[4] Liability under the FCA may be significant. The statute provides for a civil penalty of up to $22,000 for each false claim and permits the government to recover treble damages.

A claim must be "false" to be actionable under the FCA. Courts have recognized two types of false claims, express and implied. An express false claim occurs when the claim is literally false (e.g., a claim for payment for services that were never provided). An implied false claim occurs when the claim itself may be literally true (e.g., the entity did in fact provide the service for which it is requesting payment), but the entity requesting payment knowingly failed to meet a regulatory requirement that is not spelled out on the claim itself. Given the broad array of laws and regulations that might affect an entity's right to payment under a federal program, "implied false certification" liability under the FCA is an ever-present risk.

Notably, however, not all failures to comply with statutory, regulatory, or contractual requirements are actionable under the FCA. The claim must involve a false representation that is material to payment. A statement is material if it has a "natural tendency" to affect the government's payment decision.[5]

The U.S. Supreme Court has clarified that the FCA's "materiality standard is demanding," and that materiality cannot be found where noncompliance is "minor or insubstantial."[6] If the government has designated a program requirement as a condition of payment, that is relevant to materiality, but not dispositive.[7] The government's prior payment activity in the context of known

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[3] 31 U.S.C. § 3729(a).

[4] 31 U.S.C. § 3729(b)(1).

[5] 31 U.S.C. § 3729(b)(4).

[6] *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S.Ct. 1989, 2003 (2016).

[7] *Id.*

noncompliance is also relevant. If the government consistently denied payment or demanded reimbursement upon discovery of noncompliance, then those requirements are likely material.[8]

On the other hand, the government's continued payment of claims in spite of its knowledge of the noncompliance is strong evidence that the regulatory requirements are not material.[9] The novelty of CARES Act funding programs will make it challenging in the short term for recipients to assess which regulatory requirements will be considered "material" for purposes of payment.

Finally, it should be noted that the FCA's whistleblower (or "*qui tam*") provisions are likely to increase enforcement risk during difficult economic times. The *qui tam* provisions permit a whistleblower to bring an FCA action on behalf of the United States and recover a bounty of up to 30 percent in the event of a settlement or judgment.[10] *Qui tam* cases are initially filed under seal while the federal government investigates the allegations and determines whether it will "intervene" and take over litigation of the case.[11] Given that many FCA whistleblowers are former employees, layoffs prompted by the financial downturn associated with COVID-19 could lead to an uptick in *qui tam* actions.

SUGGESTED BEST PRACTICES

An increase in FCA cases is a natural byproduct of an emergency economic stimulus. When the government must distribute money quickly to address a crisis, there will be those who seek to take advantage. CARES Act programs include numerous eligibility requirements and prescribe approved uses for funds. Compliance with these requirements will be scrutinized by the government as well as plaintiffs' law firms that represent whistleblowers long after the money has left the federal treasury.

Identifying those engaged in fraud takes the government time, and many individuals and entities may be investigated as part of the process. The practices

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[8] *Id.*

[9] *Id.*

[10] 31 U.S.C. § 3730(b) & (d).

[11] *See id.* § 3730(c). The government intervenes in approximately 20 percent of FCA cases filed. *See* https://www.justice.gov/opa/speech/acting-assistant-attorney-general-stuart-f-delery-speaks-american-bar-association-s-ninth. Whether or not the government ultimately intervenes, FCA investigations can be expensive and protracted ordeals. And a non-intervention decision means only that the federal government will not take over litigation of the case; the whistleblower may still elect to pursue the case on his/her own.

outlined below, if adopted, will help individuals and businesses avoid a government inquiry, and respond effectively to an investigation if one is brought.

Invest in Robust Corporate Compliance Programs

As always, a strong compliance program can mitigate risk of regulatory non-compliance. Therefore, existing compliance programs should be augmented to address regulatory requirements imposed by the CARES Act. An effective compliance program can also be an important factor in whether the federal government intervenes in an FCA case initiated by a whistleblower.

In prepared remarks delivered in January 2020 to the Advanced Forum on False Claims and Qui Tam Enforcement, Deputy Associate Attorney General Stephen Cox made clear that robust compliance programs may be considered by the Department of Justice in evaluating whether to pursue an FCA action at all.[12]

Document Compliance with Program Requirements

Funding recipients should carefully monitor and document their own compliance with CARES Act funding program requirements. This will include the certifications made to receive the funds as well as records and documentation substantiating the reimbursement of costs paid by the funds.

For example, as a condition of receiving funds to support healthcare-related expenses and lost revenue attributable to COVID-19 and support testing and treatment for uninsured patients, the healthcare provider is required to agree that it will not collect out-of-pocket payments from a COVID-19 patient that are greater than what the patient would have otherwise been required to pay if the care had been provided by an in-network provider.

This is a complex requirement to operationalize and will require extensive coordination with patient accounting to implement effectively and to document in the event of a future audit or document request.

Monitor Evolving Agency Guidance

Organizations should also monitor and preserve communications from government agencies related to fund eligibility and program requirements. New rules or sub-regulatory guidance may be implemented over time that relate to threshold eligibility for relief funding.[13]

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[12] *See* https://www.justice.gov/opa/speech/deputy-associate-attorney-general-stephen-cox-provides-keynote-remarks-2020-advanced. *See also* DOJ Manual 4-4.112 (Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters).

[13] At present, healthcare providers can review the terms and conditions for payments from

the Public Health and Social Service Emergency Fund at https://www.hhs.gov/sites/default/files/relief-fund-payment-terms-and-conditions-04092020.pdf.