

Litigation Alert

May 2020

Managing False Claims Act Risk Associated With CARES Act Funds

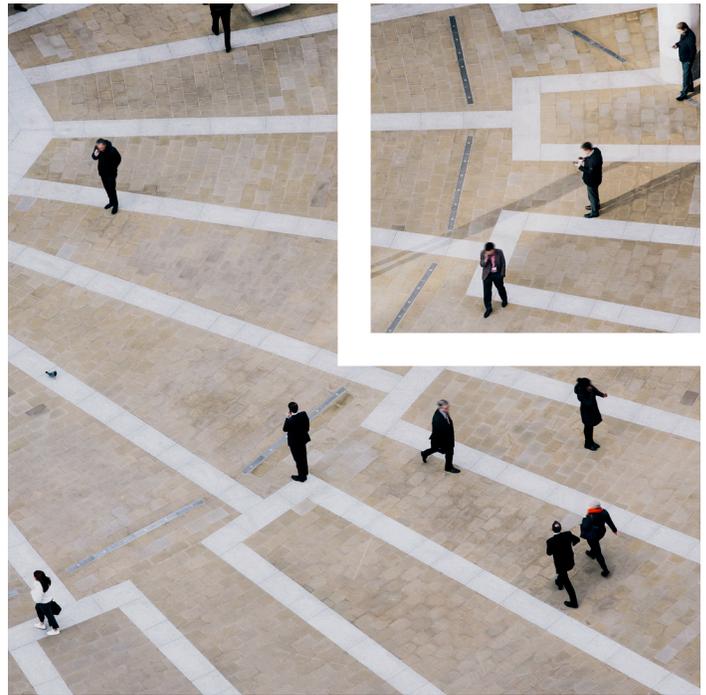
The Coronavirus Aid, Relief, and Economic Security (CARES) Act has made available trillions of dollars of federal government funds to help mitigate COVID-19's economic impact. This unprecedented influx of government funds into the economy comes with an increased risk of fraud, theft and mismanagement of those funds.

Companies in the health care and government contracting industries are already familiar with the requirements of working with the government, but the CARES Act has expanded the government's dealings to a range of industries that might not fully comprehend the risks associated with engaging the government as a business partner. Entities receiving CARES Act funds can expect their activities to be scrutinized and should plan accordingly.

When a sense of normalcy returns, in whatever form it may take, we can expect the government to increase its enforcement actions relating to CARES Act funds under the False Claims Act (FCA).

Key Takeaways

- Programs created under the CARES Act—including the Paycheck Protection Program (PPP) and Economic Injury Disaster Loan (EIDL) program—are likely to draw increased scrutiny.
- Liability for FCA violations related to federally funded programs can be extensive. Investigations and litigation of FCA claims can be time-consuming, and the federal government is permitted to recover treble damages.
- A strong compliance program can help reduce risk as well as provide evidence needed to respond to an investigation. Documentation of good-faith compliance efforts can also help mitigate penalties.



False Claims Act Background

The FCA was originally enacted by Congress in 1863 to address corruption and fraud when contractors submitted claims to the Union Army during the Civil War. The FCA creates civil liability for any person who knowingly defrauds a federal program by submitting claims for money from federally funded programs or payment for goods and services that are funded in part by the federal government. False claims can be made knowingly, in reckless disregard of or with deliberate ignorance of the truth or falsity of the claim.

Claims can be expressly or implicitly false. For example, an expressly false claim occurs when an entity overbills or bills for something that was not provided. An implicitly false claim occurs when an entity submits a claim for payment and certifies compliance with the relevant regulations when, in actuality, the entity has not complied with those regulations. Considering that the CARES Act has increased the availability of government funds across an array of industries, these implicit claims will likely pose the greatest risk for companies inexperienced in conducting business with the government.

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Not all failures to comply with applicable program requirements are actionable under the FCA. The claim must involve a false representation material to payment—that is, a statement having a “natural tendency” to impact the payment decision.

Liability under the FCA can be extensive. Penalties range from approximately \$11,000 to \$22,000 per claim, and the government is permitted to recover treble damages (triple the government’s actual damages). In 2019, the U.S. Department of Justice (DOJ) collected more than \$3 billion in FCA penalties.

The FCA also includes a whistleblower (or qui tam) provision that permits a whistleblower to bring an FCA action on behalf of the government and to recover 15% to 30% of any settlement or judgment arising from the claims. Whistleblowers can be current or former employees, contractors and even competitors, and their cases are filed under seal during the pendency of the government’s investigation to determine whether it will intervene and take over litigation of the matter. Similar to many other statutes, the FCA contains an anti-retaliation provision to protect employees and contractors that come forward with evidence of false claims.

Minimizing FCA Risks When Accepting CARES Act Funds

In the wake of the 2008 financial crisis and the implementation of the Troubled Asset Relief Program (TARP), the government saw record recoveries under the FCA through settlements and judgments. The COVID-19 pandemic will be no different, and an uptick in FCA enforcement actions related to the CARES Act can be expected in the near future.

Funding through two programs in particular is likely to draw scrutiny. The CARES Act created the PPP, which provides loans to small businesses for payroll and other fixed obligations, as well as mechanisms for loan forgiveness for small businesses that meet certain criteria. The act also created the EIDL program, which makes available grants to cover immediate operating costs.

Both the PPP and the EIDL require that applicants make certain certifications, and any misstatements or errors could spark inquiries from the government or whistleblowers. For example, the PPP imposes various constraints on applicants, which must certify compliance

with restrictions on executive pay and stock buybacks; maintenance of certain employment levels; and requirements that the funds are used for the purposes specified, among other requirements. Applicants are responsible for ensuring that all certifications are accurate in order to avoid the investigation and litigation of potential fraud claims.

The following recommendations may help businesses avoid a government inquiry or whistleblower claim, and properly respond to an investigation.

Establish a Compliance Program

Establishing and maintaining a strong compliance program is necessary to properly mitigate risk and make available the information needed to respond to a government inquiry. Existing compliance programs should be evaluated to determine whether they address the CARES Act regulatory requirements. For organizations that have never conducted business with the government, the program’s compliance requirements should be evaluated prior to applying for any federal funds. The DOJ considers an entity’s compliance program when determining whether to intervene and deciding on the type of settlement required for a particular case. The DOJ also offers compliance program guidance.

Document Compliance Efforts

In these uncertain times, it is easy to forego normal documentary procedures when using potentially company-saving funds from the federal government. Documentation of compliance implementation efforts is essential to business operations, however. Funding recipients should carefully monitor and detail compliance with all CARES Act program requirements, including certifications made to receive the funds and documentation substantiating that the certifications are authentic. This documentation will serve as a central source of information in the event of an investigation.

Additionally, with the understandably rushed implementation of the CARES Act to respond to the pandemic, ambiguities undoubtedly exist in corresponding regulations. Interpreting these regulatory ambiguities will be no easy feat, but drafting well-reasoned interpretations may prove useful in the event of an investigation and enforcement action. Courts

have held that good-faith mistakes made in interpreting the meaning of an applicable but ambiguous rule or regulation are not actionable under the FCA.

Address Compliance Deficiency Reports

The FCA provides financial incentives for whistleblowers to come forward. It is therefore vital to take whistleblower complaints seriously. Encouraging an organizational culture of compliance and correcting reported compliance deficiencies can help limit the substantial risk and expense associated with a FCA investigation and litigation.

Follow Agency Guidance

Entities applying for CARES Act funds should closely monitor and preserve all government communications relating to program eligibility and requirements. Aligning your compliance programs with these communications could help prove that the organization had a good-faith basis for believing that it met program requirements.

Considering the ever-changing legal landscape, it is important to save government communications in the event the organization is investigated or potentially conflicting governmental viewpoints emerge.

For information on the business impacts of COVID-19, please visit our [COVID-19 Resource Center](#), which we continue to update as the situation evolves. If you have questions about COVID-19's impact on your business, please reach out to your Loeb relationship partner or email us directly at COVID19@loeb.com.

Related Professional

Christopher Binns cbinns@loeb.com

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6344 REV1 05-26-2020