More Money More Whistleblowers? False Claims Act Risks in the Aftermath of the COVID-19 Pandemic

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The False Claims Act is the primary tool used by the federal government to combat fraud and recover funds fraudulently obtained through a federal program or grant. As it has in the aftermath of other national crises, the False Claims Act is expected to take on renewed importance in the aftermath of the COVID-19 pandemic as the federal government begins to scrutinize payments that were made to business under the Coronavirus Aid, Relief, and Economic Security (CARES) Act.

The CARES Act, which made over $2 trillion in relief funds available to individuals and businesses impacted by the ongoing COVID-19 pandemic, was signed into law on March 27, 2020. Key provisions of the CARES Act[1] include:

- the "Paycheck Protection Program," which allocates $349 billion in federal funding to expand the Small Business Administration's Section 7(a) loan program for eligible borrowers;
- $10 billion for emergency grants of up to $10,000 for small business to cover immediate operating costs;
- $46 million in loans, loan guarantees, and other investments for passenger air carriers, cargo air carriers, and other industries critical to national security; and
- $100 billion for "eligible health care providers" through grants and "other mechanisms."

As businesses seek emergency relief under the CARES Act, they must be mindful of the robust regulatory requirements governing the distribution and use of CARES Act funds. Businesses that do not take care to comply with the CARES Act's regulatory requirements are at great risk of finding themselves the target of a subsequent False Claims Act action by the Department of Justice.

The False Claims Act

The federal False Claims Act, 31 U.S.C. § 3729 et. seq., was originally signed into law by President Abraham Lincoln during another national crisis—the Civil War. The Act was adopted to target corruption and fraud perpetuated by companies selling substandard supplies to the Union Army during the war.

Broadly speaking, the False Claims Act imposes civil liability on any person who knowingly defrauds a federal program. More specifically, the Act prohibits individuals and businesses from: (1) knowingly presenting false or fraudulent claims for payment or approval by the government; or (2) falsely certifying to the government that they are in compliance with the material conditions for receipt of the funds.[2] "Knowingly" means that a person had actual knowledge that the claim was false, or acted in deliberate ignorance or reckless disregard of the truth or falsity of the information.[3]

The False Claims Act applies to any person or entity receiving federal funds through a federal program or grant. Those who submit false claims to the government are subject to a civil penalty of between $5,500 and $11,000 for each claim, plus three times the amount of the government's loss from the fraudulent claim. The threat of treble damages is a very powerful enforcement tool wielded by federal agencies.

Further, and notably, in addition to allowing the United States government to pursue perpetrators of fraud on its own, a key provision of the Act—the *qui tam*, or whistleblower, provision—allows anyone with knowledge of fraud against the government to bring that information forward in a *qui tam* case.[4] In fact, the Act encourages whistleblowers to come forward by authorizing private citizens who successfully bring a *qui tam* action to receive a portion of the government's recovery.[5]

False Claims Act Prosecutions in the Wake of National Crises

Previous national emergencies including Hurricane Katrina, the 2008 financial crisis, and the opioid crisis have led to vigorous post-crisis use of the False Claims Act. This is particularly true where the national crisis was accompanied by significant emergency federal spending. For example, in the aftermath of Hurricane Katrina, billions of dollars in federal funding was directed to the Gulf Coast region, resulting in an uptick in fraudulent criminal activity. In response, the United States Department of Justice established the Hurricane Katrina Task Force, which was charged with investigating and prosecuting disaster-related fraud cases. In the first two years of its existence, the Hurricane Katrina Task Force prosecuted more than 768 individuals in 41 federal judicial districts throughout the United States. The majority of the prosecutions involved fraudulent activity in connection with obtaining relief funding from the federal government.[6]

Post COVID-19 Enforcement of False Claims Under the CARES Act

The Department of Justice's pursuit of false claims actions relating to the CARES Act is expected to rival its enforcement activities in the aftermath of previous federal emergencies. In fact, the Department of Justice has already announced its intent to prioritize the detection, investigation, and prosecution of all fraudulent conduct related to the COVID-19 pandemic.[7] Further, the CARES Act itself established a number of oversight mechanisms for funds obtained under the CARES Act, including the Pandemic Response Accountability Committee, which was established to detect fraud, waste, abuse and mismanagement.

To avoid the risk of liability under the False Claims Act, businesses applying for and receiving funds under the CARES Act should, at a minimum:

1. ensure that they are eligible for the funds for which they apply;
2. ensure that all applications submitted to the federal government are complete and accurate; and
3. understand their ongoing recordkeeping and compliance obligations.[8]

If you have questions about the CARES Act, the False Claims Act, or a civil or criminal investigation related to the COVID-19 pandemic, please contact Susan Gaertner, Amy Erickson, Litigation and Dispute Resolution Practice Group Chair Matthew Jacober, or your regular Lathrop GPM contact. Our White Collar Group focuses on compliance, False Claims Act litigation, and state and federal investigations.

[1] Taken together with subsequent relief packages that have passed Congress, or are expected to become law in the coming days, about $3 trillion in aid has been provided.

[2] 31 U.S.C. § 3729(a)(1).

[3] 31 U.S.C. § 3729(b)(1).

[4] 31 U.S.C. § 3730(b).

[5] 31 U.S.C. § 3730(d).

[6] U.S. Dep't of Justice, Hurricane Katrina Task Force, Second Year Report to the Attorney General (Sept. 2007).

[7] U.S. Dep't of Justice, Memorandum from Attorney General William Barr (Mar. 16, 2020), https://www.justice.gov/ag/page/file/1258676/download.

[8] For additional information concerning the CARES Act oversight and best practices in applying for and spending CARES Act funds, *see* More Money More Problems? CARES Act Stimulus Comes with Potential for Broad Oversight, Investigations, Audits and Enforcement.