

False Claims Act Litigation Will Follow the Stimulus Package. Here's How to Avoid It.

The CARES Act is the largest stimulus package in U.S. history. Recipients of funding should ensure compliance with agency guidance.

BY JESSICA ORTIZ AND CALEB HAYES-DEATS

If the past is any guide, the government funds being used to help businesses during this downturn will surely produce False Claims Act investigations and litigation. In the five years after 2009, when Congress passed stimulus bills to respond to the financial crisis, the government and private whistleblowers filed nearly 4,000 FCA cases and recovered almost \$23 billion.

On March 27, President Donald Trump signed the Coronavirus Aid, Relief, and Economic Security Act, which provides \$2 trillion in federal funds to fight the ongoing health and economic crisis caused by COVID-19. The CARES Act is the largest economic stimulus package in U.S. history, more than twice as large as the measures passed in 2009. It provides \$349 billion in loans for small businesses, \$130 billion in relief for hospitals and medical suppliers, and \$500 billion in assistance to other businesses, states, and municipalities.

Many companies desperately need the funds the CARES Act offers, but they should carefully ensure that they meet the eligibility requirements. Any person or business that recklessly submits a material false statement in connection with a claim for funds could wind up as the target of an FCA investigation. As Oliver Wendell Holmes Jr. famously wrote, "Men must turn square corners when they deal with the Government." Here are some tips on how individuals and businesses can do so.



The U.S. Capitol building in Washington, D.C., on Thursday, December 12, 2019.

Know Program Eligibility Requirements

As the FCA's name implies, a claim must be "false" to give rise to liability. But courts have recognized two different types of falsity, "express" and "implied" falsity. Express falsity occurs when the claim for funds is literally false, such as where a business requests reimbursements for services it never provided. Implied falsity, in contrast, occurs when the claim for funds is literally true, but the person or entity requesting the funds fails to meet a broader eligibility requirement. For example, a business might make an implied false claim if it provides the services for which it seeks reimbursement, but fails to disclose that it did not have a license to do so.

The possibility of making an implied false claim means that a recipient of federal funds must know not only that the facts they communicate are true, but also that they meet any and all material program requirements. Those requirements can be extensive, spanning several different statutory and regulatory provisions. Many agencies also issue less formal guidance describing their legal interpretations and program expectations. Entities should be cautious about this less-formal guidance. In 2018, the Department of Justice issued a memorandum stating that such guidance cannot provide the basis for an FCA claim. Whether subsequent administrations apply the same approach, however, remains to be seen. Recipients of federal funding should thus continue to monitor and ensure compliance with agency guidance.

Implement Rigorous Quality Control Programs

False claims do not create liability under the FCA unless the person submitting them knows of the falsity or acts with “reckless disregard.” Knowledge and recklessness are not limited to individuals. A whole business can be reckless, and sometimes in surprising ways.

Several mortgage fraud cases brought in the last decade accused large banks of acting recklessly by failing to maintain a quality control program that could detect widespread problems. Even if individual employees believed

that mortgages met the requirements of government insurance programs, the bank could still act recklessly by operating a deficient quality control program that overlooked issues resulting from poor training, improper incentives, or third-party fraud.

To deflect any allegation of recklessness, funding recipients must monitor their own compliance with government requirements. That generally requires them to operate robust quality control programs that can detect both express and implied false claims. Businesses that regularly screen for problems and quickly correct any they find will limit their FCA exposure. And they will also be well-positioned to prove their good faith in response to any government inquiry.

Monitor the Relevant Agency's Enforcement Actions

Finally, only “material” false statements can support an FCA claim. A statement is material if it has a “natural tendency” to affect the government’s payment decision. Materiality depends on a number of factors, but two considerations are particularly relevant. First, has the government identified a program requirement as a condition of payment? Second, when an agency has uncovered past misstatements about compliance with a particular requirement, how did it react? If the government consistently refused payment or demanded reimbursement, then misstatements about that requirement

are likely material. But if the government has always paid regardless, then it may have difficulty proving materiality.

Funding recipients can analyze the materiality of their representations by monitoring agency enforcement actions. When an agency assesses penalties, debars or suspends someone, or demands repayment, the requirement it enforces is likely to be deemed material under the FCA. Businesses can thus use agency actions to prioritize the requirements on which their quality control programs should focus.

Implications

An increase in FCA cases is a natural byproduct of emergency economic stimulus. When the government must distribute money quickly to address a crisis, the unscrupulous seek to take advantage. Identifying those engaged in fraud takes the government time, and many innocent individuals and entities may be investigated as part of the process. The practices outlined above, if adopted, will help individuals and businesses respond effectively to any government inquiry.

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