False Claims Act Compliance Concerns in the Wake of COVID-19

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In response to the economic impact of the COVID-19 pandemic, the federal government has passed several new laws to provide trillions of dollars of funding to affected businesses and individuals. But this also means there are new compliance considerations for entities receiving federal funds, especially as it relates to the False Claims Act's "false certification" theory of liability.

The federal government has emphasized that it will be cracking down on fraud during the COVID-19 pandemic. For example, on March 16, 2020, the U.S. Attorney General William Barr issued a memorandum directing all U.S. Attorneys to "prioritize the detection, investigation, and prosecution of all criminal conduct related to the current pandemic." In a follow-up memorandum, Deputy Attorney General Jeffrey Rosen further directed each U.S. Attorney to appoint a Coronavirus Fraud Coordinator to serve as the legal counsel for the federal judicial district on matters relating to COVID-19, direct the prosecution of COVID-19-related crimes, and conduct outreach and awareness. And on March 20, 2020, Attorney General Barr issued a press release urging the public to report suspected fraud schemes related to COVID-19, including providers "fraudulently bill[ing]" for tests and procedures.

One statute that is likely to be implicated by the government's increased enforcement efforts is the False Claims Act, 31 U.S.C. §§ 3729 *et seq*. ("FCA"). The FCA imposes liability for knowingly presenting a false or fraudulent claim or making a false record or statement material to a false or fraudulent claim. A typical FCA case may involve "an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided." *United States v. Sci. Apps. Int'l Corp.*, 626 F.3d 1257, 1266 (D.C. Cir. 2010). In the wake of the COVID-19 pandemic, we may see an increase in cases dealing with common FCA issues such as false or misleading statements made in connection with marketing drugs or devices, improper coding or billing for testing or treatments of different types or amounts than those actually provided, and billing for testing or treatments that are not medically necessary.

A defendant can also be liable under the FCA for falsely certifying compliance with a federal statute or regulation or a prescribed contractual term. *Universal Health Servs., Inc. v. United States ex rel. Escobar,* 136 S. Ct. 1989, 2001 (2016). A false certification can be express or implied—that is, when a defendant "submits a claim for payment that makes specific representations about the goods or services provided, but knowingly fails to disclose the defendant's noncompliance with a statutory, regulatory or contractual requirement." *Id*. at 1995.

This "false certification" theory of FCA liability may be particularly relevant to entities accepting federal funds under the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), which contains several relief programs conditioned on certifying compliance with specific eligibility requirements.

For example, the Centers for Medicare & Medicaid Services is currently distributing up to $100 billion provided by the CARES Act to healthcare providers on the front lines of the COVID-19 response. But to be eligible for these payments, a healthcare provider must certify that it: (i) provides or provided after January 31, 2020 diagnosis, testing, or care for individuals with possible or actual cases of COVID-19; (ii) billed Medicare in 2019; (iii) is not currently excluded from participation in Medicare, Medicaid, and other federal health care programs; (iv) will only use the funds to prevent, prepare for, and respond to coronavirus and to serve as reimbursement for healthcare-related expenses or lost revenues attributable to coronavirus; and (v) will not use the funds to reimburse expenses or losses that have been or will be reimbursed from other sources.

In addition, the CARES Act established the Paycheck Protection Program, which provides $349 billion for low-interest, forgivable loans to small businesses. As part of the loan application, an applicant must certify that, among other things: (i) it is eligible to receive a loan under the program (i.e., it is an independent contractor, eligible self-employed individual, sole proprietor, or a small business as defined by Small Business Administration regulations); (ii) current economic uncertainty makes the loan necessary to support its ongoing operations; and (iii) the funds will be used to retain workers and maintain payroll or to make mortgage, lease, and utility payments. Notably, the application explicitly states that knowingly making a false statement to obtain a loan or knowingly using loan funds for unauthorized purposes is punishable by law.

The federal government will be carefully scrutinizing applications for funds during the COVID-19 pandemic. Importantly, the Second Circuit Court of Appeals recently confirmed that loan applications submitted to federal reserve banks during the 2008 financial crisis constituted "claims" for FCA purposes and that false certifications in those applications could lead to FCA liability. *See United States ex rel. Kraus v. Wells Fargo & Co.*, 943 F.3d 588, 601–06 (2d Cir. 2019). False certifications in applications for funding under the CARES Act could likewise lead to FCA liability.

The FCA has a scienter requirement, however, which forces plaintiffs to show that a defendant "knowingly" submitted a false or fraudulent claim. 31 U.S.C. § 3729(a)(1). To act "knowingly," a defendant must have acted with "actual knowledge of the information" or in "deliberate ignorance" or "reckless disregard" of the "truth or falsity of the information." 31 U.S.C. § 3729(b)(1). If a fund recipient's conduct is based on a reasonable interpretation of an ambiguous requirement in the absence of official government guidance, such conduct will not satisfy the FCA scienter requirement. As a result, corporate counsel and compliance officers can mitigate risk of FCA liability by actively reviewing all program rules, monitoring official government guidance, and developing a reasonable rationale for their interpretation of any ambiguous funding requirements.

Other best practices to mitigate FCA liability include:

- Tracking and understanding legislation enacted in response to the COVID-19 pandemic that may impose obligations on you or your industry;
- Documenting your compliance with new regulations and legislation and the bases of any required certifications;
- Documenting all communications to and from the government and its agents regarding compliance; and
- Implementing and evaluating a comprehensive compliance program, which includes specific policies, procedures, and training for corporate counsel and compliance officers regarding

FCA compliance, as well as an effective reporting system in place to discover and respond to potential compliance issues.

If you have questions about False Claims Act liability or compliance, please contact a member of our Government Enforcement and Litigation Practice Group below. You can also review our COVID-19 Resources page for more information.

See Also: Bridging the Gap - An Overview of SBA Loans Under the Paycheck Protection Program