

Robust Compliance Plans Can Limit PPP False Claims Act Liability

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The health-care and defense industries are very familiar with the False Claims Act and whistleblower lawsuits, but other industries may not be, and they need to understand the liability risks involved if they receive government funds under the Paycheck Protection Program during the Covid-19 pandemic.

Writing for Bloomberg Law, Andrew Dunlap and Nick Klenow offer pointers for businesses, including implementing a robust compliance plan, adopting reasonable interpretations of rules, and conducting fast internal investigations of whistleblower complaints.

The PPP allows small businesses, who may not be typical recipients of government funding and thus not usual FCA targets, to apply for and receive government loans, which may be forgiven.

These businesses could violate the FCA by falsely certifying that PPP loans were “necessary” because of “[c]urrent economic uncertainty.” (U.S. Small Bus. Admin., [Paycheck Protection Program Borrower Application Form](#) at 2 (Revised June 24, 2020)). This could turn what is intended to be a source of assistance into a significant source of liability.

Entities receiving Covid-related funds can take four steps to limit their FCA exposure.

Implement Robust Compliance Programs

Entities that receive government funding should implement compliance programs designed to prevent and identify fraud claims. They should be tailored to the aspects of their operations most likely to lead to FCA liability, like those related to billing, pricing, appropriation of funds, or product substitution.

PPP recipients need to monitor fund use: PPP recipients must certify that they will use the funds to “maintain payroll or make mortgage interest payments, lease payments, and utility payments.” They also must certify that they “ha[ve] not and will not receive another loan under the [PPP].” Fraudulent misrepresentations related to either such certification could lead to FCA liability.

Enacting compliance programs early could not only deter fraudulent conduct but might also provide a defense if FCA claims are later filed. The FCA requires that the defendant made a material misrepresentation “knowingly,” defined to include with “reckless disregard of the truth or falsity of the information.” A business could use the existence of compliance programs to show that there was no such reckless disregard.

Adopt Reasonable Interpretations of Ambiguous Rules

Many recent Covid-related laws and regulations are subject to differing interpretations. PPP borrowers, for example, may be wondering what it means for a loan to be “necessary” because of “[c]urrent economic uncertainty.” (See, e.g., [U.S. Dep’t Treasury Paycheck Protection Program, FAQs at Questions 31, 43, 46 \(June 25, 2020\)](#)).

A way to limit FCA exposure is to study those rules and agency guidance and preemptively adopt reasonable interpretations of any regulation that could be ambiguous. By way of example, PPP borrowers should review the Treasury guidance regarding good faith certifications that a PPP loan is necessary. That guidance indicates that “access to adequate sources of liquidity” is a relevant factor for determining necessity, so borrowers should consider whether alternative sources exist (and at what cost) before certifying eligibility.

The FCA requires that the defendant made false claims or statements to obtain government payment “knowingly.” Although “knowingly” encompasses (1) actual knowledge, (2) deliberate ignorance, and (3) reckless disregard for the truth, the knowledge requirement typically is *not* satisfied when a defendant has adopted a “reasonable interpretation” of an ambiguous rule.

FCA liability also requires that false statements be “material.” Adopting and documenting in communications with the government a reasonable interpretation of an ambiguous statutory requirement can reduce FCA exposure: When determining materiality, courts consider whether the government continued to pay claims despite knowledge of a violation.

Accordingly, businesses should document and save their communications with the government regarding interpretations of relevant pre-conditions to payment. A contemporaneous record of the government’s knowledge can undermine after-the-fact determinations about materiality, and thus fend off FCA claims.

Conduct a Prompt, Thorough Investigation of Allegations of Fraudulent Conduct

Many FCA violations are first reported internally to the company. Too many businesses ignore these complaints or give them short shrift. FCA relators often file suit only after a company takes no action (or retaliatory action) in response to such an internal report.

Conducting prompt and thorough investigations into reports of potential FCA violations could not only prevent a relator from filing a claim but also could convince the government to forego intervention—an important factor for some courts assessing the materiality of a misrepresentation.

Consider Seeking Cooperation Credit

Finally, if a business receives a valid report of fraudulent conduct, it might be able to limit its liability by seeking [cooperation credit](#) from the government. A party cooperating with the government can see its FCA liability reduced, although “[t]he maximum credit that a defendant may earn may not exceed an amount that would result in the government receiving less than full compensation for the losses caused by the defendant’s misconduct.”

In determining the extent of cooperation credit, the government will consider: (1) the timeliness of disclosure; (2) the truthfulness of disclosure; (3) the extent of assistance; and (4) the significance of the cooperation. This may be an especially appealing path for contractors who have long-term relationships with government entities.

Read the full article in [Bloomberg Law](#).

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