CARLTON FIELDS

Five Steps to Minimize the Risk of Future FCA Investigations and Enforcement Actions Stemming From COVID-19 Stimulus Funding

CORONAVIRUS | WHITE COLLAR CRIME & GOVERNMENT INVESTIGATIONS | APRIL 30, 2020

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Following past national economic emergencies, the government and whistleblowers have initiated federal False Claims Act actions against recipients of government funding. Recent federal financial relief programs enacted in response to the COVID-19 pandemic is sure to bring more of the same. To mitigate this risk, recipients should ensure their compliance plans are current with the evolving regulations surrounding these relief dollars.

Since the enactment of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, commenters have concluded that the funds distributed pursuant to the act bring with them a significant risk of government enforcement actions. In fact, the Department of Justice has already committed to making COVID-19-related fraud a high enforcement priority, which implicates federal fraud statutes, such as the federal False Claims Act (FCA). By prioritizing compliance, however, companies can minimize their risk of future enforcement actions.

Background of the FCA

The federal FCA, 31 U.S.C. §§ 3729-3733, creates civil liability for knowingly defrauding a federal program. Generally, the FCA prohibits knowingly presenting a false claim for payment of government funds or knowingly making a false statement material to a false claim. Violations carry significant liability, including a penalty for each claim submitted and treble damages.

Enacted to address corruption during the Civil War, the FCA is no stranger to times of national crisis. FCA cases can arise out of any situation involving federal programs or grants, but most involve government contractors and the health care industry. With the expansive scope of the CARES Act, FCA investigations will likely expand after the pandemic emergency subsides. As individuals face economic challenges, the financial incentives available from the FCA's whistleblower (or "qui tam") provisions - offering awards ranging between 15% and 30% of a settlement or judgment - also tend to increase the number of FCA actions introduced.

Best Practices to Mitigate the Risk of Future FCA Actions

Due to the rapid distribution of funds under the CARES Act programs, and the myriad eligibility requirements and approved uses for funds, heightened scrutiny of the recipients of these funds is foreseeable. Accordingly, the following best practices may help avoid future FCA enforcement actions.

1. Document compliance with COVID-19 relief program requirements and accuracy of program applications and affiliated certifications.

   Funding recipients should ensure that program applications and certifications are accurate. They must also comply with the program terms and conditions, expend funds only for permissible purposes, and memorialize any interpretations of program terms. Good faith mistakes about the applicable meaning of a rule or regulation does not rise to the level of FCA liability.

2. Monitor evolving rules, regulations, and agency guidance.

   The CARES Act has already evolved since its original enactment, and agencies continue to release interpretive guidance.

Diligent review of each evolution should ensure continued compliance.

3. Augment compliance programs to address new regulatory requirements.

   A documented, robust compliance program counters allegations that regulatory error stemmed from recklessness or deliberate indifference.

4. Follow whistleblower best practices.

   Maintain an adequate internal reporting system adapted to the company's COVID-19 operational circumstances and promptly investigate reports of compliance shortcomings. Implement and communicate strong anti-retaliation policies.

5. Review insurance coverage regarding government investigations and enforcement actions.

   D&O and umbrella policies may cover the defense expenses related to FCA investigations and enforcement actions. Policies may also cover the payout to the government for any fraud finding or settlement.