

Second Round of Pandemic Relief Revives Specter of False Claims Act Liabilities for Businesses

As a result of the COVID-19 pandemic, and the government's responses to it, many individuals and businesses that ordinarily don't do business with the government have applied for and received financial or other assistance under various government relief programs. Congress is poised to authorize another round of pandemic relief and economic stimulus packages, which will once again demand that applicants and participants comply with specific program requirements. Whether aware of it or not, those participating in pandemic-related relief programs face exposure to potentially significant liability under one of the government's most powerful civil enforcement tools, the False Claims Act (FCA).

Unprepared recipients of stimulus funds who fail to take reasonable steps to avoid FCA liability may garner the government's attention. Now is the time for businesses to take stock of how they applied for and used previous stimulus funds and, if they will be applying for or are otherwise likely to receive the next round of funds, to put in place measures that will mitigate the potential for liability.

With new relief (and new risks) on the horizon, this article highlights how the pandemic has changed the landscape of FCA liability and proposes steps businesses should take to minimize their exposure.

Unfamiliar Risks

Well before the pandemic, the FCA was a key tool in the government's toolbox to combat false claims for payment. Businesses that receive government assistance must certify (1) that they are a proper recipient of the funds and (2) that they will use (or have used) the funds appropriately. If those certifications (or any supporting statements or documentation) prove false, the FCA allows the government to prosecute the recipient of funds, seeking monetary penalties, treble damages, and collateral consequences such as suspension or debarment which may lead to the denial of other federal program benefits such as student loans.

Matthew Krueger, the United States Attorney for the Eastern District of Wisconsin, recently discussed how the pandemic has expanded the community of recipients of government funds which, in turn, expands the potential for FCA violations.

POSTED:

Dec 22, 2020

RELATED PRACTICES:

[Corporate Law](#)

<https://www.reinhartlaw.com/practices/corporate-law>

[Health Care](#)

<https://www.reinhartlaw.com/practices/health-care>

[Litigation](#)

<https://www.reinhartlaw.com/practices/litigation>

RELATED PEOPLE:

[Thomas M. Burnett](#)

<https://www.reinhartlaw.com/people/thomas-burnett>

[Daniel G. Murphy](#)

<https://www.reinhartlaw.com/people/daniel-murphy>

Pandemic relief packages have caused many businesses that previously dealt little (if at all) with the government to do so with respect to significant financial matters. And for those businesses that were already accustomed to doing business with the government, the relief programs have established a new framework (and new requirements) for dealing with the government.

In addition, the pandemic itself has created new areas for liability. For example, businesses modified their services to respond to the threats the pandemic posed. In the healthcare space, providers increasingly turned to telehealth options to safely care for their patients. The government supported the change, providing additional Medicare coverage for telehealth, increasing dollar limits and available services. But in responding to the pandemic, providers also ventured into an unfamiliar area of government assistance, increasing the prospect of FCA liability.

The Government's Focus

Krueger explained that pandemic-related enforcement efforts primarily fall into three buckets: fraud (e.g. fake treatments), hoarding and price gouging, and stimulus abuse, including FCA violations. So far, the government has focused on egregious examples of fraud and abuse. The government's first priority, of course, is to identify individuals who intentionally defraud it.

While the government will not take a one-size-fits-all approach to enforcement, any recipient of government relief that failed to comply with the program's requirements could be the target of an investigation. And depending on the egregiousness of the violation, the government may even investigate recipients of small amounts of funding. Krueger explained that as the amount at issue increases, the government has a greater obligation to ensure the funds were obtained and used properly.

Steps to Minimize Risk

To avoid scrutiny, we advise our clients to make compliance a priority, document diligence, and, if you make a mistake, address it.

1. **Make Compliance a Priority.** As businesses accept stimulus money, they must take reasonable steps to navigate that process. Each application for funding or certification of compliance with programs that provide funding, contains many declarations and typically require significant supporting documentation. And this paperwork doesn't exist in a vacuum, employees' actions impact the validity of the statements and documentation. Given the

complexity and importance of this process, a robust compliance program is key to making sure steps aren't omitted and are adequately addressed.

- 2. Do Your Diligence and Document It.** It is crucial that businesses applying for and participating in any COVID-19 relief program take the appropriate steps to confirm they comply with all program requirements and are actually eligible to participate in the program and receive government assistance. It is also equally critical that you make a record of those efforts and document your compliance, to protect yourself in any future investigation or audit. Krueger put it another way: put yourself in the shoes of an investigator. Assemble all relevant documentation contemporaneous to the request for funding or payment. Dedicate adequate resources to ensuring that the internal documentation is consistent with statements made outside the company, including those to the government. Prosecutors routinely subpoena third parties, insurers or lenders to evaluate a business' statements or certifications to the government. If a business identifies inconsistencies between its internal and external reporting, it should work to reconcile those inconsistencies and document that process too.
- 1. Address Mistakes.** The old adage "it's not the crime, it's the cover-up" is certainly true with respect to FCA violations. To Krueger, voluntary disclosure or, at least, a cooperative posture towards an investigation "makes an enormous difference." Not only will this approach typically shorten an investigation, it will likely impact the outcome favorably. So if a business does submit a false claim, or is concerned that it may have done so in the past, it should consult counsel about a possible voluntary disclosure to the government and other steps to mitigate liability.

An Ounce of Prevention

From our experience handling FCA matters, we know that it is much easier (for all involved) if businesses take steps to mitigate exposure at the outset of their participation in any government relief program, rather than wait to evaluate compliance until after the government (or whistleblowers) are already investigating a possible violation. Reinhart's False Claims Act team combines experienced civil litigators like [Tom Burnett](#) with former prosecutors like [Dan Murphy](#) to maximize our ability to anticipate areas of exposure and facilitate a coordinated response. Our team is ready to address any concerns you might have



regarding FCA compliance and will walk you through the steps the government will take when assessing your circumstances. And if it becomes appropriate, we can assist you in approaching the government to voluntarily disclose an issue. Please do not hesitate to contact us.

These materials provide general information which does not constitute legal or tax advice and should not be relied upon as such. Particular facts or future developments in the law may affect the topic(s) addressed within these materials. Always consult with a lawyer about your particular circumstances before acting on any information presented in these materials because it may not be applicable to you or your situation. Providing these materials to you does not create an attorney/client relationship. You should not provide confidential information to us until Reinhart agrees to represent you.