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COVID-19 Relief Spells Out Importance of False Claims Act Compliance Regimes

By Lori Pines and Konrad Cailteux*

To combat the economic fallout caused by the COVID-19 pandemic, the U.S. government has enacted a series of statutes and issued agency guidance to make government funds available to businesses and individuals. The Coronavirus Aid, Relief, and Economic Security Act (the CARES Act), [enacted into law on March 27, 2020](#), offered funds to businesses affected by the COVID-19 pandemic through the Paycheck Protection Program (PPP), [a program that covers costs such as payroll, mortgages, rent, and utilities](#). On December 27, 2020, the PPP was updated in the Coronavirus Response and Relief Supplemental Appropriations Act of 2021 (the CRRSAA) as part of a [government appropriations bill](#). Among other updates, the CRRSAA excluded PPP funds from gross income for tax purposes, and clarified that businesses not existing prior to February 15, 2020 are ineligible to receive PPP loans. Most recently, on March 11, 2021, [the American Rescue Plan Act \(the ARPA\)](#) was signed into law. The ARPA introduced several changes to existing COVID-19 relief programs, including allocating an additional \$7.25 billion to the PPP, extending PPP eligibility to more forms of nonprofits as well as to internet publishing organizations, and introducing a tailored program to support restaurants.

Like other government programs, the relief designed to respond to the COVID-19 pandemic requires businesses to make certifications when requesting funds or assistance from the government. For example, the [Borrower Application Form for the PPP](#) requires applicants to certify that “[c]urrent economic uncertainty makes this loan request necessary to support the [applicant’s] ongoing operations,” and that “loan proceeds will be used only for business-related purposes as specified in the loan application and consistent with the [PPP] Rules.” PPP applicants also make certain quantitative representations, [including for revenue reduction and payroll costs](#). The various COVID-19 relief programs also place restrictions on how funds can be used. The U.S. Department of the Treasury’s Small Business Administration oversees the PPP and issues [policy guidance](#) that can serve as a helpful resource for companies navigating the PPP application process.

Because the programs introduced in response to the COVID-19 pandemic will be paying out [billions of dollars](#) to businesses certifying their eligibility to receive funding, the government will be closely scrutinizing those certifications and just how businesses are using those government funds.

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Indeed, through the CARES Act, Congress created the [Pandemic Response Accountability Committee \(PRAC\)](#) and the [Special Inspector General for Pandemic Recovery \(SIGPR\)](#), both of which have oversight over funds disbursed in response to the COVID-19 pandemic. Both PRAC and SIGPR expressly announced that they aim to ensure that funding is used in permitted ways by combatting “fraud, waste, and abuse.” And, the [DOJ has publicly announced](#) that the government plans to investigate and pursue any fraud or misuse of funds in connection with COVID-19 related programs going forward. Enter the False Claims Act (FCA).

The FCA

The FCA prohibits individuals, businesses, and other entities from fraudulently transacting business with the government, [including by submitting false claims for payment to the government](#). The DOJ regularly recovers billions of dollars under the FCA [each year](#). In fact, the government’s recovery in a single FCA case has occasionally exceeded one billion dollars. Under the FCA, the government recovered [\\$2 billion from GlaxoSmithKline in 2012](#), and over [\\$1.2 billion from Johnson & Johnson in 2013](#).

Businesses should be aware that the FCA covers more than just situations in which someone lies to the government outright. Your company can be found liable under the FCA if it fails to comply with a requirement for receiving government funding, [even where there is no express certification of compliance](#). Businesses can even be found liable for FCA violations based on their customers’ actions. So, in light of the government’s heightened attention to how its funds are spent during the COVID-19 pandemic, it is critical that companies take the time to assess their compliance programs to minimize their risk of exposure to liability under the FCA. Indeed, [the DOJ and relators often point to weak or faulty compliance programs to argue that defendants should have known about or have ignored misconduct](#).

But even if your company has not taken PPP loans, if your company, its subsidiaries, or its customers conduct business with the government, now is still a

good time to assess your company’s compliance programs in order to protect against potential liabilities under the FCA. Businesses in the healthcare and pharmaceutical industries, computer and information technology providers, higher education institutions, and defense contractors should be especially vigilant in implementing best practices to minimize litigation risk because they frequently submit claims to the government and have been recent targets of FCA litigation.

Reviewing Your Company’s Compliance Program

In building an effective compliance program, there are several fundamental components that your company should consider putting in place, including:

- A widely available and up-to-date compliance manual;
- A lead compliance officer in senior management who is engaged in monitoring your company’s compliance program;
- Consistent messaging from management to employees on the importance of compliance;
- An employee hotline to report violations;
- Consistent follow-up on internal reports and violations reported through your company’s hotline;
- Regular training regarding the company’s compliance policies where attendance is verified and sessions are recorded for later viewing;
- A strong anti-retaliation policy for whistleblowers;
- Internal audits of the business; and
- Requirements and practices to ensure that business partners/acquisition targets follow the same compliance standards as the company. When dealing with acquisition targets/business partners, a company with an effective compliance program considers:

- Whether the target/business partner does business with the government;
- The terms of the target's/business partner's government contracts;
- Whether the target's/business partner's government contracts require compliance with statutes and regulations, such as the Anti-Kickback Act and the Truth in Negotiations Act;
- Any certifications and representations the target/business partner made to the government;
- Whether the target/business partner has an FCA compliance program; and
- Asking for documents/representations pertaining to the above topics during the due diligence or contracting process.

If your company's compliance program does not include any of the above components, they should consider incorporating them into the compliance program. In addition, companies should make every effort to ensure that all employees, including executives, are completing the required trainings. It may also be particularly helpful to conduct refresher trainings if your company is receiving funding from any of the COVID-19 relief programs.

What the Government Will be Looking At

[The DOJ has given specific guidance to prosecutors on how to assess whether a corporate compliance program is effective](#), and a company should keep this guidance in mind as it reviews its compliance program. In reviewing the effectiveness of your company's compliance program, the more questions below to which you can answer "yes," the lower your company's litigation risks should be:

- Does your company conduct risk assessments to determine what areas of the business raise compliance risks?
- Does your company's compliance program devote appropriate attention to high-risk areas for misconduct, rather than focusing disproportionately on low-risk areas?
- Does your company make specific changes to its compliance program in response to instances of misconduct to reduce the risk that misconduct will occur in the future?
- Does your company update its compliance policies to reflect changes to the legal and regulatory landscape?
- Are your company's policies widely available to employees and business partners/acquisition targets in a searchable format?
- Has guidance been provided to those who have approval authority or responsibility over certifications?
- Does your company offer training tailored to employees who work in areas of the business where misconduct has occurred, or is likely to occur?
- Are trainings delivered in the appropriate language for employees?
- Do employees have the opportunity to ask questions during trainings?
- Does your company evaluate the effectiveness of its trainings?
- Does your company have an anonymous reporting mechanism?
- Does your company ensure that tips are investigated in a timely manner?
- Does your company test the effectiveness of its reporting mechanism?
- Does your company take action when a business partner/acquisition target is found not to adhere to your company's compliance standards, such as by suspending business with the business partner/acquisition target?
- Do managers encourage compliance through modeling ethical behavior?
- Is compliance expertise available on the board of directors?

- Is your company's compliance officer autonomous from management, through direct access to the board of directors or the board's audit committee?
- Does your company have in place a disciplinary system that incentivizes compliance and discourages misconduct?
- Does your company frequently review the effectiveness of its overall compliance program to ensure that it is functioning as successfully as possible?

Self-Disclosure

If your company discovers a potential FCA violation, it should contact outside counsel immediately. Disclosing all information regarding the violation to the government promptly (within 30 days) and cooperating with the government investigation could reduce your company's potential damages by approximately thirty percent. To self-disclose, your company must:

- Investigate the conduct quickly and thoroughly.
- Terminate and address misconduct.
- Disclose the conduct to the relevant agency or U.S. Attorney's Office.

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