

## **Guard Against False Claims as Massive Government Spending Rolls Out to Combat COVID-19**

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Federal and state governments are ready to roll out over one trillion dollars in funding in response to the novel coronavirus (COVID-19) pandemic. As past is often prologue, we expect this new round of massive government spending to someday be subjected to strict government oversight, targeted audits and investigations, and whistleblowers all searching for potential fraud, waste and abuse. Economic downturns and the unfortunate necessity of layoffs may also lead to an increased risk of whistleblower claims by former employees. Flooding the healthcare industry and other negatively impacted industry streams with hundreds of billions in aid will no doubt prove too tempting for the ever-present fraudsters in society who are always looking to take advantage. As we have learned from past crises, however, when government enforcement eventually gets around to casting its False Claims Act (FCA) nets far and wide in search of potential fraud and abuse, many unwary businesses may be ensnared along with the usual fraudsters because of their sloppy or reckless practices. Deficient practices today could trigger an FCA investigation or enforcement action tomorrow along with all of its draconian treble damages and penalties. This article details the risks businesses face under the FCA when responding to COVID-19, and provides guidance on how to guard against them now.

### **Aggressive FCA Enforcement After Times of Crisis**

The FCA is one of the government's strongest tools for combatting fraud against the government. The FCA makes it unlawful for a person to knowingly: (1) present or cause to be presented to the government a false or fraudulent claim for payment, or (2) make or use a false record or statement that is material to a claim for payment.<sup>[1]</sup> A person acts "knowingly" under the FCA if he or she acts with "actual knowledge, deliberate ignorance or reckless disregard of the truth or falsity of information."<sup>[2]</sup> Mistakes and ordinary negligence, however, are not actionable.<sup>[3]</sup> The FCA allows the government or private whistleblowers acting as representatives of the government ("relators") to seek treble damages and severe financial penalties against persons or businesses submitting false claims to the government. Most states have their own versions of the FCA as well to root out false claims involving state and local government funding.

Historically, national and regional crises and the government monetary relief that followed preceded spikes in FCA enforcement actions against those that were perceived as taking unlawful advantage of government spending. After Hurricane Katrina hit in 2005, the government and whistleblowers

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brought numerous FCA claims against government contractors for defrauding the government of disaster relief funds. For example, whistleblowers successfully brought FCA claims against large insurance companies for allegedly manipulating insurance claims to shift liability to the government. The 2008 Financial Crisis and the financial stimulus that followed, including the Troubled Asset Relief Program (TARP), led to another round of intense and widespread FCA enforcement. A pair of whistleblowers have pursued FCA claims against one of the nation's largest financial institutions from 2011 until today, alleging that the institution misrepresented its financial condition to receive bailout funds from Federal Reserve Banks. Many other financial institutions have paid tens of billions of dollars to settle claims—including FCA claims—related to their alleged improper acts leading up to the 2008 Financial Crisis. The COVID-19 pandemic and its corresponding massive financial relief funding will likely be a precursor to later government investigations and result in a similar spike in FCA enforcement.

## **Massive Government Spending to Combat COVID-19**

The federal government has already approved an initial tranch of multiple billions of dollars in funding to fight COVID-19. On March 6, 2020, President Trump signed a spending bill approving \$8.3 billion to be used in part to develop treatments for the disease, such as vaccines, and purchase medical supplies.<sup>[4]</sup> President Trump later announced a state of emergency on March 13, 2020, authorizing him to use up to \$50 billion to combat the disease.<sup>[5]</sup> President Trump also signed a bill on March 18, 2020 releasing billions of dollars to help businesses provide paid leave benefits, bolster unemployment benefits and provide free diagnostic testing.<sup>[6]</sup> In addition, the Trump Administration is currently considering \$1 trillion in economic stimulus for businesses and households negatively impacted by the recent economic downturn.<sup>[7]</sup> Many states also plan to release their own high-dollar spending packages to fight COVID-19.

This latest round of government spending in response to a national crisis creates a new set of potential risks of FCA liability for all entities receiving government funding. Businesses must guard against and remain vigilant of FCA risks in their capacity as employers and recipients of government funding, aid, grants, and stimulus packages.

## **Potential FCA Pitfalls When Responding to COVID-19**

There are a number of potential pitfalls to avoid when receiving government funds in response to COVID-19. Based on prior FCA enforcement actions, we highlight a few here:

### **1. Submitting False Billing to Medicare and Medicaid When Treating Patients**

The healthcare industry is one of the most intensely regulated industries in the country, facing statutory and regulatory restrictions from federal, state and local governments. At the same time, the healthcare industry is rife with fraud, with the U.S. Government Accountability Office (GAO) estimating Medicare fraud to amount to tens of billions of dollars.<sup>[8]</sup> Healthcare businesses are frequent targets of FCA enforcement, with the Department of Justice collecting \$2.6 billion in FCA settlements in fiscal year 2019.<sup>[9]</sup> Businesses in the healthcare industry should be especially vigilant about submitting potential false claims to the government when responding to COVID-19.

For example, the common trap of “upcoding” Medicare and Medicaid bills applies to providers treating COVID-19 patients. At this time, the Center for Medicare and Medicaid Services (CMS) has announced two Healthcare Common Procedure Coding System (HCPCS) codes to be used when billing Medicare and Medicaid for COVID-19 diagnostic tests.<sup>[10]</sup> As with all Medicare and Medicaid

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billing, there is a risk that providers may “upcode” treatments, meaning that they will fraudulently bill for treatments different than those actually provided to claim higher reimbursements.

Healthcare providers must be aware of other potential acts that may lead to FCA liability. These may include billing for COVID-19 treatment or testing that is not medically necessary, submitting claims for treatment or testing that were not compliant with regulatory requirements, and submitting claims for treatment or testing that were not performed at all.

## **2. Selling Substandard or Faulty Treatment and Equipment to the Government**

The government has devoted funds towards developing treatments for COVID-19, including vaccines. Given the rush to develop a vaccine, some businesses may attempt to sell untested or unapproved treatments for the disease. Pharmaceutical companies may attempt to sell drugs approved for other treatments as treatments for COVID-19. Hasty or reckless acts to rush products to market could be investigated one day as potential violations of the FCA.

Businesses must also be vigilant of acquiring and passing along counterfeit or substandard products flooding the market such as fake test kits. Whether a product is purchased or manufactured, misrepresenting its true character and quality to the government could very well implicate the FCA.

## **3. Making False Representations When Treating Patients**

Once potential treatments for COVID-19 start to emerge, healthcare entities may be overly aggressive in pushing various cures to market. False or misleading marketing practices can provide the bases for many types of FCA violations. Illegal kickback payments are sometimes used to rapidly get drugs and medical equipment to market. Misrepresentation to patients about the efficacy of treatments can lead to inadequate quality of care. The novelty of COVID-19 and the urgency of treatment may cause some businesses to market unauthorized or untested treatments to government-insured patients. These are just a few examples of misrepresentations potentially affecting patient quality of care that may subject businesses to FCA scrutiny.

## **4. False Claims by New or Novice Recipients of Government Funds**

National crises such as the present pandemic may be especially risky for those that rarely or never do business with the government, but may become recipients of government funding given the vast needs of the government. Because the need for government contracting work is greater than usual, typical government contractors or providers may not be able to meet government demand. This may create an environment in which some businesses will be motivated to step in to fill the gap and become new or novice government contractors. These businesses likely will be unfamiliar with the heavily regulated government contracts industry, making them more prone to noncompliance with government standards and requirements. Ongoing noncompliance akin to recklessness can be the basis for potential violations of the FCA, especially if the new or novice government contracting business is making express or implied representations that they are compliant with all applicable regulations and requirements.

## **5. Misrepresentations by Businesses or Individuals Receiving Relief Funds**

The government plans to provide monetary relief to businesses adversely affected by the recent economic downturn. As with the 2008 Financial Crisis and TARP, funding in response to COVID-19 will likely depend on recipients' representations about their financial condition and needs.

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Businesses and individuals that seek such monetary relief should exercise great care and diligence that they make accurate and correct representations. There were many businesses and individuals that were investigated and prosecuted for improper conduct involving the TARP relief funds. Similar investigations and prosecutions of the unwary could occur should they make affirmative misrepresentations or omissions that are material to the government providing relief funds in the wake of COVID-19.

## **6. Making False Certifications of Compliance With Payment and Relief Fund Requirements**

One of the largest potential pitfalls for recipients of government funds is falsely certifying compliance of products or services provided to the government. The government may condition receipt of payments or relief funding on a recipient's certified compliance with statutes, regulations, and various other contractual requirements. Making express or implied false certifications to the government may subject businesses or individuals to FCA liability.

A claim may be false under the FCA if it falsely certifies compliance with a statute, regulation, or contractual term if compliance is a prerequisite to payment and the false certification was material. FCA claims in the healthcare industry often allege false certifications of compliance with the Anti-Kickback Statute, licensure laws, and branding requirements. Government contractors may also be subject to FCA liability if they falsely certify compliance with other prerequisites of payment, including compliance with labor requirements, safety requirements, and financial requirements.

## **Guidance on Avoiding FCA Liability**

### **1. Stay Informed About Regulatory Requirements for COVID-19 Treatment**

Regulatory requirements for healthcare providers and government contractors are extremely complex. A poor or lax understanding of the regulatory framework may lead to noncompliance that could someday trigger an FCA investigation. Businesses must be well informed about complex and constantly changing regulatory requirements when submitting claims to the government to ensure that they do not cross the line and make misrepresentations. Even unintentional misrepresentations may lead to FCA investigations and prosecutions if made with "reckless disregard" of their truth or falsity.

### **2. Carefully Review and Understand All Conditions of Payment Before Submitting Claims**

All recipients of government funds must carefully review and understand the conditions of payment tied to receipt of government funds. Submitting claims while in violation of material terms and conditions of payment may lead to FCA liability under a false certification theory. Government contractors should review their contracts for terms that require compliance with statutory and regulatory requirements and ensure that they are compliant before submitting claims. Recipients of government relief funds including aid and grants must also review conditions of funding to ensure they are compliant with all relevant statutes and regulations before claiming or receiving such funds.

### **3. Train and Educate Employees About the Risks of Noncompliance**

When an employee submits false records, statements and/or claims to the government in the course of their employment, their employer may be liable under the FCA. As such, businesses should take all precautions to ensure that their employees understand the risks associated with submitting false records, statements, and claims, as well as the types of behaviors that may trigger potential liability

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under the FCA. Businesses should train and educate their employees to comply with the terms and conditions related to products and services provided to the government, including being accurate and complete with respect to all representations and materials provided to the government. They should be adequately instructed how to report potential or suspected fraud, waste and abuse to supervisors or other designated personnel such as compliance officers.

#### **4. Maintain Strong Compliance Programs**

Businesses must maintain strong compliance programs when contracting with the government. Meaningful compliance programs will operate independently from the day to day business demands. They will provide periodic auditing and monitoring to ensure compliance with all material regulations and requirements for receiving government payments and funding.

#### **5. Prepare and Maintain Detailed Records of Government Funding Transactions**

After the current crisis begins to subside and the government has paid out hundreds of billions of dollars in the relief and economic stimulus, government investigative agents and related FCA enforcement personnel will surface to review and audit those who receive government payments and relief funds. Accordingly, during the crisis, it is imperative that businesses prepare and maintain detailed, complete and accurate records of all transactions and correspondence with the government. These measures will help businesses ensure that their claims and representations are current, accurate, and complete when they are made. They will also ensure that businesses maintain a complete audit trail to help explain and defend, if necessary, against allegations and claims of misconduct in the future.

#### **6. Have a Plan to Promptly Respond to Reports of Potential Fraud, Waste, and Abuse**

Businesses must have a plan and develop procedures to promptly respond to reports or allegations of fraud, waste, and abuse related to receipt of government funds. These procedures should allow prompt and thorough investigation of the allegations, preferably through experienced counsel in order to establish and preserve the attorney-client privilege. FCA claims are complex and difficult to navigate without experienced counsel.

### **Conclusion**

As the government continues to roll out hundreds of billions of dollars in government payments and economic stimulus, it is essential that recipients of government funding have a plan in place to ensure they comply with all applicable regulations and requirements to avoid potential FCA liability down the road.

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### **FOOTNOTES**

[1] 31 U.S.C. §§ 3729(a)(1)(A)-(B) (2009).

[2] 31 U.S.C. § 3729(b).

[3] *U.S. v. Science Applications Int'l Corp.*, 626 F.3d 1257, 653 F. Supp. 2d 87 (D.D.C. 2009).

[4] NPR. "Where That \$8.3 Billion In U.S. Coronavirus Funding Will And Won't Go," March 6,

2020. <https://www.npr.org/sections/health-shots/2020/03/06/812964894/where-that-8-3-billion-in-u-s-coronavirus-funding-will-and-wont-go>.

[5] Politico. "Trump declares national emergency in latest bid to combat coronavirus," March 13, 2020. <https://www.politico.com/news/2020/03/13/coronavirus-emergency-declaration-trump-128530>

[6] The Hill. "Trump signs coronavirus aid package with paid sick leave, free testing," March 18, 2020. <https://thehill.com/homenews/administration/488342-trump-signs-coronavirus-aid-package-with-paid-sick-leave-free-testing>.

[7] The Wall Street Journal. "U.S. Seeks to Send Checks to Americans as Part of Stimulus Package," March 17, 2020. <https://www.wsj.com/articles/trump-administration-seeking-850-billion-stimulus-package-11584448802>.

[8] U.S. Government Accountability Office. "MEDICARE: Actions Needed to Better Manage Fraud Risks," July 17, 2018. <https://www.gao.gov/products/GAO-18-660T>.

[9] Department of Justice, Office of Public Affairs. "Justice Department Recovers over \$3 Billion from False Claims Act Cases in Fiscal Year 2019," January 9, 2020. <https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019>

[10] Centers for Medicare and Medicaid Services. "CMS Develops Additional Code for Coronavirus Lab Tests," March 5, 2020. <https://www.cms.gov/newsroom/press-releases/cms-develops-additional-code-coronavirus-lab-tests>

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