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ALERT

Combatting COVID: Aggressive FCA Enforcement Tempered by the Realities of the Pandemic

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Last Friday, the U.S. Department of Justice (DOJ) pledged to "energetically use every enforcement tool available" to prevent exploitation of the coronavirus (COVID-19) crisis, promising "vigorous" enforcement with one of its most powerful tools to fight fraud: the False Claims Act (FCA). Principal Deputy Assistant Attorney General Ethan P. Davis, DOJ Civil Division's second in command, explained to the U.S. Chamber of Commerce's Institute for Legal Reform that FCA enforcement is particularly crucial given the risk for fraud inherently related to the Government's "injecting vast amounts of federal funds into the U.S. economy." However, with an eye towards helping "the economy roar back to life," the DOJ will redouble its efforts to ensure it is using its discretion to prosecute only true fraud, not unintentional regulatory foot faults.

The DOJ will use the FCA to target fraud against COVID-19 stimulus programs, prioritizing the Paycheck Protection Program (PPP). Under that program, the Small Business Administration (SBA) has issued over $500 billion in forgivable loans to over 4.5 million businesses. To receive funds and ultimately obtain loan forgiveness, borrowers must certify their eligibility and the actual use of the funds which may open borrowers to FCA liability if they submit knowingly false information. Accordingly, the DOJ Civil Division's enforcement priorities include collaborating with the SBA's Office of the Inspector General to identify potential PPP vulnerabilities and protect funds.

Similarly, the DOJ will wield its FCA hammer to combat fraud against other Coronavirus Aid, Relief, and Economic Security Act (CARES) assistance programs. This includes targeting borrowers attempting to

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circumvent the requirements of the Main Street Credit Facility (loans to small- and medium-size businesses requiring financial assistance to maintain operations that were otherwise stable pre-COVID) and the provider relief fund (loans to health care providers treating possible or actual COVID-19 cases).

Consistent with recent FCA enforcement efforts, the DOJ may also target private equity firms as these firms can facilitate fraud by providing funds. Such firms should know the preventative laws and regulations when investing in companies in the life sciences, health care, or other highly-regulated fields. This knowledge coupled with an active role in the underlying company's conduct may result in FCA liability for a private equity firm.

Aggressive at first blush, the DOJ's stance is offset by compassionate recognition of the challenging pandemic conditions. Recognizing the Supreme Court's warning in *Escobar* that the FCA "is not 'an all-purpose antifraud statute,'" and the "dizzying task" of sifting through an excess of rules, guidance, terms, and conditions is exacerbated under present conditions, Mr. Davis insisted the DOJ's Civil Division is concerned with only "actionable fraud" and emphasized the FCA's knowledge and materiality requirements. The DOJ will not pursue (1) misunderstandings about rules, certification requirements, or terms and conditions, or (2) inadvertent or immaterial paperwork mistakes. If companies are accessing CARES Act relief in good faith and complying with the rules, they "have nothing to fear from the Civil Division."

While this commitment may be true now, only time will tell if circumstances change in years to come. Between the lengthy statute of limitations under the FCA and the slow pace of government investigations, particularly when deciding whether to intervene in whistleblower suits, FCA litigation years after the fraud allegedly occurred is a real possibility.

Additionally, because private individuals can also bring actions under the FCA, there remains risk that companies who inadvertently cross the line will still have to face FCA litigation. To that point, however, Mr. Davis reiterated recent DOJ policy pronouncements about its intent to use its authority under 31 U.S.C. § 3730 (c)(2)(A) to dismiss misguided whistleblower actions.

As Mr. Davis recognized, the DOJ relies heavily on whistleblowers to bring FCA actions. Indeed, *qui tams* are responsible for about 70% of FCA recoveries since 1986. But not all *qui tams* should proceed. In January 2018, the DOJ released the Granston Memo directing attorneys to examine several factors and consider the merits of filing a (c)(2)(A) motion to dismiss when the Government declines to intervene a *qui tam*. While this may be welcome at times to defendants, the DOJ has also used this as a shield to protect pro-Government precedent. When previously confronted about the DOJ's application of the Granston Memo by staunch FCA champion Sen. Chuck Grassley, Attorney General Bill Barr had explained the "sparing[]" use of DOJ's (c)(2)(A) dismissal authority, but neglected to recognize the uptick in dismissals or mention how many relators facing a potential motion to dismiss voluntarily dropped their cases. Now, the DOJ has acknowledged the realities of the Granston Memo. In his speech, Mr. Davis recognized the DOJ has used this dismissal authority more frequently since the Granston Memo's issuance, filing about 50 motions to dismiss. Most notably, the DOJ has instructed its attorneys to consider advising relators of the *possibility* of such a dismissal to secure a voluntarily dismissal instead.

Per Mr. Davis, the DOJ will continue to use its (c)(2)(A) "authority judiciously" and COVID-related *qui tams* are no exception. The DOJ will "weed out cases" outside the U.S.'s interests or "involving regulatory overreach." Mr. Davis recognized the recent wave of agency policies to encourage re-opening per the May 19 Executive Order on Regulatory Relief to Support Economic Recovery. Specifically, the Executive Order directed agencies to consider rescinding, modifying, waiving, or exempting requirements and exercising enforcement discretion to encourage economic recovery. Mr. Davis explained if agencies indeed used this discretion and a business took good faith advantage of this regulatory flexibility, the *qui tam*'s knowledge and materiality elements would make enforcement under the FCA untenable.

Another category of COVID-related *qui tams* may involve companies' noncompliance with agency guidance about safe reopening. Noncompliance with agency guidance is not evidence of an FCA violation per the Brand Memo, later incorporated into Justice Manual § 1-20.100. But the DOJ can use *awareness* of the guidance as evidence of "the requisite scienter, notice, or knowledge of the law." Justice Manual § 1-20.201. Consistent with the Executive Order, the DOJ will consider dismissal if a company reasonably attempted to comply with agency guidance.

Finally, Mr. Davis hinted at possible forthcoming immunity. He explained HHS's recent declaration of immunity for those implementing countermeasures against COVID. Recognizing the DOJ does not want FCA liability risks to discourage companies from helping address the pandemic, Mr. Davis signaled to "[s]tay tuned for more on this front."

Given the time-sensitive nature of the unfolding pandemic, this potential immunity could come sooner than later. In the interim, businesses and individuals should continue operating in good faith and doing their best to understand the rules, guidance, and terms and conditions involved when applying for and accepting COVID-related assistance. Although the DOJ appears understanding of the current COVID-19 challenges, it is meticulously monitoring stimulus programs.

Ashlyn Roberts, a Law Clerk at Wiley, contributed to this alert.