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FIRREA: A Powerful Enforcement Tool To Combat PPP Fraud

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The U.S. Department of Justice recently announced criminal charges [1] against two men in *U.S. v. Butziger* and *U.S. v. Staveley*, for conspiracy to commit bank fraud (and other related charges) with respect to the Paycheck Protection Program.[2] The Justice Department contended that the pair conspired to acquire PPP loan funds while falsely claiming to have numerous employees at different businesses when there were no such employees at all.

The criminal prosecution is the first of its kind with respect to the PPP, and the underlying charges themselves bring into sharper focus not just the risk for criminal liability stemming from fraud committed on the PPP, but also civil liability premised upon the same underlying conduct.[3]

Indeed, while much has been written about potential civil liability for PPP applicants under the Civil War-era False Claims Act, which premises civil liability upon false or fraudulent "claims" submitted to the government, an alternative civil enforcement statute that the government has at its disposal is the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA).

FIRREA, which was enacted following the savings and loan crisis in the 1980s, imposes civil penalties if the government can prove – under a lower burden of proof than in a criminal case – violations of 14 specified criminal statutes, including bank fraud and mail/wire fraud "affecting a federally insured financial institution."[4]

By way of example, even if the Justice Department had declined to

criminally prosecute the case cited above – the Justice Department could equally seek civil enforcement based upon the bank fraud charges, seeking statutory penalties for violations up to $1 million per violation (today, $1,963,870 which includes mandated inflation adjustments) or up to $5 million for a continuing violation.

Alternatively, the government could invoke another civil penalty assessment under FIRREA, which stipulates that "[i]f any person derives pecuniary gain from the violation, or if the violation results in pecuniary loss to a person other than the violator, the amount of the civil penalty may exceed [the standard penalty amounts] but may not exceed the amount of such gain or loss."

While courts have not uniformly clarified how this latter penalty provision should be applied, such as whether the "pecuniary gain or loss" should be calculated as "gross" gains/losses or "net" gains/losses, the statute has led to billions of dollars of FIRREA recoveries over the past several years.

FIRREA Cases Following the 2008 Financial Crisis

While FIRREA's civil enforcement penalty provision was rarely used by the Justice Department in the two decades following its enactment, FIRREA was dusted off by the Justice Department in the wake of the 2008 financial crisis to levy billions in civil penalties on fraud schemes tied to residential mortgage-backed securities cases.

Some of these lengthy cases were resolved in recent years. In 2018, the Justice Department recovered over $8 billion under FIRREA, and in 2019, the FIRREA recovery amount still exceeded $1.5 billion. For context, last year, the DOJ touted $3 billion in False Claims Act recoveries in fiscal yea 2019.[5]

These prominent recoveries have sent a signal that FIRREA enforcement will remain a significant civil enforcement remedy for the government. Indeed, beyond mortgage fraud cases, in recent years, FIRREA probes have extended to investigations involving subprime auto lending and student loan programs.

And now, with the PPP providing federal funding through a variety of financial institutions, FIRREA will certainly be looked at closely by the Justice Department when contemplating enforcement measures.

This is particularly true because much of the guidance issued by the U.S. Small Business Administration and the U.S. Department of the Treasury has repeatedly emphasized the borrowers' responsibilities vis-à-vis lender financial institutions, ostensibly to ensure that lender financial institutions expeditiously process applications to get the money into the hands of the applicants as quickly as practicable. Additionally, some financial institutions have also been identified as exhibiting problems regarding the disbursement of PPP loans to borrowers.[6]

What You Should Be Aware of About FIRREA Enforcement

Whistleblower Provisions

Like the False Claims Act, FIRREA (or more technically, the FIRREA-companion Financial Institutions Anti-Fraud Enforcement Act), allows whistleblowers to report potential FIRREA violations to the attorney general in a confidential declaration, which the DOJ may then investigate to determine whether to pursue FIRREA charges.[7]

The award for FIRREA whistleblowers is statutorily capped at $1.6 million, and the procedures are dissimilar from the FCA, among other ways, insofar as in the event of a government declination, the whistleblower may only proceed if the government affirmatively contracts out to the whistleblower to bring the lawsuit.

Regardless of the procedural dissimilarities with the FCA, because there is a whistleblower incentive for FIRREA cases, it is important to be mindful of the risk of whistleblower complaints being filed with the DOJ. Entities should therefore fortify their internal whistleblower programs — including adopting consistent training for personnel, implementing measures for appropriate reporting of misconduct, and thoroughly investigating whistleblower reports when received.

10-Year Statute of Limitations

Significantly, the statute of limitations for FIRREA civil enforcement is 10 years – consistent with the criminal wire/mail fraud statute (and generally longer than civil liability statutes).

This lengthy limitations period not only raises the prospects of lengthy investigations that can be undertaken by the government during the pandemic (and long after it ends), but also underscores the importance of sound record-keeping and disciplined compliance efforts for the long haul. There are instances,[8] for example, where government scrutiny in one aspect of a business may invariably lead to other areas of inquiry not previously contemplated.

The Monetary Penalties Can Be Steep and the Availability of Statutory Penalties May Inform Government Enforcement Strategies

Unlike False Claims Act damages, which are typically tied to the amount of federal dollars received by an entity, are mitigated by the return (or payback) of those federal dollars, and are subject to proof by the government, FIRREA penalties can be statutorily imposed without the government having to prove losses – and penalties can be imposed by a court merely if the government sufficiently proves liability for the underlying predicate criminal offense.

These statutory penalties can rack up. And while there might be instances where the government might reconsider pursuing an FCA case due to difficulty of establishing FCA damages, with FIRREA, because of the statutory penalties, proof of damages may not be as tall a hurdle for the government to consider when

deciding whether to press forward with a FIRREA civil enforcement case.

A Criminal Declination May Still Lead to Civil Enforcement

While an investigation related to the PPP (or another government program) may first be opened as a criminal investigation, criminal prosecutors, in their prosecutorial discretion, may ultimately decline to move forward on criminal charges if, for example, they are unable to marshal enough evidence to "prove beyond a reasonable doubt" that an offense occurred.

Under FIRREA, a criminal declination itself – even a declination to criminally pursue charges based on one of the predicate criminal offenses – does not necessarily end the inquiry.

Notwithstanding the criminal declination, civil prosecutors within the Justice Department can nonetheless press forward based on the same underlying conduct if they believe they can marshal enough evidence to prove by a "preponderance of the evidence" that a predicate FIRREA offense occurred. FIRREA therefore simply makes it easier to bring an enforcement action based upon conduct that is already actionable under the criminal code.

The Government May Still Pursue FCA and FIRREA in the Same Case

Since the 2008 financial crisis, the Justice Department has made clear that it will pursue FCA and FIRREA liability theories in the same investigation and ensuing litigation.[9] In so doing, the Justice Department has also specified that it will, in its discretion, pursue FIRREA penalties for the same underlying conduct for which FCA damages are also sought.[10] While some have criticized this approach as being prohibited under the "excessive fines" clause of the U.S. Constitution, and there is some argument that this approach conflicts with the Justice Department's recent "no piling on" memorandum, this approach still poses risks for entities and persons considering receipt of PPP funds.

Invocation of the dual civil enforcement statutes – based upon the same conduct – confers upon the Justice Department additional leverage when negotiating FCA and FIRREA resolutions. Counsel should therefore be mindful of these nuances to inform any legal risk assessment with respect to the PPP and other recent government programs.

[1] Press Release, Two Charged with Stimulus Fraud, U.S. Attorney's Office, District of Rhode Island (May 5, 2020), https://www.justice.gov/usao-ri/pr/two-charged-stimulus-fraud

[2] The PPP is the U.S. Small Business Administration program under which the federal government has injected $670 billion into the economy to assist small businesses with retaining and/or rehiring employees during the COVID-19 pandemic.

[3] Since the announcement of this first case, the Justice Department has since announced similar PPP-related fraud cases in two cases – one in the Northern District of Georgia (Press Release, Reality TV Personality Charged with Bank Fraud, U.S. Department of Justice, Office of Public Affairs (May 13, 2020) https://www.justice.gov/opa/pr/reality-tv-personality-charged-bank-fraud), and one in the Eastern District of Texas (Press Release, Engineer Charged in Texas with COVID-Relief Fraud, U.S. Department of Justice, Office of Public Affairs (May 13, 2020) https://www.justice.gov/opa/pr/engineer-charged-texas-covid-relief-fraud).

[4] 12 U.S.C. §1833a.

[5] Press Release, Justice Department Recovers over $3 Billion from False Claims Act Cases in Fiscal Year 2019, U.S. Department of Justice (Jan. 9, 2020), https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019

[6] Emily Flitter and Stacy Cowly, Banks Gave Richest Clients 'Concierge Treatment' for Pandemic Aid, *The New York Times* (April 22, 2020), https://www.nytimes.com/2020/04/22/business/sba-loans-ppp-coronavirus.html; Stephen Gandel, Wells Fargo faces government investigations into its PPP loans, *CBS News MoneyWatch* (May 6, 2020), https://www.cbsnews.com/news/wells-fargo-paycheck-protection-program-loans-faces-government-investigation/

[7] 42 U.S.C. § 4201, et seq.

[8] Press Release, Manhattan U.S. Attorney Announces Criminal Charges Against General Motors And Deferred Prosecution Agreement With $900 Million Forfeiture, U.S. Attorney's Office, Southern District of New York (Sept. 17, 2015), https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-criminal-charges-against-general-motors-and-deferred

[9] See, e.g., *United States v. Americus Mortgage Corp.* , No. 4:12-CV-2676, 2017 WL 4117347 (S.D. Tex. Sept. 14, 2017), following trial, later aff'd in 933 F.3d 468 (5th Cir. 2019).

[10] Id.

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