

PPP LOAN RECIPIENTS: AND NOW LIABILITY RISKS UNDER THE FALSE CLAIMS ACT?

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Borrowers under the Paycheck Protection Program (“PPP”), particularly those public companies who received more than \$2 million, are juggling a lot these days. Watching the ever shifting positions of the SBA with respect to eligibility, carefully applying loan proceeds, properly applying for loan forgiveness, preparing for SBA loan reviews, coordinating with existing lenders and other stakeholders, making required current and quarterly disclosures, and attending to liquidity and business continuation risks would seem too much for most mortals. Now, those who monitor and advise with respect to fraud risk warn that an emerging significant risk to PPP loan recipients is the False Claims Act (FCA) – and more particularly, being the target of a private whistleblower who initiates a qui tam suit alleging fraud in connection with a PPP loan.

In a recent two-part series, we explored [issues related to PPP loans and the FCA](#) and provided [guidance on mitigating fraud allegation risks](#). The FCA imposes civil liability on individuals and companies that defraud the federal government. In addition, many states also have their own FCA laws. The FCA provides for the recovery of the funds fraudulently obtained, damages up to triple the amount of those funds, and potentially high monetary penalties for each false claim submitted. The aggregate potential liability far exceeds the amount initially received from the government. And because this is a civil liability, the standard for proving fraud under the FCA is significantly less than under a criminal statute. The standard under the FCA is proof of “actual knowledge, deliberate ignorance or reckless disregard of the truth or falsity of information.” FCA actions can be initiated by the Department of Justice or private whistleblowers. While we expect most of these cases will be wholly without merit, responding to fraud allegations is still necessary and PPP borrowers should be prepared. Preparing now can help minimize the future costs associated with defending against FCA allegations.

The articles detail what companies can do to protect themselves against risks of a claim under the FCA in connection with PPP loans. Much of this mirrors the best practices advocated for all PPP borrowers to establish eligibility for the PPP loan in the first instance and then to document proper use of the loan proceeds, as well as the application for forgiveness. But some of the guidance is directly related to having an appropriate response plan in the event an allegation of fraud is made, either by the government or by a private whistleblower. When these matters arise, the initial

response can be critical and have lasting consequences for the life of the investigation or lawsuit. Taking the time now to be prepared may be just as important as properly documenting eligibility, use of funds, and forgiveness qualification.

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