



Federal Relief for COVID-19: Protecting Against the Increased Risk of False Claims

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Agenda

- The current economic stabilization efforts
 - Coronavirus Preparedness & Response Supp'l Appropriations Act, 2020
 - Families First Coronavirus Response Act
 - Coronavirus Aid, Relief, and Economic Security (CARES) Act
 - Paycheck Protection Program and Health Care Enhancement Act
- What's behind the massive rise in civil and criminal False Claims Act recoveries over the past decade and what does it mean with respect to the current round of stimulus spending?
- How can federal contractors and the government recognize and protect against, or at least mitigate, those risks?



Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020

Provides FY2020 supplemental appropriations for the Department of Health and Human Services (HHS), the State Department and the Small Business Administration to respond to the coronavirus outbreak:

- Developing, manufacturing, and procuring vaccines and other medical supplies
- Grants for state, local, and tribal public health agencies and organizations
- Loans for affected small businesses
- Evacuations and emergency preparedness activities at U.S. embassies and other State Department facilities
- Humanitarian assistance and support for health systems in the affected countries

The supplemental appropriations are designated as emergency spending, which is exempt from discretionary spending limits



Families First Coronavirus Response Act

The Families First Coronavirus Response Act (FFCRA or Act) requires certain employers to provide employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19:

- Requiring private health insurance plans and Medicare cover COVID-19 testing
- Expanding unemployment insurance by \$1 billion – a number immediately seen as far too low as the unemployment rates swelled – and loosened eligibility requirements
- Providing for paid sick leave at an employee's full salary, up to \$511 per day, and paid family leave at $\frac{2}{3}$ of a parent's usual salary



The Coronavirus Aid, Relief, and Economic Security (CARES) Act

- \$2.2 trillion stimulus package – record-breaking largest stimulus package in U.S. history
- Nearly triple the initial \$830 million cost of the American Recovery and Reinvestment Act of 2009 (ARRA) enacted in response to the Great Recession
- Government spending will, and has always, spurred unprecedented scrutiny of how funds are disbursed, spent and accounted



The CARES Act: Key Provisions

- Support hospitals and health care workers (\$150 billion)
- Expand unemployment benefits (receive an additional \$600 per week)
- Checks to individuals (refundable tax credits)
- Aid state and local governments (\$150 billion fund to supplement their budgets and prevent the reduction of essential services)
- Support for small businesses
- Loans to distressed industries, cities and states (\$500 billion available in loans to airlines and other large businesses severely impacted by coronavirus crisis)



The CARES Act: Section 3610

Reimburse Federal Contractors' Employee Compensation. Section 3610 of the CARES Act provides, in part, that government funds:

“may be used by such agency to modify the terms and conditions of a contract, or other agreement, without consideration, to reimburse at the minimum applicable contract billing rates not to exceed an average of 40 hours per week any paid leave, including sick leave, a contractor provides to keep its employees or subcontractors in a ready state, including to protect the life and safety of Government and contractor personnel.”

While this provision is helpful, it does contain some limitations:

- Expires on Sept. 30, 2020
- Only applies to situations where contractor (and subcontractor) employees cannot perform work due to restrictions at a site and cannot convert to telework
- Not mandatory and subject to the availability of funds



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Paycheck Protection Program and Health Care Enhancement Act

Eligible recipients:

- Any small business concern that meets SBA's size standards
- Any business, 501(c)(3) non-profit organization, 501(c)(19) veterans organization, or tribal business concern with the greater of:
 - 500 employees
 - Meets the SBA industry size standard if more than 500
- Any business with a NAICS Code that begins with 72 (Accommodations and Food Services) that has more than one physical location and employs fewer than 500 per location
- Sole proprietors, independent contractors and self-employed persons



Paycheck Protection Program and Health Care Enhancement Act

- Provides small businesses with funds to pay up to eight weeks of payroll costs including benefits. Funds can also be used to pay interest on mortgages, rent and utilities.
- Funds are provided in the form of loans that will be fully forgiven when used for payroll costs, interest on mortgages, rent and utilities (due to likely high subscription, at least 75% of the forgiven amount must have been used for payroll). Loan payments will also be deferred for six months. No collateral or personal guarantees are required. Neither the government nor lenders will charge small businesses any fees.
- Forgiveness is based on the employer maintaining or quickly rehiring employees and maintaining salary levels. Forgiveness will be reduced if full-time headcount declines, or if salaries and wages decrease.



Paycheck Protection Program and Health Care Enhancement Act

Summary of PPP Approved Lending

Loan Count	Net Dollars	Lender Count
4,885,388	\$521,483,817,756	5,461

Lender Size	Lender Count	Loan Count	Net Dollars	% of Amount
>\$50 B in Assets	34	1,639,892	\$189,773,791,634	36%
\$10 B to \$50 B in Assets	89	739,912	\$100,724,547,553	19%
<\$10 B in Assets	5,338	2,505,584	\$230,985,478,569	44%

Source: <https://home.treasury.gov/system/files/136/SBA-Paycheck-Protection-Program-Loan-Report-Round2.pdf>



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Paycheck Protection Program and Health Care Enhancement Act

Industry by NAICS Sector

NAICS Sector Description	Loan Count	Net Dollars	% of Amount
Health Care and Social Assistance	506,263	\$67,356,500,071	12.92%
Professional, Scientific, and Technical Services	638,221	\$66,430,801,754	12.74%
Construction	466,221	\$64,568,137,994	12.38%
Manufacturing	229,591	\$54,002,922,769	10.36%
Accommodation and Food Services	367,502	\$42,099,336,178	8.07%
Retail Trade	450,181	\$40,355,657,949	7.74%
Other Services (except Public Administration)	531,572	\$31,145,678,051	5.97%
Wholesale Trade	167,237	\$27,726,783,463	5.32%
Administrative and Support and Waste Management and Remediation Services	240,947	\$26,482,972,198	5.08%
Transportation and Warehousing	191,609	\$17,088,399,318	3.28%
Real Estate and Rental and Leasing	245,697	\$15,631,026,225	3.00%

Source: <https://home.treasury.gov/system/files/136/SBA-Paycheck-Protection-Program-Loan-Report-Round2.pdf>



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Funds Distributed under the CARES Act Will Be Subject to Strict Oversight

Recent Public Statements by the Department of Justice:

- March 16, 2020: U.S. Attorney General William Barr issued a Memorandum directing all U.S. Attorneys to “prioritize the detection, investigation, and prosecution of all criminal conduct related to the current pandemic.” *Source: <https://www.justice.gov/ag/page/file/1258676/download>*
- March 19, 2020: Deputy Attorney General Jeffrey Rosen directed each U.S. Attorney to appoint a Coronavirus Fraud Coordinator to serve as the legal counsel for the federal judicial district on matters relating to the Coronavirus, direct the prosecution of Coronavirus-related crimes, and to conduct outreach and awareness activities.
- March 20, 2020: Attorney General Barr issued a press release urging the public to report suspected fraud schemes related to COVID-19.
Source: <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-urges-american-public-report-covid-19-fraud>



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False Claims Act Recoveries

Some of the largest FCA recoveries occurred after the government stimulated the economy following the financial crisis of 2008.

- More than \$3 billion in settlements and judgments for FY 2019
- More than \$62 billion in recoveries since 1986 with more than \$37 billion occurring in the last 10 years
- More than 600 New Relator (Qui Tam) suits (cases brought by whistleblowers) filed in FY 2019, and recovered over \$2.1 billion from these and earlier-filed suits in FY 2019
- More than \$265 million paid to whistleblowers in FY 2019

Source: <https://www.justice.gov/opa/press-release/file/1233201/download>



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Fraud Enforcement and Recovery Act of 2009 Impacts on False Claims Act

FERA was enacted three months after the American Recovery & Reinvestment Act of 2009 and it amended the False Claims Act in three significant ways:

- **Intent and Materiality:** Overturned *Allison Engine*. Liability attaches if a person “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval” or “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.”
- **Presentment:** Liability can attach to a claim presented to a prime contractor so long as the money claimed “is to be spent or used on the government’s behalf or to advance a Government program or interest.”
- **Civil Investigative Demands:** Attorney General may delegate authority to issue CIDs. Moreover, the Attorney General may share the information obtained under a CID with any *qui tam* plaintiff if it is determined “necessary” as part of any FCA investigation. The potential for abuse of this power and testimony and documentation obtained through CIDs is enormous.



“Individual Accountability for Corporate Wrongdoing” (the Yates Memo)

- The government is committed to holding bad actors responsible for their actions.
- Under the guidance of the Memorandum issued by Deputy Attorney General Sally Quillian Yates on September 15, 2015, the U.S. Department of Justice focuses on identifiable culpable individuals in cases of corporate fraud under the FCA.



Do Companies Make Bad Decisions or Do Individuals Make Bad Decisions?

In 2019, the former CEO of a company paid \$20 million in damages, and his general counsel paid \$225,000.

Luke Hillier, the majority owner and former Chief Executive Officer of Virginia-based defense contractor ADS, Inc., paid \$20 million to settle allegations that he fraudulently obtained federal set-aside contracts reserved for small businesses that his company was ineligible to receive. The government alleged that Hillier caused ADS to falsely represent that it qualified as a small business concern and that, as a result of Hillier's representations, his company was awarded numerous small business set-aside contracts for which it was ineligible.

The government previously resolved related claims against ADS for \$16 million and Charles Salle, the former general counsel of ADS, for \$225,000



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The False Claims Act

1. Civil False Claims Act, 31 U.S.C. 3729 *et seq.*
2. Criminal False Claims Act
 - False Claims – 18 U.S.C. 287
 - False Statements – 18 U.S.C. 1001

Both cover same types of conduct: Civil FCA is Government's primary tool, but criminal investigations may be increasing.

Applies when even \$1.00 of federal money is used to fund the project. *U.S. v. Custer Battles*, 562 F.3d 295 (4th Cir. 2009)



Civil False Claims Act (31 U.S.C. § 3729)

- Enacted in 1863 to combat fraud during the Civil War
- Rarely used until it was amended in 1986 to make it easier for private citizens and the government to recovery damages
- FAR 52.203-13 Contractors must also have a written code of business ethics and conduct, and have in place an ethics awareness and compliance program and internal control system:
 - “Self-disclosure” requirement for “credible evidence” of a violation of the civil False Claims Act or Title 18 of the U.S. Code (federal criminal provisions)
 - States explicitly to whom the disclosure shall be made – the agency OIG and the contracting officer



Civil False Claims Act (31 U.S.C. § 3729)

1. **Direct False Claim:** Knowingly submitting a false claim to the government or causing another to do so
2. **False Statement:** Knowingly making, using or causing to be made or used a false record/statement material to payment
3. **Reverse False Claim:** Knowingly concealing or decreasing an obligation to pay money to government
4. **Conspiracy** to commit # 1, 2, or 3 above



Civil False Claims Act (31 U.S.C. § 3729)

- **Claim** – means any request for money or property
 - Multiple requests = multiple false claims
- **Knowingly** – means a contractor that:
 - Has actual knowledge of falsity
 - Acts in deliberate ignorance of truth/falsity
 - Acts in reckless disregard of truth/falsity
- **Method of presenting to the government is irrelevant**
 - Sufficient that claim reaches government funds



Civil False Claims Act (31 U.S.C. § 3729)

Penalties (or *what happens if you get caught*)

- **Civil Penalties**

- Current penalty range(after June 19, 2020): \$11,665 to \$23,331 for each false claim
- Treble damages – 3x the amount of damages sustained by the government
- Costs of litigation
- Forfeit legitimate claims
- Suspension/debarment from federal contracting

- **Criminal Penalties**

- Jail time
- Criminal fines



FAR 52.203-13: Contractor Code of Business Ethics and Conduct

Within 30 days after contract award, establish a written code of business ethics and conduct (Code) and make it available to each employee engaged in the performance of the contract.

On federal contracts, contractors must:

- Exercise due diligence to prevent and detect criminal conduct
- Promote an organization culture that encourages ethical conduct and commitment to compliance with the law
- Disclose timely in writing any “credible evidence” of violation of criminal law involving fraud, conflict of interest, bribery, or gratuity violations and violations of the civil FCA.



Business Ethics Awareness and Compliance Program

If the Contractor is a large business, Contractor shall establish the following within 90 days:

- An ongoing business ethics awareness and compliance program
- An internal control system

This doesn't apply to contracts for the acquisition of commercial items as defined at FAR 2.101.



Business Ethics Awareness and Compliance Program

U.S. Department of Justice, Criminal Division has identified three fundamental questions:

- Is the corporation's compliance program well designed?
- Is the program adequately resourced and empowered to function effectively?
- Does the corporation's compliance program work in practice?

Source: U.S. Department of Justice, Criminal Division Evaluation of Corporate Compliance Programs (Updated June 2020)



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Internal Control System

- Assignment of responsibility and adequate resources to ensure effectiveness
- Periodic reviews of company business practices, procedures and policies
- Reasonable efforts not to include an individual as a principal, whom due diligence would have exposed as having engaged in conduct that is in conflict with the Contractor's code of business ethics and conduct
- Internal reporting mechanism that allow anonymity or confidentiality and encourages employees to make such reports
- Disciplinary action for improper conduct or for failing to take reasonable steps to prevent and detect improper conduct
- Timely disclosure of “credible evidence”
- Full cooperation with any audits, investigations or corrective actions



Additional Obligations Triggered by Federal Funds

- Affirmative Action Compliance and Equal Employment Opportunities
- Buy American/Buy America
- Copeland “Anti-Kickback” Act
- Davis-Bacon wages
- Notification of change in ownership
- Prompt payment
- Subcontracting plans/participation plans
- Whistleblower protections



General Recommendations for Federal Contractors

- Review your code regularly to ensure it is effective
- Provide specific training for supervisors/managers
- Conduct routine audits to determine if there are any gaps in your program
- For mega projects, designate a project-specific ethics and compliance officer
- Ask questions, especially if you have concerns about your contractual obligations, your company's program, or how it is implemented





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Questions?



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