More than five million businesses applied for emergency loans under the Paycheck Protection Program (PPP), and with a hurried implementation that prevented a full diligence process, it’s not surprising the program became a target for fraud. The government is now aggressively conducting investigations, employing both criminal and civil enforcement actions. On the civil lawsuit front, companies that received PPP loans should be aware of actions brought under the False Claims Act (FCA) and the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA). This advisory details some of the key points of these enforcement tools and what the government looks for when prosecuting fraudulent conduct.
How will PPP Loan Fraud Enforcement Under the FCA Work?

A company can be liable under the FCA if it knowingly presents a false or fraudulent claim for payment or approval to the government or uses a falsified record in the course of making a false claim. 31 U.S.C. § 3729(a)(1)(A), (B). The FCA allows the government to recover up to three times the amount of the damages caused by the false claims in addition to financial penalties of not less than (as adjusted for inflation) $12,537, and not more than $25,076 for each claim.

The FCA can be enforced by individuals through *qui tam* lawsuits. This means a private individual, known as a relator, can file a lawsuit on behalf of the government. When a *qui tam* case is filed, it remains confidential (under seal) while the government reviews the claim and decides whether to intervene in the case. If the lawsuit is successful, the relator is entitled to a portion of the reward.

The False Claims Act has been used to pursue fraud claims in connection with PPP loan applications. Any company that participated in the PPP by applying for a loan should retain documentation justifying all statements made on the loan application and evidencing how any funds obtained through the loans were utilized.

How will PPP Loan Fraud Enforcement Under FIRREA Work?

The government is also utilizing FIRREA in response to fraudulent conduct related to PPP loans. FIRREA is a “hybrid” statute, predicating civil liability on the government’s ability to prove criminal violations. The statute allows the government to recover penalties against a person who violates specifically enumerated criminal statutes such as bank fraud, making false statements to a bank, or mail or wire fraud “affecting a federally insured financial institution.” 12 U.S.C. §1833a.

To establish liability under FIRREA, the government does not have to prove any additional element beyond the violation of that offense and that the violation “affect[ed] a federally insured financial institution.” The government has invoked FIRREA in the context of PPP loan fraud by stating the fraud related to obtaining the loan falls under one or more of the predicate offenses set forth in the statute.

What Factors Determine PPP Loan Fraud Penalties Under FIRREA?

While the assessment of a penalty is mandatory under FIRREA, the amount of the penalty is left to the discretion of the court but may not exceed $1.1 million per offense. There is an exception to this maximum penalty, however, if the person against which the action is brought profited from the violation by more than $1.1 million. FIRREA then allows the government to collect the entire amount gained by the perpetrator through the fraud. The actual amount of the penalty is determined by the court after weighing several factors including:

- The good or bad faith of the defendant and the degree of his/her knowledge of wrongdoing;
- The injury to the public, and whether the defendant’s conduct created
substantial loss or the risk of substantial loss to other persons;

- The egregiousness of the violation;
- The isolated or repeated nature of the violation;
- The defendant’s financial condition and ability to pay;
- The criminal fine that could be levied for this conduct;
- The amount the defendant sought to profit through his fraud;
- The penalty range available under FIRREA; and
- The appropriateness of the amount considering the relevant factors.

The government favors utilizing FIRREA penalties to pursue fraud claims for several reasons. The statute of limitations provided in 12 U.S.C. §1833a(h) is 10 years, which is much longer than most civil statutes of limitations. The standard of proof required to impose penalties is preponderance of the evidence, rather than the higher “beyond a reasonable doubt” standard that must be met in a criminal prosecution.

**Checklist for PPP Loan Recipients**

A company that applied for COVID relief funds, such as PPP loans, should ensure they satisfy the eligibility requirements for obtaining the loan, confirm false statements were not made during the application, and review the rules set forth by the SBA for applying for PPP. The government has shown it is willing to pursue remedies under the FCA and FIRREA for fraudulent statements made regarding a PPP loan application.

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