

Increased D&O Liability Exposures Associated with PPP Loans and the False Claims Act

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“ [T]he False Claims Act has provided ordinary Americans with essential tools to combat fraud, to help recover damages, and to bring accountability to those who would take advantage of the United States government – and of American taxpayers.

*Former Attorney General Eric Holder, U.S. Department of Justice.
Remarks at the 25th anniversary of the False Claims Act (2012).*

The “False Claims Act (FCA)” was the original whistleblower law in the United States; created in 1863 by President Abraham Lincoln during the Civil War to prevent fraud and theft of wartime goods by the troops and the public. The act has been revised multiple times over the course of the years, with the most substantial amendment in 1986, where it expanded claims to include those associated with theft of government funds in addition to tangible property.

Under the law, there are severe consequences for the guilty party and large financial benefits for a whistleblower to illuminate malicious activity. If found guilty, defendants must pay civil penalties and are subject to treble damages (triple). The whistleblower is entitled to protection and can be granted up to 25% of the awards if found to be uninvolved in the fraudulent activity.

While traditionally this regulation would be limited to government contractors who have access, custody or control of governmental funds, tangible equipment or Government Contracts, the CARES Act of 2020 creates False Claims Act exposure for any entity that accepts a Paycheck Protection Program (PPP) loan. Companies that apply for the PPP Loan as a stimulus are now borrowing money from the Federal Government in good faith under the premise that the loan is necessary to support operations. Thus, there is now a new liability for a commercial entity that fraudulently accepts a PPP Loan by breaching the eligibility requirements or if there is perceived misrepresentation on behalf of the organization to collect a PPP loan.

False Claims Act allegations can be brought against Directors, Officers and the Corporation, leading to a claim under the Directors & Officers Liability policy. While intentional fraudulent acts are never covered under your D&O policy, brokers should look to the “defense” portion of the policy to contemplate defending the plaintiffs until a guilty verdict. Additionally, D&O policies vary on how they respond to claims against a whistleblower or how the wrongful act of one insured can be imputed to another.

If your organization has collected a Paycheck Protection Program Loan under the CARES Act of 2020, it is recommended to scrutinize all newly added carrier endorsements, exclusions or coverage grants at renewal. There are likely new coverage restrictions based on COVID-19, in addition to an already hardening market.

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