

DOJ's Civil Division Outlines Enforcement Priorities and Focus on COVID-19 Related Fraud

July 2, 2020

Key Points

- The Department of Justice (DOJ) will focus its civil enforcement activity on fraud and other illegal actions relating to COVID-19, including with respect to CARES Act stimulus programs and consumer products marketed for use in addressing the virus.
- Recognizing the critical role private sector companies play in helping to bring an end to the pandemic and restart the economy, the DOJ will not target businesses that operate in good faith.
- Private equity firms that invest in companies receiving CARES Act funds may be subject to enforcement activity if they take an active role in the alleged illegal conduct by one of their portfolio companies.
- The DOJ may use its dismissal authority to dismiss COVID-19 related *qui tam* actions based on technical mistakes with paperwork or honest misunderstandings of the rules, as well as those aimed at companies that acted in good faith to take advantage of the regulatory flexibility certain federal agencies granted during this time of crisis.
- As part of an information gathering initiative, DOJ attorneys will begin asking *qui tam* relators a series of questions designed to elicit whether and to what extent their cases are financed and influenced by third-party litigation funders.

In remarks at the Institute of Legal Reform, U.S. Chamber of Commerce, DOJ Civil Division Principal Deputy Assistant Attorney General Ethan Davis recently outlined the Division's enforcement priorities. Using the federal government's civil enforcement tools to target fraud in CARES Act stimulus programs and other illegal activity relating to COVID-19 remains a top priority. Mr. Davis emphasized, however, that businesses operating in good faith are not targets for the DOJ. He further announced that, as part of an information gathering initiative, DOJ attorneys will begin asking *qui tam* relators a series of questions designed to elicit whether and to what extent their cases are financed and influenced by third-party litigation funders. Mr. Davis's remarks, given June 26, 2020, are available [here](#).

Contact Information

If you have any questions concerning this alert, please contact:

Robert S. Salcido

Partner

rsalcido@akingump.com

Washington, D.C.

+1 202.887.4095

Robert K. Huffman

Partner

rhuffman@akingump.com

Washington, D.C.

+1 202.887.4530

Elizabeth D. Scott

Partner

edscott@akingump.com

Dallas

+1 214.969.4297

Angela B. Styles

Partner

astyles@akingump.com

Washington, D.C.

+1 202.887.4050

Scott M. Heimberg

Partner

sheimberg@akingump.com

Washington, D.C.

+1 202.887.4085

A. Michael Warnecke

Partner

mwarnecke@akingump.com

Dallas

+1 214.969.2890

Caroline L. Wolverton

Senior Counsel

cwolverton@akingump.com

Washington, D.C.

+1 202.887.4107

False Claims Act Enforcement Priorities with Respect to COVID-19

The False Claims Act is the federal government's most powerful civil enforcement tool, and Mr. Davis made clear that the DOJ intends to be active in using it. The False Claims Act penalizes those submitting a claim to the government "knowing" that it contains false information that is material to the government's payment determination. "Knowing" as used in the False Claims Act includes actual knowledge of the falsity of a claim or reckless disregard or deliberate ignorance of whether a claim is false. Violations of the False Claims Act result in treble damages and civil penalties of up to \$23,331 per false claim or statement. Both the DOJ and private individuals or organizations, referred to as "*qui tam* relators," can bring lawsuits in federal district court to recover damages and penalties for violations of the False Claims Act.

According to Mr. Davis, the Civil Division's Fraud Section has prioritized enforcement actions under the False Claims Act for fraud relating to CARES Act stimulus programs in three areas:

- **Paycheck Protection Program (PPP) and the Main Street Lending Program.** DOJ will be looking for borrowers that knowingly submit false certifications, as well as lenders and borrowers that intentionally flout program requirements.
- **CARES Act's Provider Relief Fund.** Providers that knowingly violate the terms and conditions on which funds are received, e.g., that the funds are for care of COVID-19 or presumptive COVID-19 patients, will be a focus of False Claims Act enforcement scrutiny.
- **Private equity firms.** Citing its pre-pandemic case against private equity firm Riordan, Lewis, and Haden related to an alleged kickback scheme to generate prescription referrals, Mr. Davis made clear that the DOJ will target private equity firms taking an active role in illegal conduct by their portfolio companies receiving CARES Act funds. Akin Gump's prior alert with respect to the Riordan, Lewis, and Haden case is available [here](#).

Mr. Davis emphasized that DOJ's enforcement efforts will avoid discouraging businesses operating in good faith from participating in stimulus programs and utilizing available regulatory flexibilities for development and distribution of COVID-19 tests, treatments and protective equipment. The DOJ does not intend to pursue enforcement actions against businesses that make "immaterial or inadvertent technical mistakes" or that "honestly misunderstood" government requirements. Mr. Davis also shared that DOJ wants to ensure that businesses are not discouraged from helping address COVID-19 by "unwarranted False Claims Act liability" and noted more information on that point would be forthcoming.

Finally, Mr. Davis indicated that the Department may use its dismissal authority under the False Claims Act to dismiss COVID-19 related *qui tam* actions based on technical mistakes with paperwork or honest misunderstandings of the rules, as well as those aimed at companies that acted in good faith to take advantage of the regulatory flexibility certain federal agencies granted during this national emergency. Although the False Claims Act provides the DOJ with authority to dismiss a *qui tam* action over a relator's objection, for decades that authority was rarely used. However, in January 2018, Deputy Assistant Attorney General Michael Granston authored a memorandum (the "Granston Memo") outlining the circumstances under which Department attorneys should consider moving to dismiss a *qui tam* action, including curbing meritless or

opportunistic litigation and preventing interference with agency policies and programs. Akin Gump's prior alert on the Granston Memo is available [here](#).

Mr. Davis confirmed that the Granston Memo has had a "meaningful effect" with respect to the dismissal of *qui tam* suits. He explained that in the two-plus years since the Memo, the Department has moved to dismiss approximately 50 *qui tam* actions, as compared to the approximately 45 *qui tam* actions the Department moved to dismiss in the entire 30 years preceding the Memo. While Mr. Davis said it would be a mistake to view the Memo as a "pro-defendant" change in practice," he indicated the Department would use its dismissal authority with respect to COVID-19 to weed out *qui tam* actions that are not in the interests of the United States because they are based on technical mistakes with paperwork or honest misunderstandings of the rules. Dismissal may also be used for *qui tam* suits that seek to hold companies liable for taking advantage of federal policies regarding agency enforcement discretion designed to encourage private sector innovation (e.g., discretionary measures aimed at making telehealth services more readily available).

Given the Department's stated intention to avoid using its enforcement power to hold companies accountable for good faith mistakes or misunderstandings, there are certain steps companies can take to mitigate the risk of liability, including identifying applicable program rules, staying actively abreast of such rules and on alert for any changes and carefully documenting compliance efforts. Where rules are ambiguous, companies should form a contemporary reasonable understanding of what they require, document that understanding and the rationale for it, and communicate the understanding to the government if the issue arises (for example, in written correspondence with government officials, routine audits, SEC filings or other public reports). For a more comprehensive discussion of the steps companies can take to minimize their exposure to False Claims Act liability in the aftermath of COVID-19 legislation, see Akin Gump's prior alert on the topic [here](#).

Mr. Davis further announced that, as part of an information gathering exercise designed to bolster the DOJ's knowledge of who is behind *qui tam* suits brought in the name of the government, DOJ lawyers will begin asking relators during their case intake interviews a series of questions regarding the role of third-party litigation funders in their cases. These questions include: whether the relator or his or her counsel has any agreement with a third-party funder and, if so, whether such agreement is in writing; the identity of the funder; whether the relator has shared information relating to the *qui tam* action with the funder; and whether the agreement entitles the funder to exercise direct or indirect control over the relator's litigation or settlement decisions. DOJ lawyers will also ask the relator to inform them if the answers to these questions change at any point over the course of the litigation. These questions should enable the DOJ to gain greater visibility into important areas in which Mr. Davis admitted the DOJ currently lacks knowledge, including "whether and to what extent the funders are exercising control over relators' litigation and settlement decisions."

Consumer Protection Priorities Related to COVID-19

The Civil Division's Consumer Protection Branch will likewise be focusing its enforcement efforts on fraudulent and otherwise illegal tests, treatments and purported cures for COVID-19. It will also pursue "scammers" seeking to prey on the elderly with false promises of government assistance through the CARES Act and other

government programs, as well as the infrastructure used in those scams, including facilitators in telecommunications, finance and marketing. The Consumer Protection Branch will take action against companies that flout safety requirements for COVID-19 treatments or related complications, particularly drugs and active pharmaceutical ingredients, and will act against fraud in clinical trials of drugs and medical devices for treating or preventing COVID-19.

As with False Claims Act enforcement efforts, the Consumer Protection Branch will work with its agency and U.S. Attorney partners to ensure that the Department's actions are consistent with the increased regulatory flexibility afforded to companies developing and distributing COVID-19 tests, treatments and protective equipment, and will not seek to target companies acting in good faith.

Other Areas of Anticipated Enforcement Activity

Mr. Davis made clear that the DOJ will continue to pursue fraud in areas other than COVID-19-related activities. The DOJ will continue to focus on the opioid crisis, electronic health records, Medicare Advantage, nursing home mistreatment, fraud on the elderly and dietary supplements. Additionally, Mr. Davis indicated that the DOJ is increasing its focus on data privacy. Aware of businesses' growing accumulations of consumer data, the Department is using its authority to enforce Federal Trade Commission Act civil penalties as well as its other enforcement tools to ensure data privacy and security. As an example of this focus, Mr. Davis cited the Consumer Protection Branch's recent role in pursuing and ultimately settling data privacy claims against Facebook for \$5 billion in civil penalties and the company's commitment to adopting robust compliance measures. Moving forward, DOJ is committed to coordinating closely with the Federal Trade Commission (FTC) and the Department's Antitrust Division to hold companies and individuals accountable for privacy law violations with respect to the acquiring, storing or using of consumer data.

Conclusion

The DOJ is focusing its civil enforcement efforts on fraud and other illegal activity relating to COVID-19. Businesses participating in one of the CARES Act stimulus programs or involved in the manufacture and supply of COVID-19-related products and equipment should pay especially close attention to applicable requirements and carefully document their compliance. The DOJ is not targeting missteps by those operating in good faith, but businesses should keep in mind that reckless disregard or deliberate ignorance of whether a claim submitted to the government is false can result in False Claims Act liability.

akingump.com