

# Borrowers beware: GAO ramps up efforts to root out fraud among CARES Act loan recipients

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## THE PROSPECT OF FALSE CLAIMS ACT'S TREBLE DAMAGES REQUIRE METICULOUS RECORD KEEPING

On April 10, 2020, the Government Accountability Office (GAO) announced<sup>1</sup> its effort to root out fraud associated with the billions of dollars in payments promised under the Coronavirus Aid, Relief, and Economic Security (CARES) Act.

The Congressional watchdog is encouraging individuals — private citizens, government workers, contractors, etc. — to anonymously and confidentially report any allegations of fraud, waste, abuse, and mismanagement through FraudNet<sup>2</sup> (the GAO's fraud-reporting website), via e-mail<sup>3</sup> or by calling 1-800-424-5454 (the GAO's automated phone answering system).

The GAO, of course, is seeking as much detail as possible about any allegations so the reports can be handed off to its own investigative unit, appropriate inspector general offices, or to the ultimate enforcer — the Department of Justice.

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When addressing and avoiding claims of fraud, a central concern for companies should be that the receipt of CARES Act dollars may bring with it the threat of a False Claims Act (FCA) accusation or lawsuit — the ever-present specter associated with the receipt of any federal dollar expended in connection with a government contract.

Seasoned federal contractors and subcontractors know the FCA well, but the CARES Act focuses on a wide swath of small businesses that may not have deep familiarity with that statute and its significant penalties.

Accordingly, there will be a lot of unsuspecting recipients of dollars from the Paycheck Protection Program (PPP) and the Small Business Administration's modified Economic Injury Disaster Loans (EIDL) program that may not see the FCA's draconian — and costly — risks coming.

For the uninitiated, the FCA provides for treble (three-times) damages plus additional penalties — which presently can be in excess of \$21,000 *per instance* for the knowing presentment of *any* false or fraudulent claim for money to the federal government.

This means, for example, that one is at risk for a single invoice for payment of any amount if it presents a false or fraudulent claim for payment by the United States.

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It also applies when a company knowingly makes or uses false records or statements material to those false or fraudulent claims for payment, meaning that FCA liability can be grounded on allegedly false certifications of eligibility related to government contracts and, specific to the CARES Act programs, loans.

What makes the applicability of the FCA to the CARES Act specifically problematic is the somewhat disjointed manner in which guidance for the CARES Act, the PPP, and the modified EIDL program has been seeping out, combined with the lightning speed in which the evaporated funds have been sought.

This is the perfect recipe for fraud under the FCA. Under the FCA, *actual* knowledge is not required to prove liability, rather “knowledge” may be demonstrated if a company is shown to have acted in reckless disregard, or in deliberate ignorance, of the truth or falsity of the information provided to the government.

Moreover, and in line with the GAO's encouragement, FCA suits are often initiated by *qui tam* relators (whistleblowers) who receive a percentage of the government's recovery. These *qui tam* suits netted the government more than \$3 billion in recoveries in FY 2019 alone.

The nexus between FCA liability and the CARES Act lies within the certifications found in the applications made to receive PPP and EIDL funds.

Any certification (either express or implied) that an applicant knows to be false or misleading, or that it recklessly fails to substantiate properly, risks FCA liability.

Whether addressing program eligibility, describing the make-up/size of the applicant company, or planning the intended use of the requested funds — companies pursuing dollars through the CARES Act (or any federal program) must ensure that their submissions are accurate and that any follow-on actions are commensurate and in accordance with the respective program’s directions and intentions.

Notably, it is worth remembering that for many of these programs the SBA has identified that “knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law” including 15 U.S.C. § 645 (false statements and other offenses related to small business aid), 18 U.S.C. § 1001 (false statements) and other applicable fraud-fighting statutes — and that the government will hold shareholders, members, or partners liable.

The importance of ensuring compliance when seeking federal dollars cannot be overstated, even during a national emergency.

Companies must continually keep abreast of all guidance and refuse to let speed replace accuracy in their filings and requests for government funds.

For many, the promise of “free” money is a dream, but the GAO guidance has deputized private citizens, competitors, and employees as whistleblowers.

When the pandemic clears and everyone comes back out into the sunlight, remember that Uncle Sam will be carefully checking receipts. If the receipts do not add up, the dream could become a nightmare.

#### NOTES

- <sup>1</sup> <https://bit.ly/2W9VClD>
- <sup>2</sup> <https://bit.ly/2YelAGE>
- <sup>3</sup> [fraud@gao.gov](mailto:fraud@gao.gov)

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