Insights Conversations: DOJ Enforcement Priorities

Skadden

09 / 30 / 20

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Former U.S. attorney **Jessie K. Liu** recently joined Skadden from her role overseeing the U.S. Attorney's Office in Washington, D.C., which is not only the largest in the country but also home to one of the busiest Civil Divisions of any of the nation's 94 U.S. Attorney's Offices. Litigation partners **Bradley A. Klein** and **Gregory M. Luce** discussed with Jessie the Department of Justice's (DOJ) current enforcement priorities, including some that may result in new False Claims Act (FCA) risks for individuals and entities to consider heading into 2021.

Brad: COVID-19 led to a number of relief programs designed to alleviate the pandemic's adverse economic effects. The Coronavirus Aid, Relief and Economic Security (CARES) Act in March provided nearly $2 trillion in relief through a variety of stimulus programs. The Paycheck Protection Program (PPP) provided nearly $670 billion in forgivable loans to help small businesses avoid layoffs. Treasury administered more than $450 billion through Federal Reserve lending programs and facilities, such as the Main Street Lending Program. And the government provided loans for the airline industry, authorization for government agencies to contract with private industry for the development of COVID-19 medications and vaccines, and funds for health care providers for pandemic-related expenses and lost revenues. Jessie, what should we expect from the DOJ in these areas in terms of enforcement priorities?

Jessie: Many companies applying for these programs may not realize that they also carry the potential for FCA liability, because in order to receive loans or other financial assistance, as well as loan forgiveness, recipients were required to make various certifications. For example, PPP applicants were required to certify that the loan was "necessary" to support "ongoing operations," and recipients must make additional certifications as a condition of loan forgiveness, both of which may give rise to FCA liability. Similarly, airlines were required to assure the government that they would not furlough employees or declare dividends for a specified period of time. As our clients with an interest in this topic will know, the FCA imposes liability on those who knowingly present the government with a false or fraudulent claim for payment or approval. That includes false records or statements relating to the false claims. Private individuals, called relators, also can pursue FCA violations on behalf of the government in *qui tam* actions and receive a percentage of any damages the government recovers, which include treble damages and civil penalties. Various government entities have made clear that they will use the FCA to pursue individuals and entities believed to have abused these stimulus programs.

Greg: You mentioned that government entities have signaled that they will use the FCA to pursue individuals and entities believed to have abused these stimulus programs. In April, Treasury Secretary Steven Mnuchin announced that all PPP loans above $2 million would be audited and that borrowers who obtained funds through false certifications would be liable. More recently, in June, the then-second-in-command at the DOJ's Civil Division, Ethan Davis, said in a speech to the U.S. Chamber of Commerce that those who make false certifications or violate the terms and conditions of the PPP, Main Street Lending Program and other stimulus programs will face FCA scrutiny. From your experience in the U.S. Attorney's Office, what are the types of issues that would raise a red flag for the government with regard to these relief programs, and how should companies be careful to manage these risks?

Jessie: As we've already seen, recipients of large amounts of government funds will draw scrutiny, as will recipients that do not appear to fit the profile of those for whom funds were intended, such as chain businesses and publicly traded companies. Similarly,

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the government likely will take a close look at recipients that seem to be spending stimulus funds inconsistently with their terms and conditions, whether by buying luxury goods instead of paying employees or asking employees to repay some of their earnings without compensation later in the year. As with any emerging area of DOJ focus, adequate monitoring and compliance controls, as well as proactive reviews of relevant operations, can help companies and their boards successfully navigate potential issues.

Brad: Mr. Davis noted in that same speech that private equity firms taking "an active role in illegal conduct" of portfolio companies receiving stimulus funds may be liable under the FCA. He cited an enforcement action against private equity (PE) firm Riordan, Lewis, and Haden, Inc. (RLH) that settled in September 2019. Is seeking to hold PE firms liable for the wrongdoing of their portfolio companies a growing trend at DOJ?

Jessie: In that particular case, the DOJ alleged that an RLH-owned pharmacy paid kickbacks to marketers for unnecessary prescription drug referrals reimbursed by a federal health care program, resulting in FCA liability. The DOJ alleged that RLH was involved in and knew of the alleged kickbacks and funded some of the allegedly illegal payments, knew or should have known that the payments violated the federal anti-kickback statute, and did not take appropriate remedial measures or cause the portfolio company to implement an adequate corporate compliance program. Although it seems unlikely that the DOJ will seek to hold PE firms liable whenever one of their portfolio companies is involved in alleged wrongdoing, prosecutors certainly will want to understand the degree to which PE firms knew or should have known about the conduct at issue. That Mr. Davis made a point of mentioning this case in his speech may be a signal that DOJ will be looking closely at potential PE involvement where their portfolio companies are accused of misconduct.

Brad: The DOJ also recently codified an interim final rule based on the Brand Memo, indicating that it will prohibit the agency from basing enforcement actions on violations of subregulatory guidance — that is, guidance that has not been subject to the notice-and-comment rulemaking process. Might this rule provide some protection against expansive enforcement initiatives?

Jessie: That likely will be the result of the memorandum's codification and could well be the intent. The interim final rule may also ease concerns that stimulus recipients could face FCA liability based on complex and voluminous guidance documents that may be unclear or are continuing to evolve. While the rule does not specifically reference the CARES Act, the DOJ's announcement of the rule does reiterate that "backdoor regulation by guidance is improper," and that guidance documents will "not be used to impose novel legal requirements as a shortcut around the rulemaking process." That said, until the practical impact of the rule on enforcement activity becomes clearer, companies should be cautious about assuming that the rule will automatically provide a shield against liability.

Greg: Recent DOJ enforcement activity also suggests that companies in the biomedical field continue to be a focus. Are there any recent trends you would note in this area?

Jessie: The government has increased efforts to eliminate improper foreign influence in the biomedical industry. Although much of the public attention in this area has focused on criminal charges against individual professors or researchers for making false statements regarding their ties to foreign countries in federal grant applications or related certifications, the DOJ also recently brought a civil FCA case against a research institute based on similar facts. In that matter, the Van Andel Institute, which conducts biomedical research, applied for a National Institutes of Health grant that required disclosure of any funding Van Andel's researchers were receiving from foreign governments. In December 2019, the DOJ reached a $5.5 million FCA settlement with the organization because it allegedly failed to disclose that two of its researchers received funding from the Chinese government. Applicants for federal funding should be scrupulously accurate in their representations to the federal government, which could require that they have appropriate procedures in place to ensure that they ascertain and disclose material facts.

Brad: Any other recent developments that companies and their boards should be thinking about as we head into the fourth quarter and start thinking about 2021?

Jessie: Just this month, the DOJ's Civil Division released new guidance for its attorneys on how to assess an entity's assertion that it is unable to pay an otherwise appropriate amount to resolve potential civil liability. The guidance makes clear that DOJ typically will evaluate such claims with the assistance of a financial expert and that it will consider a wide range of factors, such as whether and to what extent the entity has alternative sources of capital, and the timing of payments. It will be interesting to see how such "inability-to-pay" claims play out in light of this new guidance, especially with respect to companies whose ability to pay may have been adversely affected by financial difficulties during the pandemic. And, of course, we are only about a month away from a presidential election, so it will be important to watch what priorities and policies a second Trump term or a new Biden administration will bring in the False Claims Act space.