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SPOTTING THE RED FLAGS: HOW TO PROTECT YOUR COMPANY FROM PPP FRAUD PROSECUTION

On December 11, the Dallas Bar Association presented an incisive discussion regarding the future of criminal and civil litigation surrounding the CARES Act and the Paycheck Protection Program (PPP), featuring Bell Nunnally Partner Jeff Ansley and Senior Associate Saba Syed along with other current and former government officials.

As a former Assistant U.S. Attorney, and as a litigator of complex business disputes who spends significant time on False Claims Act matters, I found the discussion chock full of helpful insights that buttressed my own expectations about the future of FCA litigation in the age of CARES/PPP. Future claims by the government and by whistleblowers relating to CARES/PPP will likely involve more nuanced claims brought against larger, more complex companies, than those brought to date. Targeted companies are likely to include private equity firms answering for the CARES/PPP certifications of businesses in their portfolios. Contemporaneous documentation of real economic need during 2020, or at least a genuine contemporaneous belief in such need, will be critical to defending investigations and claims brought in the FCA "gray zone." Here are some key lessons for those considering the future of CARES/PPP litigation today:

- While early CARES/PPP prosecutions have been heavy on simple criminal prosecutions, that is because the early "smash and grab" cases are easy, involving entirely fake companies or gross abuses of CARES/PPP funds for obvious personal expenses (cars, yachts, etc.). Future cases will be more complex and nuanced, so civil False Claims Act litigation will become more prominent.

- More nuanced cases will take much longer for the government or whistleblowers to develop, so expect CARES/PPP litigation to be a feature of our legal landscape for years to come.

- For FCA cases, the truth or falsity of specific certifications made by CARES/PPP applicants will be key. Central questions will include: (1) what were the funds really used for; and (2) what were the real business conditions for the borrower in 2020? Public companies should also anticipate examinations of how they treated the receipt of CARES/PPP funds in their subsequent SEC filings.

- The certification of need required in CARES/PPP applications is likely to be a gray area that companies will see differently than the government and whistleblowers. The government and whistleblowers will be tempted to look with rose-colored glasses at CARES/PPP applicants that survived the COVID-19 crisis intact, inferring from the fact of their survival that the relief funds were unnecessary. For companies defending investigations and lawsuits, however, the operative question is whether decision-makers reasonably believed in March 2020 (or thereabouts) that their economic condition necessitated the offered assistance. Counsel will be called upon to remind the government, plaintiffs and courts of the conditions during the early pandemic. But 2020 was a unique year, and as time goes by, memories of the projections common in March and April 2020 may fade.

- Documentation of a company's financial condition, including bank statements and insider testimony, will be key to corroborating that a particular company's belief in the need for CARES/PPP funds was reasonable at the time of the application.

- Government counsel emphasized the importance of using CARES/PPP funds for their authorized purposes. "If not, the application is false." This is good advice to follow to the letter.

- According to current and former government counsel, likely points of emphasis in government FCA practice in the coming years include: (1) demands for some form of contemporaneous record that substantiates the needs for CARES/PPP funds; (2) examinations of the role of private equity companies in the decisions to seek CARES/PPP funds by their portfolio companies; and (3) the importance of the role of whistleblowers to future FCA claims. As to the latter point, the panelists agreed that the majority of FCA litigation arising from CARES/PPP will be whistleblower generated, and many cases declined by the Department of Justice may still be pursued by whistleblowers given the amounts at stake and the potential rewards. The sheer volume of potential CARES/PPP FCA claims may necessitate a larger role for *qui tam* litigation in the years ahead.

- The Department of Justice is very likely to look carefully at private equity-backed companies to discern the extent to which the equity-holders were involved in the CARES/PPP applications of their portfolio companies. Significant involvement by equity firms, especially by placing board members at portfolio businesses, will raise the prospect of liability for the equity company if the CARES/PPP application proves incorrect. Conversely, though, minimal involvement by the equity company might also create dangers, if such a hands-off approach is deemed an abdication of oversight when the equity firm is usually more involved. The clear takeaway is that in a variety of circumstances, an inaccurate CARES/PPP application by a portfolio company may also create danger for the private equity behind it. Firms should anticipate this and not presume they are beyond reach.

- To answer whistleblower or government claims or respond effectively to investigative demands, effective outside counsel will want to have a strong roster of forensic accountants who can examine company finances and help to reconstruct the real economic conditions and forecasts of 2020. Involving counsel and accountants working under the attorney-client privilege now -- before any concerns arise -- can save heartburn and funds later if a whistleblower later raises *qui tam* claims.

- In the same spirit, the opportunities presented by the government's leniency programs for self-reported FCA violations were discussed at length. In certain circumstances, self-reporting can result in the government seeking only single (not treble) damages. If potential violations are likely, self-reporting using competent counsel can be a successful strategy to diminish the impact of future FCA litigation.

Tremendous insights were on offer at this program, worth considering by anyone involved in a CARES/PPP application, or practicing in the context of FCA claims. These insights are an important starting point for analyzing issues faced by individuals and businesses. But individual circumstances require individual analysis and legal advice.

This article is not legal advice. If you have questions, you are welcome to contact Craig M. Warner or Jeffrey J. Ansley at Bell Nunnally.