

ALERT

New Congressional Report Raises Possibility of False Claims Act Scrutiny for Fintech Companies Involved In PPP Loans

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What:

A just-issued Congressional staff report raised concerns that certain financial technology companies (fintechs) were involved in processing improper loans through the Paycheck Protection Program (PPP) and recommended, among other things, that the Department of Justice (DOJ) investigate potential violations of the False Claims Act (FCA).

Background:

Program fraud by individuals and businesses taking out PPP loans has been widely publicized, and prosecution of this fraud remains ongoing. Separately, the Select Subcommittee on the Coronavirus Crisis (Select Subcommittee) has been focusing on the role of fintechs in processing PPP loans beginning in mid-April 2020. On December 1, 2022, the Select Subcommittee issued a report alleging that fintechs “facilitat[ed] a disproportionately high rate of fraudulent and otherwise ineligible loans through the [PPP]” and “handled 75 percent of the approved PPP loans that had been connected to fraud by [DOJ].”

In addition to examining specific companies in its report, the Select Subcommittee advised that “[a] comprehensive review of lenders and their third-party service providers will be crucial for lawmakers to better understand what worked and what failed in the PPP so as to incorporate those lessons into future relief programs.”

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The Select Subcommittee also recommended that DOJ investigate potential FCA violations related to whether fintech companies, employees, or principals made, or caused to be made, any false statements in connection with PPP applications that they submitted or processed. The Select Subcommittee pointed to alleged “cases where fintech principals may have committed PPP fraud,” and also “instances where fintech principals, executives, or managers acknowledged that they were aware of a risk of fraud in the loans that they were approving, but directed that employees continue to approve such loans.”

Takeaways:

This recent Congressional scrutiny of fintechs and their partners involved in PPP loan processing may prove to be just the beginning. The DOJ has aggressively used the FCA to address fraud in the PPP and this latest Congressional report will likely encourage the agency to ramp up its efforts even more. Indeed, the FCA is a particularly potent tool as it allows the Government to recover treble damages plus penalties. In FY2021, the Government obtained more than \$5.6 billion in FCA settlements and judgments.

The FCA includes *qui tam* provisions so companies may also face whistleblower lawsuits. The FCA allows individuals (called relators) to file claims on behalf of the U.S. Government. These cases are filed under seal to allow the Government time to investigate. Cases brought by relators often remain under seal in the court system for months (if not years), so cases may already be pending against companies without their knowledge. As an incentive to relators to file these cases, the FCA provides relators a percentage of any damages recovered. Indeed, the Select Subcommittee referenced at least one allegation made by a whistleblower in the report. With the Select Subcommittee’s report referencing potential FCA violations and whistleblower allegations, relators’ counsel are sure to have taken notice.

Companies involved in PPP loans should pay close attention to any indication that they are being investigated. If the company receives a civil investigative demand (CID), subpoena, or even an informal request for documents from the Government, the company should engage counsel. Even those companies concerned about potential FCA liability but which have not been approached by the Government should carefully assess how best to proceed, as FCA cases, whether filed by the Government or a relator, often take years to resolve, and the impact of the Select Subcommittee’s report will be felt for some time