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A False Claims Act Year in Review, and a Look Forward

By Scott F. Roybal*

In this article, the author reviews the basic elements of the False Claims Act, its qui tam provisions, recent Department of Justice enforcement statistics and a number of recent False Claims Act developments.

The civil False Claims Act (FCA)[1] was enacted in 1863 in response to allegations of fraud in Civil War procurements. The FCA has since become the government's weapon of choice to combat fraud, waste, and abuse in government contracting. This article begins by briefly reviewing the basic elements of the FCA and its qui tam provisions, and recent Department of Justice (DOJ) enforcement statistics. This article then discusses a number of FCA developments, including:

(1) The Supreme Court's actions regarding the government's authority to dismiss qui tam actions under 31 U.S.C. § 3730(c)(2)(A), and the correct pleading standard required to prove scienter;

(2) The Supreme Court's refusal to engage on the controversial issue of the FCA's pleading with "particularity standard";

(3) More changes in DOJ's enforcement policy under the Biden Administration;

(4) Status of Senator Chuck Grassley's proposed amendments to the FCA;

(5) Growing FCA enforcement against private equity firms; and

(6) Ongoing priority FCA enforcement against COVID-19 pandemic relief fraud.

I. BASIC ELEMENTS OF THE FCA AND QUI TAM PROVISIONS

The FCA makes it unlawful for a person to knowingly: (1) present or cause to be presented to the government a false or fraudulent claim for payment, or (2) make or use a false record or statement that is material to a claim for

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[1] 31 U.S.C. § 3729 et seq.

payment.[2] A person acts "knowingly" under the FCA if he or she acts with "actual knowledge, deliberate ignorance or reckless disregard of the truth or falsity of information."[3] Mistakes and ordinary negligence, however, are not actionable under the FCA.[4]

As of January 30, 2023, the FCA provides for up to treble damages and penalties of between $13,508 and $27,018 per violation. Violators are also subject to administrative sanctions, including suspension or debarment from participating in government contracts. The FCA has a lengthy statute of limitations of no less than six years and, in some cases, up to 10 years after a violation has been committed.

The FCA permits private citizens, known as qui tam relators, to bring cases on behalf of the government. In qui tam cases, the complaint and a written disclosure of all relevant evidence known to the relator must be served on the U.S. Attorney for the judicial district of the court where the case was filed as well as on the U.S. Attorney General. The qui tam complaint is then ordered sealed for a period of at least 60 days, and the government is required to investigate the allegations contained therein and decide whether to intervene. If the government declines to intervene, the relator may proceed with the complaint on behalf of the government. The complaint must be kept confidential and is not served on the defendant until the seal is lifted.

Relators may receive a "whistleblower bounty" of between 15 and 25 percent of the recovery if the government intervenes in their cases and between 25 and 30 percent if the government declines.

II. DOJ REPORTS HUNDREDS OF NEW FCA CASES AND BILLIONS OF DOLLARS IN RECOVERIES

Figure 1 charts new FCA cases per year, which show a steady increase in qui tam-driven cases.[5] Well over 700 FCA cases have been filed each year for the past 13 years and a high percent of those cases have been qui tam cases. Many qui tam cases remain under seal for years pending the DOJ's intervention decision. In 2022, there was a high-water mark in new FCA cases brought by both the government and qui tam relators for a total of 948, likely linked to the expenditure of substantial federal funds and potential for pandemic relief fraud. This uptick started back in 2020 during the beginning of the COVID-19

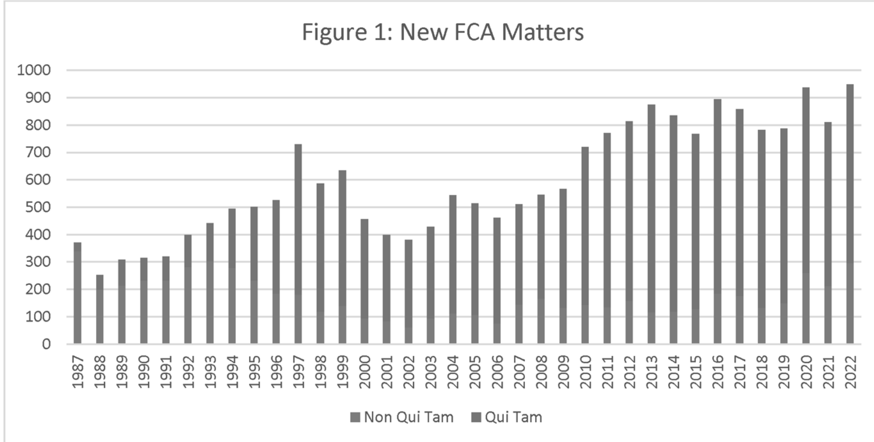
[2] 31 U.S.C. §§ 3729(a)(1)(A)–(B) (2009); U.S. ex rel. Rose v. Stephens Inst., 909 F.3d 1012, 1017 (9th Cir. 2018).

[3] 31 U.S.C. § 3729(b).

[4] U.S. v. Science Applications Int'l Corp., 626 F.3d 1257 653 F. Supp. 2d 87 (D.D.C. 2009).

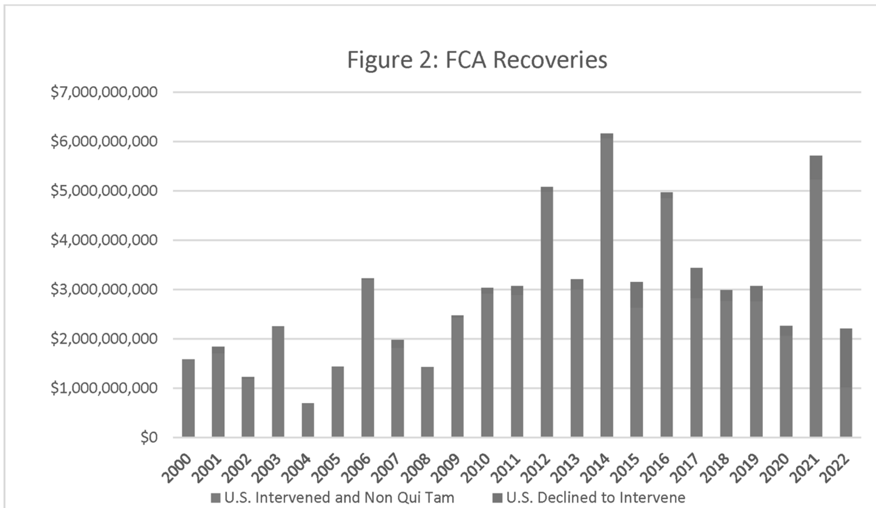
[5] DOJ Office of Public Affairs, Fraud Statistics—Overview (February 7, 2023).

pandemic and related federal stimulus. In 2020 and 2022, the government also filed more new FCA cases than in prior years showing this area remains a high priority for enforcement.



The DOJ collected over $2.2 billion in settlements and judgments in 2022, a substantial step back from prior years when there were more individual big settlements. In 2022, however, the 351 settlements and judgments reported by DOJ represents the second highest number in a single year since the FCA amendments in 1986. Figure 2 shows annual recoveries by the government in FCA cases and compares recoveries coming from qui tam cases where the government declined to intervene versus non-qui tam cases or qui tam cases where the government intervened.[6] Historically, the bulk of the recoveries came in non-qui tam cases and qui tam cases where the government intervened. There was an anomaly in 2022 when recoveries from qui tam cases outpaced those in which the government actively participated. Consistent with recent trends, DOJ reported recoveries ($1.7 billion) in 2022 mostly came from settlements and judgments from the health care industry, including drug and medical device manufacturers, durable medical equipment, home health and managed care providers, hospitals, pharmacies, hospice organizations, and physicians. DOJ reported that additional 2022 recoveries reflected its focused attention on new enforcement priorities, including in pandemic relief programs and alleged violations of cybersecurity requirements in government contracts and grants.

[6] See footnote 1 above.



III. THE SUPREME COURT GRANTS CERTIORARI REGARDING TWO KEY FCA SUBJECTS

The Government's Dismissal Authority Under 31 U.S.C. § 3730(c)(2)(A)

FCA Section 3730(c)(2)(A)[7] allows the government to dismiss a qui tam action over the objection of the relator. Rarely used until recent years, Section 3730(c)(2)(A) has emerged as a more frequent method of ending qui tam FCA cases. In 2018, Michael D. Granston, then Director of the Commercial Litigation Branch, Fraud Section, issued a memorandum (the Granston Memo) outlining seven factors for the government to consider when dismissing qui tam actions:

1. Curbing meritless qui tam actions;
2. Preventing parasitic or opportunistic qui tam actions;
3. Preventing interference with agency policies and programs;
4. Controlling litigation brought on behalf of the United States;
5. Safeguarding classified information and national security interests;
6. Preserving government resources; and
7. Addressing egregious procedural errors.

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[7] "The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion."

Circuit courts of appeals are mostly split into two general camps with respect to the role of the judiciary in reviewing dismissals of qui tam cases under Section 3730(c)(2)(A).

First, the Ninth Circuit's standard, articulated in *United States v. Baird-Neece Packing Corp.*,[8] requires the government to (1) identify a valid government purpose, and (2) demonstrate a rational relation between dismissal and accomplishment of that purpose.

Second, the District of Columbia Circuit standard, articulated in *Swift v. United States*,[9] gives the government virtually "unfettered" discretion to dismiss qui tam cases under Section 3730(c)(2)(A).

Circuit courts have continued to weigh in on the standards of review in recent years. In 2021, in *U.S. ex rel. Health Choice Alliance LLC et al. v. Eli Lilly & Co. Inc. et al.*,[10] relators accused Bayer Corp. and Eli Lilly & Co. Inc. of participating in a kickback scheme to induce medical providers to prescribe their products. The government declined to intervene and, one year later, moved to dismiss the case under Section 3730(c)(2)(A), citing its two-year investigation into the relators' case. The district court granted the motion over relators' objections. The Fifth Circuit chose not to adopt outright the D.C. Circuit's or the Ninth Circuit's standard, but determined that the Ninth Circuit's more stringent standard would have been satisfied because (1) the government established a relationship to a government purpose (dismissing a meritless case to avoid costs of prosecution), and (2) the relators could not show that the dismissal was "fraudulent, arbitrary and capricious, or illegal."

The Third Circuit added its own opinion on reviewing dismissals in 2021. In *Polansky v. Exec. Health Res. Inc*,[11] a relator brought an action against a healthcare company alleging that it overbilled Medicare by certifying inpatient services that should have been provided on an outpatient basis. The government declined to intervene and, many years later, moved to dismiss the action over the relator's objection. The Third Circuit held that the government was required to intervene in the case before it could dismiss an action under Section 3730(c)(2)(A), but nonetheless reviewed the government's motion to dismiss as a de facto motion to intervene without remanding the case to the district court. The Third Circuit also held that the government did not need to intervene at

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[8] United States v. Baird-Neece Packing Corp., 151 F.3d 1139 (9th Cir. 1998).

[9] Swift v. United States, 318 F.3d 250 (D.C. Cir. 2003).

[10] U.S. ex rel. Health Choice Alliance LLC et al. v. Eli Lilly & Co. Inc. et al., 4 F.4th 255 (5th Cir. 2021).

[11] Polansky v. Exec. Health Res. Inc, 17 F.4th 376 (3d Cir. 2021).

the first available opportunity. The Third Circuit rejected both the D.C. Circuit's and Ninth Circuit's standards and applied the standard of review under Fed. R. Civ. P. 41(a) (Dismissal of Actions), which gave the district court a "broad grant of discretion" to shape the proper terms of dismissal. In this case, Rule 41(a) permitted voluntary dismissal of the action without a court order by the plaintiff (government) as the notice of dismissal was filed before the opposing party served either an answer or a motion for summary judgment, whichever is the latter.

On June 21, 2022, the Supreme Court granted certiorari in the *Polansky* matter.[12] The questions presented for review are: (1) whether the government has authority to dismiss a qui tam FCA suit after initially declining to intervene, and (2) what standard applies if the government has such authority. At oral argument, the Justices appeared satisfied that the government has the authority and discretion to dismiss qui tam cases any time after it initially declines to intervene. However, there was considerable discussion regarding the appropriate standard to apply to the dismissal proceeding. The Supreme Court will likely follow the clear language in the statute and confirm that the government is the real party in interest in a FCA action and relator's qui tam action remains under the control of the government. Accordingly, the government likely has an absolute right, even if it initially declined to intervene, to seek dismissal at a later point in the litigation. The Court will not likely impose any higher standard that the government must satisfy in order to seek a dismissal. If the Supreme Court affirms the government's authority, seeking dismissals after intervention decisions would likely become more popular among defendants, and could chill qui tam suits depending on the applicable standard.

It should be noted that Senator Chuck Grassley intensely dislikes the potential development of dismissing qui tam suits well after the government initially declines intervention and it could spur an amendment to the FCA. Senator Grassley previously sponsored a bill in 2021 codifying the Ninth Circuit's "rational relation" standard.

The FCA's Correct Standard for Pleading and Proving Scienter

On January 13, 2023, the Supreme Court granted certiorari and decided to take up the controversial pleading requirement related to the FCA's scienter element which only allows liability when the alleged wrongdoer is shown to have acted "knowingly." The FCA defines knowingly as a person acting with actual knowledge or deliberate ignorance or reckless disregard of the truth or

[12] United States, ex rel. Jesse Polansky, M.D., M.P.H. v. Executive Health Resources, Inc., S.Ct. No. 21-1052.

falsity of information. A showing of specific intent is not required. The Supreme Court granted certiorari regarding two Seventh Circuit cases that ruled on this issue: *U.S. ex rel. Proctor v. Safeway Inc.*[13] and *U.S. ex rel. Schutte et al. v. SuperValu Inc. et al.*[14]

In both cases, the Supreme Court agreed to consider "whether and when a defendant's contemporaneous subjective understanding or beliefs about the lawfulness of its conduct are relevant to whether it 'knowingly' violated the [FCA]." Controversies surrounding the FCA's proper standard for pleading and proving scienter usually arise in matters in which the alleged misconduct involves underlying statutes or regulations upon which the false claim is predicated that are vague and ambiguous. In other words, a statute or regulation may be subject to more than one reasonable interpretation. These types of controversies frequently arise when interpreting Byzantine healthcare and federal procurement statutes and regulations. FCA defendants have argued that whether their actions are reasonable for scienter purposes can be informed by what is considered to be "an objectively reasonable" interpretation. That is, the defendant acted consistent with how a reasonable person would act under similar circumstances.

Even assuming circumstances where a defendant might have some misgivings or self-doubt, i.e., "subjective intent," regarding the propriety of the conduct at issue, defendants have argued it does not mean those doubts or misunderstandings should be analyzed in isolation and necessarily construed as "subjective intent" for purposes of triggering or satisfying the scienter element of the FCA and subjecting the person to fraud charges that can result in treble damages and statutory penalties. The government and FCA whistleblowers, however, contend otherwise and argue that the defendant's subjective intent or understanding—albeit incorrect relative to the vague and ambiguous law—is enough to establish scienter or the "knowingly" requirement.

IV. THE SUPREME COURT DENIES CERTIORARI REGARDING THE FCA'S CONTROVERSIAL PLEADING WITH "PARTICULARITY STANDARD"

In October 2022, the Supreme Court denied writs of certiorari from three circuit courts that could have settled hotly contested disputes related to the "particularity standard" required at the pleading stage in FCA actions.[15] Earlier

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[13] U.S. ex rel. Proctor v. Safeway Inc., case number 22-111.

[14] U.S. ex rel. Schutte et al. v. SuperValu Inc. et al., case number 21-1326.

[15] See Johnson v. Brethany Hospice (11th Circuit); U.S. ex rel. Owsley v. Fazzi Associates (6th Circuit), and Molina Healthcare v. Prose (7th Circuit).

in the year, the Supreme Court signaled interest in the issue by requesting the Solicitor General to file a brief expressing the government's views on the extent to which FCA complaints must plead with particularity involving circumstances resulting in fraud on the government, as required by Rule 9 (b) of the Federal Rules of Civil Procedure.

Virtually all circuit courts of appeals have articulated various and nuanced pleading standards over the years. In general, the various standards range from requiring specific details about the actual false claim (e.g., Eleventh Circuit), on the one hand, to allowing plaintiffs to allege "reliable indicia" that a false claim was submitted (Ninth Circuit), on the other hand. By leaving the various pleading with particularity standards to each of the circuit courts to determine for themselves, the Supreme Court has allowed an environment in which plaintiffs will forum shop for the most favorable or pro-plaintiff pleading standards currently found in the Third, Fifth, Seventh, Ninth, and Tenth Circuit Courts of Appeals.

V. MORE CHANGES IN ENFORCEMENT POLICY UNDER THE BIDEN ADMINISTRATION

In October 2021, Deputy Attorney General Lisa Monaco announced tougher enforcement policies for white collar cases. In effect, DOJ implemented a return of the Yates Memorandum, whereby companies must turn over all nonprivileged information on individuals involved in wrongdoing in order to receive cooperation credit. DOJ emphasized companies cannot limit disclosures of persons or management they deem substantially involved in the misconduct.

On September 15, 2022, Deputy Attorney General Monaco issued a memorandum with further revisions to corporate criminal enforcement policies following her discussions with the Corporate Crime Advisory Group comprised of leaders and experienced prosecutors from all components of the DOJ that handle corporate criminal matters. The memorandum specifically set forth DOJ policies aimed to speed up indictments against executives of companies. The DOJ offered that companies won't face guilty pleas or compliance monitors if they quickly and voluntarily disclose factual information about individual wrongdoing. The DOJ directs prosecutors to consider whether a target company actually cooperated in a timely manner.

Cooperation credit will be reduced if prosecutors identify undue or intentional delay in providing important factual information. Importantly, prosecutors must strive to complete investigations and enforcement against individuals "prior to or simultaneously" with corporate resolutions. This approach allows DOJ to maintain maximum leverage regarding targeted individuals before resolving matters with the corporate institution. These

policies may apply to civil enforcement, including FCA matters, especially when there are parallel proceedings related to potential criminal and civil fraud misconduct.

VI. STATUS OF PROPOSED AMENDMENTS TO THE FCA

On July 26, 2021, Senator Chuck Grassley and a bipartisan group of senators initially introduced the False Claims Amendments Act of 2021, S.2428, which proposed substantial changes to the FCA aimed at addressing its so-called "loopholes." Senator Grassley has long been among the strongest supporters of the FCA on Capitol Hill, and is responsible for key amendments strengthening FCA enforcement in 1986 and 2010. After some criticism, Senator Grassley introduced an amendment that revised the "materiality" section. In July 2022, the Congressional Budget Office (CBO) finally issued its cost estimates for the bill. The estimates for additional FCA successes (two to three per year) were relatively underwhelming, but the principal proponents of the bill were not deterred. The bill will likely be considered by the full Senate in 2023. Key proposed changes to the FCA include the following.

- *Materiality*: The amended materiality proposal states: "In determining materiality, the decision of the government to forego a refund or pay a claim despite actual knowledge of fraud or falsity shall not be considered dispositive if other reasons exist for the decision of the government with respect to such refund or payment." This amendment is intended to curb perceived problems Senator Grassley and other bi-partisan supporters of the bill have with the Supreme Court's decision in *Universal Health Servs., Inc. v. United States ex rel., Escobar*.[16]
- *Government Dismissal Authority*: The amendment states relators are entitled to a hearing before involuntary dismissal by the government. It further requires the government to demonstrate reasons for dismissal, and allows relator to contest the reasons. This is clearly a direct response to the Granston Memo and circuit court precedent allowing the government to dismiss FCA actions over objections by relators with little to no judicial review.
- *FCA Retaliation*: Specifies that whistleblower protections apply to "current or former" employees, contractors, or agents.

VII. GROWING FCA ENFORCEMENT AGAINST PRIVATE EQUITY FIRMS

Over the past several years, DOJ and whistleblowers have increasingly targeted private equity firms for potential violations of the FCA. In June 2020,

[16] Universal Health Servs., Inc. v. United States ex rel., Escobar, 136 S. Ct. 1989 (2016).

Principal Deputy Assistant Attorney General Ethan P. Davis of DOJ addressed the U.S. Chamber of Commerce and warned private equity firms that its enforcement efforts could target such firms that sometimes invest in companies that receive payments from the U.S. government. He stated that private equity firms should be aware of laws and regulations designed to prevent fraud from occurring in highly-regulated areas like health care or the life sciences. Later that year, in November 2020, DOJ announced the former owners of Therakos, Inc., paid $11.5 million to settle FCA allegations of promoting a drug-device system between 2006 and 2015 for unapproved uses to pediatric patients. Among the federal healthcare program payors to Therakos were Medicaid, The Federal Employee Health Benefits Program, and Tricare. The private equity firm, The Gores Group, was swept up in the investigation and prosecution because it had acquired Therakos from Johnson & Johnson in 2012 in the midst of the alleged misconduct and failed to take affirmative steps to prevent it from continuing.[17]

There has been an uptick in FCA cases against private equity firms, partially fueled by booming private equity acquisitions in health care. DOJ and whistleblowers view private equity firms as attractive targets because of their deep pockets. As with all FCA cases, liability will depend on many factors including (1) the private equity firm's knowledge of the underlying acts, and (2) how such acts may have led to submission of potential false claims to the government. Often times, FCA plaintiffs will compare patterns and practices of the portfolio before and after the acquisition to establish one or more of the requisite elements of liability under the FCA.

VIII. ONGOING PRIORITY FCA ENFORCEMENT AGAINST PANDEMIC RELIEF FRAUD

For more than two years, practitioners in the white collar and FCA areas have written about the impending flood of government and whistleblower prosecution as a result of the COVID-19 pandemic, the CARES Act, and other pandemic relief responses from the federal government. Trillions of dollars were spent by the federal government in pandemic relief, often rushed with opaque qualifications for receipt. Numerous enforcement bodies were created to address anticipated pandemic relief fraud, including the Special Inspector General for Pandemic Recovery, Congressional oversight committees, and various, multi-jurisdictional task forces within the DOJ and related agencies. The DOJ initially brought a flurry of criminal charges against obvious pandemic fraudsters based on misrepresentations in relief applications, such as fraudulent

[17] United States ex rel. Johnson v. Therakos, Inc. et al., No. 12-cv-1454 (E.D. Pa., filed March 22, 2012).

Paycheck Protection Program (PPP) applications, and for misuse of funds. Since March 2020, many enforcement actions have targeted the most obvious cases of fraud such as:

(1) PPP loans to non-existent businesses;

(2) Loan applicants that falsified the number of employees; and

(3) Loans that were used for unauthorized purchases such as expensive cars, properties, and vacations.

As predicted, wrongful or deceitful applications for pandemic relief funds have also resulted in civil liability under the FCA. Despite the expected modest rollout of publicly announced FCA claims and settlements related to COVID-19 in 2021 and 2022, there is reasonable certainty of voluminous audits and FCA enforcement actions underway and on the horizon based on false claims for pandemic relief. For example, the federal government spent over $813 billion on the PPP loan program alone. The Small Business Administration's (SBA) Inspector General reported in May 2022 that his office had identified "more than 70,000 loans totaling over $4.6 billion in potentially fraudulent PPP loans."[18] And, on August 5, 2022, President Biden signed two bills extending the statute of limitations for civil and criminal enforcement for fraud in connection with the PPP program and Economic Injury Disaster Loans (EIDL) to 10 years to ensure there is plenty of time to investigate and prosecute suspected fraudsters.[19]

In September 2022, the DOJ reported its first settlement of alleged PPP loan fraud targeting PPP lenders. Prosperity Bank settled allegations that it violated the FCA because it approved a PPP loan despite knowing that the applicant lied when checking "no" to a question related to facing criminal charges. The settlement amounted to two times the loan processing fee earned by the lender. Also, in October 2022, online lender Kabbage, Inc., one of the largest PPP lenders (reportedly more than $7 billion processed to 300,000 businesses) filed for bankruptcy. The filings revealed that it was facing investigations by two U.S. Attorney's Offices (Boston and Houston) for improperly approving PPP loans. This signals DOJ has fintechs and other lenders squarely within their crosshairs.

Recipients and lenders of the PPP loan program and other forms of pandemic relief funds would be prudent to conduct reasonable due diligence of their applications and lending processes for the PPP and other relief funds, use of such funds under the required terms and conditions, and related loan

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[18] See SBA OIG Inspection Report, SBA's Handling of Potentially Fraudulent Paycheck Protection Program Loans, Report Number 22-13 (May 26, 2022).

[19] See H.R. 7352 and H.R. 7334.

forgiveness representations to correct or clarify any misrepresentations or false certifications in order to mitigate potential enforcement in the near future.