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**PROGRAM MATERIALS**  
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## **Paying the Piper: PPP and Related COVID and CARES ACT Enforcement**

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# Paying the Piper: PPP and Related COVID and CARES ACT Enforcement

**Presented by**  
**Michael E. Clark and Robert Hauberg**  
for Celesq Attorneys Ed Center



**November 30, 2020 (12:00 p.m. EST)**

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- Handled dozens of grand jury investigations, criminal trials, civil trials involving mergers, financial institutions, RICO, false claims by government contractors, whistleblowers and bribery. Participated in matters including the Marvin Frankel insurance fraud litigation, KPMG tax shelters, shareholder litigation, securities suitability, sales of marine equipment, antitrust, health care/pharmaceutical contracts, and federal False Claims Act whistleblower litigation. Before private practice, served as a federal prosecutor (AUSA in DC; senior official in the Antitrust Division and Criminal Division (Fraud Section) of DOJ.

# AGENDA

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- Increased opportunity for fraud: contributing factors?
- Congressional oversight– including SIGPR investigations
- SEC focus and charges
- DOJ focus and charges
- Antitrust focus and charges
- Other agencies?
- Practical tips

# Increased Opportunity for Fraud and Contributing Factors

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## 1. Workplace conditions

- a. Remote employees
- b. Technology reliance and pitfalls
- c. Lack of direct supervision

## 2. Economic changes

- a. Downturn in business
- b. Competitive pressures
- c. Various stimulus programs, e.g., CARES Act
- d. COVID-affected diminution of workforce

# COVID Related Rise In Fraud

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- In September 2020, the Association of Certified Fraud Examiners published results from a survey of members, noting that they overwhelmingly confirm that preventing, detecting, and investigating fraud in the COVID-19 environment is more difficult than it was pre-COVID.
- To compound matters, the survey finds that fraud and other misconduct has been on the rise since COVID began:

# COVID Related Rise In Fraud

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- 77% of respondents observed an increase in the overall level of fraud.
- 92% of respondents expect to see a further increase in the overall level of fraud during the next year.
- 92% of respondents expect to see a further increase in the overall level of fraud during the next year.



# COVID Related Rise In Fraud

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- 83% of respondents observed an increase in cyber fraud schemes and 90% anticipate a further increase next year.
- 69% of respondents observed an increase in fraud by vendors and 83% anticipate a further increase over the next year.
- 57% of respondents have observed an increase in loan and bank fraud and 76% anticipate a further increase next year.

# COVID Related Rise In Fraud

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- 42% of respondents have observed an increase in employee embezzlement and 73% anticipate a further increase over the next year.
- 49% of respondents have observed an increase in bribery and corruption and 70% anticipate a further increase over the next year.

# Role Of Congress

- All House and Senate committees have investigatory powers across substantive areas of focus.
- The principal oversight committees are:
  - the House Committee on Operations and Reform
  - the Senate Committee on Homeland Security and Governmental Affairs (in particular, its Permanent Subcommittee on Investigations)

# Role Of Congress

- All committees can subpoena documents, order testimony at committee hearings, and sometimes compel depositions.
- Congress can investigate conduct that may be criminal, but cannot bring criminal charges or initiate a criminal prosecution.
- Congressional investigations often run parallel to a criminal investigation by the U.S. Department of Justice (DOJ).

# Role Of Congress

- Inquiry may also involve concurrent or related investigations and/or enforcement by other federal agencies, including the Office of the Inspector General and the Securities and Exchange Commission.
- Evidence presented or developed in a congressional investigation can be (and commonly is) used by DOJ in its investigation and, potentially, prosecution.

# Precedent from the Troubled Asset Relief Program (TARP)

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- The Financial Stability Oversight Board (FSOB) reported suspected fraud, misrepresentation, or malfeasance to the Special Inspector General for TARP (SIGTARP) or the U.S. Attorney General.
- Investigations resulted in over \$11 Billion recovered through civil False Claims Act or criminal enforcement cases, resulting in 438 charges and 381 convictions.

# Precedent from the Troubled Asset Relief Program (TARP)

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- The sheer magnitude of the monies being provided under the CARES Act (over \$2 Trillion) dwarfs the hundreds of billions funded through TARP (\$600 Billion) and disbursed to a much broader group — which heightens the risks.

# Key Oversight Provisions in the Cares Act

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- The CARES Act created several key oversight provisions that provide the government with tools for compliance:
  - Section 4018 creates a Special Inspector General for Pandemic Recovery (“SIGPR”) to conduct focused oversight of the funds.



# Key Oversight Provisions in the Cares Act

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- Section 4020 creates a Congressional Oversight Commission (terminating by 2025) to oversee implementation by the Treasury Department and the Federal Reserve System’s Board of Governors
- Section 15010 creates the Pandemic Response Accountability Committee (“PRAC”) charged with promoting transparency and oversight of covered funds and the Coronavirus response.

# Range of Congressional Oversight

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- Can we expect CARES Act oversight to go beyond financial institutions (which was the focus under TARP)?
  - PPP Loans and Loan Forgiveness / Banking Practices
  - Hospitals and health care systems
  - Funding services
  - Access to PPE

# Range of Congressional Oversight

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- Oversight of patient care
- Defense contracts
- FEMA funds/distribution
- Civil Rights implications – equal access issues
- Executive compensation – fees/bonus incentives
- What criteria will be used to identify subjects/targets of investigations?
- How compatible were loans—including specific Federal Reserve or Treasury-directed incentives—with the initial goals?

# Paycheck Protection Program (PPP) Under the CARES Act

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- April 3 – August 8, 2020: Loans were funded by Treasury to companies in order to keep employees on the job.
  - 5.2 million companies
  - \$525 Billion
  - Subject to forgiveness *if* conditions on use met
  - Administered by the Small Business Administration (SBA)
  - SBA is auditing all loans over \$2 Million (and some under that amount)

# Economic Injury Disaster Loan Program (EIDL)

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- Loans to small businesses of up to \$150,000 per entity (\$2 million max for all affiliates)
  - July 2020: SBA IG calls for closer oversight
  - August 2020: Project on Government Fraud reports over double the prior month's bank reports of suspected business loan fraud
  - September 2020: J. P. Morgan Chase fires employees who improperly applied for and received funds

# Enforcement Risks

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- September 1, 2020: House Select Subcommittee on The Coronavirus Crisis found \$4 Billion in suspected PPP fraud risk in 22,000 loans
- October 28, 2020: SBA IG states “strong indicators of widespread potential abuse and fraud in the PPP”

**Source:** SBA Inspector General Inspection Report, “Inspection of Small Business Administration’s Initial Disaster Assistance Response to the Coronavirus Pandemic,” Report No. 21-02, October 28, 2020.

# Main Street Lending Program (MSLP)

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- \$600 Billion set aside for loans, not subject to forgiveness
- Administered by Federal Reserve
  - As of September 3, 2020, only \$1.2 Billion had been loaned. The Fed lowered lending bank's risk from 15% to 5%, and minimum loans from \$1 Million to \$250,000; extended loan terms from four to five years; deferred principal payments for two years; and extended program to non-profits
  - On October 30, 2020, the Fed lowered minimum loan to \$100,000 and lowered fees, waving its 1%. Now, about 400 loans totaling \$3.7 Billion have been made.

# Enforcement Risks:

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- False Claims Act: the fraudulent inducement of loans/federal funds made via false certifications
- DOJ statement (June 26, 2020): DOJ will “hold accountable those who knowingly attempt to skirt [MSLP] requirements.”



# Role Of Inspectors General

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- Appointed by and accountable to President
  - President can remove within 30 days notice
  - Agency head cannot bar an investigation, although IG generally reports to him/her. Investigation results are given to DOJ/U.S. Attorneys for prosecution
  - Affirmative powers like assessing civil money penalties ("CMPs") go beyond the IG Act, but the IG has no authority over programs
- With the new administration, what will be the composition of SIGPR going forward?

# Focus/Actions of Special IG for Pandemic Recovery (SIGPR)

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- The CARES Act established SIGPR and the Pandemic Response Accountability Committee (PRAC) consisting of nine agency IGs
- First SIGPR steps:
  - Determined scope of jurisdiction
  - Organized plan for conducting audits and investigations
  - Started investigations

# Focus/Actions of Special IG for Pandemic Recovery (SIGPR)

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- **Scope includes:**
  - Loans, loan guarantees, investments by Secretary of Treasury
  - Payroll Support Program
  - Coronavirus's Relief Program
  - Loans by Secretary of Treasury to U.S. Postal Service

# Focus/Actions of Special IG for Pandemic Recovery (SIGPR)

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- SIGPR Investigations include:
  - 21 allegations
  - 7 referrals to other IGs
  - 1 joint investigation with U. S. Attorney
- Overall IG Investigations include:
  - 12 IGs
  - 141 investigations
  - 241 indictments/complaints and 10 convictions

**Sources:** SIGPR Second Quarterly Response to Congress, September 30, 2020; PRAC First Semi-annual Report to Congress, October 29, 2020

# Role of the Securities and Exchange Commission

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- On March 4, 2020, the “Division of Investment Management Staff Statement on Fund Board Meetings and Unforeseen or Emergency Circumstances Related to Coronavirus Disease 2019 (COVID-19)” was issued.
  - The Division encouraged investment advisers and funds to contact its staff with any concerns related to current or potential effects of COVID-19 on their operations, including any need for relief or guidance.

# Role of the SEC

- The Division also encouraged them to evaluate their business continuity plans and valuation procedures, among other relevant policies, procedures, and systems.
- On March 23, 2020, SEC’s Division of Enforcement cautioned market participants to “continue maintaining market integrity and following corporate controls despite the pandemic.”
  - This statement focuses on insider trading and compromised internal controls.

# Role of the SEC

- SEC's Enforcement Division warned that more people may have access to inside information due to the widespread remote working conditions.
  - The Enforcement Division's message is it will be carefully monitoring market activity.
- On March 25, 2020, in "CF Disclosure Guidance: Topic No. 9 Coronavirus (COVID-19)," SEC's Corporate Division expanded the disclosure obligations.

# Role of the SEC

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- This guidance explains that publicly-traded companies must *disclose COVID-19's effects on the company*—which includes its predicted future impact, how management is responding, and plans for virus-related uncertainties.
  - In determining what must be disclosed, the standard remains “material information that is widely disseminated” and “material to investment and voting decisions.”



# Role of the SEC

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- On April 8, 2020, Chairman Clayton and Director Hinman issued a public statement entitled “The Importance of Disclosure-For Investors, Markets and Our Fight Against COVID-19” that advises companies making disclosures to use available safe harbors for forward-looking statements:

# Role of the SEC

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“We encourage companies that respond to our call for forward-looking disclosure to avail themselves of the safe-harbors for such statements and ... we would not expect good faith attempts to provide appropriately framed forward-looking information to be second guessed by the SEC.”

- As companies were releasing quarterly earnings and having investor/analyst calls, Chairman Clayton and Director Hinman emphasized that the calls should *not* be routine, nor focus on historical measures, but be tailored to address problems from the pandemic.

# Role of the SEC

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- On May 12, 2020, Division of Enforcement Director Reiken announced the Coronavirus Steering Committee was set up to identify areas of possible misconduct, and will review whistleblower tips. Reiken reemphasized the Enforcement Division's focus on
  - Insider trading;
  - Accounting fraud, including mischaracterization of past financials;

# Role of the SEC

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- Asset management from valuations to conflicts of interest;
- Structured investment products to identify improper marketing

# SEC Enforcement Actions

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- In its September 30, 2020 fiscal year-end report the SEC stated:
  - Over 700 enforcement actions (down from the prior year) and over \$4 Billion in financial remedies
  - Of 640 new matters opened, 150 related to COVID-19
  - Dozens of suspensions of trading
  - Recent complaints:

# SEC Enforcement Actions

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- SEC suspended trading in Praxsyn Corporation on March 25, 2020; filed suit in April 2020 against the company and the CEO alleging they committed securities fraud by misrepresenting its supply of N95 masks. The SEC also sought fines and a *permanent bar* against the CEO from serving as an officer or director of a public company.

# Role of the Department of Justice

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- On March 24, 2020, Attorney General William Barr outlined a task force approach in a memorandum, “Department of Justice COVID-19 Hoarding and Price Gouging Task Force”;

# Role of the Department of Justice

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- The same day, Deputy Attorney General Jeff Rosen issued a memorandum, “Department of Justice Enforcement Actions Related to COVID-19,” that also anticipates close interagency and state coordination to address fraud and other misconduct related to the Coronavirus pandemic.



# Role of the Department of Justice

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- DOJ's Criminal Division and its United States Attorneys collaborate with the Civil Division, as they have the authority to sue for treble damages under the False Claims Act when government's funds are taken by fraud.

# Focus/Actions of DOJ

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- On September 15, 2020, DOJ announced results of Paycheck Protection Plan (“PPP”) Criminal Fraud Enforcement Action
  - Over 50 defendants charged with fraud, covering over \$175 Million, with federal government losses exceeding \$70 Million
    - Loan requests ranged from \$30,000 to \$24 Million

# Focus/Actions of DOJ

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- Fraud was based on false statements / documents:
  - Number of employees
  - Average monthly revenue and payroll figures
  - Applicant's criminal histories
  - Falsified tax records
  - Stolen personal information from third parties
  - Impermissible purchases of luxury items like homes, cars, vacations, jewelry
- By November 2020, over 70 cases had been brought, according to news reports

# Sample Prosecutions by DOJ

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- Married couple arrested at JFK airport attempting to flee country after 18 allegedly fraudulent application for PPP.
- Reality TV personality Maurice Fayre (“Love & Hip Hop: Atlanta”) charged over a \$3,725,500 PPP loan application for Flame Trucking, falsely claiming 107 employees and submitting forged bank statements. Funds spent, *inter alia*, on child support, a Rolex, and a Rolls-Royce.

# Sample Prosecutions by DOJ

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- Samuel Yates indicted for \$5 Million in applications to two lenders, claiming 400 employees (none real) by using internet name generation and forged tax records.
- Film producer William Sadlier was charged with wire and bank fraud as his \$1.7 Million PPP loan was used for personal credit card and car loan. The SEC also charged him with defrauding investors.
- Charges were filed against Florida and Ohio defendants—including a former New York Jets wide receiver—who applied for \$24 Million in loans based on false documentation in over 90 applications.

# Sample Prosecutions by DOJ

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- A superseding indictment in Florida charged Casey David Crauther with false applications to mortgage broker, bank fraud, and forfeiture for obtaining \$2,098,700 and using proceeds to purchase new catamaran.
- Michigan and Mississippi U. S. Attorneys indicted Andrew Taylor, Jr. and Judith A. Middleton, respectively, for separate schemes to fraudulently obtain unemployment insurance benefits subsidized through the CARES Act.

# Types of DOJ Criminal Charges

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- Wire fraud, attempt and conspiracy to commit wire fraud, 18 U.S.C. §§1343, 1349
- Money laundering, concealment money laundering, transactions on unlawful proceeds, 18 U.S.C. §§1956, 981(a)(c)(1), 1956 (a)(i)(B)(i), 1957
- Civil/criminal forfeiture, 18 U.S.C. §246(c)
- Bank fraud, conspiracy to commit bank fraud, 18 U.S.C. §§1344, 1349
- Mail fraud, 18 U.S.C. §1341
- Health care fraud, false statements relating to health care, 18 U.S.C. §§1935, 1347

# Types of DOJ Criminal Charges

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- Payment of healthcare kickbacks, 42 U.S.C. §1320 a-7b(b)(2)(A)
- Aggravated identity theft, 18 U.S.C. §1029(a)(2)
- False statements to financial institution, 18 U.S.C. §§1014, 1001
- False statements to SBA, 15 U.S.C. §645(a)
- Conspiracy to make false statements to influence SBA, or defraud United States, 18 U.S.C. §371
- Theft of government funds, 18 U.S.C. §641
- Interstate transportation of stolen property, 18 U.S.C. §2314
- Honest services fraud, 18 U.S.C. §1346



# Types of DOJ Criminal Charges

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- Removal of property to prevent seizure, 18 U.S.C. §2232
- Theft or receipt of stolen mail matter generally or by officer/employee, 18 U.S.C. §§1708, 1709
- Major fraud against United States, 18 U.S.C. §1031
- Fraud in connection with major disaster or emergency benefits (pandemic unemployment assistance benefits), 18 U.S.C. §1040(a)(2)
- Obstruction of justice, 18 U.S.C. §§1503, 1512(c)(2)

# Focus/Actions of DOJ Antitrust Division

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- March 23, 2020: President Trump signs executive order to prevent price-gouging and hoarding of PPE and other medical supplies.
  - Defense Procurement Act, 50 U.S.C. §4512, is a misdemeanor punishable by up to one year and \$10,000 fine
  - Price Gouging and Fraud Prosecutions – including counterfeiting, misbranding of medical devices, wire fraud

# Focus/Actions of DOJ Antitrust Division

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- Antitrust Division/U.S. Attorneys
  - *United States v. Singh*, 20 MJ 326 (E.D.N.Y.) April 24, 2020 (non-existent PPE masks, markup of 1328 percent)
  - *United States v. Romano*, 20 MAG 5276 (S.D.N.Y.) May 26, 2020 (400-500 percent mark up, respiratory masks)
  - *United States v. Schrippa*, 20 MAG 5275 (S.D.N.Y.) May 26, 2020 (50% markup, masks)

# Focus/Actions of DOJ Antitrust Division

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- *United States v. Allen and Revolorio*, 20 MJ 318 (E.D.N.Y.) April 27, 2020 (up-front payments without any product)
- *United States v. Penn*, (N.D. GA.) May 28, 2020 (50 million masks in foreign sale, markup 500 percent)
- State AGs—38 states and District of Columbia have price-gouging laws
  - Cease and desist letters sent
  - Received hot-line complaints

# Focus/Actions of DOJ Antitrust Division

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- Requests for information sent to alleged violators, *e.g.*, rising lumber prices, construction costs

# Focus/Actions by Other Agencies

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- Health and Human Services ("HHS") Office of Inspector General ("OIG") is inspecting the effectiveness of controls over awarding/disbursing \$50 Billion in Provider Relief Funds ("PRF") to hospitals
- Other HHS projects include the FDA's role in COVID-19 testing and the CDC's production and distribution of test kits

# Focus/Actions by Other Agencies

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- Department of Labor identified \$8 Billion in scammed unemployment benefits
- Internal Revenue Service publishes fraud alerts and investigates, including theft of personal tax and identity information

# Practical Tips

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- Best practices to prepare for an investigation or enforcement against companies applying for and receiving CARES Act funds include:
  - Make truthful and continuing public disclosures
  - Give fulsome and cooperative responses to Congressional and enforcement agency requests for information
  - Spot, investigate, and correct/remediate internal misconduct, including enhancing internal controls and compliance



# Practical Tips

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- Keep proper documentation for an accurate and complete record of reasons to apply for funds and how spent, including giving senior management full backup for certifications;
- Collect and protect data, including from employee devices, and suspend retention dates to hold on the documents and ESI;
- Consider refunding loans if there is credible evidence of impropriety, as government audits of all PPP loans over \$2 Million (and some under \$2 Million) are underway.

THANK YOU

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