

Paying the Piper: PPP and Related COVID RELIEF, CARES ACT, and AMERICAN RESCUE PLAN Enforcement: A 2021 Update

Presented by

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AGENDA

- Increased opportunity for fraud: what are the contributing factors?
- Congressional oversight—including “SIGPR” investigations.
- SEC focus and charges.
- DOJ focus and charges.
- Antitrust focus and charges.
- Healthcare and Labor focus.
- Practical tips.



Increased Opportunity for Fraud and Contributing Factors

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, with changing conditions and extensions.
- d. COVID-affected dispersion of workforce, unemployment.
- e. Vulnerability of business/individuals to cybersecurity risks.



COVID Related Rise In Fraud

- In September 2020, the Association of Certified Fraud Examiners published the 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

- 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

- 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 observed an increase in loan and bank fraud and 76% anticipate a further increase next year.



COVID Related Rise in Fraud

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



Oversight 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).



Oversight 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 it cannot bring criminal charges or initiate a criminal prosecution (note, however, it has contempt powers).
- Congressional investigations often run parallel to a criminal investigation by the Department of Justice (adding more risks).



Oversight Role of Congress

- Inquiry may also involve concurrent or related investigations and/or enforcement by other federal agencies, including from one of the Offices 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 the DOJ in its investigation and, potentially, prosecution.



Precedent from the Troubled Asset Relief Program (“TARP”)

- 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”)

- The sheer magnitude of the monies being provided under the CARES Act (over \$3 trillion) dwarfs the hundreds of billions funded through TARP (\$600 billion) and disbursed to a much broader group — which heightens the fraud risks.
- Post CARES Act legislation has further increased the amount of funds now at risk.



Key Oversight Provisions in the Cares Act

- 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.
 - 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.

Key Oversight Provisions in the Cares Act

- Section 15010 creates the Pandemic Response Accountability Committee (“PRAC”) charged with promoting transparency and oversight of covered funds and the Coronavirus response.
- Over \$270 million was appropriated to new and existing oversight bodies.

Range of Congressional Oversight

- Can we expect CARES Act oversight to go beyond financial institutions (which was the focus under TAPR)?
 - On May 27, 2021, the Select Subcommittee on the Coronavirus Crisis sent letter requests for documents and other information to four Fintech firms and their partner banks because of links to a disproportionate number of fraudulent PPP loans (75% of the total as reported by DOJ, whose Civil Division was also reported on May 7 to be investigating the companies for miscalculating loans and payroll taxes).



Range of Congressional Oversight

- How compatible were loans—including specific Federal Reserve or Treasury-directed incentives—with the initial goals?
- What program controls or safeguards were put in place?
 - On March 25, 2021, the Chair of the House Committee on Oversight and Reform and the Select Subcommittee on the Coronavirus Crisis released a staff memo citing evidence of Trump Administration mismanagement of PPP and EIDL programs, causing \$84 billion of potentially fraudulent loans and lacking “basic program controls.”



Paycheck Protection Program (“PPP”) Under the CARES Act

- April 3 – August 8, 2020: Loans funded by Treasury to companies 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).
 - Increased amounts and extension of the program occurred in post CARES Act legislation providing COVID relief.



Economic Injury Disaster Loan Program ("EIDL")

- Loans to small businesses 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 more than 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.
 - Beginning April 6, 2021, SBA raised the loan limit to \$500,000 for up to 24 months of economic injury.
 - Up to that point, over \$3.7 billion loans issued to businesses employing over 20 million people.

Omnibus COVID Relief Deal

- As part of the Consolidated Appropriations Act of 2021, passed by Congress on December 21, 2020, and signed by the President on December 27, 2020, the following relief, among other steps, was provided:
 - \$900 billion, including \$429 billion from repurposed, unused PPP funds appropriated under CARES Act, was appropriated.
 - Federal Pandemic Unemployment Compensation (“FPUC”). supplemented state unemployment benefits by \$300 per week
 - New round of \$600 stimulus checks provided for persons, including children, with less than \$75,000 in income.
 - PPP small business loans increased by \$325 billion.
 - Assistance to various industries is provided.
 - Added \$3 billion to Healthcare Provider Relief Fund for COVID related expenses and lost revenue.



American Rescue Plan Act of 2021

- On March 21, 2021, the President signed a \$1.9 trillion pandemic relief package, the sixth measure overall.
- Third round of direct stimulus payment to those eligible
 - \$1,400 for persons with adjusted gross income of \$75,000 or less.
 - \$1,400 for each eligible dependent.
 - Phased out for those earning \$80,000 or more.
- Pandemic Unemployment Assistance (“PUA”) now covers independent contractors through September 6, 2021.
- Pandemic Emergency Unemployment Compensation (“PEUC”) extends through September 6, 2021, providing unemployment insurance benefits to those exhausting state unemployment insurance.



American Rescue Plan Act of 2021

- The Federal Pandemic Unemployment Compensation (“FPUC”) supplement of \$300 per week extends through September 6, 2021.
- PPP loans available are increased by \$7.25 billion (through March 31, 2021) and \$15 billion goes to EIDL.
- Special restaurant revitalization fund grants \$28.6 billion through the SBA.
- No new oversight bodies were created but an additional \$200 million was appropriated for existing ones.



PPA Extension Act of 2021

- Congress on March 26, 2021, passed and the President then signed further relief provisions.
- SBA could offer PPP loans until May 31, 2021, or until remaining funds are exhausted.
- Loans can only be originated by “participating community financial institutions.”
- After 8 weeks from their first draw, small businesses could get a second draw up to \$2 million and have more time to spend it on payroll.



PPA Extension Act of 2021

- Loan forgiveness application is simplified for loans up to \$150,000 and all applications must be submitted within 10 months from the end of the loan period (i.e., the loan must be used to cover payroll costs and certain other eligible expenses for an 8 to 24 week period after the loan).
- On May 4, 2021, SBA stopped accepting new PPP applications from most lenders, as general fund had been exhausted, and new applications could only be taken for the \$8 billion set aside for community financial institutions focused on businesses in underserved communities.



Enforcement Risks

- 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's IG states "strong indicators of widespread potential abuse and fraud in the PPP."
- January 11, 2021: SBA's IG found \$3.6 billion in PPP loans went to potentially ineligible recipients.

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; "Paycheck Protection Program Loan Recipients on the Department of Treasury's Do Not Pay List," Report 21-06, January 11, 2021.



Main Street Lending Program (MSLP)

- \$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 banks' 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 the MSLP program to non-profits.

Main Street Lending Program (“MSLP”)

- On October 30, 2020, the Fed lowered the minimum loan to \$100,000 and lowered fees, waving its 1%.
- Program was terminated by Federal Reserve as of January 8, 2021.
 - \$17.5 billion in loans.
 - 1830 loans.
 - 2453 borrowers.



Main Street Lending Program (MSLP)

- Top industries:
 - Accommodation and food service (12.5%).
 - Manufacturing (9.8%).
 - Real estate and rental and leasing (9.5%)
 - Mining, oil and gas extraction (8.4%).

Enforcement Risks:

- False Claims Act (“FCA”): the fraudulent inducement of loans/federal funds via false certifications.
- DOJ statement (June 26, 2020): DOJ will “hold accountable those who knowingly attempt to skirt [MSLP] requirements.”
- In addition to government-brought civil or criminal actions, whistleblowers under the FCA’s qui tam or retaliation provisions can sue.

Enforcement Risks:

- *Rucker v. Great Dane Petroleum Contractors, Inc.*, No. 21-cv-207 (M.D. Fla., March 10, 2021) (employee fired for complaining about improper use of \$3 million PPP loan).
- Congressional Investigations
 - On May 27, 2021, Rep. Clyburn, Chair of the Select Subcommittee on the Coronavirus Crisis, sent letters to four FinTech firms and partner banks seeking documents and information about their handling of PPP loans.

Source: <https://coronavirus.house.gov/news/press-releases/select-subcommittee-launches-investigation-role-fintech-industry-ppp-fraud>

Role of Inspectors General

- Appointed by and accountable to President.
 - President can remove within 30 days notice.
 - Agency head cannot bar an investigation, although the 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.

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

- 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)

- In light of Treasury Department resistance, on April 30, 2021, DOJ stripped SIGPR of authority to investigate fraud in Payroll Support Program (“PPP”) and Coronavirus Relief Fund (“CRF”) programs and limited that authority to programs created by the Coronavirus Economic Stabilization Act (“CESA”) as a separate part under the CARES Act. CESA provided \$500 billion (later reduced) to Treasury for loans, loan guarantees, and other investments to support eligible businesses and entities and also gave regulatory relief for some industries and categories of persons.

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

- Scope originally asserted by SIGPR includes:
 - Loans, loan guarantees, and investments by Secretary of Treasury.
 - Payroll Support Program.
 - Coronavirus Relief Program.
 - Loans by Secretary of Treasury to the U.S. Postal Service.



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

- SIGPR Investigations include:
 - 363 hot line complaints.
 - 35 new investigations under the CARES Act.
 - 14 referrals to other IGs.
 - 4 joint investigations with U.S. Attorneys; 1 with DOJ Fraud Section.
- Overall IG Investigations include:
 - 22 PRAC IGs investigations.



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

- 103 reports
- Participation in 250 of 474 DOJ charged cases

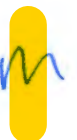
Sources: SIGPR Fourth Quarterly Response to Congress, April 30, 2021; PRAC Second Semi-annual Report to Congress, April 28, 2021.

Role of the Securities and Exchange Commission (“SEC”)

- On March 4, 2020, the SEC’s “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 advisers and funds 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 a more people may have access to inside information due to the widespread remote working conditions.
 - The Enforcement Division's message is that 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

- 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

- 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:

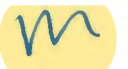
Role of the SEC

“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.”



Role of 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

- 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

- Asset management from valuations to conflicts of interest.
- Structured investment products to identify improper marketing.
- Under new SEC Chair Gensler, enforcement is expected to ramp up, but his newly appointed Director of Enforcement Oh resigned in April 2021 after only days on the job.



SEC Enforcement Actions

- In its September 30, 2020, fiscal year-end report the SEC stated there had been:
 - 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.
 - Dozens of suspensions of trading.
 - Recent complaints:



SEC Enforcement Actions

- The SEC sued a biotechnology company and its CEO for alleged misrepresentations that the company had developed and could introduce a finger-prick blood test for COVID-19. *SEC v. Berman, et al.*, No. 1:20-cv-10658 (S.D.N.Y., December 17, 2020).
- In December 2020, the SEC charged and settled for a \$125,000 fine allegations that the Cheesecake Factory falsely claimed that its restaurants were “operating sustainably.”

Role of the Department of Justice

- 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

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



Role of the Department of Justice

- 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 the government's funds are taken by fraud.
- On May 17, 2021, Attorney General Merrick Garland directed the establishment of the COVID-19 Fraud Enforcement Task Force led by the Deputy Attorney General to partner with all affected agencies to enhance enforcement efforts while augmenting existing cooperation mechanisms.



Focus/Actions of DOJ

- On March 26, 2021, DOJ announced results of its Paycheck Protection Plan (“PPP”) Criminal Fraud Enforcement Action and COVID-19 related fraud.
 - Over 474 defendants charged with fraud, with federal government and individual losses over \$569 million.
 - Loan requests ranged from \$30,000 to \$24 million.

Focus/Actions of DOJ

- PPP schemes accounted for at least 120 defendants charged.
 - Misappropriation of funds for prohibited purchases.
 - Inflating number of employees/payroll expenses.
- EIDL schemes generated over \$580 million in government recoveries.
 - Fraudulent applications on behalf of shell or non-existent businesses.



Focus/Actions of DOJ

- Fraud across all COVID-19 grant/payment programs 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, and jewelry.



Role of the Department of Justice

- Civil forfeiture sought by DOJ's Money Laundering and Asset Forfeiture Section, *e.g.*, *United States v. Edwards, et al.*, (M.D. Fla., April 29, 2021)(\$8.4 million in PPP loans used for attempted purchase of \$3.7 home).
- First COVID fraud settlement under the FCA and the Financial Institutions Reform Recovery and Enforcement Act ("FIRREA") was reached on January 12, 2021, with SlideBelts, Inc. over a \$350,000 loan. The company made false statements about its bankruptcy status to persuade banks to lend and the SBA to guarantee the PPP loan. Damages and penalties totaled \$100,000 and the loan was repaid.



Role of the Department of Justice

- Civil injunctive relief was sought in New Jersey, on November 13, 2020, to halt the sale of an unapproved “nano silver” product hyped as COVID-19 treatment by Natural Solutions Foundation and individuals despite the issuance of an earlier joint warning letter by FDA and the Federal Trade Commission (“FTC”).



Focus/Actions of DOJ

- Cybersecurity fraud prosecutions, including international cases through the International Computer Hacking and Intellectual Property program (“ICHIP”), took down hundreds of fraudulent websites.
 - Selling fraudulent or unapproved products for preventing / treatment of COVID-19.
 - Counterfeiting drugs.
 - Collecting personal information for fraud, phishing, and malware.



Focus/Actions of DOJ

- On May 3, 2021, Maryland U.S. Attorney seized the website “freevacinecovax.org” purporting to be biotechnology company developing COVID-19 vaccine.
- Importation and sale of unregistered pesticide products marketed as killer of COVID-19 virus.
- On May 25, 2021, a guilty plea was entered by EcoAirDoctor and its owner in San Diego, after the Environmental Protection Agency issued an order to cease sales of a clip-on badge.



Commonly Used DOJ Criminal Laws

- 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

- 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)
- Entry of goods falsely classified, 18 U.S.C. § 541
- Non mailable injurious articles, 18 U.S.C. § 1716 (j)(1)
- Distribution or sale of unregistered pesticides, 7 U.S.C. § § 136(j)(a)(1)(A), 136(l)(b)(1)(B)
- Conspiracy to make false statements to influence the SBA, or to defraud the United States, 18 U.S.C. §371



Types of DOJ Criminal Charges

- 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
- 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



Types of DOJ Criminal Charges

- 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/FTC

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



Focus/Actions of DOJ Antitrust Division/FTC

- On January 21, 2021, President Biden issued an executive order to immediately secure supplies to respond to the pandemic and to have the Secretary of Health and Human Services (“HHS”) recommend changes to President Trump’s order.

Focus/Actions of DOJ Antitrust Division/FTC

- Antitrust Division/U.S. Attorneys prosecutions.

Round One

- *United States v. Singh*, 20 MJ 326 (E.D.N.Y., April 24, 2020)(non-existent PPE masks, marked-up 1328%).
- *United States v. Romano*, 20 MAG 5276 (S.D.N.Y., May 26, 2020)(400-500% 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/FTC

- *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%).

Round Two

- *United States v. Leal Matos*, ____ (D.P.R., April 29, 2021)(using Facebook profiles to advertise and sell non-conforming N95 PPE at prices at least twice the acquisition costs).



Focus/Actions of DOJ Antitrust Division/FTC

- State AGs--38 states and District of Columbia have price-gouging laws.
 - Cease and desist letters sent.
 - Received hot-line complaints.
 - Requests for information sent to alleged violators, *e.g.*, rising lumber prices, construction costs.
 - Fines imposed, *e.g.*, New York assessed on November 7, 2020, three sellers of hand sanitizers on Amazon over \$52,000 in penalties and ordered reimbursement to consumers of \$23,000.

Focus/Actions of DOJ Antitrust Division

- In April 2021, Cigna as insurer/payer charged with price gouging by physician practices for in-house tests and consultations compared to tests at other labs.
- As of April 27, 2021, mentioned in testimony before Congress and in its April 2021 Staff Report Protecting Consumers during the COVID-19 Pandemic, the FTC had taken the following actions:
 - Filed 13 enforcement actions for failing to deliver PPE or making deceptive health or earnings claims.



Focus/Actions of DOJ Antitrust Division

- Issued over 250 warning letters (sometimes with FDA) to have deceptive claims removed for COVID-19 treatments, potential earnings from schemes, financial relief.
- Brought privacy enforcement actions.
- Tracked over 436,000 reports by consumers of total of \$399 million in fraud losses.



Healthcare Provider Relief Funds

- Congressional appropriations and actions include:
 - \$178 billion total to Public Health and Social Services Emergency Funds for grants to suppliers and providers.
 - \$8.5 billion to Rural Relief Fund for grants to rural providers.
 - Only for COVID-19 related expenses or lost revenues, capped at 2% of total patient care revenue in first two phases of distribution by HHS.



Healthcare Provider Relief Funds

- CARES Act provided \$175 billion; \$3 billion came under the Consolidated Appropriations Act, 2021.
- HHS has taken action as well:
 - Accelerated advance payment program enabling Center for Medicare and Medicaid Services (“CMS”) to pay providers and suppliers up front in emergencies (ended on October 8, 2020).



Healthcare Provider Relief Funds

- Recovery of advances began March 30, 2021.
- Reporting requirements to set forth justification for funds and compliance.



Healthcare Fraud

- Health and Human Services (HHS) Office of Inspector General (OIG) is inspecting the effectiveness of controls over as to the awarding/disbursing of the first phase \$50 billion in Provider Relief Funds (“PRF”) to hospitals; with the second (\$18 billion) and third (\$20 billion) phases to follow.
- Other HHS projects include the FDA’s role in COVID-19 testing and the CDC’s production and distribution of test kits.



Healthcare Fraud

- On March 21, 2021, the HHS OIG issued a fraud alert about unapproved offers in exchange for personal information:
 - HHS grants.
 - Medicare prescription cards.
 - Vaccination cards.

Healthcare Fraud

- On December 14, 2020, HHS OIG entered into a settlement agreement for \$66,715.47 with Hemet Endoscopy Center in California and its physician owner for falsifying eligibility to receive Provider Relief Fund payments.
- On May 26, 2021, the Center for Program Integrity and Centers for Medicare & Medicaid Services (PI/CMS) took administrative action against over 50 medical providers.

Healthcare Fraud

- On February 10, 2021, DOJ indicted Amina Abbas for embezzling government property, the first case involving funds allocated to provide relief to healthcare professionals. Her closed company received \$28,000 for medical treatment of COVID-19 patients that allegedly was distributed the money to family. *United States v. Abbas*, No. 2:21-cv-20103 (E.D. Mich., February 10, 2021).



Healthcare Fraud

- On May 26, 2021, DOJ charged 14 persons (11 newly charged and 3 in superseding indictments) across 7 federal districts for healthcare fraud totaling over \$143 million.
 - Offering COVID-19 tests to Medicare beneficiaries in senior living centers, drive-through sites, and medical offices, and then using personal information and samples to submit claims for unrelated medically unnecessary and more expensive lab tests. Proceeds directed through shell companies went to purchase luxury automobiles and real estate.

Healthcare Fraud

- Submitting false claims to Medicare for sham telemedicine encounters and paying bribes in exchange for medical professionals' referrals of medically unnecessary testing
- Misusing Provider Relief Fund monies



Labor Unemployment Fraud

- Over \$850 billion was appropriated for unemployment insurance through September 2021.
- Department of Labor identified \$8 billion in scammed unemployment benefits.
- Internal Revenue Service publishes fraud alerts, and its investigations include theft of personal tax and identity information.

Labor Unemployment Fraud

- DOJ through March 2021 prosecuted over 140 defendants for unemployment insurance fraud.
- Variety of identity thefts spread over multiple states key to schemes.
 - *United States v. Taylor*, ____ (W.D.N.C., May 25, 2021)(Victimizing over 35 persons by identity theft led to over \$219,000 in fraudulent unemployment benefits and additional applications defrauding DOL, SBA, and States of North Carolina, Tennessee, Texas, Ohio, Massachusetts, Nevada, and Arizona)

Labor Unemployment Fraud

- *United States v. Rex*, ____ (D. Iowa, May 21, 2021) (5-year sentence and \$63,000 in restitution ordered for obtaining over \$35,000 in falsified unemployment benefits from Arizona, Ohio, and Massachusetts, plus false tax refund obtained in name of another person).



Practical Tips

- 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.

Practical Tips

- Spot, investigate, and correct/remediate internal misconduct, including enhancing internal controls and compliance.
- 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.

Practical Tips

- 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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