

Emerging Enforcement Issues Related to COVID-19 Relief Programs

Traditional Compliance Activities Can Aid Health Care Companies in Mitigating Risks Associated with Accepting and Allocating Funds



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Since the beginning of the COVID-19 pandemic, the federal government has spent an unprecedented amount on disaster response. The large amount of funds coupled with the need to distribute the funds quickly has led to concerns about preventing and detecting fraud, both against the government and the public.

The Coronavirus Aid, Relief, and Economic Security (CARES) Act established a variety of economic assistance programs designed to help U.S. businesses survive the pandemic. The CARES Act is the largest stimulus package in U.S. history, offering economic aid to individuals, businesses, and government entities. Notably, it allocates \$500 billion to large businesses and provides \$350 billion worth of loan guarantees to small businesses.

These enormous relief figures are accompanied by a multifaceted CARES Act oversight and enforcement structure that raises traditional and novel compliance concerns. The CARES Act established a Pandemic Response Accountability Committee, which has broad oversight and enforcement authority. This committee is composed of the inspectors general of nine federal agencies. It has the authority to conduct its own comprehensive audits and investigations of federal contracts, to issue subpoenas for documents and testimony, and to refer matters to other inspectors general for enforcement and to the attorney general for criminal and civil prosecution.

With the largest infusion of federal funds into the domestic economy in U.S. history, (multiple times larger than the 2009 federal bailout)—regulators are sure to be interested in following the money closely. The government wants to know if companies that sought and

received pandemic funds legitimately certified their entitlement to the funds, and the government wants to know if recipients of the funds used them lawfully and as intended.

Investigations and enforcement efforts of receipt and use of pandemic relief funds is first among the U.S. Department of Justice's (DOJ's) recently announced civil enforcement priorities. Over time, much of that effort may be focused on the health care sector, in keeping with a consistent trend over the course of the past number of years in which roughly two-thirds of False Claims Act recoveries are obtained in connection with health care enforcement efforts.

At the end of last year, the Government Accountability Office warned that there likely would be billions of dollars in losses due to widespread fraud related to pandemic funds. And the House Select Subcommittee on the Coronavirus Crisis has said that as much as \$84 billion in Paycheck Protection Program (PPP) loans and Economic Injury Disaster Loans may be fraudulent.

The DOJ is working closely with various inspectors general, including the Special Inspector General for Pandemic Relief, to identify, monitor, and investigate the misuse of relief funds. In May 2021, the attorney general announced a new task force to combat COVID-19 fraud, noting that "The Department of Justice will use every available federal tool—including criminal, civil, and administrative actions—to combat and prevent COVID-19-related fraud."

Because there are many different programs with many different requirements that could be violated, it is difficult to say now whether the pandemic-related enforcement efforts will be centered in any particular place or on any particular type of program. Although the particular programs may be new, the kinds of fraud that they are susceptible to are not and likely will involve many of the same issues that we have seen in other

matters—ranging from eligibility requirements to the submissions of false certifications and the misuse of funds during program performance.

So far, the announced criminal fraud prosecutions seem to be more focused on what would be considered garden-variety misuse of funds for personal use (buying a Masserati, for example) instead of their intended purpose. In March 2021, for example, the DOJ publicly charged nearly 500 defendants in federal district courts across the country with criminal offenses based on fraud schemes connected to the pandemic. With regard to the Paycheck Protection Program, however, we have only seen a few announced resolutions on the civil side.

The first announced civil settlement for fraud with respect to the Cares Act PPP came in January of this year when the DOJ announced a settlement resolving allegations that an Internet retail company (and its president and chief executive officer) made false statements to multiple banks to obtain a PPP loan and to have it guaranteed by the Small Business Administration. In April of this year, there was another announced civil resolution regarding receipt of PPP funds in which a medical practice (and its owner and president) allegedly falsely certified that it had not already obtained a PPP loan when it had, thus receiving two loans when the practice was only entitled to have received one. And then most recently, the department announced yet another civil settlement resolving allegations of improper receipt of PPP funds. In each of these, the department had alleged claims under the False Claims Act as well as under the Financial Institutions Reform, Recovery, and Enforcement Act, and the monetary resolutions were relatively modest, likely because the loan amounts in each case were small and because the borrower had not yet received loan forgiveness. Although there have been only a few announced settlements and only one

involved an entity in the health care sector, we can expect that over the course of time there will be a number of investigations and resolutions on the civil side and that more will involve entities involved in health care.

For entities receiving PPP loans, there appears to have been some confusion regarding the application of the so-called “affiliation” rules to determine entitlement to funds. The government issued multiple—and sometimes conflicting—FAQs related to the affiliation rules. Moreover, the banks that issued the loans were not required to make any independent determination that the applicant met the eligibility requirements but could instead accept the applicant’s attestation. Expect to see many reviews of whether companies met these requirements as they seek forgiveness of the loans. At the same time, the inconsistent and changing guidance issued by the government can provide companies with a defense and make prosecution of a complex and somewhat ill-defined regulatory structure problematic.

In addition, the reporting requirements for entities receiving PPP loans involve calculations of employees before and during the pandemic. This guidance also has shifted along with the acceptable uses of PPP funds.

Similarly, with the Provider Relief Funds received by health care entities, the reporting requirements and the guidance on how the funds can be used have been ever-changing. And the requirements have not been the subject of notice-and-comment rulemaking but are instead issued pursuant to agency FAQs. So while companies could still face liability for knowingly submitting false statements, a prosecution or False Claims Act allegation premised on a purported violation of a requirement promulgated by FAQ is highly suspect.

Nonetheless, we can certainly expect that whistleblowers will bring *qui tam*

actions alleging misuse of pandemic relief funds or claims of false entitlement to those funds. More than 600 *qui tam* actions are filed each year, and the government has indicated that pandemic funding fraud is a top priority. This ensures that pandemic cases will be filed and will be investigated in the years to come.

Traditional compliance activities can aid health care companies in mitigating the risks associated with accepting and allocating these funds:

- **Review corporate compliance policies and identify areas for enhancement.** Federal aid is generally tied to assurances of corporate accountability, legal compliance, and proper recordkeeping. CARES Act aid recipients should revisit their policies in these areas and consider possible areas for enhancement to ensure compliance with aid requirements.
- **Allocate CARES Act loans for the uses specified.** Businesses should carefully review what expenses CARES Act loans may be used for. The Act, for example, restricts the use of certain loans to business essentials, such as payroll and rent. Segregating funds from the CARES Act loan, setting up CARES Act accounts, and taking steps to prevent commingling of other funds will greatly mitigate the risk of audit or investigation.
- **Complete applications for loans, for loan forgiveness, and for PRF reports with care.** Not every business can obtain relief from the CARES Act by default. Businesses must show that they meet certain criteria and will also have to make various certifications of compliance to the government to receive relief. Care must be taken to ensure accurate certifications of compliance are made. The same goes for the applications for loan forgiveness.
- **Document compliance with requirements, certifications, and restrictions associated with funds.** Follow the mantra that if it’s not documented, it didn’t

happen. Consider creating and employing a compliance documentation checklist that should assist in documenting compliance.

- **Bolster internal whistleblower programs and thoroughly investigate any potential whistleblower report related to receipt of these funds.**

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