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Government Enforcement of Pandemic Relief Funds: What Healthcare Providers Should Know and What's Next

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The relief funds the government distributed during the pandemic created a perfect storm for government enforcement against healthcare providers. The government gave out large sums of money quickly to a highly regulated industry, provided little guidance about how relief funds were to be used, and has prioritized enforcement against providers alleged to have misused those funds. These are the same circumstances that led to an enforcement surge after the financial crisis in 2008 and 2009. All signs show the government will be just as aggressive in pandemic-relief enforcement.

The government has already charged over 1,500 defendants with pandemic-relief fraud. And government enforcement efforts show no signs of slowing. Over the last year, the U.S. Department of Justice (DOJ) has sought to formalize its enforcement efforts by appointing a Director for COVID-19 Fraud Enforcement and establishing multiple Strike Force teams across the country. Criminal, civil, and administrative enforcement actions predictably followed. Pandemic-related fraud will remain an enforcement priority for DOJ. Although early enforcement efforts focused on outlier individuals, expect to see increasing numbers of investigations and enforcement actions against larger providers and organizations. This article provides an overview of DOJ enforcement activity to date and a look at what is likely to come. Healthcare providers that received COVID-19 relief funds should monitor enforcement activities and take practical steps to protect themselves from government scrutiny.

DOJ Response to CARES Act

The government has been alert to potential misuse of COVID-19 relief funds since the early days of the pandemic. Reacting swiftly to national crisis, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act in March 2020. The CARES Act provided \$2.2 trillion in relief to individuals and businesses to address economic uncertainty and enhance responses to the pandemic. Key programs under the CARES Act included the Paycheck Protection Program (PPP) and the Economic Injury Disaster Loan (EIDL) program. Choosing to prioritize the distribution of needed aid over establishing a detailed regulatory framework that could have slowed relief, the government rapidly infused the economy with cash, but provided little guidance on how recipients should use pandemic relief funds. With so much money distributed so quickly, the government has recognized the need to police misuse of relief funds.

COVID-19 Fraud Enforcement Task Force

DOJ has taken several steps to organize its enforcement efforts. In May 2021, Attorney General Merrick Garland established a COVID-19 Fraud Enforcement Task Force. The Task Force is an interagency effort led by the Deputy Attorney General that seeks to promote a “whole-of-government enforcement effort” by bringing together investigators and resources to assist in investigations and enforcement actions. ¹ The Task Force consists of multiple entities within DOJ and other federal agencies, including the Department of Health and Human Services, the Food and Drug Administration, and the Special Inspector General for Pandemic Relief.

Director for COVID-19 Fraud Enforcement

DOJ increased its efforts in March 2022, when the Attorney General appointed Associate Deputy Attorney General Kevin Chambers to serve as the newly created Director for COVID-19 Fraud Enforcement. This appointment, Attorney General Garland said, demonstrated that DOJ “remains committed to using every available federal tool—including criminal, civil, and administrative actions—to combat and prevent COVID-19 related fraud.” ²

Strike Force Teams

In September 2022, the newly appointed Director for COVID-19 Fraud Enforcement established three Strike Force teams to drive DOJ’s enforcement efforts. The Strike Force teams—based on

DOJ's longstanding strike force model of partnering with U.S. Attorney's Offices throughout the country—are working through U.S. Attorney's Offices in the Southern District of Florida, the District of Maryland, and the Central and Eastern Districts of California. ³ The Strike Force teams have so far targeted large-scale actors. DOJ has said the Strike Force teams bring together particular expertise in fraud, cybercrime, and money laundering.

Despite these formal steps by DOJ, many prosecutions filed since the start of the pandemic have come from U.S. Attorneys' Offices unconnected with the Strike Forces, showing that U.S. Attorneys' Offices remain active in investigating and prosecuting pandemic-related fraud outside the Task Force and Strike Force structure. DOJ has also acknowledged that its work is supported by “an extraordinary amount of data” DOJ has received from its “state workforce agency partners,” ⁴ showing that DOJ's “whole-of-government” approach extends to state agencies as well.

DOJ Enforcement Actions

As of September 2022, DOJ reported it had charged over 1,500 defendants with alleged losses exceeding \$1.1 billion, seized over \$1.2 billion in relief funds, and conducted civil investigations into more than 1,800 individuals and entities for alleged misconduct in connection with pandemic relief loans totaling more than \$6 billion. ⁵ The number of enforcement actions, and the number of actions against healthcare providers specifically, continues to increase. Below we provide an overview of enforcement activity related to the healthcare industry.

False Claims Act Enforcement

False Claims Act (FCA) enforcement actions associated with provider relief, PPP loans, and other COVID-19 relief programs at first were slow to emerge, but have picked up in the past year. Of particular note, the government has pursued a theory that providers who violated the FCA while applying for a PPP loan may be liable not only for violating the FCA but also for falsely certifying that they were not engaged in unlawful activity in their PPP loan applications. This shows how providers could find themselves pulled into DOJ's pandemic-enforcement efforts for conduct that, on its face, would not seem to implicate use of pandemic-relief funds.

Misappropriating PPP Funds

Early enforcement actions under the FCA focused on misappropriation of funds received under the PPP. In August 2021, DOJ announced a settlement with the owner of a jet company who

misappropriated PPP loan proceeds. (6) In that case, the United States alleged that within a day of receiving the PPP loan proceeds, the owner diverted a significant amount of the funds to pay for personal expenses. Similarly, DOJ announced in March 2022 that a government contractor had agreed to pay nearly \$3 million in restitution and penalties for misappropriating proceeds from a PPP loan. (7) The contractor and its owners falsely stated the loan proceeds had been used for payroll and other eligible expenses to qualify for loan forgiveness, when in fact, the entire loan amount had been transferred to a personal account. Two owners and executives of the company agreed to pay another penalty from their own funds as part of that settlement.

False Statements in PPP Applications

Other enforcement actions have focused on false statements in PPP loan applications. On September 12, 2022, DOJ announced an FCA settlement with a PPP lender, arising from a loan it processed on behalf of a pain management practice. The lender approved and processed a \$213,400 PPP loan for a pain management practice in Houston. The loan application stated that no owner of the practice was subject to criminal charges, even though, the government alleged, the lender's employees knew a physician-owner was facing criminal charges and therefore ineligible to apply for the PPP loan. The lender received a 5% processing fee of \$10,670 that the government claimed it was not entitled to receive. The physician-owner of the pain management practice agreed to pay \$523,331 to resolve his liability arising from fraudulent medical billing and submitting the false PPP loan application. DOJ noted that the settlement amount paid by the lender reflects the bank's cooperation with the investigation and implementing new compliance measures.

A New York not-for-profit also agreed in October 2022 to pay approximately \$86,000 to resolve allegations that it violated the FCA by receiving an inflated PPP loan. (8) The not-for-profit conceded in its settlement agreement that it had inflated its average monthly payroll in the PPP application and received \$86,000 more than it was entitled to. While the settlement amount was low, the case illustrates that DOJ is pursuing PPP cases that go beyond misappropriation of funds and closely examining the accuracy of the representations made by applicants.

Four California companies and their owner agreed in January 2023 to pay \$600,000 to settle FCA allegations related to improperly inflating PPP applications. (9) The government alleged that the companies improperly inflated the employee headcount on the companies' PPP loan applications by impermissibly including non-employee contract workers who were, in fact,

employed by other, unrelated entities. The owner of the companies allegedly received \$1.8 million in excess PPP funds as a result. The settlement included \$400,000 in damages and penalties under the FCA and approximately \$200,000 under the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA). Before the FCA settlement, the companies' owner had also repaid the excess PPP loans to the lender in their entirety.

Expanding Theory of FCA Liability

DOJ signaled a shift in tactic when, in April 2022, it announced a \$24.5 million FCA settlement with a large physician group, which included liability for false statements in its PPP application. ¹⁰

The government alleged that the company falsely represented to the Small Business Administration that it was not engaged in unlawful activity when it applied for a \$5.9 million loan through the PPP. To the contrary, DOJ found that the physician group had billed false claims for unnecessary medical testing and services. The government did not specify publicly which portion of the settlement amount resulted from the FCA allegations related to the company's PPP funding.

This settlement marks an avenue of liability that could apply to many other providers who applied for PPP funding. For years to come, DOJ could tack on PPP-related liability any time it alleges a defendant submitted false claims while it applied for a PPP loan. This could result in higher damages and penalties associated with essentially the same conduct because a defendant sought a PPP loan during the covered period.

Other Enforcement Priorities

Recent Healthcare Fraud Takedown

On April 20, 2023, DOJ announced criminal charges against 18 defendants in nine districts for alleged participation in fraud schemes involving healthcare services that resulted in over \$490 million in COVID-19-related false billings to federal programs and theft from federally funded pandemic programs. ¹¹ These actions included charges against defendants alleged to have defrauded the Health Resources and Services Administration (HRSA) COVID-19 Uninsured Program. For example, DOJ charged the owner of a COVID-19 testing lab in California for allegedly submitting over \$358 million in false and fraudulent claims to Medicare, HRSA, and a private insurance company for laboratory testing. The government alleged that, when billing for COVID-19 testing, the lab falsely submitted claims for additional respiratory pathogen panel tests even though ordering providers and facility administrators did not want or need them.

DOJ's announcement on April 20 also included charges against a California doctor who allegedly submitted fraudulent claims to the HRSA COVID-19 Uninsured Program for treatment of patients who were insured, billed for services that were not rendered, and billed for services that were not medically necessary. That doctor and two other individuals were also charged for allegedly submitting more than 70 fraudulent loan applications through the PPP and EIDL Program.

Long-Term Care

The government has brought enforcement actions against long-term care providers for misuse of and failure to return pandemic relief funds. In April 2022, DOJ announced charges against the owner of a hospice center for receiving and then failing to return provider relief payments, which the center received more than six months after it had stopped seeing patients. ¹² Similarly, in October 2022, the government announced criminal charges against the owners of two hospice companies for submitting fraudulent PPP loan applications and misusing other COVID-19 relief funds. ¹³

Fraudulent Testing

DOJ has announced several enforcement actions related to fraudulent testing. In April 2022, DOJ announced a COVID-19 healthcare fraud criminal takedown involving \$149 million in COVID-19-related false billings and charged 21 defendants across nine federal judicial districts. ¹⁴ This takedown targeted fraudulent testing schemes and misuse of personal identifying information to submit fraudulent claims for medical services.

In March 2023, DOJ charged the owner of a lab company that performed COVID-19 testing with wire fraud and theft of government funds. ¹⁵ The lab had enrolled in the HRSA COVID-19 Uninsured Program, which administered the funds appropriated through federal legislation to cover the costs of COVID-19 testing for individuals without health insurance coverage. DOJ alleges that the lab (1) submitted false claims to reimburse inaccurate and unreliable tests, (2) submitted claims for tests when it had collected payment from the individuals tested, and (3) provided negative results for COVID-19 tests that had not been performed. ¹⁶

Frontline Medical Providers

DOJ also has continued to prosecute defendants for misappropriating provider relief funds intended for frontline medical providers. ¹⁷ In many cases, DOJ has relied on evidence that provider relief funds were directly used for the personal enrichment of the recipients or that the

healthcare providers receiving funds made blatant misrepresentations about patient care in their funding applications. As DOJ and its partner agencies continue to scrutinize the use of provider relief funds, we expect that more and more enforcement actions will be pursued in more complex circumstances.

In Louisiana, DOJ charged the operator of a primary care clinic in April 2023 for allegedly submitting fraudulent documentation from which she received over \$1.1 million in Provider Relief Fund (PRF) and EIDL funds. The clinic owner purportedly used those funds to buy real estate, luxury vehicles, and a boat. 18

Conclusion

DOJ will focus on healthcare investigations and enforcement actions related to pandemic-relief funds for years to come. DOJ's recent announcement of a healthcare fraud takedown shows it is putting its resources to use. Although DOJ has prioritized enforcement actions against outlier individuals and practices, going forward, DOJ is expected to more closely scrutinize how specific entities used the COVID-19 funds they received. It is also expected that whistleblower FCA lawsuits stemming from the receipt of pandemic relief will be filed and unsealed in the ensuing years. For perspective, the largest FCA settlement related to the 2008 financial crisis was not announced until 2014, years after funding had been distributed. Government enforcement related to COVID-19 relief funds will continue to evolve.

There are many sources of risk healthcare providers should consider. The government has focused on the accuracy of certifications healthcare providers made when applying for pandemic relief funds. It will continue to assess whether providers met all eligibility requirements for funding, made misrepresentations in applications, misused funds, or provided accurate follow-on certifications.

When investigating the accuracy of applications and certifications, the government will likely take an enterprise-wide approach. Complicating matters for providers, their conduct will be judged with the benefit of hindsight. Practical steps providers can take to ensure compliance and reduce risk include confirming that they are preserving documentation to support their applications for funding and show that funds have been appropriately used, reviewing updated government guidance to ensure they understand the government's current views on eligibility and use of

funds, and leveraging existing compliance resources to ensure the completeness of documentation or to conduct an internal review.

Endnotes



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