

The Banking Law Journal

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COVID-19 Relief Lending Faces Scrutiny

*By Denise M. Barnes and Brian Irving**

In this article, the authors discuss government actions to challenge and recover funds lost to COVID-19 pandemic fraud.

The COVID-19 pandemic has been the one of the deadliest acute public health crises in modern history.¹ In response, the U.S. government pumped out trillions of dollars in pandemic relief through loans, grants and other funding. And while these pandemic relief efforts attempted to mitigate the economic impact of the pandemic, providing that relief in such a widespread and (largely) unfettered manner came with its own challenges.

In May 2021, the U.S. attorney general established the COVID-19 Fraud Enforcement Task Force (task force) to create a coordinated approach to prosecuting and investigating pandemic-related fraud.² The task force consists of multiple entities within the Department of Justice (DOJ) and other federal agencies, including the Department of Health and Human Services (HHS), the Food and Drug Administration (FDA), the Small Business Administration (SBA) and the Special Inspector General for Pandemic Recovery, among others.

Over the past three years, enforcement related to pandemic fraud has intensified. In April 2024, the task force announced that its efforts led to criminal charges against 3,500-plus defendants for losses of over \$2 billion, civil enforcement actions leading to over 400 settlements and judgments of over \$100 million, and more than \$1.4 billion seized or forfeited.³

For context, total budgetary spending for the pandemic has amounted to over \$4.6 trillion (not billion).⁴ The SBA alone reports⁵ that an estimated \$36 billion of \$1.2 trillion it provided in pandemic relief emergency program funds

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¹ The Deadliest Viruses in Human History, from COVID to Smallpox, June 6, 2023, <https://www.unmc.edu/healthsecurity/transmission/2023/06/06/the-deadliest-viruses-in-human-history-from-covid-to-smallpox>.

² Attorney General Announces Task Force to Combat COVID-19 Fraud, May 17, 2021, <https://www.justice.gov/opa/pr/attorney-general-announces-task-force-combat-covid-19-fraud>.

³ COVID-19 Fraud Enforcement Task Force 2024 Report, April 2024, <https://www.justice.gov/opa/pr/covid-19-fraud-enforcement-task-force-releases-2024-report>.

⁴ USA Spending as of October 4, 2024, <https://www.usaspending.gov/disaster/covid-19>.

⁵ <https://www.sba.gov/article/2023/06/27/us-small-business-administration-releases-report-anti-fraud-control-measures-pandemic-relief>.

were obtained through fraud.⁶ (Notably, some view the SBA's estimate as too conservative and would argue that it should be much larger.) So the task force's touted recovery of \$2 billion, while substantial, is a drop in the bucket compared to the sheer number of dollars spent.

PAST ENFORCEMENT

Unsurprisingly – especially given the amount spent relative to that recovered thus far – DOJ continues to pursue, investigate and resolve cases against individuals, companies and other organizations that allegedly engaged in fraud related to these programs. Early COVID-19 fraud-related cases generally involved outlandish allegations of purchasing luxury items with pandemic funds: clear no-nos. The underlying conduct in those cases was criminal in most cases and, predictably, involved extremely “bad facts.” We have all heard the scandalous stories of luxury yachts, cars and private planes purchased using pandemic funds. Early pandemic fraud enforcement punished conduct that demonstrated this level of wantonness.

Cases pursued in the civil context, however, tend to involve less salacious allegations. They generally turn on more traditional allegations of fraud: You told the government that you would do one thing and did something else. In the past, civil pandemic-related fraud cases and investigations have generally involved allegations about an individual or company's eligibility (or ineligibility) for a Paycheck Protection Program (PPP) loan or false certifications related to a company's application. The government is continuing its efforts along those lines. For example, on March 30, 2024, the government elected to pursue a whistleblower complaint filed in California against home health agency Allstar Health Providers and JMG Investments, arguing that the companies defrauded it applying for and receiving PPP funds twice, despite certifying otherwise. Allstar allegedly received two loans, each between \$150,000-\$350,000, and JMG allegedly received two loans each of \$350,000-\$1 million.

Interestingly enough, these allegations originated from a whistleblower who used publicly available data and information to identify Allstar and JMG as potential fraudsters.

Though the government will likely still pursue cases like Allstar Health, it is beginning to focus its efforts on more sophisticated pandemic-related fraud schemes, evidenced by the recent DOJ-Kabbage (financial), and DOJ-ReNew Health (healthcare) resolutions.

⁶ U.S. Small Business Administration Releases Report on Anti-Fraud Control Measures in Pandemic Relief Programs, June 27, 2023, <https://www.sba.gov/article/2023/06/27/us-small-business-administration-releases-report-anti-fraud-control-measures-pandemic-relief>.

THE FUTURE OF COVID-19 FRAUD ENFORCEMENT

Fintech Enforcement

In December 2022, Congress's Select Subcommittee on the Coronavirus Crisis issued a staff report noting that although "fintechs were given extraordinary responsibility in administering the nation's largest pandemic relief program" because they claimed they could better administer the PPP than traditional financial institutions, "many of these companies appear to have failed to stop obvious and preventable fraud, leading to the needless loss of taxpayer dollars." In fact, the subcommittee concluded that "many fintechs, largely existing outside of the regulatory structure governing traditional financial institutions and with little to no oversight from lenders, took billions in fees from taxpayers while becoming easy targets for those who sought to defraud the PPP." Indeed, two fintechs, Womply and Blueacorn, facilitated nearly one in every three PPP loans funded in 2021.⁷

Under the rules of the PPP, unlike traditional SBA 7(a) loans that require banks to engage in a robust underwriting process for creditworthiness, lenders were required to underwrite PPP loans by satisfying only four requirements:

- (1) Confirming receipt of borrower certifications;
- (2) Confirming receipt of information demonstrating that a borrower had employees for whom it paid salaries and payroll taxes on or around February 15, 2020;
- (3) Confirming the dollar amount of average monthly payroll costs; and
- (4) Following applicable Bank Secrecy Act (BSA) requirements.

But despite these more relaxed standards, fintech-facilitated or issued loans were over three times as likely to have at least one primary indicator of misreporting compared to traditional loans.

So it is no surprise that the future of pandemic-fraud enforcement will likely include a crackdown on fintechs that were responsible for underwriting pandemic-related loans.

⁷ House Select Subcommittee on the Coronavirus Crisis, Preparing for and Preventing the Next Public Health Emergency: Lessons Learned from the Coronavirus Crisis (Dec. 2022), <https://coronavirus-democrats-oversight.house.gov/sites/evo-subsites/coronavirus-democrats-oversight.house.gov/files/2022.12.09%20Preparing%20for%20and%20Preventing%20the%20Next%20Public%20Health%20Emergency.pdf>.

A recent example of this is the DOJ-Kabbage settlement. On May 13, DOJ announced⁸ its resolution with now-bankrupt fintech Kabbage Inc. related to allegations that it knowingly submitted thousands of false claims to the SBA related to its participation in the PPP. DOJ alleged that Kabbage “systemically inflated tens of thousands of PPP loans, causing the SBA to guarantee and forgive loans in amounts that exceeded what borrowers were eligible to receive under the program rules.” As part of the settlement, KServicing Wind Down Corp. admitted and acknowledged that Kabbage:

- (1) Double-counted state and local taxes paid by employees in the calculation of gross wages;
- (2) Failed to exclude annual compensation in excess of \$100,000 per employee; and
- (3) Improperly calculated payments made by employers for leave and severance.

Allegedly, Kabbage knew of these errors as early as April 2020 but failed to correct prior disbursements and continued to approve miscalculated loans.

Though the Kabbage resolution is one of the first of its kind, judging by the subcommittee’s report, additional enforcement of fintechs is likely in the future. The government will likely continue to pursue pandemic-related enforcement of more sophisticated fraud schemes. In particular, fintechs or nontraditional financial institutions that received thousands of third-party subpoenas should consider whether there were systemic issues involving the eligibility of their borrowers.

Given this focus, an organization may consider engaging in a targeted review to confirm the eligibility of its borrowers and whether its BSA/anti-money laundering controls were adequate, especially where the government has investigated a large volume of its borrowers.

Healthcare Fraud

Similarly, there also has been a bevy of enforcement in the healthcare context. On April 20, 2023, the HHS’s Office of Inspector General participated alongside key law enforcement partners in the 2023 Nationwide COVID-19 Health Care Fraud Enforcement Action. It resulted in criminal charges against doctors and providers for false billings and fraud, manufacturers of fake

⁸ <https://www.justice.gov/opa/pr/kabbage-inc-agrees-resolve-allegations-company-defrauded-paycheck-protection-program>.

COVID-19 vaccine record cards, and individuals for fraudulent Medicare charges involving over-the-counter COVID-19 testing kits. Losses exceeded \$203 million.⁹

Then, on April 26, 2024, the federal government and the state of California announced¹⁰ a \$7 million settlement with nursing home chain ReNew Health and two of its executives to resolve allegations that the defendants abused a Centers for Medicare & Medicaid Services (CMS) COVID-19 waiver in violation of the False Claims Act. During the pandemic, CMS waived a requirement that patients have at least a three-day hospital admission before receiving skilled nursing care. The governments alleged that the defendants knowingly misused this waiver by routinely submitting claims for nursing home residents – and receiving higher reimbursements – when they had merely been near other people who had COVID-19 but were not sick or injured.¹¹

This resolution simply demonstrates that pandemic-related enforcement can take many forms – and no industry is immune from this enforcement priority.

CHANGING REGULATORY ENVIRONMENT

As evidenced by these recent DOJ civil resolutions, pandemic fraud enforcement efforts span industries and conduct. But irrespective of industry, companies defending these matters should consider whether DOJ actually has a viable fraud case given that the alleged misconduct occurred in an uncertain regulatory landscape. These fraud statutes, whether in the civil or criminal context, are intended to penalize bad actors that engaged in fraud, not companies that acted in good faith and made a mistake in understanding relevant guidance.

The reality is that in many cases, the pandemic funds were distributed in a hurried and crude manner in order to meet the needs of business owners and employees who were simply trying to survive. To penalize those companies that acted in good faith and attempted to satisfy whatever requirements the government had in place but did so arguably inappropriately, now in hindsight, seems fundamentally unfair to business owners. As pandemic fraud enforce-

⁹ 2023 Nationwide COVID-19 Health Care Fraud Enforcement Action, <https://oig.hhs.gov/newsroom/media-materials/2023-covid-takedown/> (last updated June 7, 2023).

¹⁰ <https://www.justice.gov/opa/pr/california-based-nursing-home-chain-and-two-executives-pay-7m-settle-alleged-false-claims>.

¹¹ California-Based Nursing Home Chain and Two Executives to Pay \$7M to Settle Alleged False Claims for Nursing Home Residents Who Merely Had Been Near Other People With COVID-19 (Apr. 26, 2024), <https://www.justice.gov/opa/pr/california-based-nursing-home-chain-and-two-executives-pay-7m-settle-alleged-false-claims>.

ment continues, companies should defend against the government's attempt to better define the state of play after the fact.

Further, where the misconduct (or at least some misconduct) is clear, companies may consider disclosing, cooperating and remediating the conduct, as appropriate.