COVID-19 Enforcement Under the Biden Administration—
Winding Down or Just Getting Started?

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In the ABA's Winter 2022 White-Collar Newsletter, we published a look back at the first year of COVID enforcement under the Biden Administration and identified several areas of clear risk (i.e., borrowers from COVID-related loan programs) and some areas of risk that had not yet fully materialized (i.e., False Claims Act enforcement and lender risk for COVID loan programs). After another year of the Biden administration settling into power, the Garland-led Department of Justice (DOJ) has moved aggressively on all COVID-related fronts. We discuss below trends related to DOJ's activity in this area. Nor does regulatory scrutiny look set to dissipate in the near future as Congress in August 2022 extended the statute of limitations from five (5) years to ten (10) years for the primary COVID loan programs—Paycheck Protection Program (PPP) loans and Economic Injury Disaster Loan (EIDL) loans.[5]

In speech after speech, DOJ officials at all levels have made clear that prosecuting pandemic-related fraud is of the utmost importance. As the pandemic itself has dwindled, DOJ has spent more time focusing on COVID-related fraud and utilizing different prosecutorial avenues to reach that alleged misconduct. DOJ has also put its newly-budgeted resources to work investigating and prosecuting alleged COVID fraud. For instance, on September 14, 2022, DOJ announced the creation of three strike force teams to enhance its existing efforts to combat and prevent COVID-19-related fraud. In launching the strike forces, Attorney General Garland stated "these Strike Force teams will build on the Department's historic enforcement efforts to deter, detect, and disrupt pandemic fraud wherever it occurs."[6] According to Attorney General Garland, as of September 2022, DOJ had seized over $1.2 billion in relief funds that criminals were attempting to steal, and charged over 1,500 defendants with crimes in federal districts across the country.[7] In a memorandum announcing the task force, Garland wrote that DOJ "will use every

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[5] Congress.gov. "H.R.7334 - 117th Congress (2021-2022): COVID-19 EIDL Fraud Statute of Limitations Act of 2022," August 5, 2022, https://www.congress.gov/bill/117th-congress/house-bill/7334; Congress.gov. "Text - H.R.7352 - 117th Congress (2021-2022): PPP and Bank Fraud Enforcement Harmonization Act of 2022," August 5, 2022, https://www.congress.gov/bill/117th-congress/house-bill/7352/text.
[6] "Justice Department Announces COVID-19 Fraud Strike Force Teams," September 14, 2022, https://www.justice.gov/opa/pr/justice-department-announces-covid-19-fraud-strike-force-teams.
[7] *Id.*

available federal tool—including criminal, civil, and administrative actions—to combat and prevent COVID-19 related fraud."[8]

<u>The False Claims Act—Triple the Damages for a Third of the Work</u>

Former Principal Deputy Assistant Attorney General Ethan P. Davis called the False Claims Act (FCA) "one of the most effective weapons in our arsenal" to combat fraud perpetrated against the Government.[9] Since the Government often relies on third-parties (relators) to bring FCA cases in the first place (relators can receive between 15-30% of a successful FCA action plus attorney's fees) and FCA cases provide for up to treble damages and per-claim penalties of up to $25,000, [10] DOJ's enthusiasm for the FCA is easy to understand. In addition, since at least the 2008 financial crisis, DOJ has taken a broad view of the FCA's "knowing" element in order to implicate lenders in "fraud."[11]

As a result, many anticipated DOJ to aggressively apply the FCA to combat pandemic fraud. In fact, in early 2021, Assistant Attorney General Brian Boynton stated that "it is clear to me and my colleagues in the Civil Division . . . that the False Claims Act will play a significant role in the coming years as the government grapples with the consequences of this pandemic."[12] He further noted that DOJ would "monitor and investigate the misuse of critical pandemic relief monies" and expected "significant cases and recoveries."[13] However, for much of the first 18 months of the pandemic, that was primarily empty rhetoric as DOJ's use of the FCA for pandemic enforcement was slow to gather steam.

Over the last year, however, FCA activity has finally started to pick up. In particular, in September 2022, DOJ announced the first-ever FCA settlement with a PPP lender. U.S. Attorney Jennifer B. Lowery announced that Prosperity Bank had agreed to pay $18,673.50 to resolve allegations it improperly processed a PPP loan on behalf of an ineligible customer.[14] While some may view an $18,000 settlement with a regional Texas bank as nearly frivolous, the settlement is significant because DOJ was sending a message that it views the FCA as a tool against PPP fraud that will allow it to punish "gatekeepers."

Further increasing governmental scrutiny on lenders, in December of 2022, a sprawling congressional report accuses several little-known financial technology companies, or fintechs, of

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[8] *Id.*

[9] "Principal Deputy Assistant Attorney General (PDAAG) Ethan P. Davis Delivers Remarks on the False Claims Act at the U.S. Chamber of Commerce's Institute for Legal Reform," June 26, 2020, https://www.justice.gov/civil/speech/principal-deputy-assistant-attorney-general-ethan-p-davis-delivers-remarks-false-claims. At the time of the speech, PDAAG Davis was the second in command of DOJ's Civil Division.

[10] The False Claims Act (FCA), 31 U.S.C. §§ 3729 - 3733

[11] DOJ applied the "broad knowledge standard" to many major financial institutions following the 2008 financial crisis to extract multi-billion dollar settlements.

[12] "Acting Assistant Attorney General Brian M. Boynton Delivers Remarks at the Federal Bar Association Qui Tam Conference," February 22, 2021, https://www.justice.gov/opa/speech/acting-assistant-attorney-general-brian-m-boynton-delivers-remarks-federal-bar.

[13] *Id.*

[14] "Southern District of Texas | First-Ever False Claims Act Settlement Received from Paycheck Protection Program Lender | United States Department of Justice," September 13, 2022, https://www.justice.gov/usao-sdtx/pr/first-ever-false-claims-act-settlement-received-paycheck-protection-program-lender.

reaping "billions in fees from taxpayers while becoming easy targets for those who sought to defraud the PPP."[15] Congressional investigators found that banks and lending partners collaborating with fintechs admitted to doing little to check for fraud in fintech-approved loan applications.[16] The Prosperity bank case is thus likely a signal from DOJ that they will focus on prosecuting financial institutions that failed to act as the last line of defense to combat pandemic fraud *even if* various governmental organizations were pressuring lenders at the time to get as much money into private hands as quickly as possible.[17]

In fact, just over a month after the first FCA PPP lender case, The Rensselaerville Institute, a not-for-profit corporation located in Albany, New York, agreed to pay the United States $86,676 in damages and civil penalties to resolve allegations that it violated the FCA by obtaining an inflated PPP loan.[18] Further, on January 23, 2023, four California agricultural companies and their owner agreed to settle allegations that they violated the FCA and the Financial Institutions Reform, Recovery and Enforcement Act by knowingly submitting false information in support of PPP loan applications for $600,000.[19] These settlements came months after Physician Partners of America settled with DOJ for $24.5 million to resolve allegations that they violated the FCA by billing federal healthcare programs for unnecessary medical testing and services.[20] All indications are that many more PPP-related enforcement actions will continue to emerge around the country.

DOJ Criminal Investigations: New Trends

In late 2022, DOJ announced nationwide coordinated law enforcement action to combat healthcare-related COVID-19 fraud.[21] The announcement stems from criminal charges against 21 defendants in 9 federal districts across the United States for their alleged participation in various health care related fraud schemes that exploited the COVID-19 pandemic.[22] Allegedly, these cases resulted in over $149 million in COVID-19-related false billings to federal programs and theft

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[15] Austin Fast and Sacha Pfeiffer, "A Congressional Report Says Financial Technology Companies Fueled Rampant PPP Fraud," *NPR*, December 6, 2022, sec. Investigations, https://www.npr.org/2022/12/06/1140823783/a-congressional-report-says-financial-technology-companies-fueled-rampant-ppp-fr.
[16] *Id*.
[17] *See, e.g.*, ABA Banking Journal, April 13, 2020, "Lawmakers Call for Flexibility on PPP's 10-Day Disbursement Rule," https://bankingjournal.aba.com/2020/04/lawmakers-call-for-flexibility-on-ppps-10-day-disbursement-rule/.
[18] "Northern District of New York | Upstate New York Not-for-Profit Corporation Settles False Claims Act Allegations Involving Inflated Paycheck Protection Program Loan | United States Department of Justice," October 25, 2022, https://www.justice.gov/usao-ndny/pr/upstate-new-york-not-profit-corporation-settles-false-claims-act-allegations-involving.
[19] "California Agricultural Companies and Their Owner Agree to Pay $600,000 to Settle False Claims Act Allegations Relating to Improperly Inflated Paycheck Protection Program Loans," January 9, 2023, https://www.justice.gov/opa/pr/california-agricultural-companies-and-their-owner-agree-pay-600000-settle-false-claims-act-0.
[20] "Physician Partners of America to Pay $24.5 Million to Settle Allegations of Unnecessary Testing, Improper Remuneration to Physicians and a False Statement in Connection with COVID-19 Relief Funds," April 12, 2022, https://www.justice.gov/opa/pr/physician-partners-america-pay-245-million-settle-allegations-unnecessary-testing-improper.
[21] "Justice Department Announces Nationwide Coordinated Law Enforcement Action to Combat Health Care-Related COVID-19 Fraud," April 20, 2022, https://www.justice.gov/opa/pr/justice-department-announces-nationwide-coordinated-law-enforcement-action-combat-health-care.
[22] *Id*.

from federally-funded pandemic assistance programs.[23] Assistant Attorney General Kenneth A. Polite, Jr. of the Justice Department's Criminal Division stated: "The Department of Justice's Health Care Fraud Unit and our partners are dedicated to rooting out schemes that have exploited the pandemic."[24] These prosecutions focused on various levels of fraud, including 1) actions against defendants who allegedly offered COVID-19 testing to induce patients to provide their personal identifying information and a saliva or blood sample; 2) actions against a clinical laboratory charged with a health care fraud, kickback, and money laundering scheme that involved the fraudulent billing of over $214 million for laboratory tests, over $125 million of which allegedly involved fraudulent claims during the pandemic for COVID-19 and respiratory pathogen tests; and 3) actions against owners of medical clinics that allegedly obtained confidential information from patients seeking COVID-19 testing at drive-thru testing sites and then submitted fraudulent claims for lengthy office visits with the patients that did not, in fact, occur.[25]

Telemedicine Fraud

The pandemic has revolutionized how telemedicine is integrated into the United States. Before COVID, healthcare markets were generally local, and required patients to see an in-network provider accepting new patients. However, the need for social distancing forced the Government to remove barriers and regulations to expand healthcare access. In a recent study conducted by the U.S. Department of Health and Human Services Office of Inspector General (OIG), more than 28 million Medicare beneficiaries—about 2 in 5—used telehealth services during the pandemic.[26] In total, beneficiaries used 88 times more telehealth services during the first year of the pandemic than they did in the prior year. Initially, Medicare did not reimburse very much for telehealth in the fee-for-service system.[27] However, due to the pandemic, the use of telehealth has dramatically expanded, and public and private insurers have now ventured into the fee-for-service system with telehealth. For example, private insurer claims from telehealth in the United States rose 4.347 percent to 7.52 percent in March 2020—a substantial increase from 0.17 percent the previous year.[28] Although the switch was necessary in light of the circumstances, it provided rampant opportunity for unscrupulous providers to commit fraud.

Now, a key area DOJ is focusing on in COVID-related healthcare fraud involves the widespread use of telemedicine utilized during the pandemic. Recently, OIG issued a special fraud alert for providers entering into arrangements with "purported telemedicine companies."[29] OIG announced that their findings warrant "strong, targeted oversight of telehealth services" and recommend that CMS:

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[23] *Id.*
[24] *Id*.
[25] *Id*.
[26]"Medicare Telehealth Services During the First Year of the Pandemic: Program Integrity Risks," accessed January 30, 2023, https://oig.hhs.gov/oei/reports/OEI-02-20-00720.asp.
[27] *Id*.
[28]"U.S. Health Insurers, Wary of Telehealth Overuse, Urge More Planning in Policy Easing," Reuters, July 27, 2020, sec. Financial Regulatory Forum, https://www.reuters.com/article/bc-finreg-telehealth-insurance-policies-idUSKCN24S2EA.
[29] Office of Inspector General, U.S. Dep't of Health and Hum. Servs., Special Fraud Alert: OIG Alerts Practitioners To Exercise Caution When Entering Into Arrangements With Purported Telemedicine Companies (July 20, 2022), https://oig.hhs.gov/documents/root/1045/sfa-telefraud.pdf.

- Strengthen monitoring and targeted oversight of telehealth services.
- Provide additional education to providers on appropriate billing for telehealth services.
- Improve the transparency of "incident to" services when clinical staff primarily delivered the telehealth service.
- Identify telehealth companies that bill Medicare.
- Follow up on the providers identified in this report.

On the same day as OIG issued the alert, DOJ announced a major enforcement action involving $1.2 billion in fraudulent claims related to telemedicine.[30] According to DOJ, the coordinated federal investigations announced primarily targeted alleged schemes involving the payment of illegal kickbacks and bribes by laboratory owners and operators in exchange for the referral of patients by medical professionals working with fraudulent telemedicine and digital medical technology companies.[31] One particular case charged involved the operator of several clinical laboratories, who was charged in connection with a scheme to pay over $16 million in kickbacks to marketers who, in turn, paid kickbacks to telemedicine companies and call centers in exchange for doctors' orders.[32]

There appears to be no plan for DOJ to slow down its investigation of telemedicine fraud. Due to the anticipated wave of DOJ enforcement, healthcare stakeholders should remain diligent in ensuring they remain compliant with governmental regulations. Healthcare stakeholders can remain compliant with government regulations by staying informed about the laws and regulations that apply to their industry and continuing reviewing and updating their policies. Further, healthcare companies should have a compliance plan in place and make sure their employees are familiar with those compliance policies. Additionally, companies should consider having a compliance officer perform internal audits so that government compliance remains a priority and that any issues are timely handled. Finally, regularly monitoring the industry for regulatory changes and seeking legal counsel when necessary will also be useful in staying compliant.

Government Contracts

Recently, DOJ has been investigating fraud related to government contracts in various ways, and landmark cases have signaled DOJ still has a focus on prosecuting pandemic fraud-related cases. On September 20, 2022, DOJ announced federal criminal charges against 47 defendants for their alleged roles in a $250 million fraud scheme that exploited a federally-funded child nutrition program, "Feeding Our Future", during the COVID-19 pandemic.[33] According to DOJ, the defendants obtained, misappropriated, and laundered millions of dollars in program funds that were intended as reimbursements for the cost of serving meals to children.[34]

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[30] "Justice Department Charges Dozens for $1.2 Billion in Health Care Fraud," July 20, 2022, https://www.justice.gov/opa/pr/justice-department-charges-dozens-12-billion-health-care-fraud.
[31] *Id.*
[32] *Id.*
[33] "U.S. Attorney Announces Federal Charges Against 47 Defendants in $250 Million Feeding Our Future Fraud Scheme," September 20, 2022, https://www.justice.gov/opa/pr/us-attorney-announces-federal-charges-against-47-defendants-250-million-feeding-our-future.
[34] *Id.*

As part of the charged scheme, Feeding Our Future employees recruited individuals and entities to open Federal Child Nutrition Program sites throughout the state of Minnesota. These sites, created and operated by the defendants and others, fraudulently claimed to be serving meals to thousands of children a day within just days or weeks of being formed. The defendants created dozens of shell companies to enroll in the program as Federal Child Nutrition Program sites and created shell companies to receive and launder the proceeds of their fraudulent scheme.

DOJ stated that "exploiting a government program intended to feed children at the time of a national crisis is the epitome of greed…the defendants charged in this case chose to enrich themselves at the expense of children. Instead of feeding the future, they chose to steal from the future. IRS – Criminal Investigation is pleased to join our law enforcement partners to hold these defendants accountable."[35]

Along with the misappropriation of funds for charities, DOJ is also targeting companies that provided substandard personal protective equipment (PPE) to government agencies, such as masks or gowns that are counterfeit or do not meet safety standards. This includes companies who produced or distributed counterfeit PPE that were made to look like those produced by legitimate manufacturers but did not provide the needed level of protection. DOJ has taken action against those who have engaged in producing counterfeit PPE and continue to investigate companies who may have engaged in this type of fraud.

Vaccine-Related Fraud

Another trend DOJ is actively enforcing is vaccine-related fraud. Although this type of fraud can take many forms, some examples include:

- Companies issuing fake CDC COVID-19 vaccination record cards to fraudulent vaccine card seekers.
- Companies and individuals that apply for PPP loans using false information and then use the loan funds to purchase COVID-19 vaccines that are then sold on the black market at a profit.
- Companies that used PPP loan funds to purchase COVID-19 vaccines that were never administered.
- Fraud related to vaccine distribution, including companies that receive kickbacks or bribes in exchange for providing access to the vaccine.

Recently, DOJ announced charges against two companies and two individuals for their alleged roles in a scheme to defraud the PPP by submitting false loan applications for PPP funds, which they then used to purchase COVID-19 vaccines. Further, DOJ announced the indictment of an owner of a Florida-based company, who is accused of defrauding the PPP by falsely claiming the company had employees, which it did not, and by using PPP funds to purchase COVID-19 vaccines that were then sold on the black market.

[35] *Id*.

How to Remain Complaint and Avoid an Aggressive DOJ

With the increased scrutiny DOJ is placing on COVID fraud, it is essential that companies remain hyper-vigilant to maintain compliance with local and federal rules and regulations (particularly those companies in the healthcare and financial sectors). As is the case with most heavily regulated industries, compliance is the primary tool companies have to reduce their risk profile. Healthcare companies *and* financial gatekeepers must have a robust compliance program and take a proactive approach to identifying and mitigating risks. Nor can the compliance program remain static. Rather, companies must continue to update and tailor their compliance programs as their risk profile evolves. Our discussion on telemedicine is an excellent example of the type of evolving risks for which companies must prepare.

Some steps that companies can take to ensure compliance include:

- Remaining informed about pandemic fraud and seeking legal counsel when necessary.
- Updating and reviewing policies connected to coding, billing, and reimbursement, to ensure they remain compliant with the law.
- Providing regular training to employees on compliance policies, including policies related to COVID and fraud.
- Having a designated compliance officer or team to monitor compliance and handle any issues that arise.
- Having a designated compliance officer run internal and external audits to identify and address any compliance issues.
- Remaining abreast of developments in the healthcare and financial industries and regulatory updates. This is particularly important as the relevant laws and regulations may vary depending on the location in which a company operates.
- Having a process in place to detect, investigate, and report any suspected fraud, waste, or abuse related to COVID-19.
- Encouraging and rewarding employees for raising concerns about fraud, waste, or abuse and providing them with protection against retaliation.

These are, of course, only some of the steps that may be helpful. Companies must take an internal assessment of their risks and respond accordingly.