

# WHAT KEEPS GOVERNMENT CONTRACTORS UP AT NIGHT AND HOW TO MITIGATE RISK OF GOVERNMENT ACTION

A DISCUSSION OF THE LATEST DOJ ENFORCEMENT TRENDS IN THE WAKE OF COVID-19

IN CONJUNCTION WITH THE  
ASSOCIATION OF CORPORATE COUNSEL  
NATIONAL CAPITAL REGION



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# Topics Covered

- The Flow of Government Money since COVID-19
- DOJ Enforcement Priorities in the Wake of COVID-19
- Timeline from Priorities to Cases Charged or Filed
- GC Concerns about Enforcement Post-COVID-19
- What Companies Can Do Now to Minimize Risk
- When the Government Calls: Do's and Don'ts

# In Times of Crisis, Congress Uses The “Power of the Purse” To Mitigate

Federal spending: \$2.4 trillion for COVID-19 public health and economic crisis response

- March 4, 2020. Coronavirus Preparedness and Response Supplemental Appropriations Act:
  - \$8.3 billion in emergency funding for public health measures
- March 18, 2020. Families First Coronavirus Response Act:
  - \$8.3 billion for enhanced unemployment benefits and emergency funding for public health measures.

# In Times of Crisis, Congress Uses the “Power of the Purse” to Mitigate

- March 27, 2020. Coronavirus Aid, Relief, and Economic Security Act (CARES Act):
  - \$2.2 trillion for expanded unemployment benefits
  - \$150 billion in direct aid and grants for state and local governments;
  - \$349 billion of forgivable loans for small businesses through the Small Business Administration (SBA) Paycheck Protection Program (PPP);
  - \$500 billion as loan guarantees and equity investments into Federal Reserve Lending Facilities to support lending to businesses, states, and local governments.

April 24, 2020. Paycheck Protection Program and Health Care Enhancement Act:

- \$321 billion for increased funding for the PPP and provided supplemental funding for health care providers and COVID-19 testing.

# Crisis Spending Means Increased Risk

- Amount of money, speed of distribution and lack of vetting = increased risk of fraud and misuse.
- CARES Act imposed reporting requirements on agencies
  - Supplemental funds to Offices of Inspector General (OIG) for pandemic-related audit and investigative activity
  - New oversight mechanisms.

# CARES Act Oversight of Spending

- Millions in additional funding for Inspector Generals at SBA, Departments of Justice, Defense, Labor, Commerce, and Corporation for National and Community Service.
- Pandemic Response Accountability Committee
  - IGs from DoD, DOE, HHS, DHS, DOJ, DOL, Treasury, SBA, Treasury Inspector General for Tax Administration plus others
- Congressional Oversight Commission

# “Special” IG Oversight of Spending

- 2004. Special Inspector General for Iraq Reconstruction (“SIGIR”).
- 2008. Special Inspector General for the Troubled Asset Relief Program( “SIGTARP”).
- 2009. Recovery Accountability and Transparency Board to audit and review Recovery Act stimulus spending.
- 2020. Special Inspector General for Pandemic Recovery (“SIGPR”) within Department of Treasury.

# DOJ Priorities in the Wake of COVID

- **PPP Loan Fraud**
- **COVID Scams – Fake Treatments, False Advertising, Phishing and Malware**
- **False Claims Act**
- Price Gouging
- Foreign Corrupt Practices Act
- Antitrust

# DOJ Priorities in the Wake of COVID

## March 2020

- DOJ Memo, “COVID-19 – Department of Justice Priorities”
  - ◆ AG Barr directed each U.S. Attorney’s Office to “prioritize the detection, investigation, and prosecution of ***all criminal conduct related to the current pandemic.***”
- New Task Force:
  - ◆ “Department of Justice COVID-19 Hoarding and Price Gouging Task Force,” requiring a dedicated AUSA from each USAO.
- Joint FTC-DOJ Antitrust Statement Regarding COVID-19:
  - ◆ Announced expedited responses respond expeditiously to all COVID-19-related requests.

# DOJ Priorities in the Wake of COVID

## June 2020 Testimony from Law Enforcement Agents and DOJ

- “COVID-19 Fraud: Law Enforcement’s Response to Those Exploiting the Pandemic” – Testimony before the U.S. Senate Judiciary Committee.
  - ◆ Federal law enforcement witnesses testified that they are targeting price gouging and hoarding; PPP fraud; fraud in the sale of counterfeit PPE, COVID treatments, cures, and tests; the use of stolen identities to obtain government benefits; and loan fraud, bank fraud, money laundering, and aggravated identity theft relating to CARES Act funds.
  - ◆ **Prosecutors said they are particularly focused on charging fraud in connection with PPP loan applications**, having already brought six cases in Texas, Georgia, Oklahoma, Rhode Island, and California as of June 3.

# DOJ Priorities in the Wake of COVID

## June 2020 Testimony from Law Enforcement Agents and DOJ (cont.)

- The FBI discussed its new PPP Fraud Working Group in coordination with the DOJ's Fraud Section and the SBA OIG.
  - Initiated nearly 100 investigations with over \$42 million in potential fraud identified and over \$900,000 recovered.
  - Continuing to target fraud in connection with Medicare and Medicaid, and private health insurance plans.
- The Secret Service discussed its focus on four categories of COVID-19-related crime: sale of fraudulent medical equipment and nondelivery scams; cybercrime resulting from increased telework; ransomware; and the defrauding of government and financial institutions.
  - Initiated over 100 criminal investigations, prevented approximately \$1 billion in fraud losses, and successfully disrupted hundreds of online COVID-19-related scams.

# Recent (Selected) Case Activity

- ***U.S. v. Schena (N.D. Cal.) (June 2020)***– Defendant charged with participation in schemes to mislead investors, to manipulate Arrayit Corporation’s stock price and to conspire to commit health care through the submission of over \$69 million in false and fraudulent claims for allergy and COVID-19 testing.
- ***U.S. v. Goyal (SDNY) (June 2020)*** – Defendant, who was previously indicted for healthcare fraud offenses in 2019, charged with fraudulently obtaining government-guaranteed loans intended to help small businesses during the COVID-19 pandemic while he was on pretrial release.
- ***U.S. v. Romano (SDNY) (May 2020)*** – Defendant charged with attempting to deceive and price gouge New York into paying him and his co-conspirators approximately \$45 million for personal protective equipment that they did not possess and were not authorized to sell.
- ***U.S. v. Rai (E.D. TX.)(May 2020)*** – Defendant charged with wire fraud, bank fraud, false statements to a financial institution, and false statements to the SBA for fraudulently seeking more than \$10 million in PPP loans from two banks.

# Recent (Selected) Case Activity

- ***U.S. v. Schirripa (SDNY)(May 2020)*** – Defendant, a licensed pharmacist, charged with violating the Defense Production Act by hoarding and price gouging scarce N95 masks; making two false statements to law enforcement; committing healthcare fraud; and committing aggravated identity theft.
- ***U.S. v. Ma (SDNY)(May 2020)*** – Defendant charged in fraudulent scheme to obtain over \$20 million in government-guaranteed loans designed to provide relief to small businesses during the COVID-19 pandemic. He falsely represented to the SBA and five financial institutions that his companies had hundreds of employees.
- ***U.S. v. Parris (D.C.)(April 2020)*** – Defendant charged in federal court in the District of Columbia with fraud for attempting to sell millions of nonexistent respirator masks to the Department of Veterans Affairs in exchange for large upfront payments.

# What the New Priorities Mean

- Timeline from announcement of initiative to cases
- How cases come to the U.S. Attorney's Office
- Working with Agencies, IGs, and Task Forces
- How long will the wave of cases last?

# Comparisons to the Financial Crisis

- In 2008, financial fraud causing the housing crash led to the 2008 Troubled Asset Relief Program (TARP), and the creation of SIGTARP, a new law enforcement agency focused on financial institution fraud and fraudulent use of TARP funds.
- CARES ACT derives language on investigations and enforcement lifted almost verbatim from the TARP legislation.
- Since it's creation, SIGTARP has recovered more than \$10 billion and assisted in prosecuting over 20 financial institutions and over 400 individuals.
- "Special event" law enforcement agencies (like SIGTARP and SIGAR) last for a decade or more.

# Closer Look at PPP Loans

- Challenges in applying for a PPP loan
- Determining eligibility
- Certifying “necessity” in light of other sources of liquidity
- Reconsidering whether you qualify
- Terms of use
- Guidance and rules changing the landscape

# Closer Look at PPP Loans

- Scrutiny of recipients. Disclosure to public, DOJ, social media means recipients should prepare to answer:
  - Easily fall within the guidelines or creative reading?
  - How was the money used?
  - Access to other funds?
  - Ensure decision and rationale are documented

# Preparing for the Broader Enforcement Wave

- **What Companies Can Do Now to be Proactive**
  - Review your compliance program in light of most recent DOJ guidance from June 1, 2020.
  - What is the guidance and what is its purpose?
    - ◆ Guides DOJ in making suit/charge/settlement decisions involving companies, what penalties to seek, and what, if any, compliance obligations to impose.
    - ◆ The measuring stick for compliance programs.
    - ◆ Started in 2017 and updated each year.

# 2020 Updates to DOJ Guidance

- **Sufficiency of resources.** DOJ emphasizes that prosecutors should ask whether the program is “adequately resourced and empowered to function effectively.”
  - Funding, qualified personnel, and organizational support.
- **Data Driven.** DOJ increasingly looks at whether compliance personnel have “sufficient direct or indirect access to relevant sources of [company] data” to conduct effective monitoring of compliance.
- **Regular review and enhancement.** Companies must adjust and improve based on data and “lessons learned” from a company’s experience and that of others operating in the same industry and geographies.

# 2020 Updates to DOJ Guidance

- **Responsiveness to Audits:** Under the 2020 Guidance, prosecutors also will scrutinize whether a company's periodic reviews actually have led to meaningful changes in its compliance program.
- **Monitoring of Third-Party Agents.** Ask whether "the company engage[s] in risk management of third parties throughout the lifespan of the relationship, or primarily during the onboarding process."
- **Assessment of Program *Then and Now*.** DOJ urges prosecutors to consider a company's compliance program "both at the time of the offense and at the time of the charging decision and resolution."

# Implementing the Guidance: Improving Compliance Now

- Craft a narrative from the perspective of a prosecutor looking at your company's compliance program.
  - What is the overall narrative that could be created?
    - ◆ Frozen in time?
    - ◆ Series of audits with no meaningful changes?
    - ◆ Violations with no consequences?
    - ◆ Missed red flags because lack of reporting system or outdated systems?
    - ◆ Tone from the top is not serious?
  - ***Overwhelming majority of complaints to the G start out as internal complaints that were poorly handled.***

# Closer Look at Internal Complaints

- **Whistleblower activity will likely increase.** How to Prepare:
  - ◆ Update w/b policy and make sure reporting system and anti-retaliation policy are clearly communicated.
  - ◆ If you get a complaint, ensure w/b identity is protected and commence investigation with outside counsel.
  - ◆ Communicate basic process with w/b. Don't overshare/jeopardize confidentiality but don't "go dark."
  - ◆ Document resolution, remedial actions taken, decisions on disclosure.

# When the Government Calls

- **Do:**
  - Respectfully listen, listen, listen to whatever they will share.
  - Be proactive: conduct your own investigation so you can take appropriate remedial action and consider whether certain issues should be disclosed voluntarily.
  - Lead with what you can agree on and build rapport.
  - Address corporate v. individual representation early on
  - Other Basics?

# When the Government Calls

- **Don't:**
  - Suggest they have no case, misunderstand the law, or are just on a fishing expedition. Escalating is easy; de-escalating is difficult.
  - Overreach on the facts in an attempt to provide the client in a favorable light.
  - Fight about the small stuff early on.
  - Bluster or suggest you know more than you do.

# Conclusion

- The increase in federal spending means increased oversight and enforcement, most obviously in PPP loan fraud and FCA.
- Review your specific risk areas (PPP? FCA?) and certifications as well as your overall compliance program.
- If you find yourself the subject of an investigation, ***master your messaging*** as well as the facts and the law.