

# Potential Next Steps For DOJ's COVID-19 Fraud Enforcement

By **Scott Memmott, Jake Harper and Jonathan York** (June 21, 2022)

Fraud stemming from the COVID-19 pandemic continues to be a criminal enforcement priority for the U.S. Department of Justice.

As evidence of its commitment, U.S. Attorney General Merrick Garland established the DOJ COVID-19 fraud enforcement task force on May 17, 2021, to facilitate coordination with more than a dozen federal agencies to investigate and prosecute "the most culpable domestic and international criminals," according to a DOJ press release.[1]



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As announced in President Joe Biden's State of the Union address on March 1 and in seeming recognition of a need to bring more focus to the effort, the DOJ then appointed a chief pandemic prosecutor — the director for COVID-19 fraud enforcement — on March 10.[2]



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Pandemic fraud investigations and prosecutions have proceeded on several fronts, including with respect to the Paycheck Protection Program, Economic Injury Disaster Loan Program, and unemployment insurance programs.

Enforcement activities also have targeted COVID-19 health care fraud including misuse of funds from the provider relief fund, which was created as part of the Coronavirus Aid, Relief, and Economic Security Act in March 2020 to supply financial support to health care providers furnishing care to COVID-19 patients.



Jonathan York

The DOJ's April 20 announcement of a nationwide coordinated effort to combat health care-related COVID-19 fraud is the second such law enforcement action. This most recent activity involved criminal charges against 21 defendants in nine federal districts, which resulted in more than \$149 million in allegedly false billing to federal health care programs and pandemic assistance programs.[3]

When combined with the first coordinated nationwide takedown announced on May 26, 2021, in which criminal charges were filed against 14 defendants in seven districts with respect to conduct that resulted in \$143 million in allegedly false billing,[4] the April 2022 cases raise the DOJ's total COVID-19-related enforcement statistics in the health care space to 35 defendants involving more than \$290 million.

The allegations detailed with respect to both the May 2021 and April 2022 coordinated law enforcement actions involve schemes related to COVID-19 testing, telehealth, misappropriation of provider relief fund payments, and the manufacturing and distribution of fake COVID-19 vaccination cards.

Unsurprisingly, the DOJ's criminal enforcement activities have focused on individuals and entities taking advantage of the hastily constructed infrastructure surrounding the country's response to the pandemic by engaging in relatively typical, old-school fraud that is now targeted at a novel source of government funds.

For example, a physician, Sandeep Walia, and his medical practice falsely certified in an

application for a second PPP loan that the practice had not previously received a PPP loan.[5]

Defendants involved with schemes related to COVID-19 testing allegedly induced patients to provide personal information, or obtained patient personal information through drive-through COVID-19 testing sites, which was then used to submit false claims for additional unrelated, medically unnecessary, far more expensive and not always administered tests such as respiratory pathogen panel tests, cancer genetic testing and allergy testing.

In other instances, defendants forced COVID-19 diagnostic tests to be bundled improperly with other tests that were medically unnecessary. Others allegedly exploited temporary waivers of telehealth restrictions put in place by the Centers for Medicare & Medicaid Services to enable increased access to care during the pandemic.[6]

Some alleged fraud schemes were even more outrageous. In one instance, a musical artist, Fontrell Antonio Baines, rapped in a YouTube music video about getting rich from committing unemployment insurance fraud and later was arrested for applying for more than \$1.2 million in jobless benefits by using stolen identities.[7]

Not to be outdone, manufacturers of fake COVID-19 vaccination cards engaged in the most brazen conduct. In one matter involving a manufacturer that had distributed fake COVID-19 vaccination cards in multiple states, the defendant, Robert Van Camp, told an undercover federal agent that "until I get caught and go to jail ... I'm taking the money, ha! I don't care." He was later arrested.

The government also has alleged that the financial proceeds from these fraudulent schemes have been laundered by using various methods and then utilized to fund personal expenses or purchase luxury items such as the exotic automobile of choice among CARES Act fraudsters — the Lamborghini.

The real story for stakeholders in the health care and life science industries, however, may be in what lies ahead.

The DOJ's April announcement indicates that it is continuing to pursue schemes designed to be quickly and easily profitable by the most culpable criminals, where the fraudulent conduct is overt, obvious and egregious.

But given the massive size of federal programs implemented to combat COVID-19 — the provider relief fund, for example, totals \$178 billion, of which nearly \$120 billion has been distributed to health care providers — the DOJ's focus may soon turn toward more sophisticated, subtle and nuanced schemes.

According to one report, the DOJ is conducting more than 240 civil investigations, many of which likely result from qui tam complaints under the federal civil False Claims Act or from U.S. Department of Health and Human Services Office of Inspector General investigations and audits, into more than 1,800 individuals and entities for alleged misconduct in connection with pandemic relief loans totaling more than \$6 billion.[8]

As a result, the DOJ predicts numerous civil enforcement actions in the coming months.[9]

This increase in enforcement activity and shift in focus is made more likely by the growing scrutiny and criticism coming the DOJ's way with respect to its pandemic fraud prevention, detection and prosecution efforts, including that the 2022 takedown numbers may sound

impressive, but they actually represent "only a small sliver of the hundreds of billions of dollars that appear to have been lost due to pandemic-related fraud," according to Politico.[10]

Health care and life science stakeholders should attempt to get ahead of this anticipated wave of enforcement and audit activity.

As an initial step, organizations should carefully evaluate and inventory their involvement with COVID-19-related programs (e.g., did your organization receive provider relief funds and/or PPP funds, and if yes, when and how much?) even if the legal and compliance teams believe that they are already aware of all the organization's touch points with government pandemic assistance.

Second, stakeholders should deploy internal compliance resources or engage external professionals to conduct internal audits and investigations related to compliance with the myriad terms and conditions of each of these programs, some of which have changed over time and continue to evolve.

Such reviews could include certifications of economic necessity that were required to receive funding and loan forgiveness, the current status and proper use of COVID-19 funds and whether funds from programs such as the PRF or PPP were used as represented to the government, submissions of claims for reimbursement from federal health care programs, and timely compliance with program reporting and closeout requirements.

Particularly for enterprise organizations that may have received PRF funds across multiple providers, evaluating and documenting the use of those funds remains an important risk mitigation activity. Armed with a more complete compliance picture, stakeholders can feel more confident in identifying and assessing potential enforcement risk.

Third, stakeholders will need to strategically address any potentially fraudulent activity or other misconduct detected as to individuals or the organization, which likely will comprise remedying past misconduct as well as taking steps to prevent future similar misconduct. Remedial actions could include disciplinary action against individuals and mitigation steps, such as repaying funds tainted by alleged fraud.

Stakeholders also may need to consider a voluntary self-disclosure of the conduct to the appropriate federal agency, which could result in prolonged and uncomfortable discussions and negotiations with the government but also could head off investigations and litigation spurred by a potential qui tam complaint or an OIG audit.

Self-disclosure also helps to build trust with regulatory agencies and can be useful evidence of an organization's commitment to compliance in both past and future matters.

To deter similar misconduct going forward, stakeholders may need to launch or renew their focus on compliance initiatives designed to retrain employees, update COVID-19-related policies and procedures, design and implement other pandemic-related compliance controls to remove any gaps that may have allowed the misconduct to occur, and increase internal auditing and monitoring.

Internal assessments and monitoring are not one-time tasks, however — especially when COVID-19-related programs are continuously evolving. Notably, the federal government is continuing to update its policies on PRF reporting and other COVID-19 programs.

For instance, the Health Resources and Services Administration recently announced that providers experiencing extenuating circumstances may be able to submit PRF reports later than the original deadline.[11]

As has occurred in other major emergency situations, it can be particularly challenging for health care and life science stakeholders to identify and comply with changes made by government entities to regulatory requirements and obligations, which can lead to significant risk exposure after the dust has settled.

These efforts could be part of, but should not be delayed by, a coordinated review and update of all compliance-related policies and procedures. Relevant updates to compliance programs can include a review of any mechanism for disclosure of suspected fraudulent activity (e.g., a compliance hotline) and specific compliance initiatives or trainings for employees who submitted claims for, or helped oversee, funds related to COVID-19.

A well-functioning compliance program should be able to control risk regardless of whether the source of that risk is general coding and billing practices, relationships with referral sources, or the unique payment streams created by the COVID-19 pandemic.

Although an effective compliance program is not enough to ward off enforcement measures entirely, the DOJ and other agencies, when resolving a fraud case, will consider favorably efforts at continuous improvement taken by a company to expand and upgrade the scope of its compliance programs over the course of an investigation, which is likely to be the case here given the novelty of these issues.

While the DOJ continues to direct its enforcement resources at blatant, old-school fraud, the OIG is undertaking audits to assess whether PRF dollars were used and allocated appropriately that likely mirror efforts already undertaken by sophisticated and well-resourced counsel for False Claims Act relators.

We predict that the DOJ will soon refocus its efforts on larger-dollar activity occurring at the organization level. The steps outlined above can help stakeholders prepare for the inevitable wave of enforcement from the DOJ and other agencies and resolve any as-yet undetected issues.

These steps are not to be taken lightly, and any decision related to the resolution of potential misconduct requires extensive vetting and assessment. Providers should take the time now to get their COVID-19-related compliance affairs in order.

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[1] <https://www.justice.gov/opa/pr/attorney-general-announces-task-force-combat-covid-19-fraud>.

[2] Justice Department Announces Director for COVID-19 Fraud Enforcement (Mar. 10,

2022), <https://www.justice.gov/opa/pr/justice-department-announces-director-covid-19-fraud-enforcement> ("March 2022 Press Release").

[3] <https://www.justice.gov/opa/pr/justice-department-announces-nationwide-coordinated-law-enforcement-action-combat-health-care>.

[4] <https://www.justice.gov/opa/pr/doj-announces-coordinated-law-enforcement-action-combat-health-care-fraud-related-covid-19>.

[5] <https://www.justice.gov/usao-edca/pr/bakersfield-medical-practice-agrees-resolve-false-claims-act-allegations-involving>.

[6] [https://www.justice.gov/opa/pr/man-purchased-lamborghini-after-receiving-39-million-ppp-loans?utm\\_medium=email&utm\\_source=govdelivery](https://www.justice.gov/opa/pr/man-purchased-lamborghini-after-receiving-39-million-ppp-loans?utm_medium=email&utm_source=govdelivery).

[7] <https://www.justice.gov/usao-cdca/pr/rapper-who-bragged-about-unemployment-benefits-scam-music-video-arrested-allegedly>.

[8] March 2022 Press Release.

[9] Id.

[10] "Rather than something to be proud of, the department's performance in this area looks like one of the most significant law enforcement failures of the last 20 years . . ." <https://www.politico.com/news/magazine/2022/04/22/justice-department-pandemic-fraud-enforcement-00027092>.

[11] <https://www.hrsa.gov/provider-relief/reporting-auditing/late-reporting-requests>.