Pandemic Fraud

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This is the seventh in our First 100 Days series examining important trends in white collar law and investigations in the early days of the Biden administration. Our previous entry was on FCA enforcement. Up next, healthcare fraud.

2020 saw the outbreak of a global pandemic. While the focus was undoubtedly on the devastation caused, from early 2020, enforcement divisions were proactively monitoring for risk areas arising from the pandemic. By the end of 2020, it became clear that these potential risk areas had materialized into potential violations, with enforcement agencies bringing a number of actions for a slew of COVID-19-related issues. As we look to the upcoming year, we expect to see increased pandemic enforcement in the following areas:

Public Disclosures and Misleading Statements

Government enforcement agencies have focused on potential misrepresentations with respect to the pandemic and financial security.

With respect to statements about COVID-19, many companies have released public facing statements concerning COVID-19 treatment, testing, PPE, or the like. Some of these statements have drawn scrutiny For example, the SEC became aware of numerous penny stocks making misleading and false statements related to vaccine development and access to PPE. In 2020, the SEC suspended trading for more than 30 stocks and has since brought seven fraud cases on this basis.

Another area of focus will be public disclosures regarding operations and finances as a result of the pandemic. Companies must ensure that public filings and statements align with the realities behind the scenes. If a company's public filing states operations are proceeding normally, but in actuality it only has a few weeks of cash left on hand, that may be grounds for investigation and/or enforcement.

Identity Theft

"Old" crimes have also seen new iterations during the pandemic. In particular, government support provided in response to the coronavirus created a new opportunity for identity theft. While this crime itself is familiar, the sources of money and interests at stake differ.

We expect that state and national agencies will focus on the following issues in this area in 2021:

- Fraudulent applications for unemployment support and benefits;
- Groups who made fraudulent applications on behalf of others; and
- Those who assisted individuals in making applications and took a cut or all of the benefits.

This area is likely to become especially busy in the coming tax season as more people uncover that they were victims of identity theft.

Healthcare Fraud

The healthcare fraud space already saw a significant amount of COVID-related enforcement in 2020 with investigations into, and actions against, nursing homes for neglect stemming from the pandemic. We anticipate COVID enforcement in this space to continue. In addition to the continued focus on neglect, investigation into schemes regarding treatment, qualifications, telehealth, and billing are likely to arise. Specifically, healthcare fraud units may go after individuals posing as qualified professionals, or those selling and providing ineffective or not-proven COVID-19 treatments or vaccines. Billing will also be a focus given that services rendered in the telehealth space are easier to manipulate and harder to track.

False Claims Act

The False Claims Act (FCA) is one vehicle that DOJ will use to target COVID-19 fraud. Specifically, we anticipate FCA cases will focus on the CARES Act, rather than on PPP loans, given the monetary value at stake. (The PPP loans are smaller, and while those loans will still be an enforcement focus (see below), they are less likely to be the subject of a FCA claim.)

One of the principle purposes of the CARES Act was to infuse money into the economy quickly. This narrow focus on disbursement meant less attention to and development of fraud prevention mechanisms within the Act. However, although the standards for qualification were low, they were not non-existent. For the many that took advantage of the quick disbursements of funds (and received large sums of money) without attention to the appropriate guidelines, they may now find themselves facing the possibility of a civil FCA investigation. These types of cases will take time to develop, so it is possible we will not see much activity in this space until the end of 2021.

When these cases do arise, the speed with which the Act and guidance were released will become important to the defense, as defendants are likely to argue about ambiguity within the standards. We also expect ripeness challenges, with defendants arguing that the loans are not yet due and thus no loss has been suffered.

Payroll Protection Program

Payroll Protection Program (PPP) loans will also be an enforcement focus in 2021. The US Attorney's Office has signaled as much by hiring a new Assistant U.S. Attorney to handle all PPP matters for the department.

525 billion dollars were awarded in phase 1 of the PPP program. The SBA has six years to audit all loans made, and will audit every loan over 2 million dollars. For those remaining, the SBA will audit a statistical sampling based on various loan characteristics and whether the recipient applied for loan forgiveness.

In the meantime, other actors might seek enforcement. The focus of these potential actions will be on the two certifications loan recipients attested to. The first was the eligibility certification, certifying that the applicant was eligible for funds, and the second was the necessity certification, certifying that the applicant needed the funds. Fortunately for potential defendants, the necessity certification seemingly applied to need at the moment of application, not following when some companies in receipt of funds fared better than they had expected.

We'll continue to monitor developments in this area as they arise.

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