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FAST BREAK: **MANAGING COVID-19** **FRAUD ENFORCEMENT**

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Today's Host & Presenters



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Managing COVID-19 Fraud Enforcement

Topics to be discussed today include



Emerging Priorities for Fraud and Abuse Enforcement By DOJ and State AGs



Enforcement Risks from Receipt of Stimulus Funds



Investigations, audits and surveys on public health issues



Managing Enforcement Activity During the COVID-19 Public Health Emergency

Emerging Priorities

- DOJ COVID-19 Fraud Task Force formed almost immediately after declaration of the public health emergency. www.justice.gov/coronavirus/DOJresponse
- Complaints and investigations coordinated nationally. Each USAO has a designated Coronavirus Coordinator.
- Initial priorities centered on supply hoarding, counterfeit product and price gouging of critical medical and other supplies.
- Cyber-related scams have materialized: Fake COVID-19 apps and websites installing ransomware, phishing emails, robocalls to sell critical PPE.
- Sales of fake testing kits, cures or immunity pills. Offers for free COVID-19 testing to get sensitive Medicare and other information.

Emerging Priorities



As COVID-19 related stimulus and other funds have been distributed, growing focus on financial crimes or fraud related to use of those funds.

- Expect greater use of US Postal Inspectors, IRS, SBA and FDIC enforcement agencies even in the healthcare sector.
- Greater use of injunctive or emergency relief procedures to seize fraudulent gains. Expect greater use of 1345 injunctions in healthcare fraud COVID-19 matters.
- Greater scrutiny and pressure from media and legislators on who got what, when and what did they do with the funds. This pressure will be on corporate entities and national healthcare providers but expect local interest stories.
- Beware, immediate fraud enforcement focuses on low hanging fruit of overt criminal activity. COVID-19 enforcement will expand to established companies and focus on certification compliance to obtain funds and improper provision of services.

Enforcement Examples



Florida – July 29, 2020

Florida chiropractor indicted for misuse of PPP loan funds transferred to shell companies and used for personal expenses, among other frauds.



Georgia – August 6, 2020

Five individuals indicted for fraudulent application for PPP funds, misstating number of employees and payroll expenses to obtain \$4 million. Proceeds used on luxury cars and jewelry and money laundered to over 10 secondary bank accounts.



Minnesota – August 21, 2020

Owner of Tru-Cut Construction indicted for fraudulently obtaining \$841,00 in PPP funds when his business was defunct and had no employees. Proceeds spent on Harley Davidson motorcycle, golf and entertainment.

Emerging Priorities – Quality of Care Enforcement

In the wake of COVID-19 deaths and patient care management problems, DOJ and State AGs are pursuing healthcare providers for non-compliance with standards of care and COVID-19 specific guidance from CMS, FDA and CDC.

COVID-19 specific CDC infection control and prevention protocols are significant area for enforcement scrutiny and surveys. This emphasis could expand to non-healthcare sectors, hospitality, restaurants and other services.

Services involving risk to public, patients or residents in institutional setting are at risk for COVID-19 related enforcement. Media interest is high in this area as well.

House of Representatives Coronavirus Task Force on Nursing Homes.

Novel virus or not, enforcement scrutiny is always 20/20 hindsight even in a pandemic.

ENFORCEMENT RISK AREAS

The CARES Act and related COVID-19 legislation provided trillions of dollars in emergency loans and government spending.



Groundwork for increased fraud investigations and enforcement actions related to COVID-19 stimulus, including False Claims Act investigations and *qui tam* whistleblower litigation.

Healthcare Enforcement Risk



DOJ continues to prioritize civil enforcement and prosecution of fraud related to the COVID-19 crisis.

- There will likely be special scrutiny of the healthcare supply chain.
 - Analysis of whether ventilators and respirators were delivered in accordance with the timelines and quality requirements, including assessment of price gouging.
- Healthcare providers may find themselves at the center of an unprecedented increase in enforcement efforts driven by both government regulators and whistleblowers.
 - Increased focus on quality of care issues. Sources may include news reports, whistleblowers, and government agencies monitoring quality issues.



Enforcement Risks – Certifications

- Certifications related to the receipt and use of COVID-19 related funds are not uniform and all have different language and requirements.
- Qualifying conditions are not well explained and overly broad such as the reference to whether a corporate applicant is under investigation, audit or in litigation.
- Use of funds will be scrutinized as to whether conditions were met.
- Who certifies and what is the diligence required? Should cascading certifications be implemented in larger corporate structures?
- Claims-based certification – significant changes to Federal healthcare program payment policies may lead to inaccurate and improper claim submissions.

ENFORCEMENT TOOLS

Government Agencies to Combat Fraud in COVID-19

DOJ National Nursing Home Initiative –

Focus on nursing homes where grossly substandard care to residents has been provided. A pre-COVID-19 initiative that is on the hot seat.

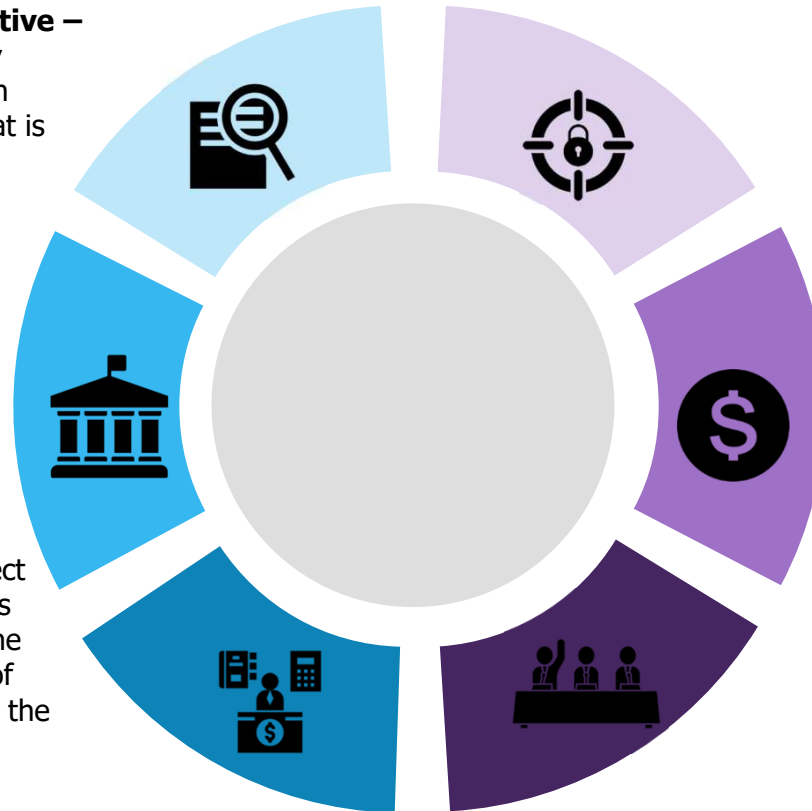
DOJ Enforcement –

Collaboration and inter-agency cooperation to crack down on COVID-19 fraud.

Congressional Committees –

Congress has various committees conducting oversight including the Select Subcommittee on the Coronavirus Crisis which submit reports to Congress on the implementation and the effectiveness of the loans and investments made under the CARES Act.

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The Pandemic Response

Accountability Committee (PRAC) – Independent Inspectors General who will conduct and coordinate audits and investigations to identify waste, fraud, and abuse in spending under the CARES Act.

Special Inspector General for Pandemic Recovery (SIGPR) –

An Inspector General position created by the CARES Act to oversee spending of government funds in response to the COVID-19 pandemic.

State Attorney General Oversight –

Assessing fraud, waste, and abuse related to COVID-19 stimulus funds in individual states, review of medical responses to COVID-19 in vulnerable populations.

Government Agencies to Combat Fraud in COVID-19

HHS Office of Inspector General

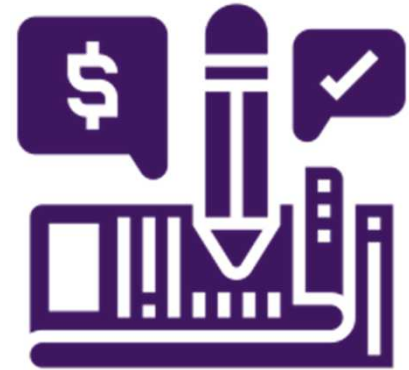
- OIG has been addressing COVID-19 related fraud issues since the beginning of the public health emergency declaration
- Initial focus on protecting Medicare beneficiaries from medical identity theft fraud schemes, but objectives evolving to include protecting Medicare funds
- In May 2020, OIG issued a strategic plan for addressing COVID-19 response and recovery, including the following four goals:
 1. Protect people
 2. Protect funds
 3. Protect infrastructure
 4. Promote effectiveness of HHS programs – now and into the future
- Among its objectives, OIG will be fighting fraud and abuse that “exploits emergency flexibilities granted to health and human services providers”

OIG Strategic Plan:
Oversight of COVID-19
Response and Recovery
May 2020



Legal Theories of Liability

- In addition to COVID-19 specific tools, there are various criminal, civil, and administrative that can be used to enforce fraud, including the False Claims Act (FCA).
 - FCA imposes liability for any person who knowingly or recklessly (1) submits a false claim to the government or (2) makes a false record or statement to obtain payment from the government
 - Invoices submitted to the government can be deemed to be a “claim.”
- Of the \$3 billion in FCA recoveries and judgments recovered by the DOJ in FY 2019, \$2.6 billion involved the healthcare industry.



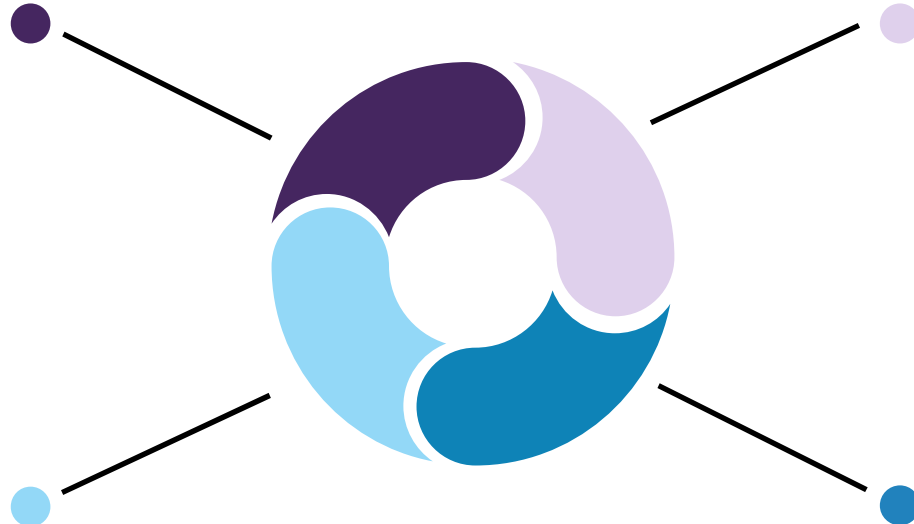
Examples of False Claims Act Risk Areas

False Certification

Scrutiny into the use of billions of dollars under the “CARES Act Provider Relief Fund” for the benefit of hospitals and other eligible healthcare providers for healthcare related expenses or lost revenues due to COVID-19

Improper Payments

Audits of any false or misleading statements made in connection with marketing drugs, the sale of devices or PPE, improper coding or billing for testing or treatments.



Medical Necessity and Coding

Unlawful kickbacks, medically unnecessary COVID-19 testing, documentation of telemedicine visits versus an e-visit or check-in, abuse of other regulatory flexibilities.

False Statements

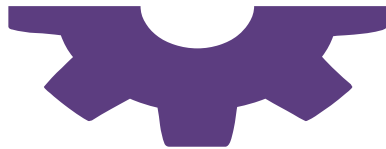
Investment scams related to vaccines and medical equipment such as masks, gloves, ventilators, etc.

MINIMIZING RISK

Implement Compliance Framework



Written procedures should be prepared which address how those CARES Act funds are to be obtained and expended.



Training COVID-19 compliance risk including for employees involved preparing documentation for relief under the CARES Act or submitting claims relating to COVID-19 relief.

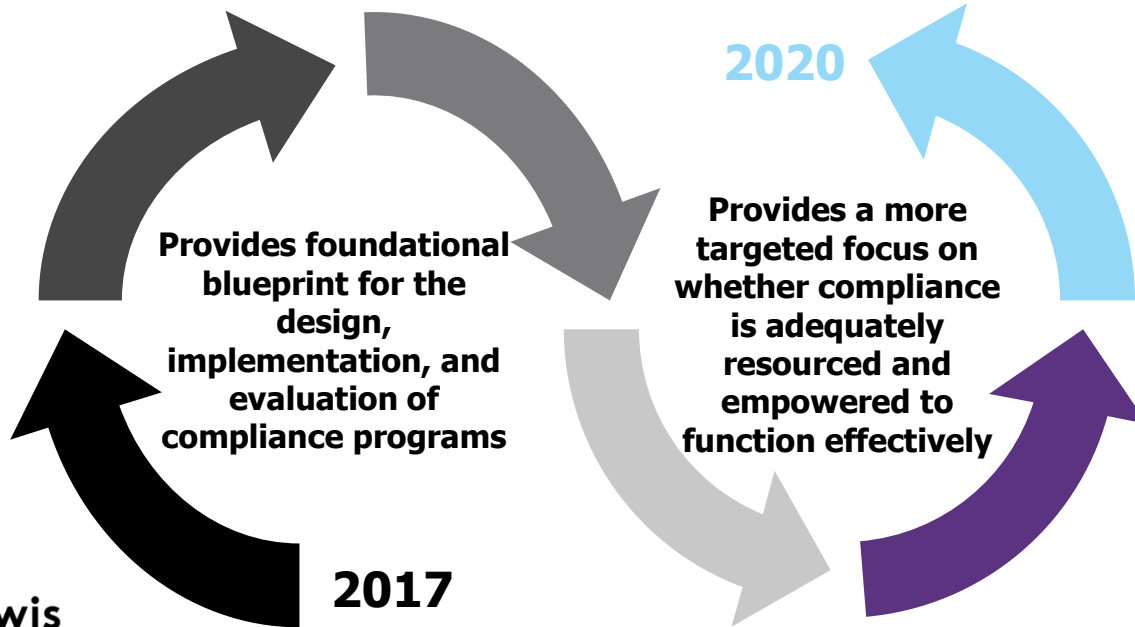


Document implementation of all applicable public health emergency guidance. May assist Prep Act immunity issues as well.



DOJ Guidance on Compliance Programming

- On June 1, 2020, The US Department of Justice's (DOJ's) Criminal Division published an update to its "Evaluation of Corporate Compliance Programs" guidance, which is used by its prosecutors to assess the adequacy and effectiveness of corporate compliance programs in corporate criminal resolutions. This updates guidance provided in 2019 and 2017, and provides companies with increased clarity on the government's evaluation of corporate compliance programs.



The Guidance Adds a Focus on Relevant Data



Guidance from the US Department of Justice (DOJ) Fraud Section provides useful insight into how it evaluates corporate compliance programs and can inform other criminal and civil enforcement actions. The DOJ Fraud Section has large corporate fraud and healthcare fraud units.

The updated guidance speaks to how compliance programs are able to access “relevant sources of data,” asking about whether data can be accessed in a timely way and whether impediments exist to such access.

Additional Updates Relevant to Current Enforcement Environment

Tracking Effectiveness

Emphasis on the ability to track the effectiveness of the compliance program.

Evolving Compliance Policies

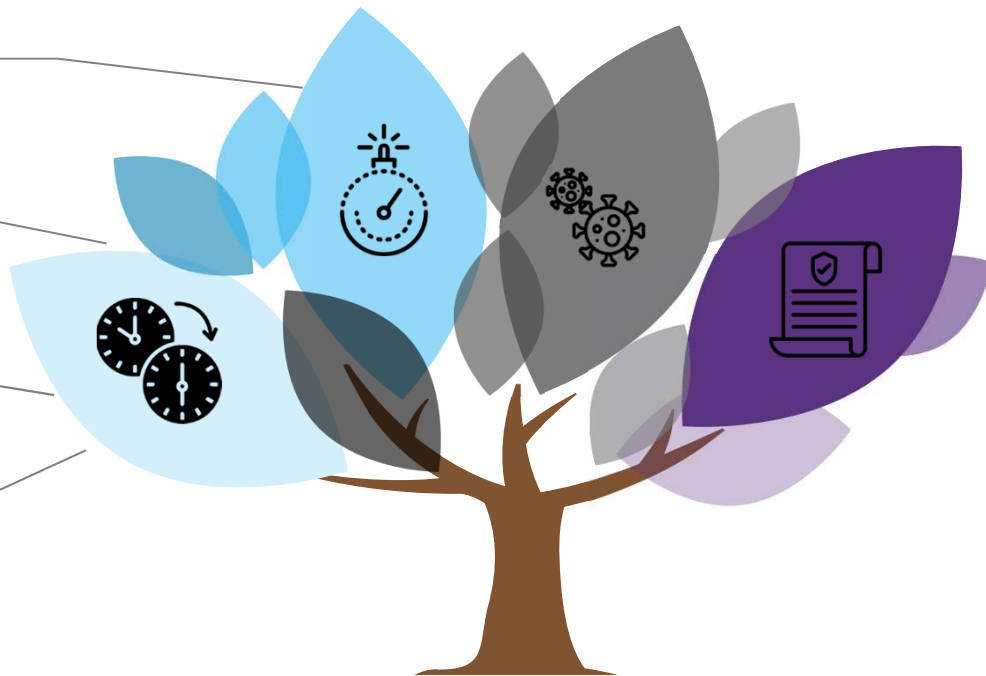
Updating existing policies to address the lessons learned from internal and/or industry misconduct.

Policy Accessibility

Compliance policies should be easily accessible to relevant employees.

Compliance Engagement

Compliance should be prevalent at all levels of the company, including the implementation of a culture of compliance at the middle management levels.



RESPONDING TO ENFORCEMENT

Responding to Investigations

Conduct internal investigations and implement corrective courses of action

Collect documentation of proactive measures that will rebut allegations that reasonable steps were not taken to ensure appropriate care of government funding

Careful and strategic engagement with government investigators and prosecutors

Obstacles in Remote Work Environment

- Assess practical limitations and delays that may arise in interactions with state and federal enforcement agencies.
 - Document Collection
 - Restrictions on travel and access to corporate facilities and personnel
 - Remote collection of documents
 - Witness Interviews
 - Interview logistics and increased use of video-conferencing technology
 - Healthcare Providers Capacity to Respond to COVID-19 pandemic and government investigation



Join us next month!

Please join us for next month's webinar:

Fast Break: Telehealth Update

Featuring

Jake Harper

➤ Thursday, September 24, 2020 3:00 PM (EST)

QUESTIONS?

Thanks and Be Well!



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A seasoned trial lawyer and former federal prosecutor, Tinos Diamantatos serves as the deputy chair of the firm's global government investigations and white collar practice. Noted by Chambers USA as "an outstanding trial lawyer" who is "tremendous for clients and a good counselor," Tinos represents organizations and individuals in trial work, litigation, government and internal investigations, and securities enforcement proceedings. This includes white collar crime, litigation related to government investigations, qui tam litigation, and complex civil litigation. In addition, he counsels clients on regulatory compliance issues. Tinos also serves as the hiring partner of the firm's Chicago office.

Thanks and Be Well!



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A former Assistant US Attorney and US Department of Justice (DOJ) Healthcare Fraud Coordinator, Katie McDermott represents healthcare and life sciences clients throughout the United States in government investigations and litigation matters relating to criminal, civil, and administrative allegations, including violations of the False Claims Act and its whistleblower provisions. Katie also advises on corporate compliance matters relating to internal investigations, voluntary government disclosures and consent decrees. Katie has handled a wide variety of quality of care enforcement matters for nursing facilities, hospice, home health and hospital providers.

Thanks and Be Well!



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Jonelle Saunders focuses her practice on healthcare and litigation matters, as well as governmental and internal corporate investigations. Jonelle advises clients on general litigation strategy, regulatory enforcement, and compliance counseling. She also provides counsel to stakeholders across the healthcare industry including hospitals, health systems, large physician group practices, chain pharmacies, and global pharmaceutical and medical device manufacturers on US federal and state fraud and abuse matters and False Claims Act (FCA) actions.

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Jacob Harper advises stakeholders across the healthcare industry, including hospitals, health systems, large physician group practices, practice management companies, hospices, chain pharmacies, manufacturers, and private equity clients, on an array of healthcare regulatory, transactional, and litigation matters. His practice focuses on compliance, fraud and abuse, and reimbursement matters, self-disclosures to and negotiations with OIG and CMS, internal investigations, provider mergers and acquisitions, and appeals before the PRRB, OMHA, and the Medicare Appeals Council.