

Looking Ahead: Enforcement Actions for Fraud, Waste, and Abuse Related to COVID-19

April 14, 2020 – FCA Now

by John Marti, Alex Hontos, Kirk Schuler, Chris DeLong, and Eric Weisenburger

As the public health and economic responses to COVID-19 dominate the headlines and traditional government enforcement actions slow, anticipate a significant increase in government enforcement actions, internal investigations related to corporate fraud, and qui tam (whistleblower) actions in the coming months. The CARES Act contains appropriations for tens of millions of dollars for agency inspector general enforcement. Leaders in federal law enforcement are telling us they are shifting enforcement priorities to target individuals and businesses for fraud, waste, and abuse related to COVID-19. This effort will last for years given the trillions of government dollars now pouring into the economy. These investigations will focus on decisions and actions (or inactions) being made now. Organizations must be looking to mitigate risk now.

Current Enforcement Picture – Scams, Statement Prosecutions, and Snake Oil

State law enforcement authorities are forming task forces to combat fraud, waste, and abuse related to COVID-19. Prosecutions will initially focus on fraudsters and price gougers seeking quick gains. Arizona and Georgia are among the latest to form such task forces, joining many others, including Nevada, South Carolina, New Jersey, Pennsylvania, Kentucky, and Louisiana. They are also already producing results. On April 9, for example, Georgia announced its task force arrested a woman for illegally selling an unregistered pesticide as a cure for the coronavirus.

The task forces are joint operations between state and federal agencies, which is unsurprising given the specialized knowledge of state investigators and Attorney General William Barr's direction to every U.S. Attorney's Office on March 16 "to prioritize the detection, investigation, and prosecution of all criminal conduct related to the current pandemic." The Department of Justice has also created at least one nationwide federal law enforcement task force. In a March 24 Memorandum Attorney General Barr announced the creation of the "COVID-19 Hoarding and Price Gouging Task Force." This task force announced on April 10 the arrest of a man for wire fraud for attempting to sell \$750 million in nonexistent personal protective equipment to the Department of

Related People

- John Marti
- Alex Hontos
- Kirk Schuler
- Chris DeLong
- Eric Weisenburger

Related Capabilities

- Healthcare Enforcement & Compliance
- Government Enforcement & Corporate Investigations

Veteran Affairs. In a March 16 letter, the National Whistleblower Center encouraged Attorney General Barr to form additional nationwide task forces, including a task force to monitor and investigate COVID-19 related False Claims Act allegations.

Small Businesses and Shareholders

On March 27, the CARES Act made \$350 billion available in loans to small businesses under the Paycheck Protection Program (PPP). The SBA made it clear in its Interim Final Rule that the applications, and hence the money, would be available on a “first-come, first-served” basis. The SBA approved the final loan application form on March 31, and small businesses scrambled to submit applications beginning April 1.

The PPP loan application for borrowers requires small businesses—i.e., generally fewer than 500 employees—to certify their eligibility as a small business. Numerous businesses may run afoul of SBA’s affiliation rules, which prevent large organizations consisting of multiple small affiliated businesses from qualifying for loans intended for small businesses. Organizations that falsely certify their small business status for federal funding are at risk for substantial penalties under the False Claims Act and other Federal enforcement statutes. The risk is especially great here given the pressure on businesses to submit applications, the ambiguity of the loan program guidance and application materials, and the current financial pressures.

These same organizations will be under extreme financial pressure *in the future* to request loan forgiveness. For example, the loan application requires the applicant to certify that they “understand that loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities, and not more than 25% of the forgiven amount may be for non-payroll costs.” It also requires the applicant to submit supporting documentation relative to such costs for the eight-week period following the loan. The pressure to obtain maximum loan forgiveness will be great. The SBA, too, has announced in its Interim Final Rule that any shareholder, member, or partner of a small business that uses PPP funds for unauthorized purposes will be subject to liability for fraud. Task forces and whistleblowers and will be watching.

Banks and Lenders

Predatory lending practices also peak in times of crisis. Some lending institutions will exploit American consumers to survive financially, and in the worst cases, to make substantial profits. Consumer protection groups working with task forces are investigating these practices. Legislators are encouraging regulators to implement rules to protect vulnerable consumers from high interest rates. Agencies are already paying attention: the SBA is on alert for such frauds and limits the fees a broker can charge a borrower to 3% for loans \$50,000 or less and 2% for loans \$50,000 to \$1,000,000 with an additional ¼% on amounts over \$1,000,000.

The False Claims Act—and its qui tam whistleblower provision—presents significant risk for lenders and banks participating in the federal stimulus programs. For example, the

PPP loan applications require the borrower to certify “acknowledge[ment] that the lender will confirm the eligible loan amount using required documents submitted.” But underwriting loans, where time is short and the desire to help borrowers is extremely high, may lead in hindsight to questionable loan acceptances. Law enforcement may pursue lenders for recklessly disregarding false statements in loan applications. Qui tam actions are inevitable.

Hospitals and Medical Providers

When the CARES Act was signed into law on March 27, it allotted \$100 billion in relief funds specifically to hospitals and other healthcare providers on the front lines of the pandemic. On April 10, as part of the “CARES Act Provider Relief Fund,” the U.S. Department of Health & Human Services (HHS) distributed \$30 billion of these allotted funds to eligible providers. Payments to providers are based on their share of total Medicare fee for service reimbursements in 2019. The payments are not loans, they are not to be repaid, and they are being automatically deposited into provider accounts via direct deposit.

Providers must sign an attestation, within thirty days of receiving the payment, confirming receipt of the funds and agreeing to HHS’s terms and conditions of payment. These terms and conditions include a certification from the provider “that the Payment will only be used to prevent, prepare for, and respond to coronavirus, and shall reimburse the Recipient only for health care related expenses or lost revenues that are attributable to coronavirus.” In addition, the terms and conditions require the provider to certify “that it will not use the Payment to reimburse expenses or losses that have been reimbursed from other sources or that other sources are obligated to reimburse.” Providers receiving other federal stimulus loans for similar relief, such as PPP loans for small business providers, may be targets of qui tam relators under the False Claims Act. Task forces and relators will examine data months and years from now for anomalies and evidence of double dipping.

Retail Stores, Wholesalers, and Suppliers

Retailers should be wary of price increases for items that limit the spread or effect of COVID-19, such as facemasks, sanitizers, disinfectants, cough medicine, and others. As scarcity continues to be a concern, the Department of Justice and state governments are responding by implementing and increasing enforcement of price gouging orders.

President Trump recently issued Executive Order 13910 on March 23 authorizing the Secretary of Health and Human Services to designate certain healthcare and medical items as protected. Under the Order and the Defense Production Act, it is a crime to accumulate designated items—which include ventilators, respirators, PPE such as face masks and gloves, sterilization products, and disinfectant products—either over a person’s reasonable needs or to sell it over prevailing market prices. Attorney General Barr issued a March 24 Memorandum (described in the introduction) stating the Department’s intent to investigate and prosecute violators of the Order and creating the COVID-19 Hoarding and Price Gouging Task Force.

Retail stores are at particular risk of enforcement actions related to these orders and should take care when adjusting prices for protected equipment. In New York City alone, the Department of Consumer and Worker Protection has received more than 7,200 complaints of price gouging related to COVID-19. New York City has filed three lawsuits against repeat offenders seeking over \$100,000 in fines. With more states putting similar orders into place and the creation of the federal task force, greater enforcement of price gouging rules is inevitable.

Procurement Fraud

Although it received less attention than the new loan programs, the straight appropriations in the CARES Act presents increased fraud risk. Appropriated funds will be used to procure PPE, vaccines, COVID-19 tests and other medical supplies, cleaning services, and to fund the construction of new field hospitals and healthcare facilities.

Enforcement against procurement fraud is already underway. As noted in the introduction, the Department of Justice announced on April 10 that it arrested and charged a Georgia man with wire fraud after fraudulently misrepresenting his ability to deliver 125 million facemasks and other personal protective equipment from domestic suppliers to the Department of Veterans Affairs. The orders would have totaled more than \$750 million. As precedent, in the two years after Hurricane Katrina, the Department of Justice brought 800 prosecutions and conducted numerous qui tam and non-qui tam investigations.

Businesses working to fulfill orders for personal protective equipment and other supplies are facing significant increased demand. Businesses must guard against producing substandard products, ignoring product failures and flaws, and passing through counterfeit product, all of which may lead to civil and criminal enforcement actions.

These concerns apply equally to products in development. Businesses developing therapies and treatments for COVID-19 are under intense market pressure to bring their product to market. While there is insatiable demand for products that treat the virus, its symptoms, and/or prevent its spread, a business that prematurely brings a product to market that causes patient harm may face substantial exposure after the emergency passes.

Whether businesses are new to the government procurement process or serve only government customers, the desire to move quickly cannot ignore compliance risk. Businesses must certify compliance with applicable regulations in exchange for payment from the government. Businesses must still pay attention to the details while working fast to satisfy government needs and being paid for that work.

What Can My Organization Do Now?

- Understand the key legal remedies that will drive future risk—statutes like the False Claims Act.
- Pay attention to the details of government loan and procurement programs. Know

what is required and comply. The implementing rules are a moving target and are being created “on the fly”—there is no substitute for understanding the details to minimize enforcement risk.

- Maintain internal controls and due-diligence procedures—through the good times and the hard times.
- Internal investigations remain—even in this environment—the key tool to identify and mitigate risks. While internal investigation activity may be slowed by the pandemic and its economic effects, curtailing investigations creates risk that the organization lacks visibility into misconduct or allegations of misconduct.
- Take internal complaints seriously. A cottage industry of qui tam relators is coming; the False Claims Act bar is recruiting whistleblowers now. You can mitigate that risk when internal whistleblowers feel “heard” and have their complaints addressed promptly and effectively.
- Understand the value of a timely, well-packaged voluntary disclosure to law enforcement or to the applicable agency. Busy agents and prosecutors may be receptive to “fully potted” disclosures and offer maximum cooperation credit in return.