

INSIGHT: Coronavirus Puts DOJ on Heightened Alert for Potential Fraud

By Alexander Canizares and Barak Cohen

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Any crisis—especially one as drastic and unprecedented as Covid-19—heightens the risks of fraud, waste, and abuse. Perkins Coie attorneys examine recent Justice Department actions and say even companies that don't receive funds specifically tied to the federal government's response to the outbreak should bear in mind the risks of potential exposure to fraud allegations.

In this time of supreme uncertainty, companies have many urgent concerns. Recent actions by the Department of Justice give businesses another thing to focus on: investigations and enforcement relating to fraud, waste, and abuse sure to trail in the wake of Covid-19 relief.

And opportunistic plaintiffs' attorneys have already begun to respond to the crisis by encouraging the federal government to open new investigations focused on health-care fraud.

Attorney General Barr Prioritizes Covid-19 Fraud Investigations

In a March 16 memorandum issued to all U.S. attorneys and in a March 20 press release, Attorney General William Barr announced that the DOJ would prioritize investigations and prosecutions relating to the Covid-19 outbreak.

Barr also urged the public to report suspected fraud related to Covid-19 by contacting the National Center for Disaster Fraud hotline. Furthermore, Deputy Attorney General Jeffrey Rosen directed all U.S. attorneys to appoint a Coronavirus Fraud Coordinator to coordinate coronavirus matters in a given district, to direct the prosecution of coronavirus-related crimes, and to conduct outreach and awareness.

On March 22, the DOJ announced its first enforcement action involving Covid-19 fraud. The DOJ obtained a temporary restraining order in federal court in Austin, Texas, to block operators of a website that offered to sell an allegedly fraudulent coronavirus vaccine.

Covid-19 Response Echoes Previous DOJ Crisis Responses

DOJ's actions bring to mind past government investigations and task forces generated in the wake of government financial bailouts. For example, following the 2008 financial crisis, the federal government formed the Office of the Special Inspector General for the Troubled Asset Relief Program (SIGTARP).

As recently as Feb. 28—more than a decade after the crisis—it was still prosecuting significant matters relating to toxic assets and banking fraud relating to the Great Recession. Similarly, in 2009, President Barack Obama created a Financial Fraud Enforcement Task Force. That task force ushered in a wave of housing and mortgage fraud investigations and *qui tam* cases under the False Claims Act and the Federal Institutions Reform, Recovery, and Enforcement Act that resulted in large settlements and litigation.

What to Expect From the Covid-19 Crisis?

The parallels to 2008 are imperfect, and the Covid-19 outbreak is unprecedented in many ways. But the recent DOJ directives and court filing, coupled with the prospects of an economic recession and an ongoing health emergency affecting the entire country, strongly suggest that the federal government will once again respond with a wave of criminal and civil cases.

State prosecutors and attorneys general will also certainly follow suit, but the DOJ will bring its greater resources to bear in this new area of enforcement.

Among the first round of schemes the DOJ said it is targeting are sales of fake cures for Covid-19, phishing email scams, and fraudulent billing for medical tests and procedures using Covid-19 patients' information. What follows is our list of the most likely other areas on which the DOJ will soon focus.

Health Care

Business should be particularly wary of FCA investigations, which may be accompanied by parallel criminal investigations initiated by whistleblowers (*qui tam* relators). For example, on March 16, Stephen Kohn, the National Whistleblower Center chair, sent a letter to Barr urging him to create a DOJ task force to monitor and investigate FCA allegations related to Covid-19.

In light of the billions in federal dollars that will ultimately be spent on coronavirus relief, Kohn wrote that, "it is imperative that the Department of Justice take prompt and effective action to ensure that no money is defrauded from any program designed to combat the Coronavirus."

Even before the Covid-19 crisis, DOJ's FCA enforcement has been robust in the health-care area. Of the more than \$3 billion DOJ recovered in FCA settlements and judgments in FY 2019, about \$2.6 billion came from the healthcare and life sciences industries.

The DOJ and the Department of Health and Human Services will certainly be on the lookout for signs of irregular billing activity arising out of increased claims for reimbursement. And there can be little doubt that aspiring *qui tam* whistleblowers and their lawyers, such as Kohn, will further encourage such scrutiny.

Procurement Fraud

Government contractors and recipients of federal grant and bailout dollars should also be mindful of the risks of *qui tam* lawsuits and government investigations resulting from the Covid-19 crisis.

Federal spending to address the spread of Covid-19 is already in the billions of dollars. On March 18, President Donald Trump issued an Executive Order invoking the Defense Production Act of 1950, which enables the federal government to order health and medical supplies to combat Covid-19. The DOJ and whistleblowers will surely scrutinize how and why those funds are expended.

Antitrust Violations

The DOJ will also invoke its criminal antitrust authority as a result of the Covid-19 situation. On March 9, the DOJ warned that those who fix prices or rig bids for personal health equipment such as face masks could face criminal prosecution.

Moreover, the DOJ's newly created Procurement Collusion Strike Force will be on "high alert" for collusive practices in the sale of such products to federal, state, and local agencies.

Financial Crimes

The government's relief efforts will also likely give rise to investigations relating to alleged financial crimes. Such misconduct can be expected to include fraudulent accounting and commercial or public-sector corruption, among other varieties of white-collar misconduct investigated by the DOJ.

Corruption

Given domestic and global supply-chain difficulties relating to the Covid-19 crisis, businesses should be especially sensitive to private-sector business partners or public officials that solicit bribes in exchange for favorable treatment.

Areas of anti-corruption focus should include licensing, import and export scrutiny, inspections, and interactions with officials. Companies should be particularly sensitive to bribery and kickback schemes that involve unscrupulous employees (or innocent business activity that might unintentionally elicit unwanted scrutiny by suspicious prosecutors).

Takeaways

Any crisis—especially one as drastic and unprecedented as this one—heightens the risks of fraud, waste, and abuse. Even if your company does not receive funds specifically tied to the federal government's response to the Covid-19 outbreak, you should bear in mind the risks of potential exposure to fraud allegations.

Robust ethics policies and compliance procedures can go a long way towards mitigating those risks. Just as importantly, companies should ensure that their policies and procedures are being implemented through robust stress-testing.

In this time of uncertainty, the best way to avoid attracting unwanted government attention is through critical self-scrutiny.

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