Avoid the Long-Haul Risks of COVID Relief Funds

October 1, 2021 **Baltimore AHLA Fraud and Abuse Conference**

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Notes:

Session Overview

On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) was signed into law, making available $2.2 trillion in relief funds – of which about $178 billion was pushed out to health care providers in the form of Provider Relief Funding.

This session will discuss the HHS Office of Inspector General's (OIG) audit plan and processes to review provider's use of Cares Act Provider Relief Funding (PRF), with a focus on:

- The Recipient's right to receive the PRF;
- Compliance with the terms and conditions;
- Mandatory reporting; and
- Enforcement Risks.

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Notes:

Legal Disclaimer

The statements made in this presentation are the views and opinions of the presenters, and not their firms/agencies. Guidance continues to evolve and change and could affect the recommendations made herein.

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Notes:

About Provider Relief Funds …

- PRF was passed as part of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") to support health care providers in responding to COVID-19
- Funded by CARES Act and the Paycheck Protection Program and Health Care Enhancement Act—total of $175 billion allocated
- Qualified providers of health care, services, and support may receive PRF payments for healthcare-related expenses or lost revenue due to COVID-19

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Notes:

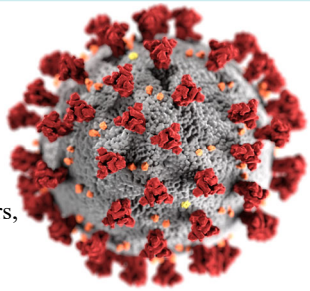
About Provider Relief Funds …

General Distribution	
Phase 1	$50B total ($30B round 1 based on MFFS payments, $20B round 2 based on revenue submissions to portal and CMS cost report). No application required. Providers must have billed MFFS in 2019
Phase 2	$18B to include Medicaid, dentists, assisted living facilities, and providers who didn't receive funds in Phase 1. Application required.
Phase 3	$24.5B to include new 2020 providers, providers who didn't bill Medicare in 2019, and behavioral health providers. Application required.

Targeted Distributions:

Additional funds of over $50 billion to:

- Hospitals in high-impact COVID-19 areas,
- Rural providers,
- Skilled Nursing Facilities and Nursing Homes,
- Tribal Hospitals, Clinics, and Urban Health Centers,
- Safety Net Hospitals, and
- Providers treating uninsured patients.



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Notes:

Phase 4 – Announced in September

On September 29, 2021, an additional $25.5 billion in relief funds, including $8.5 billion in American Rescue Plan (ARP) resources were made available for providers who serve rural patients and $17 billion for Provider Relief Fund (PRF) Phase 4 for a broad range of providers who can document revenue loss and expenses associated with the pandemic.

•**Phase 4 General Distribution** — $17 billion based on providers' lost revenues and changes in operating expenses from July 1, 2020 to March 31, 2021.

- To promote equity and to support providers with the most need, HRSA will:
  - Reimburse a higher percentage of lost revenues and expenses for smaller providers as compared to larger providers.
  - Provide "bonus" payments based on the amount of services they provide to Medicaid, CHIP, and Medicare patients, priced at the generally higher Medicare rates.

•**American Rescue Plan (ARP) Rural** — $8.5 billion based on the amount of services providers furnish to Medicaid/CHIP and Medicare beneficiaries living in Federal Office of Rural Health Policy (FORHP)-defined rural areas.

- To promote equity, HRSA will price payments at the generally higher Medicare rates for Medicaid/CHIP patients.

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PRF Terms and Conditions: The Ground Rules

Providers were required to sign an attestation agreeing to comply with the T&Cs applicable to the received funds.

Compliance with the T&Cs = Funds do not need to be repaid

Generally, T&Cs require:

- Funds used only to reimburse for health care related costs or expenses, or lost revenue attributable to COVID-19;
- Prohibition on certain uses;
- Submit required reports regarding the use of the funds;
- No balance billing; and
- Public disclosure of funds received.

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Notes:

Avoid the Long-Haul Risks of COVID Relief Funds

- Public Facing Data
  - Health Care Resources Administration (HRSA) and Pandemic Oversight (PRAC)
- HHS-OIG Division of Data Analytics (DDA), data ingestion, custom analysis and presentation
- HHS-OIG Office of Audit Services (OAS) workplan focusing on Combating Fraud Waste and Abuse in the Provider Relief Fund
- Successful criminal resolutions by HHS-OIG Office of Investigations (OI)

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Notes:

HRSA
Health Resources & Services Administration

PRF Reporting Requirements

PRF Amounts	Reporting Obligation
Under $10,000	No reporting obligation, *BUT* HHS reserves right to require report later
$10,000+ *retained*	Must file reports
$10,000-$499,999	Must classify expenses as general and administrative (G&A) or other healthcare-related expenses
>$500,000	More detailed reports required

- PRF Reporting Portal: https://prfreporting.hrsa.gov/s/

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Notes:

- "Recoupment and other legal action" for inaccurate information provided to HHS
- Or worse for intentional wrongdoing in payment applications or future report:
  - Criminal, civil or administrative penalties
  - Revocation of Medicare billing privileges
  - Exclusion
  - Fines
  - Imprisonment
- False Claims Act liability: attestation + materiality designation in PRF Terms and Conditions

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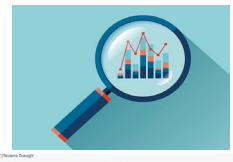
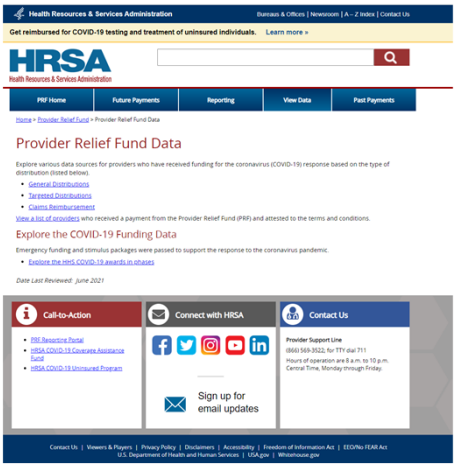
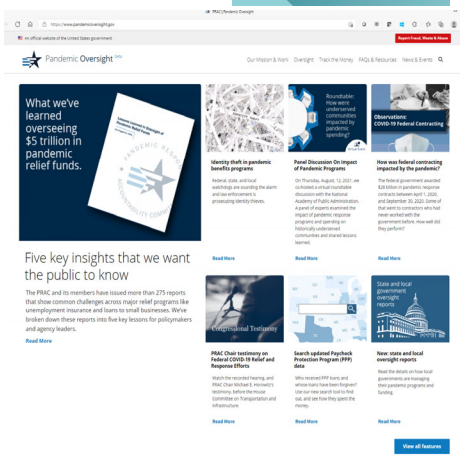
Notes:

Public Facing Data







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Notes:

Centers for Disease Control and Prevention Data.CDC.gov

Home Data Catalog Developers Video Guides Sign In

HHS Provider Relief Fund Administrative

View Data Visualize Export API

HHS is providing support to healthcare providers fighting the coronavirus disease 2019 (COVID-19) pandemic through the bipartisan Coronavirus Aid, Relief, & Economic Security (CARES) Act; the Paycheck Protection Program and Health Care Enhancement Act (PPHCEA); and the Coronavirus Response and Relief Supplemental Appropriations (CRRSA)

More

Updated September 9, 2021

Data Provided by Health Resources & Services Administration

Featured Content Using this Data

Provider Relief Fund by State

Public

September 9, 2021 15.9K Views

HHS is providing support to healthcare providers fighting the coronavirus disease 2019 (COVID-19) pandemic through the bipartisan...

About this Dataset

Mute Dataset

Updated

September 9, 2021

Data Last Updated September 9, 2021 Metadata Last Updated September 9, 2021

Date Created May 6, 2020

Views 519K Downloads 58.2K

Data Provided by Health Resources & Services Administration

Dataset Owner HHS ASPA

Contact Dataset Owner

Common Core

Contact Name	HRSA Chief Data Officer
Contact Email	PRFdata@hrsa.gov
Publisher	HRSA
Bureau Code	Health Resources and Services Administration (009-15)
Program Code	HHS:Program Management (009:020)
Geographic Coverage	US
Update Frequency	Weekly
Footnotes	Each row is a provider (aligned with billing TIN) that has received and accepted at least one payment. If a provider received 2 payments and accepted both, both payments are included. If a provider received two payments and only accepted one payment, only the accepted payment is included. If and when additional data are available, this data portal will be updated.

TAGGS

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HHS COVID-19 FUNDING

Need Help

OVERVIEW | COVID-19 AWARDS | PROVIDER RELIEF FUND | RHC TESTING FUND | UNINSURED RELIEF FUND

HHS COVID-19 Awards

The information contained on this section of the TAGGS website provides data on HHS COVID-19 Awards through the Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020; the Families First Coronavirus Response Act; the Coronavirus Aid, Relief, and Economic Security (CARES) Act; the Paycheck Protection Program and Health Care Enhancement Act (PPHCEA); the Coronavirus Response and Relief Supplemental Appropriations Act (CRSA - Division M, Title III, 2021; and the American Rescue Plan Act of 2021.

COVID-19 RESOURCES

Coronavirus.gov

Coronavirus Disease 2019 (COVID-19) (CDC.gov)

What the U.S. Government is Doing (USA.gov)

HHS News Releases

COVID-19 Awards

In response to the coronavirus pandemic, Congress has enacted funding packages. Filter the funding for HHS COVID-19 awards using these axes:

Law	Amount	Appropriation Code
PUBLIC LAW 116-123 — Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020	$2B	CV
PUBLIC LAW 116-127 — Families First Coronavirus Response Act	$329.8M	C2
PUBLIC LAW 116-136 — Coronavirus Aid, Relief, and Economic Security (CARES) Act	$13.7B	C3
PUBLIC LAW 116-139 — Paycheck Protection Program and Health Care Enhancement Act (PPHCEA)	$11.8B	C4
PUBLIC LAW 116-260 — Coronavirus Response and Relief Supplemental Appropriations Act (CRRSA - Division M, Title III, 2021)	$41.3B	C5
PUBLIC LAW 117-2 — American Rescue Plan Act of 2021	$76.7B	C6

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Notes:

Distributions of HHS Funds

- General Distributions:
  - Phases 1 & 2 - $46B (adjusted)
  - Phase 3 - $24.5B
- Targeted Distributions (more than $40.5B):
  - COVID-19 High Impact Area
  - Safety Net Hospitals (Acute Care & Children's Hospitals)
  - Rural Hospitals
  - Skilled Nursing Facility (SNF) Payments
  - Indian Health Service
- Claims paid via:
  - Uninsured Program (UIP),
    - For Testing, Treatment & Vaccine administration costs by providers or facilities.
  - Coverage Assistance Fund (CAF).

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Notes:

Division of Data Analytics

- HHS-OIG has its own internal Division of Data Analytics (DDA).

- DDA uses a multifaceted approach to ingest data from various sources that allows the team to produce High Quality Custom Data Analysis:
  - Including payments from HRSA (claims and grant) as well as other Cares Act related payments by other federal partners.

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Notes:

OAS Audit Plan

Announced or Revised	Agency	Title	Component	Report Number(s)
May 2021	Health Resources and Services Administration	Audit of CARES Act Provider Relief Funds—Payments to Health Care Providers That Applied for General Distribution Under Phases 1, 2, and 3	Office of Audit Services	W-00-21-35873
October 2020	Health Resources and Services Administration	Audit of HRSA's Controls Over Medicare Providers' Compliance with the Attestation, Submitted-Revenue-Information, and Quarterly Use-of-Funds Reporting Requirements Related to the $50 Billion General Distribution of the Provider Relief Fund	Office of Audit Services	W-00-21-59060
August 2020	Centers for Medicare and Medicaid Services	Audit of CARES Act Provider Relief Funds—General and Targeted Distributions to Hospitals	Office of Audit Services	W-00-20-35855
May 2020	OS	Audit of CARES Act Provider Relief Funds—Distribution of $50 Billion to Health Care Providers	Office of Audit Services	W-00-20-35847

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Notes:

Successful Enforcement Actions

JUSTICE NEWS

Department of Justice
Office of Public Affairs

FOR IMMEDIATE RELEASE — Thursday, April 8, 2021

Colorado Physician Charged for Misappropriating Thousands from Three Different COVID Relief Programs

An indictment was unsealed Wednesday in Denver charging a Colorado man with stealing nearly $300,000 in government funds from three different COVID relief programs and with making false statements in connection with bankruptcy proceedings.

According to court documents, Francis F. Joseph, 56, of Highlands Ranch, allegedly transferred approximately $128,000 in COVID relief funding from a medical clinic's account into his personal bank account, after which he spent the money on, among other things, travel and home improvements. The stolen funds came from two programs that were designed to aid medical providers during the COVID-19 pandemic — the Accelerated and Advance Payment Program and the Provider Relief Fund.

The Accelerated and Advance Payment Program provides necessary funds in national emergencies in order to accelerate cash flow to impacted Medicare providers. The Provider Relief Fund, through which $50 billion was allocated to providers for the coronavirus response, was part of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, a federal law enacted March 29, 2020 and designed to provide emergency financial assistance to millions of Americans who are suffering the economic effects resulting from the COVID-19 pandemic.

Today's indictment constitutes the nation's second set of criminal charges related to the misuse of Provider Relief Fund monies and the first time that charges have been brought in connection with fraud on the Accelerated and Advance Payment Program.

The indictment further alleges that following his termination from the clinic, Joseph applied for a $179,999 loan under the Paycheck Protection Program (PPP) on behalf of the medical practice, which he then directed into his personal bank account. Finally, the indictment alleges that Joseph filed for bankruptcy on behalf of (but unbeknownst to) the clinic following his termination and submitted documents containing materially false statements regarding his misappropriation of funds from the clinic in connection with that proceeding.

In April 2020, Congress authorized over $300 billion in additional PPP funding through the CARES Act. The PPP allows qualifying small business and other organizations to receive loans with a maturity of two years and an interest rate of one percent. Businesses must use PPP loan proceeds for payroll costs, interest on mortgages, rent, and utilities. The PPP allows the interest and principal to be forgiven if businesses spend the proceeds on these expenses within a set time period and use at least a certain percentage of the loan towards payroll expenses.

Joseph is charged with theft in connection with health care, theft of government property, wire fraud, and making a false statement in connection with a bankruptcy proceeding. Joseph is scheduled to make his initial court appearance on May 13 before U.S. Magistrate Judge S. Kato Crews of the U.S. District Court for the District of Colorado. If convicted, he faces maximum penalties of 10 years in prison for each theft count, 20 years for wire fraud, and five years for the bankruptcy proceeding false statement. A federal district court judge will determine any sentence after considering the U.S. Sentencing Guidelines and other statutory factors.

Acting Assistant Attorney General Nicholas L. McQuaid of the Justice Department's Criminal Division; Special Agent in Charge Curt Muller of the U.S. Department of Health and Human Services' Office of Inspector General's (HHS-OIG) Kansas City Region; and Special Agent in Charge Weston King of the U.S. Small Business Administration's Office of Inspector General's (SBA-OIG) Western Region made the announcement.

Trial Attorney Emily Gurnik of the Justice Department's Fraud Section is prosecuting the case.

This case was brought in coordination with the Health Care Fraud Unit's COVID-19 Interagency Working Group, which organizes efforts to address illegal activity involving health care programs during the pandemic. The Department of Justice also thanks the U.S. Attorney's Office for the District of Colorado and the Colorado State Medicaid Fraud Control Unit for assistance they provided.

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U.S. Attorneys » Southern District of New York » News » Press Releases

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Department of Justice
U.S. Attorney's Office
Southern District of New York

FOR IMMEDIATE RELEASE — Tuesday, September 14, 2021

Ophthalmologist Pleads Guilty To Seven-Year Healthcare Fraud Scheme And To Defrauding SBA Program Intended To Help Small Businesses During COVID-19 Pandemic

Audrey Strauss, the United States Attorney for the Southern District of New York, announced that AMEET GOYAL, an ophthalmologist in Rye, New York, pled guilty yesterday to perpetrating a seven-year healthcare fraud scheme by falsely billing for millions of dollars of procedures he did not perform, and also to fraudulently obtaining two Government-guaranteed loans intended to help small businesses during the COVID-19 pandemic while facing charges on pretrial release for the healthcare fraud scheme. GOYAL pled guilty before U.S. District Judge Cathy Seibel to all charges in a six-count superseding Indictment.

U.S. Attorney Audrey Strauss said: "Dr. Ameet Goyal was an experienced eye doctor who became blinded by greed and routinely defrauded patients who trusted him to heal their eyes. He grossly overbilled minor ophthalmological procedures, billed for tests and procedures that were never performed, falsified medical records, attempted to corrupt others in his practice to abet the scheme, and sent patients who refused to pay his fraudulent charges to collections. Already facing charges for defrauding patients and insurers of millions of dollars, Goyal committed a new fraud in applying for Paycheck Protection Program loans on behalf of two separate businesses and lying on the applications. Goyal lusted over $630,000 in federal funds earmarked for legitimate small businesses affected by the COVID-19 pandemic. Goyal has now admitted to both fraudulent schemes, agreed to forfeit $3.6 million, and faces the possibility of a significant term of incarceration."

According to the allegations contained in the Indictment, court filings, and statements made during court proceedings:

At all relevant times, GOYAL owned and operated the ophthalmology practice Ameet Goyal M.D. P.C., doing business as Rye Eye Associates, with offices in Rye, Mt. Kisco, and Wappingers Falls, New York, and Greenwich, Connecticut (the "Practice"). Between 2010 and 2017, GOYAL engaged in widespread healthcare fraud by consistently "upcoding" simpler, lower-paying surgical procedures and examinations as complex, higher-paying major operations in fraudulent billings submitted to Medicare, private insurance companies, and patients. As a result, GOYAL fraudulently obtained at least $3.6 million in payments for procedures he did not perform. As part of the scheme, GOYAL routinely falsified patient medical records, authoring fictitious templated operative reports that matched the complex operation he billed rather than the different minor procedure he actually performed. GOYAL also pressured other employees in the Practice to engage in the scheme, and threatened the livelihood of employees who refused to comply. GOYAL caused patients to pay thousands of dollars out of pocket for fraudulently billed charges, and initiated debt collection proceedings against patients who did not pay the full amounts of those false charges.

For example, GOYAL and others at the Practice routinely treated patients for an excision of a chalazion, a small bump on an eyelid, typically removed in less than 15 minutes. An excision of chalazion, when billed truthfully under its associated code, paid the Practice approximately $200 on average from patients and insurance programs. However, GOYAL systematically billed an excision of chalazion and other similar superficial eyelid procedures as if he had performed an orbitotomy together with a conjunctivoplasty, which are complex surgeries into the orbit of the eye, often to remove an orbital tumor together with grafting to close the resulting wound, that typically take an hour or more to perform. These substantial surgeries, as billed, paid the Practice approximately $1,400 on average from a combination of insurance and patient out-of-pocket payments. GOYAL also upcoded certain superficial procedures as an excision and repair of eyelid, a type of higher-paying eyelid surgery involving reconstruction or removal of certain

JUSTICE NEWS

Department of Justice
Office of Public Affairs

FOR IMMEDIATE RELEASE — Wednesday, July 29, 2020

Florida Man Charged with COVID Relief Fraud, Health Care Fraud and Money Laundering

A Florida man has been charged regarding allegations that he fraudulently obtained a Paycheck Protection Program (PPP) loan and an Economic Injury Disaster Loan (EIDL), and that he orchestrated a conspiracy to submit false and fraudulent claims for reimbursement to Medicare and CareCredit, and to defraud his own patients by charging them thousands of dollars for chiropractic services under false pretenses.

Acting Assistant Attorney General Brian Rabbitt of the Justice Department's Criminal Division, U.S. Attorney Juliana Blanco Ortiboa of the Southern District of Florida, Special Agent in Charge George L. Piro of the FBI's Miami Field Office, Special Agent in Charge Peter Ayhar of the U.S. Department of Health and Human Services-Office of the Inspector General (HHS-OIG), and Special Agent in Charge Kevin Kuppenbender of the Small Business Administration's Office of the Inspector General (SBA-OIG) made the announcement.

Dennis Nobbe, 63, of Miami, Florida, was charged by criminal complaint, unsealed today upon his arrest, in the Southern District of Florida with wire fraud; health care fraud; conspiracy to commit health care fraud and wire fraud; making false statements to a financial institution; money laundering; and conspiracy to commit money laundering. He is expected to make his initial appearance before U.S. Magistrate Judge John O'Sullivan at 3 p.m. EST today.

The complaint alleges that Nobbe, a chiropractor, orchestrated a scheme to exploit his patients for financial gain through a credit card program intended to help patients pay for out-of-pocket medical expenses. To conceal his role in the scheme, Nobbe paid bribes to other physicians to open credit card merchant accounts in their names. Nobbe then encouraged patients at his chiropractic business, Dynamic Medical Services Inc., many of whom were low-income and did not speak English, to apply for the credit cards.

According to the complaint, Nobbe charged thousands of dollars to these credit cards for services that he never, or only partially, rendered, leaving patients saddled with debt. In addition, Nobbe bribed a physician to submit claims to Medicare on Nobbe's behalf because Nobbe, as a chiropractor, was ineligible to submit the claims himself, and would not have been able to receive reimbursement for the claimed services. Nobbe and other physicians also allegedly conspired to launder the proceeds from these schemes.

As stated in the complaint, Nobbe instructed the physicians to conceal Nobbe's involvement in the scheme, and sought to conceal the purpose of large wire transfers he received, through the use of shell companies and sham contracts.

The complaint further alleges that Nobbe obtained over $200,000 in PPP and EIDL loans intended to provide COVID relief, and that Nobbe transferred portions of the proceeds to shell companies under his control and to pay personal expenses.

The Coronavirus Aid, Relief, and Economic Security (CARES) Act is a federal law enacted March 29. It is designed to provide emergency financial assistance to millions of Americans who are suffering the economic effects resulting from the COVID-19 pandemic. One source of relief provided by the CARES Act is the authorization of up to $349 billion in forgivable loans to small businesses for job retention and certain other expenses through the PPP. In April 2020, Congress authorized over $300 billion in additional PPP funding. The CARES Act also authorizes the SBA to provide Economic Injury Disaster Loans (EIDL) of up to $2 million to eligible small businesses experiencing financial disruption due to the COVID-19 pandemic.

The PPP allows qualifying small businesses and other organizations to receive loans with a maturity of two years and an interest rate of one percent. Businesses must use PPP loan proceeds for payroll costs, interest on mortgages, rent and utilities. The PPP allows the interest and principal to be forgiven if businesses spend the proceeds on these expenses within a set time period and use at least a certain percentage of the loan towards payroll expenses.

The EIDL program is designed to provide economic relief to small businesses that are currently experiencing a temporary loss of revenue. EIDL proceeds can be used to cover a wide array of working capital and normal operating expenses, such as continuation of health care benefits, rent, utilities and fixed debt payments. If an applicant also obtains a loan under the

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Notes:

Mechanism to Investigate & Enforce (Aside from OIG Audits)

CARES Act created three new entities.

- The Special Inspector General for Pandemic Recovery
- The Pandemic Responses Accountability Committee
- The Congressional Oversight Commission

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Notes:

The Special Inspector General for Pandemic Recovery

The Special Inspector General for Pandemic Recovery (SIGPR) exists within the U.S. Department of the Treasury. The SIGPR oversees programs administered by the Small Business Administration, such as the PPP and other programs established by the CARES Act. The SIGPR has a $25 million initial budget and a five-year mandate, and it is responsible for conducting, supervising, and coordinating audits and investigations. The SIGPR has the power to subpoena documents and take testimony.

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The Pandemic Response Accountability Committee

The Pandemic Response Accountability Committee (PRAC) consists of 20 Inspectors General from the Departments of Defense, Education, Health and Human Services, Homeland Security, Justice, Labor, Treasury, the Small Business Administration, and the Internal Revenue Service (IRS). PRAC is tasked with conducting, coordinating, and supporting inspectors general in their oversight of funds in order to: detect and prevent fraud, waste, abuse, and mismanagement; and mitigate major risks that cut across funding programs and agency boundaries. PRAC's authority overlaps with SIGPR's but is more extensive. PRAC may conduct investigations, including holding public hearings. PRAC may issue and enforce subpoenas, and it may refer matters to the DOJ for criminal prosecution or civil suit.

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Notes:

The Congressional Oversight Commission

The Commission is authorized to oversee the Department of the Treasury and the Board of Governors of the Federal Reserve System as these agencies administer COVID-19 relief programs. The Commission may hold hearings, take testimony, and receive evidence from federal departments or agencies.

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Notes:

June 26, 2020, Principal Deputy Assistant Attorney General Ethan Davis, in a speech to the Institute for Legal Reform made it clear that the DOJ would use

"every enforcement tool available to prevent wrongdoers from exploiting the COVID-19 crises."

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Notes:

Enforcement Activity

March 2020 – DOJ Attorney General Barr Urges American Public to Report COVID-19 Fraud. United States Attorneys in each district instructed to appoint COVID Fraud Coordinators – many also created task forces to coordinate prosecutors and agents.

Oct 15, 2020 DOJ Press Release – many criminal fraud cases and at least 11 civil fraud cases and over 50 PPP cases involving over $225 million.

National Fraud Hotline – 2021, almost every day a new press release about an indictment or plea…. https://www.justice.gov/coronavirus

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Notes:

AN ARSENAL OF LAWS ARE AVAILABLE TO THE DOJ.

The primary tool is well known to all in our industry:

The False Claims Act.

In his speech referred to above, Mr. David made it clear that the FCA would be deployed with respect to recovering wrongly paid PRF.

Once again, *qui tam suits* will be a major player.

Criminal options:

18 U.S.C. § 1001: False Statements

18 U.S.C. § 1341: Mail Fraud

18 U.S.C. § 1343: Wire Fraud

18 U.S.C. § 1344: Bank Fraud

18 U.S.C. § 371: Conspiracy

18 U.S.C. § 1345: Injunctions against Fraud

Other sources of investigation/prosecution include State Attorneys General, the Securities and Exchange Commission, and the IRS.

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Notes:

States Get in on the Act…

This Spring, the Texas 87th Legislature passed S.B. 809, an Act adding Chapter 81A entitled "Coronavirus Disease Public Health Emergency Reporting" to the Texas Health and Safety Code. This Act requires "health care institutions" who received federal relief funds under the CARES Act, Consolidated Appropriations Act, 2021, or the American Rescue Plan Act of 2021 to report the amounts received to the Texas Health and Human Services Commission. Providers are not required to report funds received under the SBA loan program or money returned to the federal government. The HHSC is required to submit these reports to the Governor and other Texas governmental officials. Rules for reporting were proposed on August 13. First monthly report is due October 1.

Other states that have implemented their own reporting requirements are

Wyoming: *See* Wyoming 66th Leg. S.F. 0228 (2021), Enrolled Act No. 72; and

Illinois: *See* 305 ILCS 5/5-5.7a.

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Notes:

But back to the FCA….

Defenses of abroad applicability to the FAC and certain criminal statutes.

- Good faith
- Materiality
- Limitations on use of guidance documents
- Reliance on advice of counsel.

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Notes:

Good Faith

Inadvertent or technical mistakes;

An “honest” misunderstanding of rules and terms;

Deviation from non-binding guidance; reasonably attempted to comply and in good faith tried to take advantage of regulatory flexibility during the pandemic.

Key is to demonstrate how they exercised good faith.

Attacks the FCA and the criminal laws mental state requirements.

Best practice: Build a record now rather than wait for an audit demand, subpoena, agents with badges, or a Civil Investigative Demand to arrive.

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Notes:

Materiality

"having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." *United States ex rel. Escobar v. Universal Health Services, Inc*.

Supreme Court determination of materiality under the FCA,

(1) whether compliance with a statute is a condition of payment;
(2) whether the alleged violation goes to the "essence of the bargain," or is minor or insubstantial;
(3) whether the government consistently pays or refuses to pay claims when it has knowledge of similar violations; and
(4) whether the government would likely have refused payment had it known of certain regulatory violations.

United States ex rel. Janssen v. Lawrence Memorial Hospital, the Tenth Circuit affirmed a district court's grant of summary judgment to the defendant under *Escobar's* materiality analysis. At issue was the hospital's alleged falsification of patient arrival times as a means of increasing Medicare reimbursement rates. The panel unanimously held that the alleged falsification was *not material* to Medicare's payment decisions.

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Notes:

Regulatory Guidance Limitations

In Azar v. Alina Health Services the U.S. Supreme Court ruled that departures from sub-regulatory guidance that establish or change a substantive legal standard cannot be the sole basis for enforcement, unless the guidance was the product of notice and comment rulemaking.

This ruling is consistent with prior guidance issued by the DOJ in January 2018, which is embodied in the U.S. Attorney's Manual.

How does apply within the context of COVID PRF?

> Statutory eligibility/use versus ever-evolving body of (sometimes inconsistent) guidance.
>
> BUT, government can and will use awareness and knowledge of guidance documents to prove that a party had the requisite scienter or knowledge of the law.

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Notes:

Advice of Counsel

Reliance on advice of counsel makes the defendant's attorney a witness and may disqualify any member of the law firm from further representing the defendant.

The defendant is required to waive attorney-client privilege.

Risk of pitting attorney against client.

The attorney could become a defendant.

AMERICAN HEALTH LAW ASSOCIATION

Notes:

Questions?

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AMERICAN HEALTH LAW ASSOCIATION

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We Are AHLA

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To lead health law to excellence through education, information, and dialogue.

Our Mission

To provide a collegial forum for interaction and information exchange to enable its members to serve their clients more effectively; to produce the highest quality, nonpartisan, educational programs, products, and services concerning health law issues; and to serve as a public resource on selected health care legal issues.

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