

Government Using Big Data and Agency Coordination in Reinvigorated Focus on Prosecuting Widespread Pandemic Fraud

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PRACTICES Healthcare and Life Sciences, Telehealth, Healthcare Transactions and Regulatory, Corporate, False Claims Act and Qui Tam Defense

Recipients of the \$5 trillion in federal funding for programs designed to respond to the economic impact of the COVID-19 pandemic could soon face fresh scrutiny for non-compliance. Recent high-profile reporting on government funds being used to purchase luxury vehicles, opulent mansions, and swanky vacations has resurrected the public's outrage at what's being called "the biggest fraud in a generation." With that renewed attention has come a reinvigorated response led by the Department of Justice ("DOJ").

As we have [previously discussed](#), the Trump administration put recipients on notice of its focus on an automatic "full review" of loans in excess of \$2 million. The Small Business Administration ("SBA") also previously issued guidance that Paycheck Protection Program ("PPP") loan recipients had to certify that the current economic uncertainty made their loan request necessary to support ongoing operations. And on May 17, 2021, Attorney General Garland [established](#) a DOJ Task Force across several partner agencies dedicated to combatting COVID-19 fraud.

Those efforts to identify and prosecute fraud in programs like the PPP have been reinforced in recent months. For instance, on December 3, 2021, the Biden Administration [released](#) "unprecedented" [guidance](#) to agencies on cooperating fully with Inspectors General. During the [2022 State of the Union](#) on March 1, 2022, President Biden declared that "the watchdogs are back" and that "we're going after the criminals who stole billions of relief money meant for small business and millions of Americans" and "the Justice Department will soon name a chief prosecutor for pandemic fraud."

One major development in enforcement is the [Pandemic Response Accountability Committee's](#) ("PRAC") creation of the Pandemic Analytics Center of Excellence ("PACE") to deliver analytic, audit, and investigative support to the oversight community. As [laid out](#) in the PRAC's strategic plan, holding wrongdoers accountable using "data analytics" remains a primary goal. DOJ Inspector General Michael Horowitz, the PRAC's Acting Chair, recently [noted new efforts](#) to hire data scientists to use artificial intelligence to identify fraud trends, patterns, and anomalies across 17 data sets and 150 million records from public, non-public, and commercial data sources. The data scientists also analyze social media to make connections in unanticipated linkages online that can lead to uncovering fraud rings. PACE's efforts are teaching computers to recognize fraud through machine learning. Horowitz [emphasized](#) that the "[t]he PRAC's long-term strategy for [PACE] is

sustainment.” Relatedly, Gene Dodaro, head of the Government Accountability Office, has [suggested](#) making the PACE permanent.

The PRAC’s [21 Inspectors General](#) now provide coordinated, comprehensive oversight to 426 pandemic relief programs across more than 40 agencies by collaborating on investigations with 41 investigators and 36 law enforcement partners. On March 17, 2022, Horowitz [wrote](#) that—to date—the work of the PRAC and other Inspectors General have led to 1,272 indictments and complaints, 949 arrests, and 455 convictions.

On January 21, 2022, the PRAC [published](#) its assessment of the SBA’s Phase III fraud controls, identifying gaps that still allow fraud schemes to go undetected and advising for enhanced measures. SBA Inspector General Hannibal “Mike” Ware has [said](#) that pandemic stimulus fraud will “likely continue to be” its top challenge “for years as the agency grapples with fraud in the programs.” The SBA has consistently noted that “[m]isrepresentation of eligibility [for pandemic funds] is unlawful, and, when appropriate, these cases are referred to the Office of the Inspector General.”

Although the PPP ended on May 31, 2021, existing borrowers must decide to pay back their loans or apply for loan forgiveness. Current [estimates](#) from PRAC suggest that approximately 2.27 million loans remain unforgiven. To seek forgiveness for a PPP loan, a borrower must meet [certain requirements](#), such as using at least 60% of the loan for payroll costs. The most recent forgiveness form from the SBA, revised July 30, 2021, requires borrowers to make [representations and certifications](#) about compliance with the program’s terms and conditions.

These required certifications can be the basis of False Claims Act (“FCA”) liability if it is determined that an applicant knowingly certified false compliance. 31 U.S.C. § 3729(a)(1). The DOJ has [acknowledged](#) the essential role that private citizens with knowledge of fraud against the government can play in bringing a FCA lawsuit on behalf of the United States and sharing in any recovery. Borrowers may be understandably apprehensive about these certifications due to ambiguity in the terms and conditions.

Fortunately for fund recipients, as we have [previously discussed](#), acting “knowingly” means that a defendant must have acted with “actual knowledge of the information” or in “deliberate ignorance” or “reckless disregard” of the “truth or falsity of the information.” 31 U.S.C. § 3729(b)(1). If a recipient’s conduct is based on a reasonable interpretation of an ambiguous requirement in the absence of official government guidance, such conduct will not satisfy the FCA scienter requirement. As a result, recipients and their counsel can mitigate risk of FCA liability by actively reviewing all program rules, monitoring official government guidance, and developing a reasonable rationale for their interpretation of any ambiguous funding requirements.

The relevant question for borrowers is whether the DOJ could retroactively interpret some companies' retention of COVID-19 funds as "retention of an overpayment"—that is, funds the company was not entitled to retain given its economic need at the time it submitted its loan application. Such an interpretation could subject companies to "reverse false claims" liability under the FCA.

The PRAC's and the Inspector General community's ability to fight fraud in pandemic-related spending may be further enhanced by the reforms outlined in the Administrative False Claims Act of 2021, S.B. 2429, which is pending in the U.S. Senate. The proposed legislation would raise the maximum amount of a fraud claim that may be handled administratively by the government from \$150,000 to \$1,000,000—significantly expanding the scope of reviewed loans.

Generally speaking, best practices to mitigate FCA liability include:

- Tracking and understanding obligations created by legislation enacted in response to the COVID-19 pandemic;
- Documenting compliance with new regulations and legislation and the bases of any required certifications;
- Documenting all communications to and from the government and its agents regarding compliance; and
- Implementing and evaluating a comprehensive compliance program, which should include specific policies, procedures, and training for corporate counsel and compliance officers.

If you have questions about PPP loan liability or FCA compliance, please contact a member of our Government Enforcement and Litigation Practice Group below. You can also review our [COVID-19 Resources page](#) for more information.