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HEALTH CARE ALERT

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DAVID KELCH
412.235.1497
dkelch@porterwright.com

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Heightened government oversight amid COVID-19 crisis: False claims and other concerns

The COVID-19 global pandemic has taken thousands of lives, devastated the world economy and shaken social stability. In response, world governments—including the U.S. government—have instituted unprecedented stimulus spending. To oversee proper use of this spending and to police for improper corporate behavior during the pandemic, the U.S. government has also instituted new oversight powers and established a number of government oversight entities tasked with monitoring the recipients of government stimulus funds. As a result, corporate stakeholders, particularly those in the healthcare industry, face renewed scrutiny. This article examines the powers and purposes of CARES Act-related watchdogs and assesses the impact that the use of highly monitored CARES Act funds may have on the healthcare industry. Particular focus is given to COVID-19-related False Claims Act concerns.

The primary legislative stimulus is the Coronavirus Aid, Relief and Economic Security Act (CARES Act). This legislation authorized the spending of over $2 trillion—more than any crisis relief funding in history. Not only did it provide loans and stimulus checks to individuals, it also created a number of government oversight entities which have broad investigative powers to ensure that CARES Act funds are used for their intended purpose.

CARES Act-created oversight: COC, PRAC and SIGPR

The Congressional Oversight Commission (COC) is the main oversight entity created under the CARES Act to monitor the use of CARES Act funds. The COC is a five-person commission of U.S. House and Senate members focused on monitoring the impact of CARES Act funds by

Information about COVID-19 and its impact on local, state and federal levels is changing rapidly. This article may not reflect updates to news, executive orders, legislation and regulations made after its publication date. Visit our COVID-19 resource page to find the most current information.

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reporting monthly to Congress. To create these reports, the COC has the authority to hold hearings, call witnesses and receive evidence from federal agencies related to the CARES Act spending programs.

The CARES Act also established a new committee within the executive branch. The Pandemic Response Accountability Committee (PRAC) was established and tasked with promoting transparency and ensuring accountability throughout all phases of relief authorized under the CARES Act. PRAC is part of an independent committee within the executive branch called the Committee of the Council of the Inspectors General on Integrity and Efficiency (CIGIE), which is composed of 75 statutorily created federal Inspectors General. Relatedly, the Office of Special Inspector General for Pandemic Recovery (SIGPR) was established within the U.S. Department of Treasury. The SIGPR works closely with PRAC, but focuses specifically on the use of Treasury Department funds such as loans, loan guarantees and other investments authorized under the CARES Act. Importantly, the SIGPR has authority to issue subpoenas and direct law enforcement authority to seek and execute search and arrest warrants. These law enforcement powers require the SIGPR to work closely with the U.S. Department of Justice (DOJ).

COVID-19-related oversight efforts by Congress

In addition to the CARES Act-created watchdogs, the U.S. House established a subcommittee within the Committee on Oversight and Government Reform (COGR) called the House Select Subcommittee on the Coronavirus Crisis. This subcommittee is tasked with investigating COVID-19 issues relating to waste, fraud and abuse, price-gouging, profiteering and political favoritism. The subcommittee shares the broad investigative powers of the COGR to fulfil its purpose of ensuring that COVID-19 relief funds are used appropriately. These powers include the authority to issue subpoenas as well as compel witness testimony from federal agencies, individuals and other entities related to the use of CARES Act funds.

The DOJ's COVID-19 Fraud Task Force

The DOJ independently created a task force to specifically combat fraud related to COVID-19 and is pursuing investigations aggressively. According to the DOJ website and numerous press-releases from Attorney General William Barr, the task force is already investigating and prosecuting cases of CARES Act fraud, price-gouging and hoarding schemes, healthcare and medical fraud, tax and investment scams, and (unsurprisingly) online and remote work and school scams. Notably, there is an anticipated increase in scrutiny of the healthcare industry and potential false claims by healthcare providers.

The DOJ website specifically warns readers of "[m]edical providers obtaining patient information for COVID-19 testing and then using that information to fraudulently bill for other tests and procedures." Naturally, the U.S. government is concerned about healthcare providers exploiting

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patients and government funds during these times of crisis, especially in light of the over $2 trillion that has been spent to mitigate and monitor the COVID-19 crisis. However, the combination of legislative committees and aggressive law enforcement efforts to investigate and pursue COVID-19 fraud or abuse should concern even the most well-intending healthcare professional.

Heightened scrutiny for False Claims Act concerns in healthcare industry under CARES Act oversight

It is particularly important for healthcare providers benefiting from the CARES Act to be mindful of False Claims Act (FCA) liability given the expected increase in DOJ scrutiny of this industry.

Importantly, the FCA imposes penalties for (among other things) falsely (1) making claims for payment from the government; (2) failing to return government property (money) that was inappropriately disbursed; or (3) making a false statement to avoid or decrease an obligation to the government.

Title III of the CARES Act and Government/Private Partnerships

Of particular importance for the healthcare industry is Title III of the CARES Act. Pursuant to Title III, it is easier for the U.S. Department of Health and Human Services (HHS) to enter partnerships with private healthcare industry. The goal of these partnerships is to promote innovation in the bio-medical industry with a focus on COVID-19-related products like vaccines, tests and other treatments. Such partnerships should be carefully made, however, because liability may arise under the FCA-related Doctrine of Worthless Services if the partnered-for product or service is ineffective or impossible to implement.

The CARES Act Provider Relief Fund

The CARES Act also supports healthcare providers and their families with the establishment of the $175 billion CARES Act Provider Relief Fund. Specifically, HHS expects to distribute $15 billion to Medicaid and Children's Health Insurance Program (CHIP) providers through this fund. When requesting this relief, healthcare providers must make certifications as to their COVID-19-related need and proposed use of these funds. HHS provides the terms and conditions for various forms of relief under the Provider Relief Fund and healthcare providers are able to request funds online. However, in requesting funds, providers must submit tax and other financial data and complete specific applications based on the reason that payment is requested.

Both the submission of financial information and certifications of need may give rise to liability under the FCA if providers are not careful. Moreover, healthcare providers should be wary of hastily applying for funds under this increased scrutiny because it is unclear how the amount of payment will be determined and how their use of funds will be monitored after disbursement.

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Moreover, the COVID-19 Fraud Task Force is vigorously investigating alleged violations of the FCA, especially those relating to the use of COVID-19 relief efforts for healthcare providers and medical device manufacturers. In fact, the DOJ is actively pursuing alleged misuse of funds by healthcare providers as well as partnerships made to expedite production of personal protective equipment and medicine.

Conclusion

For healthcare professionals, one thing is certain—the government is keenly aware of the potential for abuse and is zealously pursuing alleged misuse of CARES Act resources. The investigative entities established by the CARES Act and by the DOJ require all stakeholders, but especially medical and healthcare providers, to be meticulous in requesting and using relief funds. In many instances, it may be wise to engage legal counsel with FCA and government investigation response experience to ensure compliance with the FCA and the proper response to government scrutiny.

For more information please contact John Carney, David Kelch or any member of Porter Wright's Health Care practice group.

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