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Zero Transparency in a Perfect Storm: How Enforcement Actions Relating to the CARES Act Will Be the Most Numerous in U.S. History

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Introduction

The COVID-19 pandemic took the world by surprise in early 2020 and transformed every society on the globe. Individuals from all walks of life lost their jobs, homes, businesses, and loved ones either due to the virus itself or due to rapid economic and societal changes. The impact of COVID-19 will still be felt for years to come, and the actions of the U.S. government as well as other national governments will be carefully examined and scrutinized by scholars, educators, and researchers for subsequent decades.

The U.S. was already experiencing a shift in societal norms before the COVID-19 outbreak, as former President Donald Trump was the focus (and some would argue source) of controversy between U.S. Democrat and Republican voters. The American political landscape had begun changing since Donald Trump's presidential win in the 2016 elections; Americans were more divided and untrusting of their government than ever before, fueled by then-President Trump's blatant instructions to distrust news media and any political actor besides himself. Many Americans began to associate Donald Trump's presidency with governmental corruption; some believed Trump was an honest, "everyday" man among dishonest politicians, while others believed it was Trump himself who was the source of corruption in Washington.

The political landscape of 2016-2020 is important to understanding the U.S. government's response to the COVID-19 pandemic, which is the focus of this article. As a result of delay and corruption in the Trump administration, among other factors, enforcement actions relating to the Coronavirus Aid, Relief, and Economic Security (CARES) Act will be substantially more numerous than in prior relief programs. Furthermore, based on the unprecedented monetary size of the CARES Act, the fraud estimates of many federal institutions, the creation of the COVID-19 Fraud Enforcement Task Force, and the amount pandemic-related fraud cases already uncovered and prosecuted, enforcement actions related to the COVID-19 pandemic will continue for several years to come and dramatically eclipse the total fraud-related enforcement actions of any previous unified federal effort.

Trump Administration Pandemic Oversight

The Trump administration was notoriously hostile to oversight during his presidential campaign, and this carried on through to his negotiations of the CARES Act.[1] President Trump claimed that he personally would "be the oversight" and chose to sign a statement after passage of the CARES Act stating that he would not treat some of the inspector general reporting requirements for claims made under the Act as mandatory.[2] The Trump administration had taken steps to undermine the independence of executive oversight bodies, declaring that the special inspector general overseeing the Act funding cannot submit reports to Congress without "presidential supervision."[3] Furthermore, an unrelated provision in the CARES Act allowed the Federal Reserve chairman, Jerome H. Powell, to request confidentiality for information related to trillions of dollars going to businesses deemed worthy by the Federal Reserve.[4]

Former President Trump came under bipartisan scrutiny in Congress after he removed two inspectors general consecutively and publicly criticized a third, leaving Washington unsure of

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[1] Aryeh Mellman and Norman Eisen, *Addressing the other COVID crisis: Corruption*, THE BROOKINGS INSTITUTE (July 22, 2020), https://www.brookings.edu/research/addressing-the-other-covid-crisis-corruption/#footnote-7 (last visited May 6, 2022).
[2] *Id*.
[3] Aaron Gregg, *Trump administration won't say who got $511 billion in taxpayer-backed coronavirus loans*, THE WASHINGTON POST (June 11, 2020), https://www.washingtonpost.com/business/2020/06/11/trump-administration-wont-say-who-got-511-billion-taxpayer-backed-coronavirus-loans/ (last visited May 6, 2022).
[4] *Id.*

the nation's future with its chief executive refusing independent oversight during the beginning of a global pandemic.[5] Trump's removal of Michael Atkinson, the intelligence community's inspector general, had particularly troubled influential Senate Republicans who pushed the former President for a more detailed explanation of why Atkinson was suddenly dismissed from his position amid coronavirus aid negotiations.[6] After firing Atkinson, Trump removed Glenn Fine, who had been the acting inspector general for the Pentagon and was to chair a federal panel overseeing the Trump administration's management of the $2 trillion coronavirus rescue package passed by Congress.[7]

This erratic behavior during the lawmaking process created confusion and uncertainty, and delayed individuals and businesses from receiving aid for much longer than necessary.[8] The lack of transparency and functionality in Trump's cabinet created opportunities for incredible fraud, mismanaged or unreported data, and other corruption in what was already a late-blooming relief program.[9] The president also was critical of Christi A. Grimm (principal deputy inspector general at the Department of Health and Human Services) because her office released a report that found a "severe" and "widespread" shortage of testing supplies and protective gear at hospitals dealing with the pandemic.[10] Public criticism of the HHS for reporting on factual findings also fueled general misinformation in the public and created uncertainty during a time when not trusting medical experts could easily lead to unnecessary human loss. Trump's supposed contrarian attitude was during this time exposed to rather be a lack of concern or

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[5] Seung Min Kim, Josh Dawsey, Tom Hamburger, and Mike DeBonis, *Trump's resistance to independent oversight draws bipartisan scrunity*, THE WASHINGTON POST (April 9, 2020), https://www.washingtonpost.com/politics/trumps-resistance-to-independent-oversight-draws-bipartisan-scrutiny/2020/04/08/d9776f48-79af-11ea-9bee-c5bf9d2e3288_story.html (last visited May 5, 2022).
[6] *Id*.
[7] *Id*.
[8] *Id*.
[9] *Id*.
[10] *Id*.

appreciation for creating mass casualties and causing one of the greatest corruptions of federal funding in U.S. history.[11]

The Treasury Department followed Trump's lead and initially refused to disclose recipients of Paycheck Protection Program (PPP) funds, and only reversed their position in wake of tremendous public and congressional pressure.[12] A Treasury Department spokesman, Brian Morgenstern, explained their position as wanting to protect the confidentiality and propriety data of small businesses, writing, "The notion that the administration is hiding something is categorically false… loan level data with identifying information would risk disclosing proprietary data of millions of small businesses."[13]

However, former President Trump's legacy regarding COVID-19 relief funding is now clearly understood to be that of a U.S. President doing everything in his power to deny relief to struggling Americans and instead benefit his own elite contemporaries and political advocates.[14] Rep. James Clyburn, Chairman of the Select Subcommittee on the Coronavirus Crisis, put it best when he issued the following statement after President trump had tweeted that he is ending coronavirus relief negotiations until after the presidential election concluded: "While President Trump may be on a political timetable, the American people are not—they need help now, not after the election."[15] The Trump Administration's initial mishandling of COVID-19 relief funding set the groundwork for excessive enforcement and a delayed prosecutorial process.

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[11] *Id*.
[12] Mellman and Eisen, *supra* note 1.
[13] Gregg, *supra* note 3.
[14] *See* Press Release, James E. Clyburn, Chairman, Select Subcommittee on the Coronavirus Crisis, Chair Clyburn Denounces Trump's Abandonment of Coronavirus Relief Negotiations (Oct. 6, 2020), https://coronavirus.house.gov/news/press-releases/chair-clyburn-denounces-trump-s-abandonment-coronavirus-relief-negotiations.
[15] *Id*.

<u>Background on CARES Act</u>

On March 29, 2020, the Coronavirus Aid, Relief, and Economic Security Act was signed into law, providing more than $2 trillion in economic relief to help Americans cope with the economic impact of the COVID-19 global pandemic.[16] The Act first authorized up to $349 billion in forgivable loans to small businesses through PPP funds, and Congress later authorized an additional $321 billion of funding for the PPP.[17] The CARES Act also authorized other relief, such as the Economic Injury Disaster Loan (EIDL), Economic Impact Payments (EIP), Provider Relief Fund (PRF), Pandemic Unemployment Assistance (PUA), and Federal Pandemic Unemployment Compensation (FPUC).[18] The Small Business Administration (SBA) received funding and authority through the Act to modify existing loan programs and establish a new loan programs to assist small businesses, leading to the creation of the Paycheck Protection Program.[19]

A) Provider Relief Fund

The Provider Relief Fund was used to allocate $50 billion to providers for the coronavirus response.[20] To be eligible for the General Distributions under this fund, a provider must have billed Medicare fee-for-service in 2019, be a known Medicaid and CHIP or dental provider, and provide diagnoses, testing, or care for individuals with possible or actual cases of

[16] CARES Act Fraud Tracker, ARNOLD & PORTER (last updated May 3, 2022), https://www.arnoldporter.com/en/general/cares-act-fraud-tracker (last visited May 5, 2022).
[17] *Id*.
[18] *Id*.
[19] Interim Final Rule, U.S. SMALL BUSINESS ADMINISTRATION, DEPARTMENT OF THE TREASURY (April 2, 2020), https://www.sba.gov/sites/default/files/2021-01/PPP%20--%20IFR%20--%20Paycheck%20Protection%20Program%20as%20Amended%20by%20Economic%20Aid%20Act%20%281.6.2021%29.pdf (last visited May 6, 2022).
[20] *See* Press Release, Office of Public Affairs, Department of Justice (last updated April 8, 2021), https://www.justice.gov/opa/pr/colorado-physician-charged-misappropriating-thousands-three-different-covid-relief-programs (last visited May 5, 2022).

COVID-19 after January 31, 2020 (the HHS broadly views every patient as a possible case of COVID-19).[21]

According to the HRSA official government website, providers that have Provider Relief Fund payments that they cannot expend on allowable expenses or lost revenues attributable to coronavirus by the "Period of Availability" that corresponds to the "Payment Received Period" are required to return such funds to the federal government using the "Return Unused PRF Funds Portal."[22] For example, the first of four periods listed has a Payment Received Period of April 10, 2020, to June 30, 2020, and a Period of Availability of January 1, 2020, to June 30, 2021.[23] This means that those providers who received Provider Relief Fund payments between April 10—June 30, 2020, are required to return unused funds to the federal government by the end of the corresponding Period of Availability: June 30, 2021. The Provider Relief Fund Terms and Conditions authorize the HHS to audit PRF recipients "now or in the future" to ensure that program requirements were met, and the HHS is authorized to recover any PRF payments that were made in error, exceed lost revenue or expenses due to coronavirus, or do not otherwise meet program requirements.[24] There is no direct ban under the CARES Act that prevents providers from accepting a payment from the PRF in addition to other sources, so long as the payment from the PRF is used only for permissible purposes and recipients comply with the Terms and Conditions.[25]

B) U.S. Small Business Association Payment Protection Program

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[21] *Provider Relief Fund General Information*, HEALTH RESOURCES & SERVICES ADMINISTRATION, https://www.hrsa.gov/provider-relief/faq/general (last visited May 6, 2022).
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*

Section 1102 of the CARES Act temporarily permitted the SBA to guarantee 100 percent of 7(a) loans (pursuant to section 7(a)(36) of the Small Business Act) under a new program: the "Paycheck Protection Program."[26] Additionally, Section 1106 of the CARES Act provided for forgiveness of up to the full principal amount of qualifying loans guaranteed under the PPP.[27] On April 24, 2020, former President Trump signed the Paycheck Protection Program and Health Care Enhancement Act, which provided additional funding and authority for the PPP.[28] Under Section 1109 of the Act, the Treasury Department is authorized to issue regulations and guidance that establish terms and conditions for PPP loans which pertain to certain criteria that are consistent to the "maximum extent practicable" with section 7(a) of the Small Business act.[29]

PPP loan funds may only be used for: (1) payroll costs; (2) costs related to the continuation of group healthcare benefits during periods of paid sick, medical, or family leave, and insurance premiums; (3) mortgage interest payments (but not mortgage prepayments or principal payments); (4) rent payments (only as attributable to the borrower); (5) utility payments; (6) interest payments on any other debt obligations that were incurred before February 15, 2020; and (7) refinancing an SBA Economic Injury Disaster Loan (EIDL) loan made between January 31–April 3, 2020.[30] Although this list is exhaustive, it does not include the full slate of uses provided for traditional SBA 7(a) loans.[31]

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[26] Interim Final Rule, *supra* note 19, at *4.
[27] *Id.*
[28] *Id*.
[29] Interim Final Rule, *supra* note 19, at *7.
[30] PAYCHECK PROTECTION PROGRAM LOANS, FREQUENTLY ASKED QUESTIONS (FAQS) (July 29, 2021), https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf (last visited May 6, 2022).
[31] *Cares Act: Paycheck Protection Program Provides Small Business Loans to Support Employees*, MORGAN LEWIS (March 27, 2020; last updated August 27, 2020), https://www.morganlewis.com/pubs/2020/08/cares-act-paycheck-protection-program-provides-small-business-loans-to-support-employees (last visited May 5, 2022).

HHS Payment Phases & Initial Projections

The Provider Relief Fund program allocated payments to eligible providers in three main phases. On April 10, 2020, two weeks after the enactment of the CARES ACT, HHS initially projected and announced $30 billion in Phase 1 General Distribution funding to eligible providers who billed Medicare fee-for-service to provide financial relief during the coronavirus pandemic.[32] The funds were allocated in proportion to providers' share of annual patient revenue.[33] An additional $20 billion was later announced for Phase 1, bringing the total projection to $50 billion in General Distribution funding.[34]

HHS initially projected $18 billion in Phase 2 General Distribution funding, although this was later revised when HHS received less than $18 billion in applications eligible for funding. Eligible providers included "participants in state Medicaid programs, including Medicaid managed care plans, Children's Health Insurance Program (CHIP), and certain Medicare providers, including those who did not receive a Phase 1 General Distribution payment equal to 2% of their total patient care revenue or had a change in ownership in 2019 or 2020."[35] Additionally, living facilities and some dentists were newly eligible to apply in Phase 2 funding.[36]

HHS initially allocated $24.5 billion in new funding available from existing PRF funds for a Phase 3 General Distribution allocation.[37] Providers who were previously eligible in earlier phases or who had already received PRF payments were now eligible to apply for additional payments that would account for their financial losses and changes in operating expenses caused

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[32] HEALTH RESOURCES & SERVICES ADMINISTRATION, *supra* note 21.
[33] *Id*.
[34] *Id*.
[35] *Id*.
[36] *Id*.
[37] *Id*.

by the COVID-19 pandemic; however, the payments they had received in earlier phases were deducted from any Phase 3 payment.[38] Some previously ineligible providers, like those who began operations in the first quarter of 2020, were now invited to apply for funding.[39] Similarly, an expanded group of behavioral health providers were eligible for relief payments.[40]

<u>Corruption & Favorability Within the Trump Administration</u>

According to an *Associated Press News* analysis of federal data, as much as $273 million in federal coronavirus aid was awarded to more than 100 companies that are owned or operated by major donors to former President Donald Trump's 2016 election efforts.[41] Most of these favored companies were among the first to be approved for a loan in early April 2020 when the administration first launched the lending program; only eight companies had to wait until early May before securing aid.[42] The favored companies obtained aid through the Paycheck Protection Program, which was created to help small businesses survive during the coronavirus pandemic.[43]

The U.S. Small Business Administration and Treasury Department announced in July of 2020 that it would release a data set showing which businesses received many taxpayer-funded Paycheck Protection Program loans (walking back its earlier stance that the business names would remain hidden because the Trump administration deemed them proprietary).[44] The data included the names of recipients who received loans of more than $150,000 and revealed a dollar

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[38] *Id*.
[39] *Id*.
[40] *Id*.
[41] Brian Slodysko and Angeliki Kastanis, *Trump donors among early recipients of coronavirus loans*, ASSOCIATED PRESS (July 7, 2020), *https*://apnews.com/article/virus-outbreak-donald-trump-ap-top-news-elections-politics-00a34243825661313f2cb6a0f6a21720.
[42] *Id*.
[43] *Id*.
[44] Aaron Gregg and Jeff Stein, *In big reversal, Treasury and SBA agree to disclose details about many small business loan recipients*, THE WASHINGTON POST (June 19, 2020), https://www.washingtonpost.com/business/2020/06/19/treasury-sba-ppp-disclosure/.

range for each loan, such as whether it was between $1 million and $2 million.[45] Contrary to the *Associated Press*, the administration said nearly 75 percent of all loans were for $150,000 or more, therefore most borrowers would be revealed.[46] The announcement came after several weeks of tense negotiations with congressional leadership (in which members of both parties pressed for some form of disclosure) and amounted to an attempted compromise in which most loan recipients would be made public while specific details would remain obscured.[47]

Among the list of companies that received $150,000 or more from the Paycheck Protection Program were several run by Trump donors, including *Muy Brands* and *NewsMax*.[48] *Muy Brands* is a San Antonio, Texas-based company that operates the *Taco Bell*, *Pizza Hut* and *Wendy's* franchises, and it was approved for a loan worth between $5 million and $10 million.[49] The company owner, James Bodenstedt, has donated $672,570 to Trump since 2016.[50]

Irving, Texas-based *M Crowd Restaurant Group* (which owns 27 Texas restaurants including the Mi Cocina chain) was approved for between $5 million and $10 million; Ray Washburne, one of the company's founders, was vice chairman of the Trump Victory Committee in 2016 and donated $100,000 to the PAC in August of 2019.[51] The Joseph Kushner Hebrew Academy in New Jersey (named after Trump's son-in-law and adviser Jared Kushner's grandfather) was approved for a loan in the range of $1 million to $2 million on April 5, 2020.[52] The law firm founded by Trump's longtime personal attorney Marc Kasowitz (Kasowitz Benson

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[45] *Id.*
[46] *Id.*
[47] *Id*.
[48] Karl Evers-Hillstrom, *Company that gave six figures to pro-Trump super PAC got PPP loan worth at least $5 million*, OPEN SECRETS: FOLLOWING THE MONEY IN POLITICS (July 7, 2020, 4:21 pm), https://www.opensecrets.org/news/2020/07/company-that-gave-six-figures-to-pro-trump-super-pac-got-ppp-loan-over-5-million/.
[49] Slodysko and Kastanis, *supra* note 41.
[50] *Id*.
[51] *Id*.
[52] *Id*.

Torres) was approved for a loan worth between $5 million and $10 million.[53] Trump advocates running companies that received loans donated at least $11 million to Trump's campaign and committees backing him.[54] Transportation Secretary Elaine Chao's family's business, Foremost Maritime Co., received a loan valued between $350,000 and $1 million; she is married to the Senate majority leader, Mitch McConnell.[55] Broadcasting company Patrick Broadcasting, which is owned by Texas Lt. Gov. Dan Patrick, a firebrand conservative and former talk radio host, received a loan of $179,000; Patrick is the Texas chairman of Trump's presidential campaign, and the money was used to cover the payroll and expenses of 13 employees.[56]

G.H. Palmer Associates, a real estate firm run by longtime Trump backer Geoffrey Palmer, was approved for a loan worth $350,000 to $1 million. Curiously, the company is labeled as "G.H. Palmer Inc." on the list of loans that were distributed, but the address of the company matches that of Palmer's real estate firm in Beverly Hills, California.[57] White Stallion Energy, a coal mining company out of Indiana that gave $175,000 to Trump's inaugural committee, received between $5 million to $10 million in PPP loans.[58] At 40 Wall Street (an office building Trump owns in Lower Manhattan), 22 companies received loans for a combined total of at least $16.6 million.[59] The recipients included pro-Israel group Hadassah, the Girl Scout Council of Greater New York, and the engineering and consulting firm *Atane*.[60]

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[53] *Id*.
[54] Evers-Hillstrom, *supra* note 48.
[55] Slodysko and Kastanis, *supra* note 41.
[56] *Id*.
[57] Brian Schwartz, *Companies with Trump ties got coronavirus small business loans*, CNBC (July 7, 2020, 5:55 pm; updated July 7, 2020, 6:42 pm), https://www.cnbc.com/2020/07/07/coronavirus-small-business-relief-companies-with-trump-ties-got-ppp-loans.html.
[58] *Id*.
[59] Gregg and Stein, *supra* note 44.
[60] *Id*.

Interestingly, an energy drink company, *Vital Pharmaceuticals*, that donated six figures in corporate money to President Donald Trump's preferred super PAC received an emergency small business loan worth between $5 million and $10 million. [61] *Vital Pharmaceuticals* is the maker of "Bang Energy," and donated $250,000 to America First Action, the only super PAC with the president's official endorsement.[62] *Vital Pharmaceuticals* is a rare example of a well-known company backing Trump's reelection by donating corporate funds, and then having that political spending be offset by forgivable loans.[63]

Given the wide reach of the small business loan program, a large variety of companies with links to lawmakers and lobbyists received government aid; furthermore, companies tied to members of Trump's family received PPP loans as well.[64] On the other side of the political aisle, a firm linked to House Speaker Nancy Pelosi's (D-Calif.) husband also received a small business loan, the Washington Post reported.[65] Additionally, even some lobbying firms that influenced the legislation to authorize PPP loans received government aid themselves, including several firms that worked with Trump-tied lobbyists and lobbyists for foreign nations.[66] The $2.2 trillion CARES Act was the second most lobbied bill of all time, as thousands of lobbyists attempted to influence the government's response to the deadly coronavirus pandemic.[67]

Furthermore, the Paycheck Protection Program itself has come under scrutiny for its loans to billionaire-owned or private-equity-backed companies, while many small businesses were shut out when the program ran out of money within a month of enactment.[68] Congress was

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[61] Evers-Hillstrom, *supra* note 48.
[62] *Id*.
[63] *Id*.
[64] *Id*.
[65] *Id*.
[66] *Id*.
[67] *Id*.
[68] *Id*.

forced to implement millions more for the PPP program in April to reach minority-owned businesses and underserved communities that missed out on the first round of loans.[69]Among loan recipients, 48,922 reported "zero" as the number of jobs they would retain with the money, and 40,506 applicants left that section blank; furthermore, 10 companies that received between $5 million and $10 million reported retaining only one job with the money they received.[70] It appears that companies were applying for and receiving loans without having any serious plan or indication of using these funds for approved purposes like job salary and retainment.

According to Craig Holman, a lobbyist with the advocacy group *Public Citizen*, "The very first line of defense for the public to make sure the money is being awarded to the businesses that are supposed to be getting it is through transparency… It's a problem with PPP, but it also goes far beyond that... The entire pandemic response has been defined by a lack of transparency."[71] In part, this is due to efforts to streamline the process, as the SBA and the Treasury Department allowed lenders to take borrowers at their word regarding their need and eligibility.[72] Although the SBA later said that any loan above $2 million would be audited, business applicants were initially subject to very little vetting.[73]Concerningly, the SBA handed out loans to private schools catering to elite clientele, firms owned by foreign companies and large chains backed by well-off Wall Street firms; in fact, close to 90,000 companies in the program took the aid without ever promising on their applications they would rehire workers or create jobs.[74] The Small Business Association issued approximately $755 billion in Paycheck

[69] *Id*.
[70] Jonathan O'Connell, Aaron Gregg, Steven Rich, Anu Narayanswamy, and Peter Whoriskey, *Treasury, SBA data show small-business loans went to private equity backed chains, members of Congress*, THE WASHINGTON POST (July 6, 2020), https://www.washingtonpost.com/business/2020/07/06/sba-ppp-loans-data/.
[71] Gregg, *supra* note 3.
[72] *Id*.
[73] *Id*.
[74] Gregg and Stein, *supra* note 44.

Protection Program loans as well as another $202 billion in Economic Injury Disaster loans since March 2020, when the CARES Act was signed into law.[75]

Fraud and the Paycheck Protection Program

Although fraud is always a factor to consider in any governmental relief program, it is especially prevalent in the case of the CARES Act, in part, because of the Trump Administration's initial lack of transparency at the start of the pandemic and the questions surrounding whether connected entities were preferentially allotted pandemic funds. As of March 2022, there have been criminal charges against over 1,000 defendants with alleged losses exceeding $1.1 billion; the seizure of over $1 billion in Economic Injury Disaster Loan proceeds; and over 240 civil investigations into more than 1,800 individuals and entities for alleged misconduct in connection with pandemic relief loans totaling more than $6 billion.[76] The Justice Department's Inspector General and acting chairman of the Pandemic Response Accountability Committee (PRAC), Michael E. Horowitz, stated in 2020 that if the committee limited fraud to 1% of what Congress authorized, that sum would be an amount that rivals the DOJ's annual budget—around $26 billion dollars.[77] Furthermore, in a March 2022 statement before the U.S. Senate Committee on Homeland Security & Governmental Affairs, Horowitz explains that more than $5 trillion has been spent by the federal government in pandemic relief funding, which

[75] Jacob A. Sand and David Hall, *CARES Act Compliance an Enforcement Priority*, NATIONAL LAW REVIEW, VOLUME XI, NUMBER 153 (June 2, 2021), https://www.natlawreview.com/article/cares-act-compliance-enforcement-priority.
[76] *Fraud Section Enforcement Related to the CARES Act*, THE UNITED STATES DEPARTMENT OF JUSTICE (last updated May 4, 2022), https://www.justice.gov/criminal-fraud/cares-act-fraud (last visited May 5, 2022).
[77] Jory Heckman, *IGs on pandemic oversight board warn job well done still means billions in fraud*, FEDERAL NEWS NETWORK (September 24, 2020, 9:02 am), https://federalnewsnetwork.com/agency-oversight/2020/09/igs-on-pandemic-oversight-board-warn-job-well-done-still-means-billions-in-fraud/ (last visited May 5, 2022).

exceeds its total spending in 2019 for discretionary, mandatory, and interest on the debt.[78] It is also greater than six times the amount of the $800 billion relief package passed in 2009 in response to the financial crisis (which at the time was the largest oversight effort undertaken by the OIG).[79] In fact, just the Paycheck Protection Program alone has distributed approximately $800 billion in funding to date.[80]

Interestingly, in just the first 14 days of fund disbursements alone, about 1.7 million PPP loans were issued totaling upwards of $343 billion.[81] Horowitz notes that these funds were allotted with few, if any, controls—and that consequently, effective and coordinated independent oversight has been most crucial to improving how federal agencies are operating their pandemic relief programs, delivering essential services to the public, and combating fraud, waste, abuse, and mismanagement of funds.[82] Horowitz also elaborates on the importance of transparency in pandemic oversight, as the PRAC's efforts to make governmental funding data available to the public have allowed the PRAC and Inspectors General to benefit from tips that whistleblowers and the general public have provided after reviewing data on the online database *PandemicOversight.gov*.[83]

According to the Association of Certified Fraud Examiners, estimates indicate that organizations lose 5% of their revenue each year to fraud.[84] PRAC's deputy executive director

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[78] *See* Statement of Michael E. Horowitz, *Pandemic Response and Accountability: Reducing Fraud and Expanding Access to COVID-19 Relief through Effective Oversight*, Office of the Inspector General, Chair, Pandemic Response Accountability Committee Inspector General, U.S. Department of Justice (March 17, 2022), https://oig.justice.gov/news/testimony/statement-michael-e-horowitz-chair-pandemic-response-accountability-committee-1.
[79] *Id*.
[80] *Id*.
[81] *Id*.
[82] *Id*.
[83] *Id*.
[84] *See* Press Release, *Think Pandemic-Related Fraud Is Going Away? Think Again*, Association of Certified Fraud Examiners (Sept. 9, 2021), https://www.acfe.com/about-the-acfe/newsroom-for-media/press-releases/press-release-detail?s=Think-Pandemic-Related-Fraud-Is-Going-Away.

Linda Miller, who asserts that there has "never been a bigger challenge" when it comes to fraud in government spending.[85] Miller continues, "The investigations are ongoing, so we won't know the scope of the fraud for years… My guess is when we're all said and done, it's going to be significantly higher than 5% in the case of the CARES Act."[86] If this analysis is correct, it is likely that enforcement actions relating to the CARES Act will be substantially more numerous (and more costly overall) than those conducted in connection with prior relief programs.[87] A March 25, 2021, memorandum released by the Select Subcommittee on the Coronavirus Crisis described the Biden-Harris Administration's efforts to greatly heighten oversight in response to an enormous increase in hotline complaints to the SBA Office of the Inspector General: "148,525 complaints (an increase of 19,500% from prior years) and 1.34 million referrals for suspected fraud."[88] This highly sought after and contentious data paints a picture of a haphazard, first-come, first-served program that was not designed to evaluate the relative need of the recipients.[89] Although it served many industries and entities, including restaurants, medical offices, car dealerships, law firms and nonprofits, the PPP agency made no effort to identify or exclude companies that have potential conflicts of interest among influential Washington figures.[90]

The SBA OIG report from July 28, 2020, illustrated at a relatively early point in the pandemic's history that a lack of oversight in the President's Administration had resulted in severe nationwide fraud and corruption. The report claims that the OIG has been "inundated with contacts to investigate field offices from financial institutions across the nation and the complaint

[85] Heckman, *supra* note 77.
[86] *Id*.
[87] Sand and Hall, *supra* note 75.
[88] *Id*.
[89] O'Connell, Gregg, Rich, Narayanswamy, and Whoriskey, *supra* note 70.
[90] *Id*.

Hotline" and that they had received complaints of more than 5,000 instances of suspected fraud from financial institutions receiving economic injury loan deposits, 3,800 of which came from only six financial institutions (an additional 1,220 reports came from other financial institutions).[91] Some institutions have reported dollar amounts rather than the specific number of instances of suspected fraud: nine financial institutions have reported a combined total of $187.3 million in suspected fraudulent transactions.[92] The OIG received 465 hotline complaints by May 19, 2020, and by June 26, 2020, the number of OIG hotline complaints related to economic injury loans had increased to 1,038 complaints. Of these, 692 complaints were about potential fraud or scams, including credit inquiries for "individuals who had never applied for an economic injury loan or grant. "[93] Furthermore, the OIG's preliminary review revealed strong indicators of widespread potential fraud in the PPP program as early as July 2020 and identified systemic issues and internal control deficiencies related to disaster assistance for the COVID-19 pandemic. [94]

One systemic issue in need of addressing was that, according to filings with the Securities and Exchange Commission, nearly 300 publicly traded companies received $1 billion in stimulus funding, which prompted an after-the-fact ruling from SBA that public companies with access to credit elsewhere would likely not qualify for funding.[95] Many of those businesses subsequently returned the money although the SBA has declined to be transparent on exactly how many did so, leading advocacy groups to claim that the decision not to release records could shield other

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[91] *See* Management Alert, *Serious Concerns of Potential Fraud in Economic Injury Disaster Loan Program Pertaining to the Response to COVID-19*, SBA Inspector General, Report Number 20-16 (July 28, 2020), https://www.sba.gov/sites/default/files/2020-07/SBA_OIG_Report_20-16_508.1.pdf.
[92] *Id*.
[93] *Id*.
[94] *Id*.
[95] Gregg, *supra* note 3.

undeserving applicants from public scrutiny.[96] According to Steve Ellis, president of the advocacy group Taxpayers for Common Sense, "Clearly, this is meant to prevent some entities from being embarrassed, or being revealed… Nobody forced them to take the money, and it was already set up so that they could return it with no questions asked."[97]

According to a report on March 25, 2021, made by Rep. Clyburn, Chairman of the Select Subcommittee on the Coronavirus Crisis, the Trump Administration is responsible for nearly $84 billion in potentially fraudulent loans due to mismanagement of small business relief programs.[98] This same subcommittee also sent a letter to the SBA OIG flagging an error at SBA that allowed for duplicate loans, and the SBA OIG published a flash report identifying $692 million in duplicate loans.[99] To help detect fraud in small business relief programs, including PPP and the EIDL program, the American Rescue Plan invested an additional $142 million into oversight of these programs.[100]

The Select Subcommittee's analysis of nonpublic loan data revealed that a total of 22,529 PPP loans (worth more than $4.2 billion) issued by the Trump Administration could be subject to fraud, waste, or abuse.[101] These loans included: (1) over $1 billion in loans that went to companies that received multiple loans; (2) over 600 loans totaling more than $96 million that went to companies excluded from doing business with the government (and therefore prohibited from obtaining a PPP loan); (3) over 350 loans worth $195 million went to government

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[96] *Id*.
[97] *Id*.
[98] *Remote Hearing On "Rooting Out Fraud In Small Business Relief Programs",* SELECT SUBCOMMITTEE ON THE CORONAVIRUS CRISIS, https://coronavirus.house.gov/subcommittee-activity/hearings/remote-hearing-rooting-out-fraud-small-business-relief-programs.
[99] *Id*.
[100] *Id*.
[101] *See* Interim Staff Report, *Ineffective and Inequitable: The Trump Administration's Failed Response to the Coronavirus Crisis*, Select Subcommittee on the Coronavirus Crisis (October 2020), https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/InterimStaffReport10.30.20.pdf.

contractors with significant performance and integrity issues; and (4) over 11,000 borrowers and $2.98 billion in loans that raise potential fraud concerns when compared against the federal government's System for Award Management database.[102] On September 1, 2020, Chairman Clyburn referred these potentially fraudulent loans to the Inspectors General at Treasury and SBA for examination and called for them to conduct a review of the program's oversight and accountability mechanisms.[103]

This committee staff report focused on the Trump Administration's contribution to fraud and came to several conclusions. The report concluded that the Federal Reserve directly purchased corporate debt but failed to protect workers, allowing companies to lay off or furlough more than one million Americans.[104] It also states that the Treasury privately encouraged banks to exclude new customers from the PPP, hurting minority and women-owned businesses.[105] Furthermore, the report blamed the Trump administration for failing to implement strong fraud protections which led to more than $4 billion in potentially fraudulent loans, stating, "The Administration's response to this economic crisis has benefited larger companies and wealthy Americans, while leaving behind many disadvantaged communities and struggling small businesses. The Administration's implementation of relief programs passed by Congress has allegedly also been marred by fraud, waste, and abuse."[106]

<u>DOJ & False Claims Act</u>

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[102] *Id*.
[103] *Id*.
[104] *See* Press Release, *Select Subcommittee Releases New Staff Report On Investigations Into Trump Administration Pandemic Response*, Select Subcommittee on the Coronavirus Crisis (Oct. 30, 2020), https://coronavirus.house.gov/news/press-releases/select-subcommittee-releases-new-staff-report-investigations-trump.
[105] *Id*.
[106] *Id*.

In May of 2021, the DOJ attorney general announced the creation of a "Task Force" to combat COVID-19 fraud.[107] The COVID-19 Fraud Enforcement Task Force was created to augment and incorporate the existing coordination mechanisms within the DOJ and continue to work in close coordination with other efforts underway throughout the federal government; it was designed to work closely with interagency partners to share information and insights gained from prior enforcement experience, and intended to help agencies tasked with administering significant relief programs to increase their fraud prevention efforts by providing information that law enforcement learns regarding fraud trends and illicit tactics.[108] The Task Force was also intended to investigate and prosecute the most culpable domestic and international criminals, prevent the exploitation of government assistance for personal and financial gain, and recover stolen funds.[109] The Task Force also includes several entities within the DOJ, including the Criminal and Civil Divisions, the Executive Office for United States Attorneys, and the Federal Bureau of Investigation. Furthermore, key interagency partners, such as the Department of Labor, the Department of the Treasury, the Department of Homeland Security, the Small Business Administration, the Special Inspector General for Pandemic Relief (SIGPR), the Pandemic Response Accountability Committee (PRAC), and others, were invited to be part of the Task Force.[110]

On May 26, 2021, the DOJ and HHS-OIG announced new criminal healthcare fraud charges against 14 defendants in nine different cases as part of a coordinated nationwide

[107] *See* Press Release, *Attorney General Announces Task Force to Combat COVID-19 Fraud*, U.S. Department of Justice (May 17, 2021), https://www.justice.gov/opa/pr/attorney-general-announces-task-force-combat-covid-19-fraud.
[108] *Id.*
[109] *Id.*
[110] *Id.*

"takedown" effort.[111] The 14 defendants were, collectively, alleged to have caused over $143 million in false Medicare and Medicaid billings.[112] The takedown included the third criminal case in the country involving the Provider Relief Fund (the DOJ alleged that the owner of a home health agency misappropriated PRF funds for his own benefit).[113] Although all three criminal cases filed to date have involved similar misappropriation allegations, the DOJ has indicated that it also will pursue civil PRF cases under the False Claims Act's (FCA) reverse false claims provision.[114]

The False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, provides that any person who knowingly submits false claims to the government is liable for treble damages plus a penalty linked to inflation.[115] The FCA specifies that "knowingly" means a person that has actual knowledge of the information related to fraud, acts in deliberate ignorance of the truth or falsity of the information, or acts in reckless disregard of the truth or falsity of the information; furthermore, there is no requirement for proof of specific intent to defraud.[116] The DOJ received over $5.6 billion in settlements and judgments from civil cases involving fraud and false claims against the government in the fiscal year ending Sept. 30, 2021.[117]

In addition to allowing the U.S. federal government to pursue perpetrators of fraud on its own, the FCA allows private citizens to file suits on behalf of the government against those who have defrauded the government: these are referred to as "*qui tam*" lawsuits.[118] Private citizens

[111] *DOJ And HHS-OIG Ramp Up COVID-Related Healthcare Fraud Enforcement Activity*, NATIONAL LAW REVIEW, VOLUME XI, NUMBER 152 (June 1, 2021), https://www.natlawreview.com/article/doj-and-hhs-oig-ramp-covid-related-healthcare-fraud-enforcement-activity.
[112] *Id*.
[113] *Id*.
[114] *Id*.
[115] *The False Claims Act*, THE UNITED STATES DEPARTMENT OF JUSTICE (last updated Feb. 2, 2022), https://www.justice.gov/civil/false-claims-act.
[116] 32 U.S. Code § 3729
[117] THE UNITED STATES DEPARTMENT OF JUSTICE, *supra* note 115.
[118] *Id*.

who successfully bring *qui tam* actions may receive a portion of the government's recovery.[119] In *qui tam* actions, a private party who brings an action on the government's behalf is called a "relator."[120] If the action succeeds, then the relator may receive up to a 30% share of the government's award; however, the government, not the relator, is still considered the real plaintiff.[121]

At the Federal Bar Association Qui Tam Conference, acting Assistant Attorney General Brian M. Boynton delivered remarks on the FCA's enforcement policies to combat fraud within coronavirus relief programs.[122] Boynton first assured the conference that *qui tams* will continue to be an essential source of new leads, and the Department will continue to rely on whistleblowers to help root out the misuse and abuse of taxpayer funds.[123] Second, he confirms that the Civil Division of the DOJ will continue to expand its own efforts to identify potential fraudsters, including reliance on various types of data analysis: for example, Boynton said the Civil Division has been undertaking analyses of Medicare data to uncover potential fraud schemes that have not been identified by whistleblower suits as well as to help analyze and support the allegations that are received from such suits.[124] Similarly, the DOJ Task Force on COVID-19 Fraud also announced its intention to use sophisticated data analytics to identify patterns across different types of health care providers and spot trends and extreme outliers.[125] The DOJ Task Force boasts that the data they and the DOJ's Civil Division can access allows

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[119] *Id.*
[120] *See* Definition, *Qui tam action*, Legal Information Institute, Cornell Law School, https://www.law.cornell.edu/wex/qui_tam_action.
[121] *Id.*
[122] *Acting Assistant Attorney General Brian M. Boynton Delivers Remarks at the Federal Bar Association Qui Tam Conference*, THE UNITED STATES DEPARTMENT OF JUSTICE (Feb. 17, 2021; last updated Feb. 22, 2021), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-brian-m-boynton-delivers-remarks-federal-bar.
[123] *Id.*
[124] *Id.*
[125] *Id.*

them to see where the highest risk physicians are in each state and federal district as well as how much each is costing the Medicare program.[126] These more sophisticated data analytics tools will help the DOJ identify and prosecute more cases of fraud than what similar tools have provided in the past, which is a factor that will undoubtedly increase the overall amount of enforcement actions resulting from the COVID-19 pandemic.[127] As stated by PRAC's Horowitz, "The only way to effectively oversee $5 trillion in relief spending is with data. At the PRAC, we have been using advanced data science to advance our oversight mission in a manner never before undertaken by the Inspector General community."[128] Data analysts develop risk models to help Inspectors General identify high risk recipients of pandemic funds and assess which of these recipients to pursue.[129]

<u>Mitigating Fraud and Looking Towards the Future</u>

In present day, the HHS OIG is still actively investigating and pursuing civil monetary penalties for PRF fraud. On February 23, 2022, the Chief Counsel to the HHS OIG presented to the Federal Bar Association's 2022 virtual qui tam conference that the OIG is actively investigating and pursuing civil monetary penalties for cases of provider fraud relating to the Provider Relief Fund.[130] The OIG's 2022 Work Plan includes auditing of CARES Act Provider Relief Fund payments to health care providers made under Phases 1, 2, and 3 to determine whether payments were: (1) correctly calculated for providers that applied for these payments, (2) supported by appropriate and reasonable documentation, and (3) made to eligible

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[126] *Id*.
[127] *Id*.
[128] Statement of Michael E. Horowitz, *supra* note 78.
[129] *Id*.
[130] Lindsay K. Scott, *HHS Office of Inspector General to Pursue COVID Aid Fraud*, WYATT, TARRANT & COMBS, LLC. (Feb. 25, 2022), https://wyattfirm.com/hhs-office-of-inspector-general-to-pursue-covid-aid-fraud/ (last visited May 5, 2022).

providers.[131] The COVID-19 Fraud Enforcement Task Force, established in May 2021, has been successful in identifying, investigating, and prosecuting the most culpable domestic and criminal actors and assists other agencies like the HHS OIG to uncover fraudulent actors.[132]

The first person in the United States to be indicted on criminal charges for the intentional misuse of pandemic funds was Amina Abbas, a Michigan woman who received approximately $37,656.95 designated for the medical treatment and care of COVID-19 patients through Abbas's home health services and misappropriated the funds by issuing checks to her family members for personal use.[133] Abbas was indicted in February 2021, and pleaded guilty to the charges against her approximately one year later on February 1st, 2022.[134] She could serve up to 10 years in prison.[135]

The second person criminally indicted and charged for misuse of the Provider Relief Fund was Francis F. Joseph of Denver, Colorado, who was found to have stolen nearly $300,000 in government funds from three different COVID relief programs including having transferred approximately $118,000 of that funding into his personal bank account (later spending the money on personal luxuries).[136] Joseph's case was also the first time that charges had been

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131 *Audit of CARES Act Provider Relief Funds—Payments to Health Care Providers That Applied for General Distribution Under Phases 1, 2, and 3*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, OFFICE OF INSPECTOR GENERAL, https://oig.hhs.gov/reports-and-publications/workplan/summary/wp-summary-0000587.asp.

132 *See* Press Release 22-84, *Woman Pleads Guilty to Misappropriating Funds for Care of COVID-19 Patients,* U.S. Department of Justice, Office of Public Affairs (Feb. 1, 2022), https://www.justice.gov/opa/pr/woman-pleads-guilty-misappropriating-funds-care-covid-19-patients.

133 *See* Press Release 21-146, *Woman First in the Nation Charged with Misappropriating Monies Designed for COVID Medical Provider Relief*, U.S. Department of Justice, Office of Public Affairs (Feb. 11, 2021), https://www.justice.gov/opa/pr/woman-first-nation-charged-misappropriating-monies-designed-covid-medical-provider-relief.

134 Press Release 22-84, *supra* note 132.

135 *Id*.

136 *See* Press Release 21-311, *Colorado Physician Charged for Misappropriating Thousands from Three Different COVID Relief Programs*, U.S. Department of Justice, Office of Public Affairs (April 8, 2021), https://www.justice.gov/opa/pr/colorado-physician-charged-misappropriating-thousands-three-different-covid-relief-programs.

brought in connection with fraud on the Accelerated and Advance Payment Program.[137] Patricia Derges of Nixa, Missouri was charged in a 23-count indictment for fraudulently receiving $296,574 in CARES Act funds for her non-profit corporation "Lift Up Someone Today, Inc" even though it did not provide COVID-19 testing services to its patients and was closed at the beginning of the pandemic until June 2020.[138] Furthermore, Derges fraudulently requested reimbursement for COVID-19 related expenses of up to $882,644 from the PRF on her corporation's behalf.[139]

An even more robust example of criminal charges includes those levied against 14 defendants in seven federal districts across the U.S. charged with participating in various health care fraud schemes that exploited the COVID-19 pandemic and resulted in over $143 million in false billings.[140] The defendants in this case engaged in schemes such as offering COVID-19 tests to Medicare beneficiaries at senior living facilities, drive-through COVID-19 testing sites, and medical offices to deceive the beneficiaries into providing their personal identifying information and a saliva or blood sample.[141] The defendants then misused the information and samples to submit claims to Medicare for unrelated, unnecessary, and more expensive laboratory tests, including cancer genetic testing and allergy testing.[142] Proceeds of this scheme were

[137] *Id*.
[138] *See* Press Release, *More Charges Against State Lawmaker for $900,000 COVID-19 Fraud Scheme at Springfield Health Care Charity*, U.S. Department of Justice, U.S. Attorney's Office, Western District of Missouri (March 26, 2021), https://www.justice.gov/usao-wdmo/pr/more-charges-against-state-lawmaker-900000-covid-19-fraud-scheme-springfield-health.
[139] *Id*.
[140] *See* Press Release 21-486, *DOJ Announces Coordinated Law Enforcement Action to Combat Health Care Fraud Related to COVID-19*, U.S. Department of Justice, Office of Public Affairs (May 26, 2021), https://www.justice.gov/opa/pr/doj-announces-coordinated-law-enforcement-action-combat-health-care-fraud-related-covid-19.
[141] *Id*.
[142] *Id*.

allegedly laundered through shell corporations and used to purchase exotic automobiles and luxury real estate.[143]

Most recently, a Chinese national named Muge Ma was sentenced to 52 months for a $20 million pandemic loan fraud scheme in connection with the PPP and EIDL Program.[144] Ma falsely represented to the SBA and six financial institutions that his companies ("NYIC" and "Hurley") had hundreds of employees and paid millions of dollars in wages to those employees, when in fact Ma was the only employee of his companies.[145] Before the discovery of the fraudulent conduct, the SBA had already approved a $500,000 EIDL Program loan for NYIC and a $150,000 EIDL loan for Hurley, and a further $20,000 in loans advances were provided to Ma by the SBA.[146]

The COVID Task Force will continue to identify and prosecute fraudulent schemes and can expect more cases of fraud to be uncovered, pushing the total recovered losses due to prosecutorial efforts much further over the $1.1 billion mark that was identified in March 2022.[147] As COVID-related health care schemes and scams continue into late 2022, the amount of enforcement actions related to the CARES act will continue to grow rapidly.[148] The DOJ warns individuals to remain wary of unsolicited requests for Medicare information or other personal information by fraudulent charities or medical groups.[149]

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[143] *Id.*
[144] *See* Press Release 22-130, *Chinese National Sentenced To 52 Months For $20 Million COVID-19 Pandemic Loan Fraud Scheme*, U.S. Department of Justice, U.S. Attorney's Office, Southern District of New York (April 21, 2022), https://www.justice.gov/usao-sdny/pr/chinese-national-sentenced-52-months-20-million-covid-19-pandemic-loan-fraud-scheme.
[145] *Id.*
[146] *Id.*
[147] THE UNITED STATES DEPARTMENT OF JUSTICE, *supra* note 76.
[148] *Combating COVID-19 Fraud*, THE UNITED STATES DEPARTMENT OF JUSTICE (last updated March 23, 2022), https://www.justice.gov/coronavirus/combatingfraud.
[149] *Id.*

Conclusion

As a result of the incompetency and lack of transparency of the Trump administration during the beginning of the COVID-19 pandemic and throughout Congress's relief negotiations, enforcement actions relating to the CARES Act will be substantially more numerous than in prior relief programs and have a greater impact on future fraud prevention. Although enforcement actions and monetary civil penalties are greater than in past U.S. relief efforts, the diligent work of the HHS OIG and other departments in combatting fraud has created a model to abide by in the case of future economic and/or health crises.