

PRATT'S GOVERNMENT CONTRACTING LAW REPORT

VOLUME 8

NUMBER 12

December 2022

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Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)

ISSN: 2688-7290

Cite this publication as:

[author name], [article title], [vol. no.] PRATT’S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt).

Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT’S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

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POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

DOJ Aggressively Pursues COVID-19 Related Fraud

***By Callan G. Stein, Michael S. Lowe, Dominyka Plukaite and
Frederick J. King****

The authors of this article discuss a recent Department of Justice indictment of 47 individuals in the District of Minnesota in connection with an alleged \$250 million COVID-19 related fraud scheme. Although the indictments allege specific conduct by specific individuals, they reveal important insights into the Department's enforcement priorities and strategies in combatting COVID-19 fraud.

The U.S. Department of Justice (“DOJ”) has committed to aggressively investigate and prosecute COVID-19-related fraud schemes, particularly those involving government funding programs created or broadened during the pandemic. Several of these programs, including the Payroll Protection Program (“PPP”), the Provider Relief Fund, the Federal Child Nutrition Program (“FCNP”), and others, paid out hundreds of millions of dollars during the height of the COVID-19 pandemic. As part of the federal government’s COVID-19 response, some of these programs loosened their eligibility requirements.

Since then, DOJ and various other federal agencies have uncovered what they claim to be rampant fraud in connection with the dispersal of the vast sums of federal dollars through many of these programs. Although there have not yet been many federal prosecutions or enforcement actions related to some of these COVID-19 relief programs, DOJ’s recent actions indicate that the federal government remains determined to both recover fraudulently obtained funds through civil actions and to punish those involved through criminal prosecutions.

With all signs pointing to an imminent and noticeable uptick in federal COVID-19-related fraud investigations (and eventually prosecutions), companies and individuals should be advised that DOJ and the U.S. attorneys’ offices

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(“USAOs”) operating within DOJ will likely target not just the individuals responsible for fraudulent submissions, but also companies that obtained COVID-19-related funds.

But, with so few examples to date, what can we expect these future investigations and prosecutions to look like?

The recent indictment of 47 individuals in the District of Minnesota—mostly company owners and corporate officers—in connection with an alleged \$250 million FCNP fraud scheme is the federal government’s highest-profile COVID-19 fraud prosecution to date. Although the indictments allege specific conduct by specific individuals, they reveal important insights into DOJ’s enforcement priorities and strategies in combatting COVID-19 fraud.

As a result, individuals and companies across the country can learn valuable lessons from DOJ’s ongoing civil and criminal prosecution of COVID-19 fraud.

THE FEDERAL CHILD NUTRITION PROGRAM

The FCNP is a federally funded program designed to provide free meals to children in need. The U.S. Department of Agriculture (“USDA”) administers the program and disburses funds to state governments. In Minnesota, the Minnesota Department of Education (“MDE”) administers and oversees the FCNP. Meals funded by the FCNP are served by “sites,” which must be sponsored by an authorized sponsoring organization. Sponsors must apply to the MDE for each site and are responsible for monitoring their sites and preparing reimbursement claims. The USDA then provides funds to the MDE on a per-meal basis for the MDE to disburse to sponsoring organizations. The sponsoring organizations retain 10% to 15% of the disbursements as administrative fees.

During the COVID-19 pandemic, the USDA waived some of the FCNP program requirements to increase access to the FCNP funds to serve more children nationwide. Among other things, the USDA allowed for-profit restaurants to participate in the program. It also allowed off-site food distribution to children outside of educational programs.

THE DISTRICT OF MINNESOTA INDICTMENTS

In the prosecution brought by the USAO for the District of Minnesota (“DMN”), a federal grand jury returned six indictments, and the USAO for the DMN filed three informations, charging a total of 47 defendants with a series of crimes, stemming from a scheme that allegedly took advantage of the loosened FCNP requirements to defraud the federal government of more than \$250 million.

As alleged in the indictment charging the lead defendant, Feeding Our Future (“FOF”) Founder and Executive Director Aimee Bock, the organization recruited and oversaw the other defendants as they registered fake “sites” that falsely claimed to serve thousands of children per day—sometimes as soon as days after opening—and received federal funds from the FCNP for doing so. Bock helped register the fake sites, assured the MDE that the sites were compliant, and blocked the MDE’s repeated attempts to investigate the defendants involved. In return, FOF and Bock received kickbacks from each site. FOF’s alleged \$250 million fraud scheme is the largest COVID-19 fraud scheme prosecution to date.

As in most of the COVID-19 fraud cases to date, the government appears to have primarily relied upon the wire fraud and money laundering statutes in its FCNP fraud prosecutions. These charges, spread over the six indictments, include not just wire fraud and money laundering, however, but also federal programs fraud and conspiracy to commit each. The DMN indictments set forth in great detail the defendants’ alleged actions, which included falsely purporting to sell food to individual sites and providing sham payroll and bookkeeping services to other defendants to disguise the fraud.

WHAT THE INDICTMENTS REVEAL ABOUT DOJ’S FUTURE ENFORCEMENT PRIORITIES

So, what can these indictments tell us about how DOJ intends to investigate and prosecute COVID-19 fraud schemes going forward? And what lessons can individuals and companies around the country glean from the biggest COVID-19 prosecution yet?

Systemic Fraud

First and foremost, the DMN indictments confirm that DOJ (and the USAOs throughout the country) will be focusing on *systemic* COVID-19 fraud schemes rather than just isolated incidents. The alleged conduct paints the quintessential picture of systemic fraud that involves coordinated efforts among multiple parties.

For example, FOF is alleged to have opened more than 250 new FCNP sites during the pandemic, which increased its funding from \$3.4 million in 2019 to \$200 million in 2021. It also allegedly created dozens of shell companies to receive and launder the proceeds. According to the indictments, FOF required the sponsored entities to pay kickbacks, disguised as consulting fees, to FOF’s leadership and created fake contracts to disguise the payments. The individual site owners and their associates also allegedly created shell companies to launder the proceeds of the scheme to their personal bank accounts.

The primacy of these allegations to the charges and the extent to which they were detailed in the indictments suggest the systemic nature of the alleged fraud was critical to the charging decisions.

False Documentation

Next, the DMN indictments make clear that federal COVID-19 fraud prosecution will likely remain focused on tangibly false documentation. In the FOF scheme, the defendants' alleged false documentary submissions to the MDE took center stage in the indictments. In fact, the Bock indictment alleges that there were false attendant sheets with fake names that did not match children in the local public school systems, as well as a spreadsheet of children that contained a column with an Excel formula used to generate random, fake ages for children.

The Bock indictment specifically highlights an email from one of the site owners to one of their employees that stated: "Can you make all the kids ages 6-17?" The DMN indictments also allege the defendants submitted meal count sheets that listed nearly identical numbers of meals every day, and some of the defendants went as far as creating fake invoices from legitimate food distribution companies to cover up their scheme.

While the overall scheme alleged in the six DMN indictments appears widespread and far-reaching, each separate indictment appears to go to great lengths to tether the alleged wrongdoing to specific documents the defendants allegedly submitted to the government.

Circumstantial Evidence

The DMN indictments also suggest that, notwithstanding the investigation's apparent reliance on tangible false documents, DOJ is not overlooking circumstantial evidence of fraud in connection with COVID-19 programs.

For example, the huge increases in FOF's operations clearly raised a red flag to the investigators, as the Bock indictment alleges that FOF went from receiving and disbursing \$3.4 million in federal funds in 2019 to nearly \$200 million in 2020, when COVID-19-related shutdowns were at their peak. While large increases in funding are not alone illegal or necessarily indicative of fraud, what was likely exceptionally suspicious was the number of children the sites claimed to be serving immediately, within mere days or weeks of opening.

Some sites, for example, claimed to be serving a vast number of children—2,000 or 3,000 per day—despite historically only servicing a few dozen each day. Some sites also claimed to serve more meals than feasible, given the population of the location's city, the number of staff employed, or the size of the

establishment.¹ The indictments' detailed recitation of these suspicious statistics strongly suggests that quantitative circumstantial evidence played a major role in the investigation, and in fact, may have been the genesis of the investigation.

Noncooperation

Another clear red flag to the investigators appears to have been FOF's resistance to proper federal oversight. As outlined in the indictments, when the MDE inquired as to FOF's oversight of its sites, FOF leadership failed to cooperate and even accused the agency of unfair scrutiny. When the MDE denied future FOF sponsorship applications, FOF filed a lawsuit, alleging racial animus.

While not directly relevant to proving the charges, the detailed recitation of this noncooperation in the Bock indictment suggests this was another red flag to the investigators that may have contributed to the investigation's inception. FOF's allegedly aggressive and obstructionist actions likely exacerbated the investigators' concerns.

CONCLUSION

Although the recent DMN prosecutions relate to FCNP fraud, many more government programs like the FCNP were expanded during the COVID-19 pandemic. If the DMN prosecutions are indicative of DOJ's future strategy, DOJ will increase its efforts and diversify its resources to uncover COVID-19 fraud and prosecute those involved.

Even though the DMN cases were not brought under the False Claims Act ("FCA"), the indictments describe "classic" FCA-defying conduct, such as submitting false claims to the government for payment.

In light of this, companies that received federal program funds during the pandemic should be aware that this high-profile prosecution could very well lead to an increase in civil qui tam FCA claims in the near future. Given the large dollar figures attached to the DMN prosecution and the FCA's significant financial incentives, it would not be surprising to see more whistleblowers come forward. Whistleblowers can pocket as much as a third of the jury award or settlement,² in addition to receiving up to 30% of awarded treble damages. In

¹ One of the sites—the Stigma-Free Willmar site—purported to serve meals to 2,000 to 3,000 children a day, seven days a week, from FaaFan Restaurant, a small storefront restaurant in downtown Willmar. Prior to 2020, FaaFan Restaurant served only a few dozen customers a day, and had only \$500 to \$600 in daily sales and less than \$200,000 in annual revenue.

² <https://www.law360.com/health/articles/1534416/biogen-whistleblower-s-250m-award-extraordinary-for-fca>.

the DMN cases, for example, a whistleblower could have received as much as \$225 million had an FCA action been brought.

In addition to criminal prosecutions and FCA cases, companies should also expect more civil actions brought by the USAOs' Civil Divisions. For example, as announced in a June 2021 DOJ press release,³ the USAO for the Eastern District of Virginia settled a PPP fraud investigation against KC Investments Group in return for the payment of approximately \$230,000.

Finally, expect DOJ's Civil Division to begin filing administrative cases under the Program Fraud Civil Remedies Act ("PFCRA"). The PFCRA, an administrative tool that has seemingly not yet been used in connection with COVID-19-related fraud, will very likely be the next tool after DOJ finishes targeting the more egregious violators through criminal prosecutions.

If the government decides not to pursue a case under the FCA, the PFCRA can be used to recover up to \$150,000, with double loss recovery plus up to \$5,000 per claim or statement as a penalty. Indeed, the DOJ Inspector General Michael Horowitz's recent request⁴ to Congress to raise the \$150,000 threshold to \$1 million under the PFCRA suggests that DOJ is strongly considering this course of action.

Given the prevalence of COVID-19-related fraud and DOJ's demonstrated willingness to use whatever tools it can—criminal, civil, and even administrative—we can expect to see in the very near future more criminal indictments, civil FCA and other civil actions, and administrative claims brought under the PFCRA.

As such, proactive measures, such as revising compliance programs and conducting internal investigations into whistleblower complaints and other potential instances of misconduct, are excellent ways to protect you and your company from government investigations and civil litigation.

³ <https://www.justice.gov/usao-edva/pr/virginia-company-agrees-settle-civil-fraud-allegations-paycheck-protection-program>.

⁴ <https://oig.justice.gov/news/testimony/statement-michael-e-horowitz-chair-pandemic-response-accountability-committee-2>.