

March 17, 2021

## Department of Justice Under Merrick Garland

On March 10, 2021, former Chief Judge of the D.C. Circuit Merrick Garland was confirmed by the Senate as the new United States Attorney General by a sizable bipartisan majority. Garland's ability to garner such broad support from both sides of the political spectrum—even after 24 years on the federal bench issuing opinions on a wide range of sometimes contentious topics—is evidence of his generally moderate views and a testament to his reputation for integrity and respect for the rule of law. Although divining the investigative and prosecution priorities of an institution with as many components as the DOJ is sometimes more art than science, the announced priorities of the Biden administration, both during the campaign and thereafter, and the on-the-ground realities of current economic and social conditions, provide an opportunity to assess the likely priorities of a Garland DOJ.

**Attorneys**  
[Brian R. Blais](#)  
[John T. Dey](#)  
[Abraham Lee](#)

During his confirmation hearing, Garland stated that his top priority would be the investigation and prosecution of the perpetrators of the January 6 attack on the Capitol. And while combatting domestic terrorism and the aftermath of the January 6 attack will almost certainly receive significant focus in a Garland DOJ, in the wake of COVID-19 and its related economic impact, at least four other areas of enforcement appear likely to emerge as top Justice Department priorities over the next four years. Specifically, we can expect vigorous enforcement efforts against fraud pertaining to COVID relief funds, increased enforcement against financial and other white collar crime, continued focus on combatting fraud in the health care sector generally, as well as potentially increased antitrust enforcement.

### COVID-19-Related Fraud

In the span of just a year, Congress has passed several of the largest economic relief plans in history, approving nearly \$5 trillion of COVID relief funding, including the recently enacted \$1.9 trillion American Rescue Plan Act. These substantial outflows, which have provided economic support to businesses and individuals suffering the effects of pandemic-related shutdowns, create opportunities for fraud. The DOJ has already taken action to prosecute the most egregious and blatant forms of COVID relief fraud (e.g., where a defendant submitted more than 20 applications for Paycheck Protection Program (“PPP”) and Economic Injury Disaster Loans (“EIDL”) funds under his name and another name other than his own<sup>1</sup>). Given the sheer volume of funds expended for COVID relief, the DOJ under Garland's leadership will undoubtedly continue to pursue such obvious instances of fraud, while also seeking recoveries under the False Claims Act (“FCA”) for other instances of fraud in the application for, and use of, COVID relief funding. These efforts might include, as an example, scrutiny of the necessity certifications that accompanied applications for COVID relief funds, examination of whether entities received COVID relief funding from more than one source, and investigation of whether COVID relief funding was used for the purposes represented in an application.<sup>2</sup>

In 2004, in one of only 25 concurring or dissenting opinions Garland authored during his tenure on the D.C. Circuit, he agreed with the long-held DOJ view of the FCA as a broad anti-fraud statute “intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.” *U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 509 (D.C. Cir. 2004) (citing *United States v. Neifert-White Co.*, 88 S. Ct. 959, 961 (1968)) (Garland, J., dissenting). In that case, the majority held that the government could not recover for a false claim made to Amtrak

<sup>1</sup> *United States v. Trosin*, No. 5:20-cr-4066 (N.D. Iowa 2021); see also *United States v. Santos*, No. 20-9096 (D.N.J. complaint filed Mar. 26, 2020) (where the DOJ brought charges under federal health care fraud laws and the AKS against a diagnostics marketing company executive who allegedly received kickbacks from clinical and diagnostic testing companies in exchange for referring Medicare patients to specific companies for COVID-19 tests).

<sup>2</sup> Under the CARES Act, a borrower is required to fill out and certify a “loan necessity questionnaire” that states that the economic uncertainty of the pandemic “made the loan request necessary.” Any borrower of loans receiving \$2 million or greater is required to complete the necessity questionnaire.

because Amtrak was a federal grantee and not the government itself. Garland, however, said that the plain text and the legislative history of the FCA properly allowed the federal government to recover on claims made to “publicly funded operations” such as Amtrak.

It thus appears likely that the Garland DOJ will liberally use the FCA to combat fraud related to the various COVID-19 stimulus programs, including the Paycheck Protection Program and Main Street Lending Program. Although the DOJ has focused primarily on criminal prosecutions thus far and only one COVID-related civil settlement under the FCA has been announced to date,<sup>3</sup> we can expect continued, vigorous enforcement, both criminally and civilly, against COVID-relief fraud in a Garland DOJ.

### White Collar Crime

Although white collar crime was not a specific focus during Garland’s confirmation hearing, it appears likely that white collar enforcement activity will significantly increase under his leadership.

First and foremost, Garland is taking the helm of the DOJ after a period of financial disruption and heavy market volatility caused by COVID-19. As was observed in 2010 and 2011 following the Great Recession, periods of financial disruption often lead to an uptick in white collar crime and a related escalation in prosecutions.<sup>4</sup> Given this market disruption, along with the fact that the past four years have seen the lowest levels of white collar prosecutions in over 20 years,<sup>5</sup> a significant increase in traditional areas of financial crimes prosecution—including insider trading, accounting fraud, market manipulation, earnings management, and, in the asset management space, valuation or mismarking fraud—can be expected. Additionally, given the growing market prominence of cryptocurrency and other digital assets, increased enforcement efforts in this space are also likely.

In one of the few cases of white collar misconduct to come before Garland during his time as a federal judge, Garland issued a concurring opinion in which he agreed with the majority’s affirmance of a defendant’s bank fraud conviction, but specifically wrote to indicate that he also believed the defendant’s sentence should have been increased “for his role as the leader of a criminal activity that was ‘otherwise extensive.’” *United States v. Wilson*, 240 F.3d 39, 51 (D.C. Cir. 2001). While broad conclusions cannot be drawn from this single case, it is highly likely that COVID-related economic disruption, coupled with prevailing sentiment against corporate excesses, will lead to more robust white collar enforcement in a Garland DOJ.

Additionally, the Garland DOJ’s efforts in this area will be significantly influenced by Lisa Monaco, who has been nominated to serve as the Deputy Attorney General under Garland. Though primarily known for her background in national security, Monaco has deep experience prosecuting white collar crime. As a federal prosecutor, she served as a member of the Enron Task Force and co-led a trial team that prosecuted five former Enron executives. Indeed, in her Senate Judiciary Committee Questionnaire, Monaco listed white collar matters as the first five of the most significant litigated matters that she handled as a lawyer.

---

<sup>3</sup> See Press Release, U.S. Dep’t of Justice, Eastern District of California Obtains Nation’s First Civil Settlement for Fraud on Cares Act Paycheck Protection Program (Jan. 12, 2021) (where a company and its president admitted to straightforward allegations of making false statements to federally insured banks).

<sup>4</sup> See White Collar Crime Prosecutions for December 2020, TracReports (Jan. 20, 2021), [https://trac.syr.edu/tracreports/bulletins/white\\_collar\\_crime/monthlydec20/fil/](https://trac.syr.edu/tracreports/bulletins/white_collar_crime/monthlydec20/fil/); see also White Collar Prosecutions Fall to Lowest in 20 Years, TracReports (May 24, 2018), <https://trac.syr.edu/tracreports/crim/514/>.

<sup>5</sup> *Id.*

## Fraud in the Health Care Sector

Most of the largest FCA recoveries in recent years have arisen from the health care sector. For example, in 2020, a major pharmaceutical company paid over \$591 million to resolve claims that it paid kickbacks to doctors to induce them to prescribe its drugs. The previous year, another drug company paid a total of \$1.4 billion to resolve claims related to the marketing of an opioid addiction treatment drug. Of the \$2.2 billion the government recovered from FCA cases in 2020, \$1.8 billion related to matters involving the health care industry, falling just short of what would have been the eleventh straight year of the DOJ's civil health care fraud settlements and judgments exceeding \$2 billion. In the wake of the pandemic and with five of the 20 fastest-growing industries from 2019 to 2029 expected to be in health care and social assistance,<sup>6</sup> there is little reason to believe there will be diminishing recoveries from health care companies in a Garland DOJ.

The pandemic has caused significant economic and regulatory shifts that may increase the regulatory focus on several industries within the health care sector. For example, the surge in patient demand for telehealth combined with significantly expanded reimbursements for telehealth services has opened the door to new avenues for fraudulent billing that will likely increase prosecutorial focus on telehealth companies.<sup>7</sup> Similarly, expanded Medicaid enrollment combined with increased federal government spending to cover shortfalls within financially strapped states may increase scrutiny on the recipients of such funds.<sup>8</sup>

FCA recoveries from these various types of fraud are fueled in significant measure by incentivizing whistleblowers to bring *qui tam* actions. For example, in 2020, \$1.6 billion of the \$2.2 billion in FCA settlements and judgments arose from lawsuits filed under the *qui tam* provisions, and in 2019, \$2.1 billion of the \$3 billion were from *qui tam* actions.<sup>9</sup> Given the financial incentives available to successful whistleblowers, and the ever-growing amounts of money expended by federal health care programs, we can expect to see continued high levels of *qui tam* filings in the health care sector, with subsequent DOJ intervention in many of these matters.

## Antitrust

Garland brings to the DOJ a deep well of experience in antitrust law. At his confirmation hearing, Garland said that he first “fell in love” with antitrust law in law school. After graduation, Garland taught antitrust as an adjunct professor at Harvard Law School; he litigated antitrust cases as a partner at Arnold & Porter;<sup>10</sup> and he heard several antitrust cases as a judge on the D.C. Circuit. Garland's record with antitrust cases does not indicate an obvious tilt in any one direction,

<sup>6</sup> See “5 out of 20 fastest-growing industries from 2019 to 2029 are in healthcare and social assistance, U.S. Bureau of Labor Statistics” (Sept. 4, 2020), [https://www.bls.gov/opub/ted/2020/5-out-of-20-fastest-growing-industries-from-2019-to-2029-are-in-healthcare-and-social-assistance.htm?view\\_full](https://www.bls.gov/opub/ted/2020/5-out-of-20-fastest-growing-industries-from-2019-to-2029-are-in-healthcare-and-social-assistance.htm?view_full).

<sup>7</sup> Medicare Telemedicine Health Care Provider Fact Sheet, U.S. Centers for Medicare and Medicare Services (May 17, 2020), <https://www.cms.gov/newsroom/fact-sheets/medicare-telemedicine-health-care-provider-fact-sheet>.

<sup>8</sup> “In federal fiscal year 2020 (FFY 2020), federal Medicaid outlays totaled \$458 billion and grew at a rate of 12.0% compared to 5.2% in FFY 2019.” Federal Medical Outlays During the COVID-19 Pandemic, Kaiser Family Foundation (Feb 3, 2021), <https://www.kff.org/coronavirus-covid-19/issue-brief/federal-medicaid-outlays-during-the-covid-19-pandemic/>; see also Medicaid Expansion Enrollment and Spending Leading up to the COVID-19 Pandemic, Kaiser Family Foundation (Jan. 12, 2021), <https://www.kff.org/medicaid/issue-brief/medicaid-expansion-enrollment-and-spending-leading-up-to-the-covid-19-pandemic/#:~:text=Medicaid%20enrollment%20has%20increased%20by,the%20start%20of%20the%20pandemic.>

<sup>9</sup> See Press Release, Dep't of Justice, Justice Department Recovers Over \$2.2 Billion from False Claims Act Cases in Fiscal Year 2020, <https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020>; see also Press Release, Dep't of Justice, Justice Department Recovers over \$3 Billion from False Claims Act Cases in Fiscal Year 2019, <https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019>.

<sup>10</sup> See *Posa, Inc. v. Miller Brewing Co.*, 642 F. Supp. 1198 (E.D.N.Y. 1986).

but instead the pursuit of a measured and fair approach. Active antitrust enforcement activity in a Garland DOJ would be unsurprising.

### Takeaways

- Many Biden administration priorities are likely to impact the Justice Department. One development that bears watching is how the enforcement priorities discussed above fare in the competition for the time, mindshare, and focus of Justice Department leadership alongside other Department priorities, including combatting domestic terrorism, vigorously enforcing civil rights guarantees, ramping up efforts to combat environmental crimes and address the effects of climate change, reforming immigration policy and immigration enforcement efforts, prosecuting international and domestic corruption, and dealing with mass incarceration and reform of the criminal justice system.
- Clients should be mindful of the expected increase in enforcement activity in a Garland DOJ, especially in the four areas discussed above, and should continue to ensure robust compliance efforts aimed at preventing, discovering, and remediating misconduct.