

NEW DOJ FALSE CLAIMS ACT ENFORCEMENT PRIORITIES EMPHASIZE IMPACT OF COVID- 19 PANDEMIC

On Feb. 17, 2021, at the Federal Bar Association's Qui Tam Conference, Acting Assistant Attorney General of the Department of Justice (DOJ) Civil Division Brian Boynton highlighted DOJ's top priority areas for False Claims Act (FCA) enforcement in 2021 and beyond.

Although none of the priorities listed are necessarily new, it is clear that the DOJ's priorities have been largely impacted by the COVID-19 pandemic, and Boynton explicitly noted that the FCA will play a "very significant role in the coming years" when it comes to such pandemic-related fraud. Indeed, the COVID-19 pandemic has resulted in widespread allocation of federal funds, ranging from an estimated \$4 trillion in relief funds for businesses and individuals pursuant to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), and at least several billion dollars in pandemic-related contracts for everything from COVID-19 testing, Personal Protective Equipment (PPE) and sterilization products, to the ongoing vaccine rollout. As Boynton put it in his remarks, "The circumstances of the current pandemic may be novel, but the inevitable fraud schemes it will produce will in many cases resemble misconduct that the False Claims Act has long been used to address."

1. PANDEMIC-RELATED FRAUD

Boynton's remarks on pandemic-related fraud focused largely on potential fraud related to COVID-19 relief packages. Boynton highlighted that last month the first civil settlement resolving allegations of fraud relating to the Paycheck Protection Program (PPP) was reached in the Eastern District of California, wherein an internet retail company and its President and CEO admitted to making false statements that the company was not in bankruptcy in order to improperly obtain a \$350,000 PPP loan. With the Biden administration proposing roughly \$2 trillion more in relief funds, we can expect even more investigations into businesses and individuals that received such funds.

2. OPIOIDS

Boynton emphasized that the DOJ will continue to use its civil and criminal

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authority to target parties involved in the opioid crisis, and particularly parties who used false or misleading statements when marketing opioids, or who paid or received kickbacks in connection with opioid prescriptions. In addition to pharmaceutical companies and manufacturers, enforcement targets include pharmacies, doctors, clinics and other actors in the opioid distribution chain. Within the last two years, the DOJ's enforcement in this area has involved both criminal and civil actions resulting in high-dollar settlements, including \$300 million and \$1.4 billion settlements involving FCA allegations.

3. FRAUD TARGETING SENIORS

Boynton noted that the DOJ will continue to use the FCA as an enforcement vehicle for health care schemes targeting seniors and taking advantage of elderly patients by providing them poor or unnecessary health care. Boynton highlighted a recent DOJ action utilizing the FCA to resolve matters with skilled nursing facility chains and rehabilitation contractors for knowingly providing or billing for medically unnecessary rehabilitation therapy services, and open and active DOJ investigations across the country focused on nursing homes that are providing deficient care.

4. ELECTRONIC HEALTH RECORDS

Boynton explained a likely DOJ focus on potential electronic health records fraud arising out of the increased reliance on such electronic records to improve the delivery of health care. Such potential FCA enforcement ranges from kickback schemes to sell electronic health records software to false statements misrepresenting software capabilities. Boynton referenced a recent settlement for \$18.25 million in which a provider allegedly paid kickbacks, including free trips and "lead generation fees" to generate sales of its electronic health records technology.

5. TELEHEALTH

Boynton expressed an expectation that the DOJ will continue to focus on telehealth fraud, especially with the rise of reliance on telehealth as a mechanism to safely deliver care during the COVID-19 pandemic. Although DOJ has sometimes termed recent fraud actions as involving "telemedicine," these actions have tended to involve alleged schemes surrounding fraudulent prescriptions, including for medical equipment and testing, arising in marketing center calls. Boynton illustrated a recent guilty plea and civil settlement of up to \$20.3 million to resolve allegations that a business owner and her company established dozens of medical equipment supply companies in the names of straw owners, and then collectively submitted claims for federal reimbursement falsely asserting that the claims resulted from telehealth visits when no such telehealth interaction occurred and doctors received kickbacks



for their approval.

6. CYBERSECURITY

Boynton's remarks regarding cybersecurity emphasized generally the increasing importance of technology to the health care sector. For years, cybersecurity incidents have been one of the most-often—if not the most-often—perceived risks facing companies and individuals, but using the FCA as a vehicle to combat cybersecurity incidents is a novel approach. The DOJ highlighted the possibility of FCA enforcement actions involving cybersecurity where government funds are used to protect and secure systems and data.

Armstrong Teasdale's White-Collar Criminal Defense and Government Investigations attorneys have significant experience with the False Claims Act, including advising and assisting companies and government contractors across various industries, including health care and life sciences, as well as the technology sector. We will continue to monitor and provide updates regarding these developments. If you would like to further discuss the DOJ's recently stated enforcement priorities, the False Claims Act or other fraud-related matters, please contact your regular AT attorney or those listed on this advisory.