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Outlook 2024: FCA Cases May Not Always Go It Alone; MA Enforcement Spreads to Providers

By Nina Youngstrom

When Taxpayers Against Fraud (TAF)—a national coalition of whistleblower attorneys—recently changed its name to The Anti-Fraud Coalition, it was more than symbolic. The new name stands for the proposition that False Claims Act (FCA) complaints in 2024 and beyond will increasingly be intertwined with other kinds of cases—from the Securities and Exchange Commission (SEC), Internal Revenue Service (IRS), Federal Trade Commission and Commody Futures Trading Commission (CFTC).

"A lot of financial fraud cases have a False Claims Act component," said Jeb White, president of The Anti-Fraud Coalition. "More law enforcement eyes are looking at fact patterns, and it's more likely these cases will move forward to resolution. This is important in the health care world because of the increased presence of private equity." About 150 members of his organization are now cross-admitted, which converges nicely because like the FCA, the SEC, IRS and CFTC all have whistleblower programs, White noted. This heightens the risk for health care organizations.

The fusion of FCA and financial fraud allegations is one prediction for 2024 in the enforcement arena. Other expectations for the year include the pursuit of fraud related to private equity, COVID-19 relief funds, Medicare Advantage (MA), remote monitoring and labs. Court decisions affecting the outcome of FCA cases also are anticipated.

It will be a busy year, said former federal prosecutor Pam Johnston, with Foley & Lardner LLP in Los Angeles. "I think we're in an upswing period of prosecutions." It started in the second half of 2022, when the U.S. Department of Justice (DOJ) sent people back to working in the office because COVID-19 had died down. "2024 will be like late 2022 and 2023—a lot of subpoenas and civil investigative demands" in kickback cases involving labs and physician arrangements, Johnston said.

And as the year unfolds, it will become clearer how the latest revisions to DOJ's corporate enforcement policy (CEP), which applies to the criminal division, will play out with line prosecutors, said former U.S. Attorney Matthew Krueger, with Foley & Lardner LLP.[1] The CEP gives tangible rewards to companies that come forward and reveal their involvement in possible criminal misconduct. When criminal prosecution is warranted even with self-disclosure, DOJ will recommend a 50% to 75% reduction of the fine range from the U.S. Sentencing Guidelines, except in cases of criminal recidivists. "I'm also curious to see whether" DOJ's civil division and U.S. attorneys' offices will embrace the new mergers and acquisitions safe harbor, Krueger said.[2] To qualify for the safe harbor, companies are required to voluntarily self-disclose to DOJ any criminal wrongdoing they uncover at an acquired entity within six months of the closing date.