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Déjà Vu All Over Again: Pandemic Renews Focus on Ongoing False Claims Act Enforcement Priorities

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There are few areas that the pandemic has not touched, directly or indirectly. The Department of Justice Civil Division knows no different, as is reflected in its current statements regarding priorities for False Claims Act (FCA) enforcement. The obvious potential for fraud arising from misuse of stimulus program funds is just a modern telling of an old tale of fraud against the government, which the nearly 150-year-old FCA is already well suited to handle. Beyond the obvious anticipated prosecutions for Paycheck Protection Program and Coronavirus Aid, Relief, and Economic Security Act chicanery, however, the pandemic has exacerbated many existing areas for fraud – and the Civil Division wants you to know they have not forgotten about those.

Civil Division FCA Enforcement Priorities for 2021

On February 17, 2021, Acting Attorney General Brian M. Boynton appeared virtually to give remarks at the annual Federal Bar Association Qui Tam Conference in Washington, D.C. He announced the Civil Division's FCA enforcement priorities for 2021:

1. Pandemic-related fraud;
2. Opioid promulgators;
3. Fraud targeting seniors;
4. Electronic health records;
5. Telehealth; and
6. Cybersecurity.

Mr. Boynton also commented on how the Civil Division has increased its number of non-qui tam filings over the past few years. He appeared to credit the Civil Division's use of data analytics to identify and investigate potential cases without the help of whistleblowers.

Despite the seismic ripples created by the pandemic in American hospitals, workplaces, schools, and homes, these enforcement priorities have, overall, changed very little from last year. Notably, last year's remarks by Assistant Attorney General Joseph H. Hunt, delivered just weeks before the first pandemic-related shutdowns in the United States, [offered strikingly similar priorities](#) for 2020: health care-related matters, including a growing focus on Medicare Part C matters; electronic health records; and nursing home and elder care justice. Other than the addition of cybersecurity, Mr. Boynton's comments this year suggest there will be no significant changes in enforcement priorities as we begin a new administration.

As Mr. Boynton pointed out, the pandemic, while a new source of fraud in its own right, has "exacerbated" other crises. The opioid crisis continues, and overdose deaths remain at all-time highs. The Civil Division will continue to bring FCA enforcement actions against those persons it believes are responsible for "triggering and fueling the opioid epidemic," including (i) pharmaceutical companies that marketed opioids with false and misleading statements or unduly influenced providers, (ii) pharmacies that knowingly dispensed unnecessary opioids, and (iii) doctors who prescribed opioids for unnecessary testing or procedures, among "other actors in the opioid distribution chain."

The third priority announced was fraud against senior citizens. Among the first and hardest hit communities from the pandemic were residents of nursing home and rehabilitation centers, who are overwhelmingly seniors. Notably, the Civil Division did not suggest that FCA enforcement was necessary because of the pandemic and pandemic-related fraud at nursing homes, but rather that this population was as vulnerable as ever to fraud at their expense.

According to Mr. Boynton, the next two priorities – electronic health records and telehealth – reflect the increasing importance of technology to the health care system. While electronic health record-related fraud was already a priority for the Civil Division, Mr. Boynton noted the increasing reliance on technology such as telehealth during and because of the pandemic. Despite the new technology, the fraudulent schemes mentioned as examples in connection with electronic health records and telehealth were typical of traditional health care fraud, such as Medicare overpayments attributable to provider kickbacks and fabricated medical care.

The direction of cybersecurity enforcement, one of the newer frontiers for the Civil Division, remains unclear. Mr. Boynton indicated that "it is not difficult to imagine" where the FCA could be a tool to address cybersecurity-related fraud against the government where, for example, "the government pays for systems or services that purport to comply with required cybersecurity standards but fail to do so." What is unclear is how the Civil Division will handle matters in contexts that do not involve government contracts – for instance, where it involves protecting Medicare patient information. Unlike the other named priorities, however, Mr. Boynton offered no concrete examples of recent cases or settlements involving cybersecurity breaches. While his example of false certifications suggests either express or implied certification theories of FCA violations, it remains to be seen how the Civil Division – or relators – will attempt to adapt this very old law for this burgeoning threat.

If you have any questions, please contact the authors or your Baker Donelson attorney.