

Report on Medicare Compliance Volume 31, Number 1. January 10, 2022

Outlook 2022: COVID-19 Fraud May Factor in Cases 'Based on Different Allegations'

By Nina Youngstrom

Although many enforcement targets will be familiar in 2022, with whistleblowers and the Department of Justice (DOJ) pursuing kickbacks, medical necessity cases, Medicare Advantage fraud and other violations, there will be another dimension, lawyers said. The use of COVID-19 relief funds will be part and parcel of many false claims investigations into other matters, and DOJ again is putting the spotlight on the people who pull the strings in a corporate fraud case.

"It is a more comprehensive approach rather than just paying money, settling and being done with it," said Colette Matzzie, an attorney with Phillips & Cohen, a whistleblower firm in Washington, D.C. "It is requiring a greater level of corporate accountability and, at times, changes in corporate governance." COVID-19 relief fraud, including abuse of the Provider Relief Fund and Paycheck Protection Program, is not just a target of the DOJ in and of itself. "It is an overlay on everything," Matzzie said. "DOJ will look for misuse of COVID funds as an additional area of investigation on a case that might have originated based on different allegations."

The COVID-19 waivers also are seen as ripe for False Claims Act (FCA) cases if they have been misused. "We will start to see fallout from things that happened during the public health emergency," said attorney Judy Waltz, with Foley & Lardner LLP. She doesn't expect DOJ to be forgiving of big mistakes because the pandemic is not breaking news anymore. As the cliché goes, it's the new normal.

'I Expect to See Real Momentum'

As the Biden administration enters its second year, "I expect to see real momentum in the priorities they have set forth," said former U.S. Attorney Matthew Krueger, with Foley & Lardner LLP. "We have heard a pretty consistent message from DOJ" and the HHS Office of Inspector General (OIG). They're focusing on fraud in telehealth, Medicare Advantage, prescription drugs, the Anti-Kickback Statute, COVID relief funds, cybersecurity, data privacy and electronic health records.

There's also tremendous attention being paid to opioids and their interplay with the other targets. "Addressing the knowing decisions that led to the opioid epidemic is a very significant priority for enforcement for DOJ, HHS and other agencies," Matzzie said. "Accordingly, when evidence of overutilization or abuse arises, whether with a pharmaceutical company, a Medicare Part C or D plan, a pharmacy, a skilled nursing facility, an addiction treatment or pain clinic, or with an individual provider, that case will receive significant investigation and likely be a priority." It may lead to coordination with other agencies, such as the Drug Enforcement Administration, to remedy the underlying conduct (e.g., whether there were violations of the Controlled Substances Act), she noted.

Deputy Attorney General Lisa Monaco has been laying the groundwork for a more vigorous crusade against white-collar crime. In an October memo, she reinstated the 2015 Yates memo, also known as the Individual Accountability Policy, which had been scaled back by the Trump administration.^[1] The Monaco memo requires corporations to disclose all "relevant facts about the individuals involved in corporate misconduct" if they want

cooperation credit from DOJ when resolving fraud and other white-collar crime cases. Krueger believes that this and other policies announced by Monaco signal there will be “a more structured and skeptical review of corporate compliance programs and cooperation before DOJ is willing to give credit to corporations. It will be all the more important when engaged with DOJ or OIG to be able to tell the story of all the efforts the company is making, and especially to show the integrity of internal investigations.” If organizations want to earn cooperation credit, they need to inspire DOJ’s confidence that they’re disclosing all relevant facts about the misconduct and naming everyone who is potentially culpable, Krueger said. The misery of COVID-19, even with the Omicron setback, won’t be an excuse. “I don’t think there will be sympathy from OIG and DOJ on under-investments in compliance,” he noted.

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