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Outlook 2021: Expect 'Vigorous' FCA Enforcement; Prosecutor: Don't Back Off Compliance

By Nina Youngstrom

Although there will be new leadership at the Department of Justice (DOJ) and HHS, prosecutors and other attorneys say they have a pretty good feel for what health fraud enforcement will look like in 2021. The new kid on the block will be COVID-19 fraud and abuse, where it joins other recent priorities, including cases involving opioids and electronic health records (EHRs). DOJ and/or the HHS Office of Inspector General (OIG) also are expected to hammer away at kickbacks and substandard care in nursing facilities.

"There will be vigorous enforcement across the board," predicts Washington, D.C., attorney Colette Matzzie, with Phillips and Cohen, which represents whistleblowers. "I think we will see continuing enforcement priorities and then kind of a renewed push."

The logistics of investigating and adjudicating False Claims Act (FCA) and other kinds of cases were affected by the pandemic. For example, OIG modified the terms of corporate integrity agreements and granted payment extensions in civil monetary penalty cases. "But it's safe to assume that health care fraud will remain a top focus for the Department of Justice's enforcement efforts," said Adam Katz, assistant U.S. attorney in the U.S. Attorney's Office for the Northern District of New York.

There will be "increasing reliance" on data analytics "as a source of investigations," said Matthew Krueger, the U.S. attorney for the Eastern District of Wisconsin. "DOJ and HHS are continually getting better at analyzing Medicare claims data and working with state partners to identify indicia of Medicaid fraud." Data analysis helps direct scarce law enforcement resources, Krueger said. For example, data analytics can be used to identify relationships among providers and between physicians and pharmaceutical and medical device manufacturers and labs, which may surface improper payments. "Anti-Kickback Statute enforcement will continue to be particularly important," Krueger said. Although CMS and OIG finalized new Stark and safe harbor regulations, respectively, that are intended to ease regulatory burdens and foster innovation, "if there is a sham value-based arrangement, we will demonstrate the Anti-Kickback Statute still applies."

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