

DOJ & HHS Announce Reinvigoration of False Claims Act Working Group and Healthcare Fraud Enforcement Priorities

by Alex Hontos, Chris DeLong, Caitlin L.D. Hull, Matthew Gillespie, and Annie Boeckers

The Department of Justice and the Department of Health and Human Services announced the reinvigoration of a False Claims Act (“FCA”) Working Group, a joint effort between the two agencies. The announcement was made on July 2 during [remarks at the American Health Law Association \(“AHLA”\) Annual Meeting](#) by Brenna Jenny, the new Deputy Assistant Attorney General of DOJ’s Commercial Litigation Branch, and in a [press release](#) that same day. This working group underscores that healthcare fraud is a priority for the Administration, despite recent staff changes and recent policy announcements about enforcement priorities in civil rights and DEI. It also underscores that robust compliance programs should continue to be a priority for healthcare-industry stakeholders.

Overview

The DOJ-HHS FCA Working Group will consist of members from the HHS Office of General Counsel, HHS Office of Inspector General (“HHS-OIG”), the Centers for Medicare & Medicaid Services (“CMS”) Center for Program Integrity, the Civil Division at DOJ, and representatives from U.S. Attorneys’ Offices. The HHS General Counsel, Chief Counsel to HHS-OIG, and DAAG Jenny will jointly lead the Working Group. Its purpose is to “advance priority enforcement areas” in the healthcare industry through the FCA. As Jenny explained in her July 2 remarks, DOJ and HHS have a longstanding partnership, and this working group is intended to formalize and advance parts of their cross-agency collaboration, as well as to enhance the efficiency of their operations. In addition to priority enforcement areas [previously announced on June 11](#) by the Assistant Attorney General of DOJ’s Civil Division (described below), the Working Group has the following priority enforcement areas:

- Medicare Advantage;
- Drug, device, or biologics pricing, including arrangements for discounts, rebates, service fees, and formulary placement and price reporting;
- Barriers to patient access to care, including violations of network adequacy

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requirements;

- Kickbacks related to drugs, medical devices, durable medical equipment, and other products paid for by federal healthcare programs;
- Materially defective medical devices that impact patient safety; and
- Manipulation of Electronic Health Records (“EHR”) systems to drive inappropriate use of Medicare covered products and services.

Some of these identified priorities, such as kickbacks offered, paid, solicited, or received in violation of the federal anti-kickback statute (“AKS”), align with longstanding DOJ FCA enforcement priorities. However, the announcement also identifies areas that have not been significant FCA enforcement priorities. For example, the announcement signals an intent to target Medicare Advantage Organizations and Medicaid managed care plans for compliance with regulatory or contractual requirements around the adequacy of provider networks. There may be increased litigation and enforcement actions relating to network adequacy in “medical deserts” or (often rural) areas with limited access to healthcare providers.

Similarly, a focus on EHR systems suggests the federal government may increasingly scrutinize how the use of technology impacts care utilization. The announcement provides the working group will “expedite ongoing investigations” into priority areas by leveraging resources through “enhanced data mining and assessment of HHS and HHS-OIG report findings.”

The announcement also signals that CMS may take a more aggressive approach to Medicare payment suspensions, providing “[t]he Working Group shall discuss considerations bearing on whether HHS should implement a payment suspension pursuant to 42 C.F.R. § 405.370 *et seq.*” Depending on how these discussions bear out and how any subsequent decisions are made, increased parallel administrative enforcement resulting in Medicare payment suspension could have significant, immediate impacts on healthcare organizations caught in FCA investigations.

DOJ and HHS will also “discuss considerations bearing on . . . whether DOJ shall move to dismiss a *qui tam* complaint.” Although Michael Granston’s namesake memo, issued over seven years ago, provided guidance on and considerations for DOJ dismissals of *qui tam* actions, such dismissals have remained relatively rare. The announcement may indicate renewed interest in government dismissals of *qui tam* actions that run counter to the government’s enforcement policies and priorities. As Jenny explained in her July 2 remarks, “we welcome *qui tam* complaints but we are not content to rely on them.” She also stated that dismissing *qui tam* actions is “an area that I am passionate about.”

The Announcement in Context

The announcement of the reinvigorated Working Group follows a significant staff change at the DOJ Civil Division. In May, longtime DAAG Michael Granston—the highest-ranking career official in the DOJ Civil Division and an FCA expert—retired. Former DAAG Granston announced in February the Administration’s intent to “aggressively” enforce the FCA, with a focus on healthcare fraud (among other areas). The new DAAG, Jenny, has

past HHS experience in addition to private practice experience with the FCA. As Jenny explained in her remarks at the AHLA Annual Meeting on July 2, she co-founded the Working Group during her past time at HHS, and is now one of the leaders of the reinvigorated group.

The announcement of the reinvigorated Working Group also follows significant policy announcements by DOJ related to civil-rights issues. In May, DOJ launched the “Civil Rights Fraud Initiative.” As Dorsey explained in another client brief, in June the Assistant Attorney General of DOJ’s Civil Division announced the Civil Division’s enforcement priorities, which incorporate the Civil Rights Fraud Initiative priorities and include: (1) combatting discriminatory practices and policies; (2) ending antisemitism; (3) protecting women and children; (4) ending sanctuary jurisdictions; and (5) denaturalization of illegally obtained naturalization. Jenny explained in her July 2 remarks she has spent the majority of her time since becoming DAAG with the Civil Frauds section on these enforcement priorities. Jenny further explained that she has seen law firms speculating that healthcare enforcement may wane and DOJ will focus on the new priorities in the June 11 memo to the exclusion of traditional priorities like healthcare fraud. She stated: “I’m here to tell you that that is incorrect. We are broadly committed to fighting fraud, waste, and abuse in federal funding and rooting out healthcare fraud remains a priority.”

What Healthcare Organizations and Providers Should Do Now

Going forward, healthcare industry stakeholders should track the DOJ-HHS False Claims Act Working Group’s activities and continuing developments in the federal government’s healthcare fraud and FCA enforcement policies and priorities. It is clear that, even with DOJ staff changes and adding the focus on civil-rights fraud, healthcare fraud enforcement is not waning and may even increase in the new Administration.

While the renewed interest in government dismissals of *qui tam* actions indicates some possible relief for defendants involved in FCA litigation, the more aggressive approach to Medicare payment suspension and the introduction of new enforcement areas indicates that healthcare industry stakeholders must continue to remain vigilant about their FCA risk exposure. Strong and robust compliance programs remain a way to mitigate organizational risk. This includes comprehensive policies, regular audits of compliance with regulatory and policy standards, audits of claims documentation and billing practices, remediation plans, and other elements articulated by HHS-OIG in its General Compliance Program Guidance. Further, proactively identifying and self-reporting overpayments may mitigate the risks of FCA investigations and litigation, and potentially reduce liability for FCA violations.