Increased FCA Enforcement Targeting PE Firms Expected in 2024

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In a speech on February 22, 2024, Principal Deputy Assistant Attorney General Brian M. Boynton outlined the Department of Justice's ("DOJ") intention to investigate the role that PE firms and other investors play in facilitating healthcare fraud and abuse committed by their portfolio companies. On March 5, 2024, DOJ, together with the Federal Trade Commission and Department of Health and Human Services, launched a joint inquiry into the "impact of corporate greed in health care." PE firms should pay careful attention to these developments because prosecutors follow the investigative priorities set forth by their leadership. Below we provide an overview of issues DOJ is likely to investigate and the steps PE firms can take to mitigate the risks posed by such investigations.

Mr. Boynton "emphasize[d] [DOJ's] commitment to holding accountable third parties that cause the submission of false claims"—and specifically singled out "private equity firms." Mr. Boynton noted that "a wide collection of actors that may influence the claims that are ultimately submitted to the government," and that the past few years had demonstrated the variety of "ways that third parties can influence the type and frequency of claims that are submitted." Among other things, he explained that PE firms may "influence patient care by providing express direction for how a provider should conduct their business, or more indirectly by providing revenue targets or other indirect benchmarks intended to prioritize reimbursement." In DOJ's view, these tactics "can undermine medical judgment, inappropriately influence the doctor/patient relationship, and cause the submission of false claims to federal healthcare programs."

As we've discussed previously, PE firms are no strangers to a heightened scrutiny by the government—politicians have long criticized what they perceive to be the undue influence of private investors in the healthcare industry. There have already been a small number of cases in which PE sponsors have paid a significant amount of money in connection with the resolution of lawsuits under the False Claims Act ("FCA"). For example, in 2021, the Massachusetts Attorney General's Office announced a $25 million settlement agreement—paid in part by the sponsor—to resolve claims that a PE firm and former executives of a mental health center employed unlicensed and unqualified staff at its facilities, which violated the regulations of the state's Medicaid program. But

the involvement of federal prosecutors significantly amplifies the risk for PE firms, as prosecutors have greater resources, the authority to criminally charge companies and individuals, and to file or intervene in FCA lawsuits (which can result in huge recoveries for the government, as FCA awards can potentially include treble damages and a large statutory fine for each false claim submitted).

We anticipate that DOJ investigations of PE firms are likely to focus on the following issues (among others):

- whether a sponsor learned during diligence of a material compliance issue and/or failure to maintain proper internal controls that could result in the company submitting false claims to federal and/or state healthcare programs;

- whether a sponsor sets aggressive revenue targets that arguably place undue pressure on the company to increase claims for federal reimbursement or otherwise influence medical judgment;

- whether a sponsor is alleged to be expressly directing healthcare providers on how to conduct their business, either through board control or a consulting agreement with the portfolio company;

- whether a sponsor that encourages the adoption of operational efficiencies, e.g., reduced staffing, is jeopardizing the quality of patient care and is thereby responsible for causing the submission of false claims for inadequate or substandard care; and

- whether a sponsor encourages adoption of programs that improperly incentivize patient referrals.

In light of Mr. Boynton's remarks, it is critical that PE firms proceed with caution to protect themselves and their investments—including by consulting when necessary with counsel who are experienced in healthcare fraud and PE governance. Among other things, sponsors' representatives on a portfolio company board should assess with management and counsel (following appropriate governance procedures) whether any compliance gaps identified during diligence need to be rectified and whether the company has allocated sufficient resources to its legal and compliance functions. Sponsor representatives should also carefully consider any recommendations to the portfolio company: strategies designed to enhance revenue that might be appropriate in other industries may run afoul with federal and/or state fraud and abuse laws. Maintaining proper corporate governance is critical. DOJ will examine whether representatives of a PE sponsor have intruded into the day-to-day management of a portfolio company that DOJ is investigating or is otherwise inappropriately influencing

operations. If DOJ finds evidence of such conduct, it is more likely to argue that the PE sponsor should be held liable for the portfolio company's conduct.

Please do not hesitate to let us know if you have any questions.

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Helen V. Cantwell
Partner, New York
+1 212 909 6312
hcantwell@debevoise.com

Courtney M. Dankworth
Partner, New York
+1 212 909 6758
cmdankworth@debevoise.com

Mark P. Goodman
Partner, New York
+1 212 909 7253
mpgoodman@debevoise.com

Maura Kathleen Monaghan
Partner, New York
+1 212 909 7459
mkmonaghan@debevoise.com

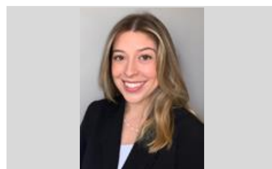
Winston M. Paes
Partner, New York
+1 212 909 6896
wmpaes@debevoise.com

Zachary H. Saltzman
Partner, New York
+1 212 909 6690
zhsaltzman@debevoise.com

Shannon Rose Selden
Partner, New York
+1 212 909 6082
srselden@debevoise.com

Jacob W. Stahl
Counsel, New York
+1 212 909 6874
jwstahl@debevoise.com

Adam Aukland-Peck
Associate, New York
+1 212 909 6703
aauklandpeck@debevoise.com



Kaitlyn McGill
Associate, New York
+1 212 909 6817
kemcgill@debevoise.com

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