US DEPARTMENT OF JUSTICE ANNOUNCES US$2.68 BILLION IN FISCAL YEAR 2023 FALSE CLAIMS ACT RECOVERIES

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US Policy and Regulatory Alert

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On 22 February 2024, the US Department of Justice (DOJ) published its report (Report) announcing civil recoveries under the False Claims Act (FCA) for Fiscal Year (FY) 2023. The recoveries for FY 2023 exceeded US$2.68 billion, US$1.8 billion of which involved the health care industry. The US government has now collected over US$75 billion in recoveries under the FCA since the statute was amended in 1986 to allow for treble damages and increased incentives for whistleblowers. Notably, the 543 settlements and judgments in FY 2023 marked the highest-ever number of settlements and judgments in a single year.

As with FY 2022, qui tam cases comprised the largest portion of recoveries, with over 85% (US$2.3 billion) stemming from whistleblower actions. The government paid over US$349 million to whistleblowers in relation to these FY 2023 recoveries. Whistleblower actions do not appear to be slowing down, with 712 qui tams filed in FY 2023, which is the third highest number on record. Of the 712 qui tam suits that were filed in FY 2023, 348 were health care focused.

DOJ also highlighted its five “key enforcement priorities” for FY 2023 and provided representative examples. The enforcement priorities included health care fraud, procurement fraud, pandemic fraud, cybersecurity fraud, and individual accountability. As with prior years, health care fraud was the principal source of FCA recoveries, which included recoveries relating to Medicare Advantage fraud, billing for unnecessary services and substandard care, opioid epidemic-related fraud, and kickback schemes.

HEALTH CARE FRAUD

Last year, Medicare Advantage, also known as Medicare Part C, became the largest component of the Medicare program, with the highest number of beneficiaries and the most federal dollars spent. In FY 2023, the government secured substantial recoveries from organizations that inaccurately submitted or failed to correct inaccurate information regarding their Medicare Advantage patients. DOJ also obtained substantial recoveries from providers who improperly billed for medically unnecessary services and substandard care. Additionally, after its large settlement with Purdue Pharma in 2021, the government has continued to focus on opioid crisis-related fraud.

Some of the largest health care recoveries in FY 2023 resulted from unlawful kickback schemes. The illegal remuneration ranged from supervision fees above fair market value to a physician, to sporting events and entertainment tickets for customers whose referrals led to new sales. The focus on kickbacks has resulted in substantial recoveries for the government, including a US$46 million settlement with 43 physicians related to laboratories and their recruiters paying physicians kickbacks disguised as legitimate payments. In light of these

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large kickback-related recoveries, health care providers will want to keep a close eye on the ongoing circuit split over what is required to prove causation in kickback-premised FCA actions. To date, the Third Circuit has stated that merely some causal connection is required between the alleged kickback and the claim forpayment, whereas the Sixth and Eighth Circuits have required “but-for” causation. That split is expected to deepen in the coming year with the First Circuit set to join either the Third Circuit or the Sixth and Eighth Circuits.

OTHER ENFORCEMENT PRIORITIES

In addition to health care-specific recoveries, the government recovered significant funds stemming from procurement fraud and cyber fraud. FY 2023 included one of the largest procurement settlements ever made. The US$377 million settlement resolved allegations that the government was improperly billed for costs incurred by non-governmental entities. The government also resolved an estimated 270 cases, totaling over US$48.3 million, in connection with Paycheck Protection Program (PPP) loans. The pandemic fraud resulted in large part from the submission of inaccurate information in PPP loan applications, which allowed for unqualified companies to obtain federal aid.

In October 2021, DOJ announced its Civil Cyber-Fraud Initiative with the goal of pursuing companies who receive federal funds while failing to follow required cybersecurity standards. In FY 2023, the government entered into several recoveries under the Civil Cyber-Fraud Initiative.

In its Report, DOJ noted its continued commitment to using the FCA to deter and penalize individual wrongdoing. This position is in line with recent DOJ activity in this area, including: Deputy Attorney General Lisa Monaco's 2022 memorandum regarding “Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group,” the Criminal Division's January 2023 updates to its Corporate Enforcement and Voluntary Self-Disclosure Policy, and DOJ's February 2023 policy establishing a standard for voluntary self-disclosure credit in corporate enforcement actions brought by US Attorneys' Offices.

The FY 2023 settlements and judgments provide an insight into the government's enforcement priorities and potential future enforcement areas. Our forthcoming article *The False Claims Act and Health Care: 2023 Recoveries and 2024 Outlook* will provide an in-depth analysis of the 2023 recoveries, as well as some key enforcement areas to look out for in 2024.

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