HEALTH CARE

FCA ENFORCEMENT: DIFFERENT, BUT STILL HERE

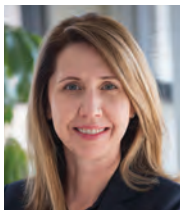
Earlier this year, many health care companies wondered if changing priorities at the Department of Justice would reduce the threat of False Claims Act actions. Now, however, it seems clear that the FCA should still be on the general counsel's radar.

Certainly things are changing at DOJ. Parts of DOJ continued to be affected by a hiring freeze; while some new staff have been brought on for health care fraud cases, others have seen their responsibilities shift to handling other types of work, such as Controlled Substance Act cases. The net result: "Over the coming year, we're going to continue to see DOJ enforcement of FCA cases in the health care industry," says Laura Cordova, a partner in Crowell & Moring's White Collar & Regulatory Enforcement and Health Care groups.

Even when it doesn't intervene, DOJ is likely to stay involved in other ways. For example, Cordova says, "Several circuits have concluded that DOJ has absolute veto power over FCA settlements, and it has used that power to veto settlements between relators and defendants that it thinks are too low."

In addition, courts have typically allowed the department to file statements of interest in cases where it has not intervened—"and DOJ's statements of interest can have an impact on the court's decision," she says. Overall, "this approach is in keeping with the administration's priorities of reducing the federal workforce while still collecting significant amounts of money through *qui tam* enforcement of the FCA."

DOJ's continued reluctance to intervene in many cases provides health care FCA defendants with potential tools. For one, it opens the door to early arguments against a plaintiff's



"In some cases, DOJ will be willing to step back and let relators' counsel move forward with the cases, so the department can conserve its own resources." —*Laura Cordova*

DOJ's role in cases may be shifting a bit, however. DOJ leadership recently indicated that the department might start taking a closer look at cases brought by relators and moving more frequently to dismiss cases that DOJ believes lack merit. While DOJ has always had the power to move to dismiss *qui tam* cases, it has taken this step only rarely. In cases where DOJ does not intervene and does not move to dismiss a *qui tam* complaint, thereby allowing the relator to pursue the case, the department is likely to watch relator actions closely and then weigh in where it thinks it needs to.

"In some cases, DOJ will be willing to step back and let relators' counsel move forward with the cases, so the department can conserve its own resources," says Cordova, who formerly worked in the fraud section of DOJ's criminal division. That said, DOJ is going to be keeping watch to ensure that these cases do not create bad law or precedent from their perspective.

pursuit of a case. In its May 2017 *United States ex rel. Petratos v. Genentech, Inc.* decision, the Third Circuit, applying the materiality standard established by the Supreme Court in *Escobar*, noted the government's refusal to intervene in a *qui tam* suit as further evidence that the false certifications alleged in the complaint were not material to the government's payment decisions on the underlying claims.

In the same vein, the Fourth Circuit concluded in *United States ex rel. Badr v. Triple Canopy Inc.* that DOJ's immediate intervention in a case was evidence that the alleged falsehood affected the government's decision to pay the underlying claims.

Looking ahead, there are several key areas where DOJ will likely take an interest in relators' cases, or even pursue its own litigation. "The government is looking at drug pricing—which folks across the political spectrum are talking about," says Cordova. "And cases involving opioids are going to rise to the top of the pile."