

# Due Diligence and Compliance

Edgar Bueno

Partner

Morris, Manning & Martin LLP

Lindsey Lonergan

VP & Deputy General Counsel

Navicent Health, Inc.

1

1

## Government touches are now the rule, not the exception

*“The Department of Justice has placed a high priority on rooting out and pursuing those who cheat government programs for their own gain. The recoveries announced today are a message that fraud and dishonesty will not be tolerated.”*

- In 2018, DOJ recovered \$2.9 billion from health care companies doing business with the government.
  - Health care and life science are the primary False Claims Act (FCA) focus
  - 767 new matters initiated in 2018 (500+ health care focused)
  - \$2.1 billion of the total from qui tam cases

2

2

## FCA Enforcement – The Same or New?

- Theories of Liability
  - Anti-Kickback
  - Stark Law
  - False Claims
  - Poor Quality
- Types of Defendants
  - Hospitals
  - Laboratories
  - Long-Term Care Facilities
  - Rehab Facilities
  - EHR Companies
  - Telemedicine
  - Drug Treatment Centers
  - Private Equity

3

3

Active Investigations does not mean deal activity ends.

- Health care companies have closed small and large deals in the face of active investigations and settlements with the DOJ.

4

4

# The Deal and the Life of a FCA Investigation

## BE INFORMED AND STAY INFORMED

- **How the Investigation Starts and Why It Matters**
  - Contractor Audit, Qui Tam Filing, Data Mining
  - Subpoenas and CIDs
- **Learning the Status of an Investigation**
  - Communicate
  - Research
  - Qui Tam Investigations and the Seal

5

5

# The Deal and the Life of a FCA Investigation

- **Closure of Investigation**
- **Settlement**
  - The Importance of the “Hand-Shake Agreement”
  - The Settlement Agreement – The Parties, Covered Conduct, Release, Cooperation
  - Pay-Over-Time Considerations
  - Administrative Liability Concerns – CIAs and Successor Liability
  - Press Releases
  - Relator Issues – Continue Litigation, Challenge to Settlement, Attorney’s Fees
- **Dismissal of Case**

6

6

## Negotiating with companies with active investigations

- Assure cultural alignment of the two companies.
- Develop meaningful due diligence plans.
- Work with outside counsel to ensure proper balance between candor/privilege.

7

7

## Assure cultural alignment of the two companies.

*“Corporate America is often the first line of defense for detecting and deterring fraud. Meaningful compliance measures help the Department preserve its finite resources. We want to reward companies that invest in strong compliance measures.”* Rod Rosenstein, March 2, 2018

- Does the company have an effective compliance program?
- What was the impetus of the investigation?
- Leadership role in investigation, role in future shared company.

8

8

## Develop meaningful due diligence plan.

- Understand the nature of the investigation.
  - What is the posture of the investigation?
  - Who is pursuing it? Government or solely relator?
- Focus diligence on current state of target.
- Will value of organization change depending on outcome of investigation?
- Utilize government guidance when building plan.
  - DOJ *Evaluation of Corporate Compliance Programs* (April 2019)
- Consider the importance of reverse diligence.
  - Don't jump from the frying pan into the fire!

9

9

## Work with outside counsel to ensure proper balance between candor/privilege.

- Set the expectations of both parties.
  - Focus on ensuring reasonable expectations.
    - It will be uncomfortable and may be untraditional.
  - Make sure your outside counsel's perspectives is consistent with that of both companies.
    - What can you share with the other party? How do you strike that balance?
- Do you close before or after the investigation is complete?
  - Ensure proper protections in place for both parties regarding financial risks.
  - Will party interests change after the investigation ends?

10

10