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BBA 2024 White Collar Crime Conference Takeaways

Choate sponsored the Boston Bar Association's May 2024 White Collar Crime Conference, which brought together law firm defense counsel, prosecutors, in-house counsel, and judges, to discuss recent white collar crime cases and practice developments. Below are key takeaways from the conference.

A Conversation with Joshua Levy, Acting U.S. Attorney for the District of Massachusetts

In the year since Levy assumed his role as Acting U.S. Attorney for the District of Massachusetts, he has guided his team through stabilization and a full rebound. Levy noted the following:

- Healthcare is still a focus. While off-label marketing enforcement has been curtailed due primarily to changes in industry marketing practices, there is an uptick in cases related to rare diseases, genetic testing, opioid prescriptions, co-pay assistance, and COVID-19 fraud.
- Corporate cooperation credit. While most companies say they want to cooperate with a government investigation, the Office sees a range of corporate behavior and is particularly concerned when companies appear to be hiding from bad facts (i.e., not addressing bad documents or problematic issues). Levy said he expects companies that want cooperation credit to flag hot documents for the government and then explain them in a presentation.
- Expanded whistleblower programs. The Office is taking a wait-and-see approach on whether to implement something like the pilot program in the Southern District of New York, which rewards whistleblowers with non-prosecution agreements.

The False Claims Act: Enforcement Priorities and the Evolving Landscape of FCA Investigations and Litigation

The Head of the Massachusetts U.S. Attorney's Office Affirmative Civil Enforcement Unit and the Chief of the Attorney General's Medicaid Fraud Division spoke together to explain their key priorities. These priorities include kickbacks, COVID-19 fraud, the opioid crisis, fraud within Medicaid managed care, non-traditional investing in healthcare, behavioral health fraud, transportation services, and poor dental practices. They noted that settlements in these types of cases typically involve appointing a corporate monitor, while early substantive cooperation may help to avoid the need for monitoring.

Navigating Cutting-Edge Issues in Corporate Cooperation

Corporate enforcement continues to be a priority. The government noted several key aspects of true corporate cooperation, including:

- Open communication and seeking feedback early and often.
- Development of a robust and appropriately resourced compliance program to identify misconduct and prevent it from reoccurring.
- Responding to government requests in a timely manner.

- Identifying key documents in a document production, rather than burying them.
- Willingness to address the most difficult facts of the case.
- Providing information about relevant individuals so that the government will be in position to make charging decisions about individuals at the same time as company resolutions.

Compliance measures taken by the company may affect the government's decision whether to assign a monitor going forward — including whether compliance mechanisms were in place at the time the misconduct occurred, whether the company was willing to share how it discovered and remediated the misconduct, and whether the company conducted an internal audit.

Individual Cooperation: Risks, Rewards, and the Ride

In determining an individual's level of cooperation, the government considers factors such as credibility, promptness, temperament, relative culpability compared to others in the corporate hierarchy, and whether the individual received or reviewed discovery. The prosecutors noted that, in many cases, they are now inviting law enforcement agents to attend attorney proffers. These proffers are common starting points for a cooperation discussion. The government lawyers are now asking the agents to draft interview reports about those proffers, a practice that may call into question whether attorney proffers continue to be useful to defense counsel and their clients.

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