

# What to Do When the Government Comes Knocking

A Discussion of Government Investigations, Subpoenas, Cooperation/Compliance, and Various Best Practices

November 5, 2018  
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## Disclaimers

- The views expressed in this presentation are the speakers' own respective views. These slides do not represent any formal position taken by either the Department of Justice, the United States Attorney's Office, the federal government, or the Bradley law firm.
- All examples and case studies discussed herein are published from open-source resources and do not reflect any on-going, non-public cases.

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## Presentation Overview

1. Government Subpoenas and Healthcare Investigation Background
2. What to Do When Receiving a Subpoena
3. Settlement and Plea Considerations
4. Compliance Best Practices
5. Questions

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## DOJ Commitment to Healthcare Fraud Enforcement

- Continuing its annual pattern, DOJ announced the arrest of more than 600 individuals earlier this summer.
- This was the largest healthcare fraud takedown to date, topping the record years of 2013-2017.

### Over 600 Individuals Charged in 2018 Healthcare Fraud Takedown

In the largest healthcare fraud takedown to date, DOJ and DOJ responded charging individuals involved in fraud schemes that cost Medicaid and Medicare \$1 billion.



DOJ announced today that it has charged more than 600 individuals in the largest healthcare fraud takedown to date, costing Medicaid and Medicare \$1 billion. The charges include conspiracy, fraud, and other offenses. The individuals charged are involved in a wide range of fraud schemes, including billing for services not rendered, upcoding, and other forms of fraud. The charges are part of a larger effort to combat healthcare fraud and protect the integrity of the Medicare and Medicaid programs.



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## Recent DOJ Efforts: Largest Hiring in Decades



- Earlier this summer, DOJ announced the largest increase in Assistant US Attorneys in decades.
- Nearly 1/3<sup>rd</sup> of the new hires were hired to specifically focus on affirmative civil enforcement—or *qui tam*/whistleblower cases.

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## False Claims Act Enforcement Statistics

- According to the most recent statistics, the Department of Justice (DOJ) is maintaining a fast clip with respect to False Claims Act prosecutions.
- In fiscal year 2017, the federal government collected more than \$3.7 billion in fraud recoveries from federal contractors.
- The vast majority of those recoveries came in the healthcare arena

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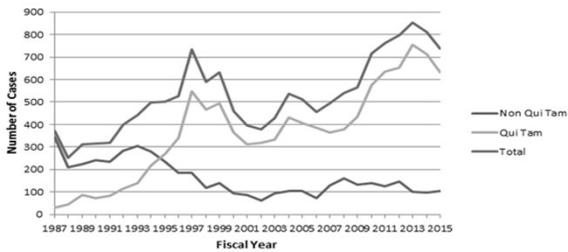
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### False Claims Act Cases Per Year – All Cases



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## Healthcare Enforcement Generally

- Despite some thoughts that the Trump administration might curtail healthcare enforcement actions, DOJ appears to be continuing its enforcement at a high rate.
- These matters are both civil and criminal in nature. Increasingly, many of these matters are being investigated in parallel—that is, being examined from both a criminal and a civil perspectives.
- Whether it is an individual practitioner or a large medical provider, healthcare practitioners would be well-served by being aware of DOJ's priorities and how these matters are being investigated.

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## Basics Regarding Criminal Healthcare Enforcement Actions

- In the criminal realm, most (but certainly not all) healthcare actions are based on 18 U.S.C. 1347—the general healthcare fraud statute.
- This statute punishes any “scheme or artifice” to defraud a healthcare program.
- You may learn about a criminal action through the issuance of a *grand jury* subpoena.



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## Criminal Grand Jury Subpoenas

- Under the rules, a grand jury may investigate suspected violations of federal law.
- The scope of authority under a grand jury is expansive. The grand jury may request *documents* or may compel *testimony*.
- A grand jury subpoena will normally be served by a federal law enforcement agent (although there may be other times that the subpoena is served differently). Note that, as a practical matter, a law enforcement officer will likely try to interview the recipient of a grand jury subpoena at the time the subpoena is served.

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## Reading the Tea Leaves of a Criminal Grand Jury Subpoena

- If you get a grand jury subpoena, you can likely learn a considerable amount about the investigation simply from the face of the subpoena.
  - You can determine which officer, and most likely which prosecutor, is investigating the case.
  - Based on the requests, you can likely learn the focus of the investigation and the allegations alleged.
  - If a law enforcement agent is listed, you can determine what agency/agencies are investigating.
  - Based on the extensiveness of the requests, you can try to determine how far along the investigation is.

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## Basics Regarding Civil Healthcare Investigations

- In contrast to criminal matters, the primary tool for the government to investigate civil healthcare fraud is the False Claims Act, 31 U.S.C. 3729.
- This statute prohibits the submission of “false” claims to the government.
- One of the most sure-fire ways to know you are the target of a civil investigation is the receipt of a Civil Investigative Demand (CID).

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## Civil Investigative Demands

- Under the government’s Civil Investigative Demand authority, the government may request documents, testimony, and written answers to interrogatory questions.
  - The use of interrogatories is unique to CIDs (as opposed to grand jury subpoenas).
- Importantly, the CID too will reveal key information about the state of the investigation. The statute allowing the government to issue CIDs specifically requires that the government provide “sufficient detail to put witness on notice of the nature of the investigation.”
- CIDs too are generally served by law enforcement officers, but not always.

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## Differences in CID/Grand Jury Subpoenas

- In some ways, grand jury subpoenas are more onerous on defendants.
  - With compelled testimony, the person being questioned is not allowed to have his/her attorney in the room.
  - In addition to the prosecutor asking questions, the grand jurors may ask questions as well.
  - As a practical matter, it is much harder to quash a Grand Jury subpoena.
- In other ways, CIDs are more onerous on defendants
  - CIDs allow the government to obtain written answers to interrogatories.
  - In addition to the prosecutor, law enforcement agents may be in the room for questioning/ testimony.
  - CID information may be shared with others, including criminal prosecutors (whereas grand jury material may not be shared with others).

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## Parallel Proceedings

- Importantly, DOJ investigations need not be an either/or proposition. Sometimes, the government investigates in parallel. That is, sometimes the government investigates matters both civilly *and* criminally.
- When facing a parallel proceedings, defendants and their lawyers need to be mindful of the mine-field of risks and how information may be used by both sides of the house.

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## Preliminary Step: Assess the Investigation

- As a basic matter, you should not panic and overreact. While you should take the matter seriously, government investigations are the new “normal.”
- You should carefully read the CID/Grand Jury Subpoena. Understand what is being investigated, what is being asked, and what the deadlines are.
- It is usually a best practice to obtain competent outside counsel versed in these matters—whether the matter is civil or criminal.

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## Preserving Documents

- One of the most important first steps in any investigation is to take all precautions to preserve relevant documents.
- If documents are deleted in response to a subpoena, it is likely to get the government's attention and the government will likely impute a very nefarious intent.
- It is a best practice to get your internal IT person (or, outsource to a third party IT vendor) to take all steps to preserve documents and halt document destruction protocols.

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## Meeting with Witnesses

- An important consideration early on is determining who at your company will have relevant information.
- As appropriate, you should apprise these individuals of the investigation. And you should remind these individuals not to delete anything relevant—including on their personal devices.
- Do not coach your employees/witnesses to lie or obstruct any investigation.
- Be careful not to retaliate against any suspected whistleblower.

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## Cooperation

- The government has opined repeatedly on what cooperation means—and what it doesn't mean.
- Simply complying with a subpoena is not considered cooperation.
- Likewise, reporting fraud after the government has begun its investigation is not considered exhaustive cooperation.
- Cooperation typically requires the following:
  - Early and voluntary self-disclosure that helps the government understand the problem and secure a resolution more quickly
  - Identifying individuals responsible
  - Disclosing facts that the government did not know

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## Cooperation Following Subpoena

- If you decide to cooperate with the government, be prepared to do five things.
  - Immediately put a stop to any misconduct once it is revealed;
  - Fully investigate any alleged wrongdoing;
  - Fully cooperate with the government and share all known information about individuals implicated in the improper behavior;
  - Make appropriate enhancements to compliance programs to mitigate opportunities for similar misconduct in the future; and
  - Pay restitution.
- If you cannot do these five things, your “cooperation” will likely not be recognized by the government.

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## Dealing with Individual Wrong-Doers

- The Trump administration is continuing a trend of the Obama administration in its focus of individual wrong-doers.
- This focus on individual wrong-doers often requires companies to be at odds with its employees.
- Common considerations for employers are: (a) whether to retain independent counsel for employees; (b) whether to terminate employees; and (c) whether to report suspected wrong-doer employees to DOJ.

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## Settlement Considerations: Civil

- In the civil context, the government is generally focused on monetary resolutions (although not always).
- One of the questions most defendants grapple with is the timing to both initiate and actually resolve settlement. There are different considerations from the government/defense perspective on the right time to settle.
- Note that in the *qui tam* context, there is often an important inflection point—deciding whether to settle prior to “intervention” of a sealed lawsuit.

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## Plea Considerations: Criminal

- In the criminal context, the key decision points as to plea bargaining are either pre-indictment (where the government initiates a conversation) or pre-trial.
- The key focus for most defendants will be the recommended sentencing guideline score.
  - Note that while this is not a financial penalty consideration, it involves the same considerations as civil settlements—determining and recognizing the correct “loss” amount.
- Pleas are rewarded by “acceptance of responsibility” credit in the Sentencing Guidelines.

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## Key Considerations in Any Settlement/Plea

- What are the government's requirements? Will it require admissions or commitments of cooperation?
- In the corporate context, what is the consequence for individuals?
- Scope of the release: What is the “covered conduct” or the “factual basis”?
- Press releases
- Approval Process

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## Collateral Consequences of Settlement/Plea

- Companies and individuals should be mindful that there are a panoply of consequences that follow from a criminal/civil resolution.
- **Collateral Actions:** Increasingly, states and private insurers are mining DOJ press releases to learn of possible new investigations.
- **Disciplinary Consequences:** State Departments of Health often review these press releases to determine whether licensure should be suspended/revoked.
- **Ability to Prospectively Participate in Healthcare Programs:** A felony conviction will disqualify most practitioners from future participation in the healthcare programs. A civil settlement may also affect future participation in the healthcare programs.
- **Insurance:** Note that a civil or criminal resolution may affect the ability of practitioners to obtain insurance in the future.

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## Practical Proactive Compliance Strategies

- We describe some high-level suggestions for companies and individuals to possibly prevent government enforcement actions.
- We emphasize that “no one size fits all” and that no strategy will immunize a company from possible government investigations.
- Further, we note that many companies will likely already have many of these suggestions in place.

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### General Compliance Strategy: Establish and Advertise Whistleblower Hotline Programs

- A whistleblower hotline is often a key component of an effective corporate compliance and ethics program.
- According to some research studies, in companies with an internal hotline, tips account for over half of all fraud detection. A best practice is to consider making the hotline anonymous as anonymity often generates more calls.
- Hotlines become stale, however. Therefore, the best proactive strategy is to make the hotlines fresh and meaningful.
- Make sure employees know about the hotline – emphasize it at meetings, in newsletters, on intranet sites, and anywhere else.

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### General Compliance Strategy: Promote a Sense of Agency Throughout the Organization

- Employees generally tend to report concerns only when they feel a sense of agency—or, otherwise feel that their reported concerns are being addressed.
- This, of course, starts with the tone at the top. Make sure all individuals—from the top down—feel like their concerns are being heard and addressed, as appropriate.
- Consider ways to show that complaints are taken seriously—perhaps by addressing complaints at staff meetings or otherwise publicizing the work done to ameliorate employees' concerns.
- Consider ways to “close the feedback loop.”

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### General Compliance Strategy: Benchmark Your Compliance Program

- A best practice is to benchmark, or otherwise measure, the effectiveness of internal compliance systems.
- Companies should benchmark their compliance programs to internal (e.g., location, business units and departments) and external (e.g., peers and industry) data sources.
- Data benchmarking provides companies with comparative information to determine reporting patterns that are higher than, lower than or in line with peers and their industry.

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**General Compliance Strategy: Follow-up With the Whistleblower**

- When suspected unethical or unlawful activity is reported, no matter whether corroborated or otherwise, follow-up with the whistleblower.
- Many government whistleblowers first report the concerns internally and then only turn to the government after they feel that their concerns were not addressed.
- So, develop a system to close the feedback loop and keep the whistleblowers informed about their concerns.

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**General Compliance Strategy: Know Your Data**

- Increasingly, the government is using data analytics to identify and target outliers.
- Given the government's increasing focus on data, practitioners would be well-served by reviewing their own data to determine where they might be aberrant.
- Consider file reviews and self-audits to periodically ensure and demonstrate compliance.

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## Questions

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