

What to Do When the Government Comes Knocking

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

May 17, 2019

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1

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

Slide 2

2

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Slide 3

3

DOJ Commitment to Healthcare Fraud Enforcement

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



Slide 4

Over 600 Individuals Charged in 2018 Healthcare Fraud Takedown

In the largest healthcare fraud takedown to date, OIG and DoJ reported charging individuals involved in fraud schemes that cost Medicaid and Medicare \$2 billion.



Source: Thinkstock

By Jacqueline LaPointe



June 18, 2018 - The HHS Office of the Inspector General (OIG) and Department of Justice (DoJ) recently announced the largest healthcare fraud takedown to date, with over 600 defendants charged with participating in fraud schemes amounting to about \$2 billion in losses to Medicare and Medicaid.

Of the over 600 defendants charged, 465 were medical professionals, including 32 doctors who allegedly participated in healthcare fraud schemes involving prescribing and distributing opioids and other narcotics.

The charges jointly announced by the OIG and DoJ also involved claims submitted to Medicare, Medicaid, TRICARE, and private insurance companies for medically unnecessary prescription drugs that were oftentimes never purchased or given to patients.

4

Recent DOJ Efforts: Largest Hiring in Decades



Slide 5

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

5

Regional Efforts – Prescription Opioid Strike Force

- Last month 60 individuals were charged across six states (Alabama, Kentucky, Ohio, Tennessee, Virginia, and West Virginia)
- 54 of those accused are medical professionals
 - 31 doctors
 - 7 pharmacists
 - 8 nurse practitioners
 - 7 other licensed medical professionals
- Focus was on unlawful distribution of opioids and *other prescription narcotics*.

Slide 6

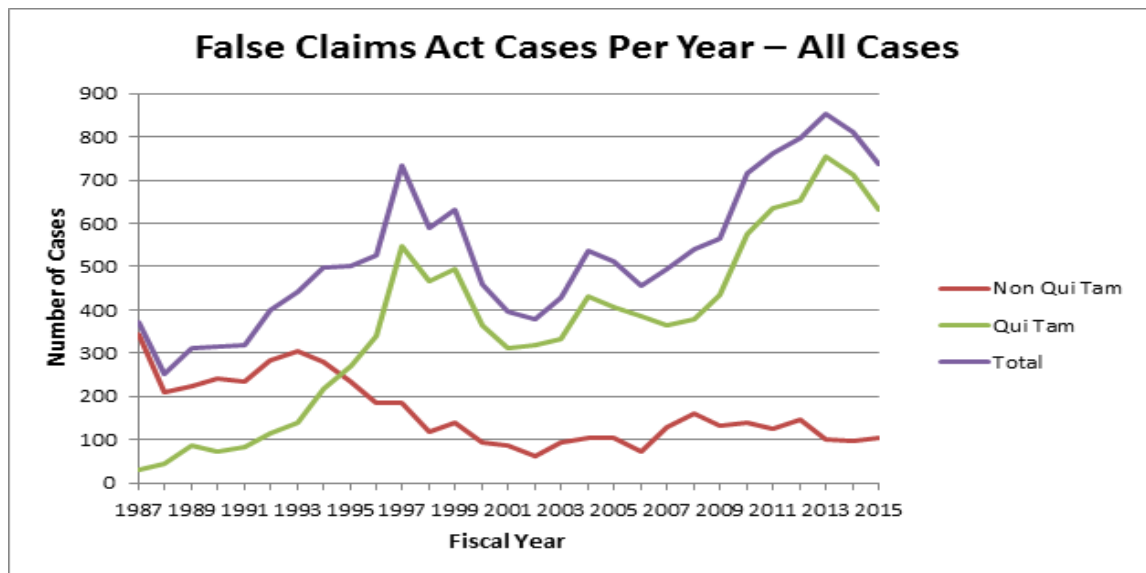
6

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 2018, the federal government collected more than \$2.8 billion in fraud recoveries from federal contractors.
 - Healthcare account for \$2.5 billion of that amount (87%)
 - Down from \$3.5 billion in FY 2017 and \$4.9 billion in FY 2016
 - Lowest mark since 2009
- The vast majority of those recoveries came in the healthcare arena

Slide 7

7



Slide 8

8

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.

Slide 9

9

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.

Slide 10

UNITED STATES DISTRICT COURT
for the
District of Maine

SUBPOENA TO TESTIFY BEFORE A GRAND JURY

To: John Doe

YOU ARE COMMANDED to appear in this United States district court at the time, date, and place shown below to testify before the court's grand jury. When you arrive, you must remain at the court until the judge or a court official allows you to leave.

Place: Edward T. Digheau Federal Courthouse 100 Federal Street Portland, ME 04101	Date and Time:
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You must also bring with you the following documents, electronically stored information, or objects (if not applicable):

Date: _____


Christa K. Berry
Christa K. Berry
Clerk, U.S. District Court

The name, address, e-mail, and telephone number of the United States attorney, or alternate United States attorney, who issued this subpoena, are:
Daniel J. Perry, DOJ/BA
100 Middle Street, 9th Floor, East Tower
Portland, ME 04101
Dan.Perry@doj.gov 207-750-3257

10

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.

Slide 11

11

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.

Slide 12

12

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).

Slide 13

13

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.

Slide 14

14

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).

Slide 15

15

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.

Slide 16

16

Parallel Criminal v. Civil Actions: Not Necessarily the Same Case

Criminal

- Proof beyond a reasonable doubt
- Must prove intent
- SOLs – typically 5 years
- If a criminal defendant is an individual...

Civil

- Proof by a preponderance of the evidence
- Must prove actual knowledge, deliberate ignorance or reckless disregard of the truth
- SOLs –6 to 10 years
- The civil defendant may be the individual's employer – who may be liable for the acts of its employee.

17

From the Government's Perspective Parallel Proceedings Make Sense

- **Comprehensive remedies**
 - Make the government whole, punish the wrongdoer, deter future misconduct and protect the government from doing business with irresponsible contractors
 - Federal interests not always vindicated by just one remedy
- **Preservation of remedies and assets**
 - May not know whether criminal or civil can provide appropriate remedy until the investigation is complete
 - Investigation may not support criminal prosecution, but may make a good civil case (knowledge and burden of proof easier) and vice versa (*e.g.*, where damages limited)

Slide 18

18

For the Government Parallel Proceedings Make Sense

- **Remedies more efficiently obtained**
 - Investigate while evidence is fresh (witnesses disappear, memories fade, documents get destroyed)
 - Avoid duplication of effort

- **Defendants may want a Global Resolution**
 - Often requested by defendant

Slide 19

19

Rule One for the Government: Stay In Your Lane

- Civil processes cannot be used as a pretext to obtain information for a criminal investigation. If a civil method is used to collect evidence, there should be a legitimate need for it in the civil case.

- Criminal processes cannot be used as a pretext to obtain information for a civil investigation. If a criminal method is used to collect evidence, there should be a legitimate need for it in the criminal case.

- This does not mean you that information cannot be shared or that investigations cannot be coordinated. Most often what is needed or useful in a criminal case is also going to be helpful in a civil case and vice versa.

Slide 20

20

Rule Two for the Government: No Affirmative Misrepresentations or Deceit

- Agents should not mislead witness into thinking the investigation is purely civil if there's a criminal investigation underway.
 - *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977)
- There is no general duty to warn that an investigation may result in criminal charges, absent affirmative misrepresentation.
- Even statements that are literally true may be misleading or deceptive in context.

Slide 21

21

Limits to what can be shared

- ***Criminal cannot share with civil:***
 - Tax information obtained from IRS
 - Wire taps under Title III
 - **Grand jury information**
 - Cannot share "matters occurring before the grand jury" with civil attorneys without a court order showing "particularized need . . . preliminarily to or in connection with a judicial proceeding."

Slide 22

22

“Matters Occurring Before The Grand Jury” under Fed.R.Crim.P. 6(e)

- Core meaning relates to what goes on in the grand jury room, including:
 - Identity of the target(s)
 - Identity of witnesses before the grand jury
 - Strategy or direction of the grand jury investigation
 - Nature of the evidence produced to the grand jury
 - Substance of testimony
 - What grand jury subpoenas have been issued
 - Deliberations, questions and views expressed by grand jury members
 - Draft indictment

See Fund for Constitutional Gov't v. Nat'l Archives & Records Serv.,
656 F.2d 856 (D.C.Cir. 1981)

Slide 23

23

What Can Be Shared?

- Materials produced in response to Inspector General Subpoenas
- Evidence obtained by search warrants
 - Must be conceived and initiated for the criminal case
 - Scope of warrant appropriate for criminal case
 - Timing relative to grand jury may be an issue
 - Warrant affidavit may not be shared with civil if sealed or contains matters occurring before the grand jury
- Evidence obtained through **consensual monitoring**
- Documents obtained **voluntarily** from defendants and witnesses
- Voluntary witness interviews (grand jury material must be redacted; and only if grand jury material not used)
- CID evidence
- Products of civil investigation or discovery

Slide 24

24

What Can Be Shared?

- **Civil Investigative Demands (CIDs)**

31 U.S.C. §3733

- A civil tool provided for civil False Claims Act investigations.
- Can get documents, testimony & interrogatory answers.
- Evidence can be shared with prosecutors.
31 U.S.C. §3733 (i)(3)

Slide 25

25

Grand Jury Issues

- The government will likely avoid the grand jury as long as it makes sense
- Grand jury advantages –
 - Secrecy: prevents subornation of perjury and witness tampering; encourages full disclosure by witnesses; protects innocent individuals under investigation
 - Relatively easy
 - Meets regularly
 - Process is very familiar to prosecutors
- Sanctions for unauthorized disclosures of grand jury material include contempt, equitable relief/injunction, professional reprimand, court order for investigation by DOJ Office of Professional Responsibility
- What about agents who have seen 6(e) material . . . can they still work on civil case?
- Can the same AUSA work on both the criminal and civil cases?

Slide 26

26

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Slide 27

27

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.

Slide 28

28

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.

Slide 29

29

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.

Slide 30

30

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.

Slide 31

31

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.

Slide 32

32

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.

Slide 33

33

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Slide 34

34

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.

Slide 35

35

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.

Slide 36

36

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

Slide 37

37

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.

Slide 38

38

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Slide 39

39

Practical Proactive Compliance Strategies

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

Slide 40

40

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.

Slide 41

41

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.”

Slide 42

42

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.

Slide 43

43

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.

Slide 44

44

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.

Slide 45

45

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4. Compliance Best Practices
- 5. Questions**

Slide 46

46

Questions

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Slide 47