

How to Not Panic When the Government Knocks on Your Door

2011 Health Care Regulatory and Compliance Update
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News

- **Justice Department charges 94 people with health-care fraud**

Washington Post, July 16, 2010

[Excerpts] The Justice Department . . . announc[ed] charges against 94 people in what authorities called the largest health-care fraud sting in U.S. history. . . accused of bilking the Medicare system out of more than \$251 million through false claims for services. . .

- **Dozens arrested in health care fraud schemes**

CNN, October 13, 2010

[Excerpts] The Justice Department indicted 73 individuals in New York and four other states for allegedly defrauding Medicare and other health care programs of an estimated \$163 million.

- **111 charged in Medicare scams**

The Associated Press, February 17, 2011

[Excerpt.] More than 700 law enforcement agents fanned out to arrest dozens of people accused of illegally billing Medicare more than \$225 million. The arrests are the latest in a string of major busts in the past two years as authorities have struggled to pare the fraud that's believed to cost the government between \$60 billion and \$90 billion each year.

Health Care Fraud Enforcement Top DOJ Priority

- 11/22/10, DOJ AAG Tony West
 - \$3 billion in FCA *civil* settlements/judgments in FY10, of which \$2.5 billion was in Health Care
 - Largest ever annual health care recovery
 - One of few areas of growth for FY11
- Trend: Closer coordination with Health and Human Services
 - Greater focus on criminal task forces

Health Care Fraud and Abuse Control (HCFAC)

- Expand Medicare Fraud Strike Force operations from 7 to 20 locations across nation
 - Operate more like traditional organized crime task forces
- **HEAT** (Health care fraud prevention and Enforcement Action Team)
 - A multi-agency team of federal, state and local investigators designed to combat Medicare fraud through the use of Medicare data analysis techniques
- Goal: \$2.7 billion in savings over next 5 years

PPACA Anti-Fraud Provisions

- **Anti-Kickback Statute**
 - Codifies lower scienter
 - Violation constitutes “false claim” under FCA
- **False Claims Act**
 - Narrows definition of “public disclosure”
- **Overpayments**
 - Providers must report and return any overpayment within 60 days
- **Increase provider exposure to administrative, civil and criminal liability**

Responding to Subpoenas

- Documents are not protected by the Fifth Amendment, but other considerations may apply
 - Attorney-client and attorney work product
 - Internal Investigation
 - Doctor-patient privilege
 - Limits on unreasonable or overly burdensome requests
- Act of Production protection: at times there is a Fifth Amendment privilege against producing incriminating documents

Bad Things Can Happen

- Arthur Andersen
 - Shredding audit documents in anticipation of SEC subpoena
- Frank Quatrone
 - Deleting emails in anticipation of grand jury subpoena
- Lauren Stevens
 - GlaxoSmithKline In-House Counsel
 - November 2010 Indictment District of Massachusetts
 - Stevens was charged with one count of obstructing an official proceeding, one count of concealing and falsifying documents to influence a federal agency, and five counts of making false statements to the FDA.

Execution of a Search Warrant

- Always be polite and cooperative, but never consent to expanded search or consent to voluntary interviews
 - Inform agents that they are not to speak to anyone
- Gain as much information of possible
 - Ask the purpose of the visit
 - Names and titles of all agents
 - Copy of search warrant (mandatory) and affidavit (discretionary)
 - Monitor all items that are removed

We Are All Boy Scouts

- **“BE PREPARED”**— Boy Scout motto
- Designate a single contact person to meet with all government visitors
 - In-house attorney, head of security, human resources
 - Have at least one back-up point person
- Ensures company speaks with one voice and permits company to control documents

Never Talk to Strangers

- **EDUCATE ALL EMPLOYEES**
 - Employees have the right to talk or not talk to investigators
 - Employees have the right to talk with counsel before deciding whether to consent to a voluntary interview
 - Employees have the right to have counsel present during any interviews
- Remember: it is the employee's decision, not the company's decision whether to consent to be interviewed

Be Aware of the End Run

- Communication with Represented Party
 - *Who is a represented party?*
- It Depends
 - In California, “an officer, director, or managing agent” is always covered. Rule 2-100(B)(1)
 - Former employees are never covered
 - Low level employees are almost never covered
 - Mid-level managers is the gray area

The Best Defense

- A robust, real Corporate Compliance Program can solve many problems
- Mandatory ethics training
- Commitment from the top
- Effective response to problems

Contact

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