

SPECIAL REPORT



**Whyte
Hirschboeck
Dudek S.C.**

Presented by the Health Care and Corporate Compliance & White Collar Defense Teams of Whyte Hirschboeck Dudek S.C.

Client Success.



Responding to Health Care Enforcers at the Door

*by Patrick S. Coffey, Team Leader,
Corporate Compliance & White
Collar Defense*

It is expected that 2013 will bring further enforcement efforts touching on a wide span of health care organizations and business practices. These efforts will range from criminal investigations (including the use of search warrants) to civil inquiries and accompanying whistleblower and *qui tam* litigation under state and federal False Claims Acts. Subjects of investigation will include hospital and physician arrangements as well as other arrangements being driven by health reform, overpayments, billing and coding (including use of modifiers), Stark self-referrals and kickbacks.

Health care organizations should consider establishing effective and proper procedures that will assist them in responding to health care fraud investigation contacts. These guidelines are intended to outline the issues health care organizations need to address in the event government investigators, *e.g.*, FBI, OIG agents or state investigators, arrive at a facility seeking documents or interviews. The manner in which health care organizations handle these initial contacts largely sets the tone and stage for the entire course of an enforcement probe.

When contacted by government representatives in connection with an investigation or enforcement proceeding, personnel should be polite and cooperative and consider the following better practices:

Initial Contact With Investigators

- Request formal identification, *e.g.*, a badge and/or picture identification card. Record the agent's name and contact information.
- Immediately notify the Corporate Compliance Officer (CCO) or other corporate designee, of the agent's presence.
- Ask the agent to wait for the CCO or other corporate designee to arrive.
- The CCO or designee should show the agent into a private room and introduce himself/herself as the responsible contact for investigation related requests and issues.
- The agent should be accompanied at all times while on premises.

Coordinated Handling of Investigation Requests

- Senior management and counsel should be immediately advised of the investigation or inquiry.
- The CCO or designee should receive and handle all requests made by the investigating agent.
- The CCO or designated official should coordinate with counsel before providing any response or records to government agents.
- The CCO and counsel should establish a team to assemble responsive materials and perform an internal assessment of the issues under investigation.
- Based on the subpoena or any other information provided by the agents, the organizational areas at issue in the investigation should be identified and contacted so that relevant records are protected from loss or destruction.

Questioning by Agents

- Agents may request to interview employees at work. These requests may come with no advance notice.
- Employees are not obligated to talk to agents and the organization has the right to restrict interviews to mutually convenient times and places.
- If employees are requested to submit to questioning by an agent, they have the right to speak with an attorney before agreeing to an interview and to have the attorney present at the interview.
- The organization may elect to provide an attorney for employees prior to talking to the agent, or at other times during the investigation.
- All personnel dealing with government investigators should be cooperative and truthful regardless of whether they are under oath.

Health Care Law

Bruce G. Arnold
Michael J. Cronin, Ph.D.
Donald A. Daugherty
Erik K. Eisenmann
Daniel W. Gentges
Thomas P. Godar
Frank A. Gumina
David C. Hertel
Jerard J. Jensen
Erin M. Keesecker
Thomas E. Klancnik
Lisa R. Lange
Richard J. Lewandowski
Douglas A. Pessefall
Arthur T. Phillips
Joseph A. Pickart
Dennis J. Purtell
Michael S. Rogowski
Thomas J. Springer
Steven F. Stanaszak
Michael W. Taibleson
Lynda R. Templen
John B. Tuffnell
Barbara J. Zabawa

Paralegal

Teresa A. Noeske

Corporate Compliance & White Collar Defense

Charles H. Bohl
Jennifer Drury Buzdecky
Patrick S. Coffey
Emily A. Constantine
Donald A. Daugherty
Benjamin W. Dyer
David C. Hertel
William E. Hughes
Jerard J. Jensen
Jennifer H. Jin
Andrew A. Jones
Richard J. Lewandowski
Jeffrey J. Liotta
James R. Lowe
Douglas A. Pessefall
Andrew J. Schlidt
Karen L. Tidwall
John B. Tuffnell
Thomas R. Vance
Barbara J. Zabawa

Consultant

John C. Healy

Paralegal

Cindi M. Wittlinger

Government Requests for Documents and Warrants

Subpoena

- Agents often serve subpoenas that require the production of documents relating to the issues that are the subject of the probe.
- There is no requirement that documents be produced immediately and typically it is possible to reach an agreed timetable for the production of responsive documents.
- No records should be provided to the agent without CCO approval and/or review by counsel.
- Separate copies and an index should be made to accurately record any information provided in response to a subpoena or civil investigative demand.
- Do not copy or produce documents subject to the attorney-client or other privileges.
- Counsel may be asked to assist in the review of documents to confirm responsiveness to the subpoena, and to determine whether privileges apply.
- Once on notice of a governmental investigation or inquiry, no documents or electronic data should be destroyed or deleted without clearance from the CCO and/or counsel and appropriate document hold notices should be issued.

Search Warrant

- When executing a search warrant, agents are entitled to immediately seize responsive documents.
- Agents will provide a copy of the search warrant as well as an inventory of all seized items.
- Agents are entitled to take original documents and other items as specified in the warrant.
- Request time to have the CCO, General Counsel or other designated official present during the search.

- If the agents will not wait, or if the appropriate officials cannot be located:
 - » Review the warrant to understand the scope of the search authority.
 - » Direct the agents to where records identified in the warrant are kept.
 - » Monitor and note if agents take documents that exceed the scope of the warrant.
 - » Inform the agents of any privileged documents and request that they be excluded from the search process.
 - » **Do not** try to prevent or in any way obstruct the removal of records.
 - » **Do not** interfere in any way with the agents' execution of the search warrant.
- Request copies of any original records being taken by the agents.
- As to computers and related data, the CCO or designees should request that the agents work with the organization to allow for access to information sufficient to continue business operations.

Patient Records

- Agents conducting an investigation are entitled to documents with no signed patient releases.

WHD's Health Care and Corporate Compliance & White Collar Defense teams have substantial experience representing clients in enforcement proceedings involving the DOJ, OIG and other federal agencies, as well as attorneys general and other state enforcement authorities.

For more information, please contact Patrick Coffey, leader of the Corporate Compliance & White Collar Defense Team at (312) 523-2080, (847) 736-0231 (cell), (414) 978-5538 or pcoffey@whdlaw.com, or your WHD attorney.



Whyte Hirschboeck Dudek S.C.

Client Success.

MILWAUKEE OFFICE

555 East Wells Street, Suite 1900
Milwaukee, WI 53202-3819
414.273.2100

MADISON OFFICE

33 East Main Street, Suite 300
P.O. Box 1379
Madison, WI 53701-1379
608.255.4440

CHICAGO OFFICE

161 North Clark Street, Suite 4700
Chicago, IL 60601-3206
312.523.2080

www.whdlaw.com