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When the U.S. knocks on your door

For anyone who continues to underestimate the impact of health-care fraud enforcement actions, a recent indictment clarified how real the consequences can be.

Three defendants are accused of committing \$1 billion worth of health-care fraud and are facing possible life imprisonment. The Justice Department, in a rare move, is seeking pretrial detention: That the incarceration should begin immediately before any proceedings have begun.

On July 21, the Justice Department leveled unprecedented charges against three Miami-area health-care providers. In a sprawling 34-page, 28-count indictment, alleging violations of 12 federal criminal statutes, the Justice Department alleged that Philip Esformes, Odette Barcha, Arnaldo Carmouze and others conspired to defraud Medicare of \$1 billion by having their nursing homes and assisted-living facilities fraudulently bill for services that were either "medically unnecessary" or that were tainted by illicit referral payments.

In addition to the potential for life imprisonment, the indictment seeks seizure and forfeiture of bank accounts, homes, cars and other "luxury" items.

Now is a good time for those in the long-term care industry to reflect on what organizational changes they can (and perhaps should) make to ensure that they never end up in the same position as these defendants. They may also want to heed the advice of attorneys who specialize in handling health-care fraud audits, compliance and enforcement investigations from inception, identification, investigation and even indictment.

In our work as prosecutors, we have learned that the government is now going after where



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the money is and the health-care industry certainly has its fair share. This recent indictment should give the industry pause to reflect on the federal government's new priorities and what it can do to insulate itself from potential civil and criminal penalties. Mishandling the initial inquiry can substantially impact what direction an investigation can take.

Below are some do's and don'ts to consider when dealing with the government-funded health-care system and a quick "how to" when a federal agent comes knocking at your door.

Don'ts

1. Don't commit fraud. This should go without saying, but so many are cutting corners or breaking the law, and you will be evaluated under the specter of their misconduct.

2. Don't talk without legal counsel present, even if you have nothing to hide (and especially if you might). A simple miscommunication can yield a misunderstanding that, once written up in an investigative report, is the government's reality. Simply say: "I am happy to assist. Please call my attorney to schedule a time for us to talk."

3. When you ignore No. 2, don't lie. Do not lie to the investigators in any way, shape or form. Doing

so can turn what may not be a problem into a serious problem. Lying to federal investigators during the course of an investigation is its own crime. Don't make a bad situation worse — it limits your options.

4. Don't turn over any documents. Coordinate with legal counsel first. When it comes to health care, the government already has access to everything it needs before it knocks on your door. Whatever you do or don't produce will be used against you. This is a good area in which to work with trained professionals.

5. Don't panic. Whatever circumstances you are facing, there are ways to clarify any confusion or minimize the consequences of actual misconduct. Take the necessary steps to protect your business and yourself.

Do's

1. Know whom you are going to call. Know before the government knocks on the door. Few respond well in a crisis, and it is essential to have access to a qualified lawyer who knows how to handle health-care fraud investigations.

2. Have a compliance program. Not only have one in place, but actually comply with it! The government will use any failure to comply with your own policy against you, and when none of

your employees can cite to its requirements, it is hard to describe it as being robust.

3. Tell your employees what to do. You practice for fires, but hope not to need the skill. Tell your employees what to do if they are approached by government investigators. They should know you will coordinate arranging legal counsel for them at no expense. Investigators will find the last person you want anyone talking to and interview that person first.

4. Understand that you will have to communicate. You are going to have to communicate, and often cooperate, with government investigators. Ignoring the problem will only make it worse. Communicate first with legal counsel and let them navigate you through what lies ahead.

5. Be nice to employees. Understand that the most likely source of an allegation or investigation is a disgruntled former employee or a quality employee who feels his concerns are not being taken seriously. How you treat your employees matters considerably.

It may not be the end of days, but the government's focus on health-care fraud has reached long-term care. Having gone after home health and hospice, the government has shifted its attention to nursing homes.

In the event that you are contacted by law enforcement, you may be a witness or a target, or that may yet to be determined.

How you handle it has consequences. Consider taking the advice you would give a resident's family about caring for a loved one themselves. Let trained professionals give you the assistance you need to; do not try to do this on your own.

Be proactive and seek legal counsel before the government is at your door.

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