

## Medicare Fraud Units Will Scrutinize Health Care Cos.

By Hilary Russ

Law360, New York (November 12, 2010) -- With the federal government's plan to nearly triple the number of its Medicare fraud strike force units around the U.S., attorneys who represent health care companies are bracing for more aggressive prosecutions aimed not only at unscrupulous doctors and fraudsters but at legitimate businesses.

Add to that an expected burst of whistleblower claims and an uptick in civil enforcement and other health care fraud prosecution overall, and you've got a potent brew that attorneys say will increase the number of health care providers, medical device manufacturers and pharmaceutical companies facing government scrutiny.

"Anyone today in the healthcare space is going to be under a larger microscope as a result of increased government attention to the industry," said John "Jay" Darden, a former assistant chief of the U.S. Department of Justice's Fraud Section who became a partner at Patton Boggs LLP in May.

"You're going to see the government taking a more proactive enforcement posture that goes beyond blatantly fraudulent enterprises and includes looking for potential health care fraud and abuse in otherwise legitimate companies," said Darden, who helped oversee the early development of the Justice Department's strike force model, which is slated to move into as many as 13 new cities next year.

The Medicare strike force units — part of a larger program called Health Care Fraud Prevention and Enforcement Action Team to combat all forms of health care fraud — are run jointly by the Justice Department and the U.S. Department of Health and Human Services, and are known for going after individuals or crime rings that have allegedly defrauded government health insurance programs through an array of schemes.

In mid-October, the Justice Department charged 73 people — mostly members and associates of an Armenian-American organized crime ring called Mirzoyan-Terdjanian — in an alleged \$163 million nationwide scam, the largest Medicare fraud scheme ever perpetrated by a single group.

Another October development that got less attention in the general press may have caught attorneys' eyes, when for the first time a HEAT strike force indicted a corporate entity on Medicare fraud charges.

In that case, federal prosecutors in Miami secured indictments against four individuals and against American Therapeutic Corp. and Medlink Professional Management Group Inc. for their roles in an alleged scheme to fraudulently bill Medicare \$200 million for nonexistent or unnecessary mental health services.

Lanny Breuer, assistant attorney general of the Justice Department's criminal section, told Law360 in early November that the strike force model was "extremely successful" and said the department would keep expanding the units.

For fiscal year 2011, the Justice Department requested a \$60 million increase to its discretionary resources for health care fraud and abuse enforcement, about \$46 million of which would go to expand the current number of strike forces from seven to 20 cities.

Overall, the planned budget increases mean that the number of federal health care fraud and abuse prosecutors at the DOJ's criminal Fraud Section will nearly triple, with other high-profile U.S. attorney's offices in Boston and Philadelphia getting extra personnel as well, according to Darden.

Prosecutors might also have more help than ever from whistleblowers after changes in the law this year broadened the scope of actions protected under whistleblower provisions of the False Claims Act and extended the period of time for which employees are protected from retaliation if they come forward and report alleged wrongdoing to the government.

Whistleblowers are also likely to be emboldened by the \$96 million award won by Cheryl D. Eckard in October for having blown the whistle on her former employer, GlaxoSmithKline PLC, several years ago over alleged problems with mixed-up medicines and defective drugs in its now-shuttered Puerto Rico factory.

"That kind of payment triggers the filing of whistleblower suits," said Michael K. Loucks, partner at Skadden Arps Slate Meagher & Flom LLP. Loucks is a former acting U.S. Attorney for the District of Massachusetts, where he led several major health care fraud prosecutions.

He also said that medical device makers and drug companies in particular will likely come under increasing scrutiny by the government for any potential manufacturing problems.

Yet while corporations have always been a broad target for health care fraud probes, the ramp up of HEAT strike forces — which began in Miami in 2007 by analyzing Medicare data to identify people whose abundant or odd billing practices made them outliers — has added another layer of enforcement.

Attorneys are counseling companies in the health care field to take measures that put them in a better position to show the government they did everything possible to keep business above board.

"Take a look at who your independent contractors are — who they are, where they come from, what they're practices have been," said Lisa M. Noller, a partner at Foley & Lardner LLP and a former assistant U.S. attorney in Chicago.

"If if those folks are not clean, then they're the ones who are going to be targeted," she said, noting that prosecutors may start trying to flip the small fry fraudsters to try to get at potential misbehavior further up the chain.

"The entire range of penalties is on the table. You could be criminally liable if you recruited somebody to join your practice if, for example, you were paying them on the number of patient referrals," Noller said. "If you know on the front end that the person or entity you're contracting with has the potential to do something that will grow your practice... you've got to be thinking [about] anti-kickback statutes."

Attorneys can tell clients that if they think there's a problem — especially if they've received more money than they were actually owed — they should report it and tender the overpayment, according to John F. Libby, a partner at Manatt Phelps & Phillips LLP.

"It's a pretty effective way of blunting any criminal exposure, and it certainly makes any negotiation over civil settlement a lot easier," Libby said.

Above all, companies must have a comprehensive compliance program in place, according to Libby and other attorneys.

“Sometimes a client will show up after they've already become subject to scrutiny by the government, whether actual criminal or civil charges or a search warrant,” Libby said.

Implementing a compliance program at that point “is sort of like repairing an airplane in flight,” he said.

--Additional reporting by Ian Thoms