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Professional Perspective

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Your company just received a letter from your state attorney general's office enclosing a civil investigative demand or other administrative subpoena for company documents and/or testimony. These requests are extremely broad, and you can already tell they will take you significant time and effort to answer them. What do you do? Naturally, first you should call outside counsel for advice and assistance. But, it may be helpful to have some background information about state-issued CIDs before making that call.

Like the U.S. Attorney General, state attorney general offices have broad power to receive, investigate, and prosecute complaints concerning businesses and, in particular, health-care providers. Attorneys general serve as chief legal counsel for their states—they often, among other things, issue opinions about the law, act as public advocates, propose legislation, and represent the state in litigation. In most states, the attorney general is popularly elected, but in some states they are appointed.

The offices for most attorneys general are organized into various divisions that focus on particular issues affecting their state. Any division can accept and investigate citizen or other complaints, and, generally speaking, each division has inherent authority to issue administrative subpoenas or civil investigative demands in furtherance of an investigation. Many states have a consumer protection division that is charged with enforcing the state's consumer protection laws and protecting citizens from unfair and deceptive trade practices.

Increasingly, state attorneys general are using Medicaid Fraud Control Units to investigate and prosecute alleged Medicaid and Medicare fraud, misappropriation, abuse and neglect. See 42 C.F.R. § 455.1; 42 C.F.R. § 1007.3; see also U.S. Department of Health and Human Services, Office of Inspector General, Medicaid Fraud Control Units. Although these units are funded by both state and federal governments, they operate under the oversight of the Inspector General of the Health and Human Services, and are comprised of attorney-led teams of investigators/auditors who adopt a multi-disciplinary approach. In 2017 and 2018, MFCUs across the U.S. handled, on average, 19,000 separate investigations each year.

CID Significance

When a state attorney general's office issues a civil investigative demand or subpoena to an individual or a company, it likely means one of two things. The first possibility is that the state attorney general is investigating potential fraud or a consumer complaint directly involving a company and/or its employees (meaning that the company and/or its employees is or are the "subject(s)" or "target(s)" of the investigation). The second possibility is that the recipient is believed to have information that is relevant to an open investigation (meaning the company or individual is merely a "witness"). Obviously, the second scenario is far more preferable. However, as outlined below, it is critical to determine (if possible) the category in which the company falls. As outlined below, challenging a state-issued subpoena is extremely difficult, so gathering key information about the company's role in the investigation will help the company and its counsel formulate a strategy and determine the most cost effective and efficient approach for responding to the subpoena.

In most states, the attorney general has plenary authority to issue and enforce requests for information in various forms, so long as it is germane to an investigation or some other legitimate purpose. As one court noted, a state has a "profound interest in fighting corruption in the Medicaid industry" and enforcing its laws, which gives it broad authority to issue demands for information. See, e.g., *Congregation B'Nai Jonah v. Kuriansky*, 172 A.D.2d 35, 39 (New York S Ct 1991).

A recipient may be held in contempt for failing to respond to a valid subpoena and compelled to provide the testimony and information requested. See, e.g., Tenn. Code Ann. § 8-6-404. Generally, to challenge a state administrative subpoena, the challenger must seek a protective order in state court and demonstrate that the issuing authority failed to take reasonable steps to avoid imposing an undue burden or expense and that the subpoena is unreasonable and oppressive. See e.g., Tenn. R. Civ. P. 45.07. This is not a simple standard to meet, and it can be more difficult to challenge a state subpoena than it is to challenge a civil investigative demand issued by the federal government.

Challenging a CID

In the context of federal investigations, CIDs are widely used and rarely contested in federal court because the False Claims Act grants the U.S. Attorney General and his/her designees broad authority and a wide berth when it comes to gathering evidence during an investigation. 31 U.S.C. § 3733. As a federal district court in California recently held, a civil investigative demand issued by the federal government must be "plainly incompetent or irrelevant to any lawful purpose of the agency" before it may be successfully quashed. *U.S. v. Picetti*, No. 2:19-cv-00049, Apr. 29, 2019.

There are limits on the application and reach of a federal CID, however. The most oft-cited limitation is found in the plain language of the statute, which only authorizes the U.S. Attorney General or a designee to issue a CID "before commencing a civil proceeding under § 3720(a) or other false claims law." Relying on this provision, a Maryland hospital successfully petitioned a federal court to quash a CID that sought largely the same information that was the subject of a previous FCA action that was dismissed. *United States v. Kernan*, No. RDB-11-2961, Nov. 20, 2012.

In contrast to the above-referenced federal statute, state CID statutes vary in substance and, as such, may not be as restrictive as their federal counterpart. In Tennessee, for example, an intermediate appellate court recently held that the state retained the right to issue and seek the enforcement of CIDs issued to several oil companies during an investigation into alleged false claims and violations of the Tennessee Petroleum Underground Storage Tank Act after the Tennessee Attorney General voluntarily dismissed a state-based false claims act case filed against the same companies. *State ex rel. Slatery v. Chevron Corp., et al.*, No. M2018-00798-COA-R3-CV, Dec. 18, 2018.

This ruling was premised on the plain language of the applicable CID statute, which authorizes Tennessee's Attorney General to issue a CID "where the state is a party litigant, or there is reasonable cause to indicate it will be a party litigant." Tenn. Code Ann. § 8-6-401. The fact that the underlying litigation was dismissed did not alter the appellate court's analysis, as there was "reasonable cause" to indicate the state could be a party to litigation in the future. *Chevron Corp.*, No. M2018-00798-COA-R3-CV, Dec. 18, 2018.

Mounting a successful challenge to a subpoena related to a Medicaid/Medicare investigation can be even more onerous for health care providers because their provider agreement requires the provider to produce any and all medical records for Medicaid/Medicaid patients upon request. See, e.g., *State v. Liu*, No. 1709017188, Jan. 2, 2018, (Del. Sup. Ct.). Not surprisingly, courts have held that this agreement makes any request for medical records reasonable per se. ("The Court also finds that the reasonableness of the subpoena is significantly bolstered by [provider's] agreement pursuant to the Delaware Medical Assistance Program to produce upon request all medical records involving Medicaid billed patients.").

Responding to a CID

Because invalidating a state civil investigative demand is next to impossible, and ignoring the subpoena is not advisable either, two viable options remain: respond to the subpoena as written, or contact the issuing agency and attempt to narrow the scope of the subpoena. Regardless of the approach, retaining experienced counsel in the early stages of a state investigation can conserve time and resources and lead to far better outcomes than responding to a CID unassisted, particularly because a CID can and often does lead to litigation.

For most, the second option is more appealing, as most subpoenas are drafted broadly and seek a large volume of company records—including electronically stored information—that is often cumbersome and expensive to collect and produce. For this reason, narrowing the scope of the subpoena is critical. Before counsel contacts the issuing agency or division to discuss the scope of the subpoena, it is helpful to understand a few basic ground rules. First, most privacy laws (e.g., the Health Insurance Portability and Accountability Act), as well as statutory and common law privileges that limit or shield a company's obligation to disclose certain information cannot be relied upon in the context of a state investigation. See, e.g., *People v. Ekong*, 582 N.E.2d 233, 234 (Ill. Ct. App. 1991) (holding that the doctor-patient privilege does not apply to state investigations related to health care fraud); 45 C.F.R. § 164.512(d), (f) (excepting disclosures for the purpose of health oversight activities and law enforcement purposes from HIPAA).

Thus, most form objections that are often raised in civil litigation during discovery – apart from the work-product doctrine and attorney-client privilege – cannot be employed when responding to a subpoena. Second, a state may not be obligated to maintain the confidentiality of information and/or documents produced in response to an administrative subpoena. To avoid the public disclosure of this information (through an open records act request or otherwise), the need to protect sensitive information should be discussed with the state attorney general so that (hopefully) some form of confidentiality agreement can be reached prior to the production of any such materials.

If the attorney general is unwilling to entertain a request for confidentiality, that may signal that the CID was issued in response to a whistleblower complaint, and that documents produced in response to the CID will likely be shared with the whistleblower(s) who filed the complaint.

Discussions regarding confidentiality and the scope of the subpoena often go hand in hand. When a subpoena is issued, an attorney general's office is often armed with a limited understanding of the underlying facts and has only a fraction of the information within a company's custody or control. The degree to which an investigative agency is willing to share information about the focus or aim of an underlying investigation varies widely from state to state and may hinge, in large part, on the role of the subpoena's recipient in the investigation (e.g., witness, target, subject).

Nevertheless, the more information a company can gather about the investigation, the better equipped it will be to help the government limit the focus of its inquiry to the specific information, individuals, and topics that are the most relevant to the investigation. Narrowing the requests to a particular time period, a particular geographic area, and/or particular data custodians can also save a company significant time and resources.

Conclusion

Regardless of the relative success (or failure) of a company's pre-production negotiations with the state attorney general, cultivating a good relationship with the attorney general's office early on is vital for outside counsel. Companies who demonstrate a willingness to cooperate with the investigation and to determine, for itself, whether any legal violations occurred almost always fare better during the investigation and ensuing litigation (if applicable) than companies who elect to "stone wall" or try to play hardball when responding to a CID.

Given that there is room to negotiate and narrow the scope of most CIDs, outside counsel's primary job is to gather, through his/her own investigation, as much information as possible about the subject matter of the CID and the records requested (along with the relative ease or difficulty with which such records can be collected). This informed approach should lead to more fruitful pre-production discussions with the state, which, in turn, will allow the company to respond to the CID in the most cost-effective and efficient manner possible.