

HEALTH CARE PROVIDER ALERT

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Government Crackdown on Health Care Fraud and Opioid Prescription Abuse

By David Hochman, Partner

Recent actions by the U.S. Department of Justice (DOJ) evidence that prosecution of health care fraud and crackdowns on opioid abuse¹ remain high on the Government's agenda.

On July 13, 2017, the Government announced that 412 people, including dozens of physicians, had been charged with bilking Medicare and Medicaid of \$1.3 billion. While southern Florida topped the list with 77 people, 15 individuals in the Northern District of Illinois were charged with schemes that allegedly involved illegally billing the Government for \$13 million. According to an article published in the on-line edition of The New York Times on July 13, nearly one-third of those charged were accused of opioid-related crimes. These providers, which included about 50 doctors, billed the Government for drugs that were never purchased and for false rehab services and tests, and, in addition, wrote prescriptions in exchange for cash. Acting FBI Director Andrew McCabe commented that some of these doctors wrote more prescriptions for controlled substances in a single month than entire hospitals in the same time period.

The following week, the FBI announced the seizure of Alpha Bay, which reportedly was the largest darknet marketplace for illegal drugs, and the arrest of the site's creator and administrator. Sales on AlphaBay have been linked to multiple overdose death in the United States. AlphaBay had operated for more than two years and had transactions exceeding \$1 billion. It was a major source for heroin and fentanyl, and at the time of its takedown, had more than 250,000 listings for illegal drugs and toxic chemicals.

In an effort to ramp up future enforcement, the U.S. attorney for the Northern District of Illinois announced the creation of a special unit that will be dedicated to the prosecution of health care fraud cases. Five assistant U.S. attorneys have been assigned to this unit. Similar units have previously been established in other U.S. Attorney's offices, and the DOJ headquarters has a Medicare Fraud Strike Force unit devoted to prosecuting health care crimes.

In August, in a speech before the Columbus, Ohio Police Academy, U.S. Attorney General Jeff Sessions announced the formation of the Opioid Fraud and Detection Unit. Under this pilot program, the DOJ will fund 12 Assistant U.S. Attorneys for a three-year term to investigate and prosecute health care fraud related to prescription opioids, including pill mill schemes and pharmacies that divert or dispense prescription opioids for illegal purposes. These prosecutors will be based in several states, including Southern Ohio, where the Government believes enforcement will be most effective in curbing prescription opioid abuse.

In his comments, Mr. Sessions said, "I have created this unit to focus specifically on opioid-related health care fraud using data to identify and prosecute individuals that are contributing to this opioid epidemic. This sort of data analytics team can tell us important information about prescription opioids – like which physicians are writing opioid prescriptions at a rate that far exceeds their peers; how many of a doctor's patients died within 60 days of an opioid prescription; the average age of the patients receiving these prescriptions, pharmacies that are dispensing disproportionately large amounts of opioids and regional hot spots for opioid issues."

Aside from concerns raised by the Government's increased emphasis on health care fraud that involves opioid abuse, physicians are increasingly being put between a rock and a hard place when it comes to prescribing opioids. While prescription opioids are important in treating pain, the recent increase in opioid-related deaths

¹ The Center for Disease Control and Prevention reported that overdose deaths from prescription opioids have quadrupled from 1999 to 2015. Based on preliminary data, nearly 60,000 Americans died from a drug overdose in 2016.

has caused renewed scrutiny of prescribing practices. It is no longer unusual for a physician to be pressured for more opioids by patients who may be addicted to opioids. Additionally, physicians are increasingly being held accountable when patients die from an overdose of opioids they prescribed, which is clear from the fact that the number of physicians against whom the Drug Enforcement Administration took action increased by more than five times between 2011 and 2016. A Texas physician was recently indicted in connection with the overdose deaths of at least seven people over a four-year period. All died within a month of filling the prescriptions written by this physician. The indictment charged the physician with issuing prescriptions that had no legitimate medical purpose and defrauding Medicare by submitting false claims.

What can a physician do to protect himself? While there is no course of action that fits every situation, there are some basic steps that every physician should consider:

- Be alert to whether patients exhibit drug-seeking behavior.
- Do not prescribe, dispense or administer controlled substances outside the scope of your professional practice.
- Follow CDC guidelines when prescribing medication for chronic pain (found at <https://www.cdc.gov/mmwr/volumes/65/rr/rr6501e1.htm>). The CDC recommends that providers follow these guidelines when prescribing medication for chronic pain:
 - Prescribe opioids only when benefits outweigh the risks
 - Start with the lowest effective dose of immediate-release opioids. For acute pain, prescribe only the number of days that the pain is expected to be severe enough to require opioids
 - Reassess benefits and risks when considering an increase in dosage
 - Use state-based prescription drug monitoring programs to help identify patients at risk of addiction or overdose, e.g., the Illinois Prescription Monitoring Program (<https://www.ilpmp.org>).
- Communicate with patients the risks of using opioids for chronic pain and, if opioids will not be part of the patient's treatment plan, why the patient is not a candidate for opioid therapy.
- Establish policies and procedures on how the practice will deal with a patient who becomes upset, abusive or confrontational.

While the prescription and use of opioids may be beneficial and medically indicated, physicians should carefully consider the need for opioid prescriptions and closely monitor all patients. If you have any questions regarding opioid prescribing and enforcement actions, we encourage you to contact one of the listed Roetzel attorneys.

Manager
Ericka L. Adler
eadler@ralaw.com

David Hochman
dhochman@ralaw.com

Mazen Asbahi
masbahi@ralaw.com

Christina M. Kuta
ckuta@ralaw.com

Avery Delott
adelott@ralaw.com