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## **ADMINISTRATIVE SUBPOENAS BLUR THE LINE BETWEEN CIVIL AND CRIMINAL ENFORCEMENT**

by  
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As regulators and law enforcement investigators have increased their scrutiny of health care providers and pharmaceutical companies over the last several years, their primary investigative tool has been the administrative subpoena, which provides access to documents and testimony without going through the grand jury process or getting court authorization. Traditionally limited to civil enforcement actions by regulatory agencies like the Department of Health and Human Services (HHS) or the Securities and Exchange Commission (SEC), administrative subpoenas are increasingly being relied upon in criminal grand jury investigations due to the ease with which they can be obtained, the lower standard of relevance required to obtain the documents, and the likelihood that they will not be successfully challenged. The use of the administrative subpoena has blurred the line between civil and criminal enforcement, raising substantial policy concerns and practical implications for corporate counsel concerning when and how to challenge an investigation.

Administrative subpoenas were most commonly issued by the Offices of the Inspector General (OIG) of the various regulatory agencies for civil enforcement actions. However, beginning in 1996, Congress granted the FBI the authority to issue its own administrative subpoenas in health care fraud cases under the Health Insurance Portability and Accountability Act (HIPAA). 18 U.S.C. § 3486. Most recently, the Department of Justice (DOJ) has tried to expand that authority to terrorism cases in the proposed amendments to the USA Patriot Act, arguing that administrative subpoenas are more effective than grand jury subpoenas or warrants because they can be issued quickly and can be shared among investigators without implicating the stringent grand jury secrecy requirements.

This sharing of information among investigators was the basis of a recent challenge in the Eastern District of Pennsylvania in June 2005 that highlighted the dilemma confronting corporate counsel in responding to administrative subpoenas. In that case, according to publicly disclosed records, Medco Health Solutions, Inc. had received an administrative subpoena from the HHS OIG concerning allegations by a whistleblower of alleged kickbacks to pharmaceutical companies for favoring certain medications over others. At the same time, the United States Attorney's Office was conducting a fraud investigation of the company.

In responding to the administrative subpoena, Medco lawyers sought to preclude the OIG from sharing the information obtained with the DOJ investigators. In particular, Medco did not want to turn over evidence in the civil case that would be used against them in the fraud case. On June 14, 2005, the judge entered a consent order suspending enforcement of the subpoena so that the parties could resolve the dispute out of court.

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The Medco case was significant in that the company challenged the subpoena at all. In an era when the government rewards cooperation by companies under scrutiny above everything else, the decision to challenge the breadth of a subpoena or the sharing of information carries great risks for a company. First, challenges to administrative subpoenas are rarely successful. Agency investigators are permitted to issue subpoenas for documents, or in some cases even testimony, when seeking information “reasonably relevant” to an ongoing investigation. *United States v. Morton Salt Co.*, 338 U.S. 632, 652-53 (1950). Relevance is a much lower standard than the probable cause required for a search warrant, and the subpoena will be enforced as long as it is not overly broad or unduly burdensome.

Second, as was reflected in recent deferred prosecution agreements, prosecutors credit complete cooperation, timely disclosure, and selective waivers of the attorney-client privilege. The emphasis on cooperation and disclosure, even at the early stages of an investigation, means that companies choosing to fight the administrative subpoena face a greater risk of indictment. Lawyers have to decide whether the company can afford to fight, both financially and in the public arena, given the scope of the investigation, the cost of having to defend in both civil and criminal proceedings, and the reality that ultimately, both civil and criminal investigations will likely result in a large financial settlement.

For counsel who choose to fight the subpoena, however, significant policy and practical arguments should be made. The increased use of administrative subpoenas in criminal investigation raises the public policy concern that civil enforcement tools are being used as an end-run around the heightened standards for criminal matters. In particular, counsel should ensure that the administrative subpoena is not being used to obtain information for which a judicially-authorized search warrant would normally be required under the Fourth Amendment.

In one recent case in Maine, a chiropractor being investigated by the FBI for health care fraud successfully challenged and narrowed the scope of a subpoena in which agents sought all business records and computer equipment. *In the Matter of Two Administrative Subpoenas Duces Tecum Served Upon Steven P. Amato*, 2005 WL 1429743 (D. Me. June 17, 2005). The court ruled that while the business records were covered by the subpoena, the seizure of the computer equipment violated the Fourth Amendment’s reasonableness requirement, and the equipment could only have been obtained through the use of a search warrant.

Additionally, the use of administrative subpoenas may also implicate the Fifth Amendment right against self-incrimination. Under the Fifth Amendment, in a civil enforcement proceeding, an individual may withhold information if the disclosure could possibly be used in a later criminal prosecution. While corporations cannot invoke the Fifth Amendment to prevent the disclosure of records requested by an administrative subpoena, the individuals within the company providing the documents may be able to argue that the act of producing the documents may incriminate them individually, and thus withhold compliance with the subpoena.

As a practical matter, challenging the administrative subpoena comes down to issues of cost and knowledge. Filing motions in an adversarial proceeding will be costly and will require the use of outside counsel with expertise in both civil and criminal litigation. On the one hand, counsel may want to contest the subpoena in order to gather knowledge about the investigation early on by requiring the government to reveal the type of case it has, therefore narrowing the subpoena and the breadth of the investigation. On the other hand, it may be more cost effective and generate better financial results for the company to cooperate early and get the credit in the end for its cooperation.

Following the lessons learned from the deferred prosecution cases, when faced with an administrative subpoena, regardless of the broader policy implications, the primary focus for both civil and criminal counsel will be how to respond adequately to a government investigation in order to maximize the company’s knowledge of the government’s evidence, minimize the exposure to financial penalties, and leave a positive impression of cooperation with investors, employees, and the public.