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When the DEA Comes Knocking

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With the establishment of the U.S. Department of Justice's Prescription Interdiction & Litigation (PIL) Task Force,[1] it's inevitable that physicians who dispense controlled substances will see an uptick in enforcement activity by the Drug Enforcement Agency ("DEA") and Department of Justice ("DOJ"). Indeed, many clients have come to our firm reporting that a DEA or state controlled substance enforcement official appeared at their door, and asked to inspect their controlled substance records. Certain questions invariably follow, such as "Can the DEA do that?" and "What do I need to give the inspector?" This article attempts to answer some of these questions by focusing on the inspection process under the Controlled Substances Act ("CSA").[2]

The Federal agencies charged with enforcing the CSA have three options when it comes to conducting an inspection and gathering documents:

(a) Investigators can get a warrant for an administrative inspection;
(b) Investigators may conduct an administrative investigation, in certain circumstances, without a warrant; and,
(c) The DOJ can issue a subpoena.

In the majority of cases, the DEA must acquire a warrant in order to inspect a practitioner's premises and records. These administrative inspection warrants are incredibly easy for the inspector to acquire, as the inspector need only show probable cause, defined in the CSA as:

> "…a valid public interest in the effective enforcement of this subchapter or regulations thereunder sufficient to justify administrative inspections of the area, premises, building, or conveyance, or contents thereof, in the circumstances specified in the application for the warrant." 21 U.S.C. § 880(d)(1).

Courts have held that this statute, read literally, would only require an inspector to show that the office handles a controlled substance, which can be established by virtue of the office's registration under the CSA.[3] Then, once the investigator has gained access to the office by means of a legitimate administrative inspection warrant, any evidence of a crime that the investigator

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1 "Attorney General Sessions Announces New Prescription Interdiction & Litigation Task Force" Department of Justice, 2/27/2018, https://www.justice.gov/opa/pr/attorney-general-sessions-announces-new-prescription-interdiction-litigation-task-force (Accessed 9/5/2018).

2 Importantly, the CSA has many state-specific analogs, and the majority of CSA matters begin at the state level. As such, it is incredibly important to contact a licensed, healthcare attorney in your jurisdiction to discuss state-specific requirements, in addition to the CSA.

3 *See U.S. v. Nechy*, 827 F.2d 1161, 1165-66 (7th Cir. 1987).

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then discovers through plain view of the premises is admissible against the practitioner in a criminal case.[4]

Given the ease of acquiring such a warrant and the relative breadth of access allowed, it is exceedingly important to examine the scope and parameters of any inspection warrant upon presentment by the DEA inspector. A warrant may only be issued to inspect the "controlled premises" of a registrant, which is defined as the place where records are required to be kept under the CSA, or the location where a registrant may hold, administer, or otherwise dispose of controlled substances.[5]

A valid administrative inspection warrant is required to state a number of items: (1) identification of the area to be inspected; (2) the purpose of the inspection; (3) the property to be inspected; (4) the property to be seized, if any; and, (5) the grounds for the warrant's issuance.[6] The administrative inspection warrant must also identify the person authorized to execute the warrant, and the warrant must be executed during normal business hours.[7] If the warrant (and the execution thereof) does not satisfy these conditions, the inspector may be denied entry to the premises.

In certain situations, an administrative inspection warrant is not required.[8] The most important of these situations is where the registrant (or the registrant's agent) consents to the inspection despite the lack of administrative inspection warrant. In fact, DEA inspectors have been known to simply show up at the door, and request access to inspect the premises. Importantly, where the inspector does not have a warrant, the registrant is ***not*** required to permit access to the premises.

There are, of course, pros and cons to denying a DEA inspector access to the controlled premises. Denial gives the registrant the opportunity to make sure no items outside the scope of the potential warrant are in "plain view" within the controlled premises; however, invariably, the inspector will return with a warrant to inspect the premises, and will likely be motivated to find any evidence that he or she believes the registrant may have been hiding. Regardless of whether the inspector turns up with a warrant or without one, practitioners should strongly consider contacting an attorney, as the inspection indicates an interest on behalf of federal agencies in pursuing claims against a practitioner.

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4 *See id.*; *See U.S. v. Acklen*, 690 F.2d 70, 73-75 (6th Cir. 1982); *See U.S. v. Goldfine*, 538 F.2d 815, 818-19 (9th Cir. 1976).

5 21 U.S.C. § 880(b)(1); 21 U.S.C. § 880(a).

6 21 U.S.C. § 880(d)(2).

7 *Id*.

8 An administrative inspection warrant is not required: "(1) with the consent of the owner, operator, or agent in charge of the controlled premises; (2) in situations presenting imminent danger to health or safety; (3) in situations involving inspection of conveyances where there is reasonable cause to believe that the mobility of the conveyance makes it impracticable to obtain a warrant; (4) in any other exceptional or emergency circumstance where time or opportunity to apply for a warrant is lacking; or (5) in any other situations where a warrant is not constitutionally required." 21 U.S.C. § 880(c). It appears, from the CSA, that conveyance includes any sort of vehicle intended for the use or to facility the use of controlled substances. See 21 § U.S.C. 881(a)(4).

The final investigatory tool in the federal government's arsenal is its most powerful: the DOJ subpoena. The DOJ's subpoena power is incredibly broad – it can compel the production of any records or other tangible objects, or the appearance of witnesses. The only limit on this authority is that the DOJ must find the information or witnesses relevant or material to its investigation under the CSA.[9] Failure to comply with such a subpoena is punishable by contempt of court.[10] The receipt of a DOJ subpoena indicates the active involvement of an U.S. Attorney's office in pursuing a claim under the CSA or other federal, healthcare fraud and abuse statutes. Accordingly, it's vitally important to contact an attorney upon receipt of such a subpoena.

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This article is for informational and educational purposes only. Health care providers should contact their advisors for assistance.

9 21 U.S.C. § 876(a).
10 21 U.S.C. § 876(c).