



As Biden admin. takes shape, expect closer scrutiny on compliance, HIPAA, billing

by: Roy Edroso

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The advent of a new presidential administration is expected to bring changes in health care compliance enforcement: You should watch for the new wave of HHS, CMS and Department of Justice (DOJ) agencies to go after big health care-related crimes. They're also likely to scrutinize HIPAA and the big payments made to help providers over the COVID-19 hump.

In the days since his Jan. 20 inauguration, President Joe Biden has issued several executive orders pertaining to health care, including a COVID-19 vaccination program, and has publicized plans for health care reform, such as increased subsidies for the Affordable Care Act

Concrete progress on those fronts will largely depend on Congress and the actions of Biden's as-yet-unappointed department heads, including HHS Secretary nominee Xavier Becerra and Attorney General nominee Merrick Garland. Once the team is in place, however, you can expect policy adjustments that will lead federal auditors, investigators and prosecutors to pay closer attention to certain health care compliance areas than the previous administration did.

Accelerating focus on fraud, abuse

Experts think you'll see more high-level prosecutions of white-collar health care crime — and executives of health care entities being named in them — under Biden than under Trump.

The Trump Administration was not as zealous in pursuit of fraud as was the previous administration. In its last fiscal year, 2016, the Obama DOJ racked up \$4.7 billion in False Claims Act recoveries, including \$2.5 billion related to health care; in 2020, Trump's DOJ pulled in \$2.2 billion in total False Claims Act recoveries, \$1.9 billion of which was attributable to health care.

"The Trump administration wasn't as receptive to white collar prosecutions generally, and that carried over to health care fraud," says J.D. Thomas, former federal prosecutor and partner with Waller Lansden Dortch & Davis LLP in Nashville. "Frankly, I think you see that in the pardons he issued. There were a lot of names who had been convicted in some large and notable health care fraud prosecutions." Thomas cites a recent New York Times story about convicted health care fraudsters, such as Philip Esformes and Judith Negron, whom Trump released from prison in the final days of his tenure.

The shift from one administration to the next isn't always world-altering, says Ty E. Howard, a former state and federal prosecutor and current partner with Bradley Arant Boult Cummings LLP in Nashville and Dallas. "Sometimes we can overstate the [enforcement] changes that are caused by administration changes," he says.

However, Howard does think the focus of inquiries — and resources — could change under Biden. "The Trump administration put greater focus on violent crimes, street crimes [and] drug crimes," Howard adds. "And there's a finite amount of resources. So if you are devoting federal resources toward those things, there will be non-zero diminishment of resources for white-collar crime."

A major enforcement target would be telemedicine-type Medicare scams — that is, not innocent errors by providers billing telehealth procedures, but real criminal fraud.

"It's kind of low-hanging fruit," Howard says. Often including durable medical equipment, medical creams or genomic cancer testing, and "facilitated in some way by a quote unquote 'telemedicine consult,'" these scams harvest beneficiaries using telemarketers, overseas call centers or health fairs and use their data to charge for massive inappropriate or non-existent treatments.

Targeting telehealth

Howard refers to those cases as "first-wave enforcement," targeting overt and high-profile fraud, where the accent is on criminal intent, not the means of committing it. As he and his colleague Janus Pan wrote in a recent paper, such scams "are no more 'telemedicine fraud' than a bank robbery in which the robbers facilitate their crime through a getaway car is 'automobile fraud.'"

Howard expects that these prosecutions will be followed by "second-wave" enforcement targeting "more nuanced cases" of telehealth malfeasance. That may include instances of "less overtly wrongful conduct, premised more squarely on telehealth requirements generally," Howard predicts.

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An example of such cases might include inappropriate use of telehealth for diagnosis or following the more casual standards for telehealth under the public health emergency (PHE) after it's declared over.

Honing in on HIPAA

Speaking of telehealth, expect to see HIPAA as a major enforcement target, due in no small part to the telehealth boom. Experts have been warning for months that the telehealth flexibilities the federal government granted under COVID-19 and the resulting explosion in use would lead to some providers getting sloppy about safeguarding patients' protected health information (PHI) ([PBN 7/2/20](#)).

"Under the pandemic, there's been a tremendous amount of health care information that's been shared and put on telehealth platforms," Thomas says. "So I think that there is more vulnerability there."

Auditing provider relief funds

You may recall that the \$120 billion in provider relief funds enabled by the CARES Act and distributed in stages during the PHE came with definite terms of use ([PBN 4/23/20](#), [10/22/20](#)). For instance, providers faced reporting requirements and a mandate that the payments would not serve as reimbursement for business expenses or losses.

"There will be efforts to audit that," Thomas says.

Howard expects to see paycheck protection program loans — the low-interest, forgivable loans given by the Small Business Administration to COVID-affected businesses, including medical practices — come under scrutiny as well ([PBN 4/7/20](#)). This is because of "the volume of money and the speed with which it was dispensed," Howard says. "That creates an environment where there is more likely to be fraud. We've seen that before with big publicly-funded programs."

"In a matter of months, HHS has distributed on behalf of Congress close to \$175 billion to nearly every health care provider to cover COVID-related expenses and losses," says Philo Hall, senior counsel in the health care and life sciences practice of Epstein Becker & Green firm in Washington, D.C. "Ensuring that those funds were appropriately allocated and claimed and that providers are adhering to the terms and conditions will produce several years of work for HRSA [U.S. Health Resources and Services Administration], OIG and DOJ."

Keep an eye on other targets

- **E/M coding.** Michael Bagley of Zenith Healthcare Solutions in New Braunfels, Texas, notes the new E/M rubric will undoubtedly lead to heavy auditor attention ([PBN 6/4/20](#)). "The monitoring of physicians claims will increase, especially if they bill by time only instead of adjusting the documentation and billing by medical decision-making and overall meeting of medical necessity for the service being provided," Bagley says.
- **Meaningful use.** Remember the meaningful use program? Thomas says payments made to providers to get their electronic health records (EHR) up to speed in the previous decade are still subject to audit under a six-year look-back period.
- **Workplace safety.** Biden has already asked the Department of Labor for "revised guidance to employers on workplace safety during the COVID-19 pandemic" under the Occupational Safety and Health Act (OSHA). Also, he has asked other departments, including HHS, to "explore mechanisms to protect workers not protected under the Act so that they remain healthy and safe on the job during the COVID-19 pandemic." Depending on how that shakes out, you may be obliged to reassign or relocate employees or improve protections against the virus ([PBN 4/16/20](#)).

Final warning

Howard advises that you keep your eyes open for early warnings of compliance trends at the audit level and even among non-governmental bodies from which government may take their cues.

"For example, say a provider gets contacted by their [state] Board of Medical Examiners about an issue," Howard muses. "He may say, 'I didn't realize [that was wrong], I'll agree to the sanction,' and not think much of it. Or you get an audit request from state Medicaid or a private insurer. These things can turn into investigations into civil and even in some cases criminal liability."

Resources

White House, Jan. 21, "Executive Order on Protecting Worker Health and Safety," www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-protecting-worker-health-and-safety/

New York Times, Jan. 21, "For Prosecutors, Trump's Clemency Decisions Were a 'Kick in the Teeth':" www.nytimes.com/2021/01/21/us/politics/trump-pardons-medicare-fraud.html



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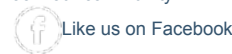
Coding References

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