White Collar Defense

January 6, 2025

In Trump's Second Term, Healthcare Enforcement May Remain Business as Usual

By Jason S. Gould, Scott B. McBride, Daniel W. Borneman, and Katherine Ferrara

Compared with other issues, healthcare enforcement during President-elect Donald Trump's upcoming second term has received little attention. When he takes office again on January 20, should industry actors like pharmaceutical companies, hospital systems, clinical laboratories, physician groups, and others expect the same level of enforcement that took place during Trump's first term, or something different?

This alert seeks to answer that question by looking at four key indicators: (1) healthcare enforcement during Trump's first term; (2) the structure and success of the current healthcare enforcement organization within the Department of Justice (DOJ); (3) probable leadership within DOJ and its agency partners; and (4) anticipated resource allocation to healthcare enforcement. Based on available information, we conclude that the second Trump administration is highly likely to continue the yearslong efforts of both parties to vigorously enforce federal healthcare laws.

Trump's First Term

Historically, healthcare enforcement has transcended politics. It has received widespread bipartisan support in part because neither party wants to turn a blind eye to fraud or violations of the Anti-Kickback Statute (AKS) and False Claims Act (FCA). According to expert estimates, between 3 percent and 10 percent of total healthcare expenditures are the result of fraud. Failing to aggressively police that fraud could be construed as tacit approval of bad actors stealing from American taxpayers—something neither party wants to condone. Moreover, unlike other areas of enforcement, the nation's federal healthcare laws, particularly the FCA, are essential to recovering taxpayer money. For these reasons, fighting healthcare fraud has consistently enjoyed support from both parties.

That certainly held true during Trump's first term. In 2017, his first year in office, law enforcement opened about an equal number of criminal healthcare investigations as in the year before (Barack Obama's final year). But in 2018, that number increased by roughly 17 percent and remained level through 2020. The number of civil investigations also increased during Trump's first term compared with the last few years of Obama's presidency.

Indeed, the Trump administration registered the two largest national healthcare fraud "enforcement actions" (colloquially referred to as "takedowns") in history during his first term. In 2017, DOJ announced during a two-week period that it was charging more than 400 defendants with crimes involving losses of $1.3 billion, and in 2018, DOJ boasted a takedown involving charges against more than 600 defendants with estimated losses of over $2 billion. These numbers in some respects are misleading. For example, DOJ uses "intended loss" (what someone billed Medicare) rather than "actual loss" (what Medicare actually paid) to inflate the dollar figures—actual loss often is only a fraction of intended loss. Still, these takedowns demonstrate the Trump administration's eagerness to project strength in combating healthcare fraud and enforcing the country's healthcare laws.

Despite Trump's expressed antipathy toward DOJ during his campaign, there is little reason to think that his second administration will want to portray weakness in an area where his first claimed success. Trump's hostility likely stemmed from DOJ's two criminal prosecutions against him, both of which have now been dismissed. It therefore seems more likely that his negative campaign rhetoric regarding DOJ will not carry over into areas like healthcare enforcement.

Structure and Success of Current DOJ Healthcare Enforcement

The diffuse structure of healthcare enforcement within DOJ and its success over the past several administrations suggests that Trump will seek to capitalize on it rather than curb it.

Healthcare enforcement in the United States takes place in a variety of federal offices across the country, including the 94 U.S. Attorney's offices, DOJ's Healthcare Fraud Unit in the Criminal Division (which has approximately 80 trial attorneys working at over a dozen "Strike Forces" around the country, including in Newark and Brooklyn), and DOJ's Civil Fraud Unit in the Civil Division (which oversees violations of the FCA, the government's primary tool to pursue civil recoveries in healthcare matters). These offices often work independently to investigate and prosecute healthcare offenses, but sometimes they work in concert depending on the type and size of a particular case.

This structure has yielded significant successes for DOJ in recent years. For example, according to the recently released 2023 Health Care Fraud and Abuse Control (HCFAC) Program Annual Report, DOJ's Healthcare Fraud Unit (which includes its Strike Forces) combined with U.S. Attorney's offices to file 276 indictments in 2023. This is in line with 2021 and 2022, when they filed 281 and 266 indictments, respectively. In comparison, during Trump's first term, the Healthcare Fraud Unit and U.S. Attorney's offices filed 253 indictments in 2017, 313 in 2018, 359 in 2019, and 263 indictments in 2020. Likewise, the HCFAC report shows that healthcare enforcement is currently enjoying significant tailwinds in monetary recoveries. According to the HCFAC report, DOJ recovered $3.4 billion in 2023 from criminal and civil cases—double what it collected in 2022. Given these significant and consistent results, the Trump administration will certainly want to maintain the same production in his second term.

In addition to its regular healthcare enforcement priorities, the HCFAC report highlights how DOJ in 2023 continued to focus on pandemic-related fraud. This included, among other things, prosecuting schemes to provide Medicare and Medicaid beneficiaries with medically unnecessary items and services related to the pandemic (such as unnecessarily expansive and expensive respiratory pathogen tests), and schemes aimed at fraudulently obtaining COVID-related healthcare relief funds. It remains to be seen for how long DOJ will continue to focus on pandemic-related offenses before it turns its focus elsewhere, but for now they are a robust source of cases and monetary recoveries.

DOJ's successes have also been due in large part to its lucrative FCA enforcement program, which has flourished over the years. In fact, for 15 straight years, total FCA recoveries have exceeded $2 billion (this includes both healthcare and non-healthcare cases). As a result, FCA cases and recoveries do not tend to fluctuate materially across administrations, and we do not expect significant change once Trump retakes office.

One potential roadblock for continued FCA enforcement during the Trump administration is a constitutional challenge the FCA is facing in the Eleventh Circuit. In a significant break from decades of FCA precedent, a Florida district court judge recently deemed the FCA's *qui tam* provisions unconstitutional in *United States ex rel. Zafirov v. Florida Medical Associates, LLC*, 2024 WL 4349242 (M.D. Fla. Sept. 30, 2024) as violative of the Appointments Clause. We covered that decision [here]. Although Judge Kathryn Kimball Mizelle's opinion is the first of its kind, three Supreme Court Justices have previously signaled their willingness to reconsider the constitutionality of the FCA's *qui tam* provisions. Both the relator and the government have filed notices of appeal to the Eleventh Circuit in *Zafirov*. Because the FCA is a congressional statute that has long been used to fight fraud, we anticipate that the Trump administration will continue the work started by the current administration and vigorously defend its constitutionality.

In the meantime, however, it seems unlikely that a second Trump administration would try to undermine the various offices that investigate and prosecute healthcare offenses, particularly where those offices have had substantial success in recent years, during both Trump's first term and Biden's presidency.

DOJ and Agency Leadership

Trump has said that he will nominate former prosecutors for the three top roles at DOJ. Trump's pick for Attorney General, Pam Bondi, was Attorney General of Florida, where she prioritized prosecuting pill mill operators and drug distributors and worked with lawmakers to strengthen prescription drug monitoring. Those have been federal bipartisan priorities as well. Although Bondi does not have federal enforcement experience, Trump's selections for the department's second- and third-ranking positions do. He has announced that he'll nominate Todd Blanche for Deputy Attorney General and Emil Bove for Principal Associate Deputy Attorney General. Both are former Assistant U.S. Attorneys (AUSAs) from the Southern District of New York who prosecuted and supervised white-collar fraud cases. These relatively conventional choices, all with law enforcement backgrounds, suggest that DOJ is unlikely to seek major change in healthcare enforcement.

That said, predictions based on the department's senior leadership have limitations because there are scores of other open leadership positions within DOJ. Those include the 93 remaining U.S. Attorney selections (Trump announced his first U.S. Attorney pick, for the Southern District of New York, would be Jay Clayton, who previously served as the Securities and Exchange Commission Chairman during Trump's first term). They also include many Assistant Attorney General positions across DOJ, including those that oversee the Healthcare Fraud Unit in the Criminal Division and Civil Frauds in the Civil

Division. Given the politically charged environment, it is possible that some of these positions will be filled by inexperienced or unqualified candidates. But, historically, including during Trump's first term, these positions were filled by experienced attorneys who were unlikely to undermine the goals and traditions of the department. Moreover, nonpolitical career lawyers often run the day-to-day operations of units within the department, and they tend to maintain a business-as-usual approach.

Leadership at Health and Human Services (HHS) and the FBI also substantially affects healthcare enforcement. HHS's Office of Inspector General and the FBI serve as the primary investigators of healthcare offenses. Trump's proclaimed choices to lead these departments (Robert F. Kennedy Jr. (HHS) and Kash Patel (FBI)) have faced significant criticism, particularly due to their lack of law enforcement experience and expertise leading enormous federal agencies. Whether they are confirmed and, if so, whether they will drastically shake up their departments' approach to investigating healthcare offenses remain to be seen. But thus far neither has signaled an intent to cut back. To the contrary, Kennedy Jr. for his part has for decades exhibited hostility toward large drug manufacturers and agrochemical companies, undercutting any notion of relaxed enforcement.

Allocation of Resources

Perhaps the most meaningful factor influencing healthcare enforcement is resource allocation, and it might also be the hardest to predict.

So far, the Trump camp has emphasized deregulation, efficiency, and budget cuts. Elon Musk and Vivek Ramaswamy are set to lead Trump's new Department of Government Efficiency (DOGE) and have professed their intention to significantly cut federal spending. The DOJ, HHS, and FBI budgets could face substantial reductions, which would likely mean less money for AUSAs, trial attorneys, law enforcement agents, and staff dedicated to investigating and prosecuting healthcare offenses.

On the other hand, during his first term, Trump actually increased funding for healthcare enforcement. For example, Trump's 2018 budget proposed $70 million in additional funding, a more than 10 percent increase, for HCFAC—which was especially notable since the budget generally contemplated reductions, not increases. Moreover, healthcare enforcement may emerge unscathed because it generally yields a windfall for the federal government—from 2021 to 2023, for example, HCFAC announced that it recovered $2.80 for every dollar it spent. If DOGE sees HCFAC as a revenue generator rather than a cost center, it could increase HCFAC's funding to turbocharge its return on investment.

Separately, Trump has repeatedly emphasized bulking up enforcement of immigration offenses and violent crime, as he did during his first term. Such a change in priorities would potentially tie up attorney time at U.S. Attorney's offices across the country and take them away from white-collar enforcement. Most large offices in major cities, however, already have significant resources dedicated to combating violent crime, and offices in border states devote considerable manpower to illegal reentry and other immigration offenses. These bigger offices will be able to withstand the impact of any change in priorities because they will still have ample resources to devote to white-collar and healthcare enforcement. But smaller offices that cannot readily absorb the changes—particularly if they are required by DOJ to pull AUSAs away from white-collar enforcement to immigration and violent crimes—may more acutely feel the impact.

Conclusion

The President-elect is once again inheriting a well-established healthcare enforcement machine. His administration eagerly touted its successes during his first term, and that seems likely to continue in his second. Even considering his public hostility toward DOJ while the criminal prosecutions against him were pending, Trump will want to appear tough on those who try to steal from the American taxpayers by defrauding its healthcare system. As things stand, undercutting the established enforcement structure at U.S. Attorney's offices and within DOJ would be practically difficult and could draw unwanted scrutiny in an area that historically has enjoyed bipartisan support. His current picks to lead DOJ and his budget choices during his first term underscore his probable commitment to continuing to forcefully fight healthcare fraud. While predicting the future is often a fool's errand, we think the most likely fate for healthcare enforcement over the next four years is more of the same.

Contacts

Please contact the listed attorneys for further information on the matters discussed herein.

JASON S. GOULD
Partner
T: 862.926.2035
jgould@lowenstein.com

SCOTT B. MCBRIDE
Partner
T: 973.597.6136
smcbride@lowenstein.com

DANIEL W. BORNEMAN
Associate
T: 862.926.2869
dborneman@lowenstein.com

KATHERINE FERRARA
Associate
T: 973.422.6436
kferrara@lowenstein.com

NEW YORK   PALO ALTO   NEW JERSEY   UTAH   WASHINGTON, D.C