

## **THE FUTURE OF POST-ACUTE ADMINISTRATIVE ENFORCEMENT AND APPEALS - WHITE HOUSE PROPOSES TEN “PRINCIPLES OF FAIRNESS”**

The future of post-acute provider enforcement actions will likely include increased attention, investigation and citing of infection control practices and resident abuse and neglect. On August 31, 2020, the Office of Management and Budget issued a **Memorandum** for the Deputy Secretaries of Executive Departments and Agencies (M-20-31) titled “Implementation of Section 6 of Executive Order 13924” (the “Memo”) which offered principles of fairness in administrative enforcement and adjudication, which includes post-acute provider administrative appeals.

### **TEN “PRINCIPLES OF FAIRNESS”**

The Memo outlines ten “principles of fairness” and recommended practices for administrative enforcement and adjudication by agencies.

#### **1) The government should bear the burden of proving an alleged violation of law; the subject of enforcement should not bear the burden of proving compliance.**

The regulated individuals and businesses are not required to prove a negative to prevent liability and enforcement consequences in the absence of statutory standards requiring otherwise. Agencies should read genuine statutory or regulatory ambiguities related to administrative violations and penalties in favor of the targeted individuals and businesses in enforcement.

#### **2) Administrative enforcement should be prompt and fair.**

Agencies should seek approval before entering into a tolling agreement that would have the effect of extending the statute of limitations for an infraction.

Agencies should publish a rule of agency procedure governing civil administrative inspections.

Agency regulations should require investigating staff to either recommend or bring an enforcement action or instead cease the investigation within a defined time period after its commencement.

For individuals and businesses that have been informed by an agency that it is under investigation, the agency should inform the party when the investigation is closed and, when the agency has made no finding of violation.

#### **3) Administrative adjudicators should operate independently of enforcement staff on matters within their areas of adjudication.**

Agency adjudicators should operate independently from investigators and enforcement staff, as the Administrative Procedure Act requires under 5 U.S.C. §§ 554(d) and 557(d).

#### **4) The government should provide favorable relevant evidence in possession of the agency to the subject of an administrative enforcement action.**

Agency officials should timely disclose exculpatory evidence to the target individual or business of enforcement using similar procedures as those detailed in the Justice Manual of the U.S. Department of Justice. Agencies should also automatically disclose evidence material to the mitigation of damages or penalties.

#### **5) All rules of evidence and procedure should be public, clear and effective.**

Agencies should adopt or amend regulations regarding evidence and adjudicatory procedure to eliminate any unfair prejudice, reduce undue delay, avoid the needless presentation of cumulative evidence and promote efficiency.

Agencies should explicitly authorize the representation of regulated parties by legal counsel. Agencies should also take steps to avoid disadvantaging parties who are not represented by counsel, including by writing rules of evidence and procedure in plain language.

**6) Penalties should be proportionate, transparent and imposed in adherence to consistent standards and only as authorized by law.**

Agencies should establish policies of enforcement discretion that decline enforcement or the imposition of a penalty, in the course of enforcement when the agency determines that the regulated individual or business attempted in good faith to comply with the law.

Agencies should make the public aware of the conditions in which investigations and enforcement actions will be brought and provide the public with information on the penalties sought for common infractions.

Agencies should adopt expiration dates and/or termination criteria for consent orders, consent decrees and settlements that are proportionate to the violation of the law that is being remedied.

Consent orders, consent decrees and settlements should not bar private parties from disseminating information about their cases.

Agencies should establish procedures to encourage voluntary self-reporting of regulatory violations by regulated parties in exchange for reductions or waivers of civil penalties.

**7) Administrative enforcement should be free of improper government coercion.**

Retaliatory or punitive motives should not form the basis for an agency's selection of targets for investigations or enforcement actions, or other investigation and enforcement decisions.

**8) Liability should be imposed only for violations of statutes or duly issued regulations, after notice and an opportunity to respond.**

Agencies should review their procedures for adjudication to ensure that liability is imposed only after notice and an opportunity to respond. In any document initiating an investigation or enforcement action, an agency should include a citation to the statute and regulation asserted to be violated, and an explanation as to how the asserted conduct is prohibited by the cited statute and regulation.

**9) Administrative enforcement should be free of unfair surprise.**

Agencies should ensure they have rules in place that provide parties with a reasonable period of time to respond to filings or charges brought by the agency. For example, agencies should provide parties with at least as much time to respond to an agency notice of charges as parties would have to respond to filings in civil complaints brought in Federal Court.

**10) Agencies must be accountable for their administrative enforcement decisions.**

The Memo's recommendations include that the initiation of investigations and enforcement actions should be approved by an official who is an Officer of the United States. Agencies should publish data on the number of matters that have been pending with the agency over relevant time periods, the number of matters disposed of by the agency annually and the types of matters before and disposed of by the agency.

**NEXT ACTION ITEMS:**

- Post-acute providers should look for U.S. Department of Health and Human Services, Centers for Medicare & Medicaid Services and other agencies to adopt these fairness principles and use them to their advantage in administrative adjudications.
- Post-acute providers should ask for these rights as their cases proceed through their administrative adjudications.

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