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*Reliance on Government Advice to Preclude Criminal Enforcement Actions
Under the Health Insurance Portability and Accountability Act*

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Abstract by Carrie Mitchell

The new Health and Human Services (HHS) advisory opinion procedure focuses on the preclusive effect HHS advisory opinions should have with respect to criminal prosecution by the Justice Department. The HHS advisory opinion procedure is compared to comparable established federal agency advisory opinion regimes in order to determine the likely preclusive effect to be given to enforcers. Possible constitutional arguments could be invoked to hinder prosecution in cases where favorable advisory opinion has been issued and relied upon.

Based on statutory and regulatory provisions, the Justice Department is most likely precluded from prosecuting conduct if a favorable advisory opinion has been issued. The Justice Department may prefer to test its limits in court by bringing a case. The Justice Department may look to a case where a third party relies on an advisory opinion issued to someone else as a guide for its own actions. There is a strong possibility, the author believes of getting caught in the middle when the standard is not clear.