

Preface to the Third Edition

This Third Edition is current through July 1, 2016.

The Second Edition of *Prosecuting and Defending Health Care Fraud Cases* was published in December 2010, just seven months after the passage of the Patient Protection and Affordable Care Act (PPACA). Numerous constitutional challenges were immediately lodged, and in the Preface to the Second Edition my coauthor, Carol Lam, and I raised the following rhetorical questions:

- Will PPACA survive the many constitutional challenges?
- Will it achieve the goal of “curtailing, or at least slowing,” the growth in the cost of the federal health care programs?

While PPACA has survived every constitutional challenge thrown its way—and there were many—PPACA appears on the verge of a crushing political challenge, given the promise made by President-elect Donald J. Trump to seek its repeal on “day one.”¹ In all likelihood, 2017 will prove to be an eventful year for our nation’s government-funded health insurance programs.

Addressing the second question posed in our 2010 Preface is more nuanced. As we noted in December of that year, the 2010 Medicare Trustees report projected, based upon certain PPACA provisions, that the Medicare Hospital Insurance Trust Fund would remain solvent until 2029. What was their prediction this year? “In the year of asset depletion, which is projected to be 2028 in this report, HI [hospital insurance trust fund] revenues are projected to cover 87 percent of program costs.”² More troubling is the pace of depletion: the time horizon for depletion from the date of prediction. In 2002, the trustees predicted solvency for 28 years; in 2010, the trustees predicted solvency for 19 years. This year, as noted above, the trustees are predicting solvency for a mere 11 years. One could, in gloomy narrative, note that notwithstanding nearly 15 years—2002 through 2016—of efforts to control costs, including “trying” an entirely new system, no progress has been made in slowing the march to insolvency.

¹Campaign of Donald J. Trump, Healthcare Reform to Make American Great Again, <https://www.donaldjtrump.com/positions/healthcare-reform>.

²2016 ANNUAL REPORT OF THE BOARDS OF TRUSTEES OF THE FEDERAL HOSPITAL INSURANCE AND FEDERAL SUPPLEMENTARY MEDICAL INSURANCE TRUST FUND, at 5 (June 2016), <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/ReportsTrustFunds/downloads/tr2016.pdf>.

While progress on cost control has at best only waned, health care enforcement efforts first waxed but, when measured by financial recoveries, recently have waned. In each four-year period (five four-year periods commencing on January 1, 1993, and ending on December 31, 2012), health care recoveries from criminal prosecutions and civil suits grew dramatically, jumping from \$1.35 billion in the first four-year period, ending December 31, 1996, to \$18.8 billion in the four-year period ending on December 31, 2012.³ During the latest four-year period, ending on December 31, 2016, however, recoveries have waned, dropping to just under \$10 billion. Is this a temporary lull, or is it reflective of diminishing or shifting enforcement efforts? The result of better provider and supplier behavior?

Other indicators, including numbers of defendants prosecuted and excluded, have not dropped. In 2015, the 93 United States Attorneys' Offices filed criminal charges "in 463 cases involving 888 defendants."⁴ In 2012, these numbers were 452 and 892 respectively.⁵ In 2008, the United States Attorneys reported 502 cases and 797 defendants. In 2015, 2012, and 2008, the OIG excluded 4,112,⁶ 3,131,⁷ and 3,129⁸ individuals and entities, respectively. The best conclusion for this complex puzzle is this: the federal enforcement effort has been and remains steadfast and determined, while failing to keep pace, in its scope, with the growth in the federal health care program dollars.

The purpose of this book remains the same: to guide the health care attorney through the statutes and regulations prohibiting certain conduct by health care providers and suppliers and to provide practical advice regarding investigations, criminal and/or civil proceedings, and sentencing or settlement. The rich history of prosecutions and investigations is a good, albeit imperfect, guide for assessing future behavior and risk; the goal of this book is to provide the details and nuance of that rich history. It is an honor to publish a Third Edition, and it is my hope that this edition of *Prosecuting and Defending Health Care Fraud Cases* will assist a wide range of counsel.

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³See Chapter 11 (Global Resolutions), Section IV, Table 11.1 (Number and Amounts of Settlements in Four-Year Intervals).

⁴U.S. Dep't of Health & Human Servs. & U.S. Dep't of Justice, *Health Care Fraud and Abuse Control Program Annual Report for Fiscal Year 2015*, at 65 (Feb. 2016), <https://oig.hhs.gov/publications/docs/hcfac/FY2015-hcfac.pdf>.

⁵U.S. Dep't of Health & Human Servs. & U.S. Dep't of Justice, *Health Care Fraud and Abuse Control Program Annual Report for Fiscal Year 2012*, at 79 (Feb. 2013), <https://oig.hhs.gov/publications/docs/hcfac/hcfacreport2012.pdf>.

⁶*Health Care Fraud and Abuse Control Program Annual Report for FY 2015*, at 1.

⁷*Health Care Fraud and Abuse Control Program Annual Report for FY 2012*, at 2.

⁸U.S. Dep't of Health & Human Servs. & U.S. Dep't of Justice, *Health Care Fraud and Abuse Control Program Annual Report for FY 2008*, at 24 (Sept. 2009), <https://oig.hhs.gov/publications/docs/hcfac/hcfacreport2008.pdf>.