
8 Years Of Health Care Enforcement: Doing Less With More

By **Michael Loucks, Maya Florence and Alexandra Gorman**

Law360, New York (August 10, 2017, 10:29 AM EDT) -- During the period 2008 to 2016, funds allocated to federal health care enforcement quadrupled, going from \$255 million in 2008, to \$577 million in 2011, to more than \$963 million in 2016. At the same time, from the very start of his tenure, former United States Attorney General Eric Holder embraced health care fraud enforcement actions with vigor — creating "healthcare enforcement action teams" (or HEAT) in numerous cities, adding resources to a Main Justice unit for health care fraud cases, and periodically announcing significant and coordinated arrests of individuals nationwide.[1] Between the rhetoric from the U.S. Department of Justice and the quadrupling of enforcement funds, one would expect an overall and substantial increase in health care fraud enforcement.



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In fact, health care enforcement at the national level has been stagnant since 2012, and has dropped precipitously since 2014. Not only were fewer defendants adjudicated in federal criminal cases in 2016 than in 2012, but aggregate recoveries in federal False Claims Act cases dropped from 2009 to 2016 (\$2.8 billion compared to \$5.2 billion). Despite the allocation of an additional \$708 million in enforcement resources between 2008 and 2016, increases in financial recoveries and the prosecution of individuals never materialized. This article explores what happened and what can be changed.



Maya Florence

A word about data sources at the outset: This article relies upon data from the annual Health Care Fraud and Abuse Control Report (HCFAC reports)[2] published by the DOJ and the Office of Inspector General; data published by the federal court system regarding defendants disposed of annually in health care fraud (and FDA) cases[3]; and annual financial recoveries in federal False Claims Act cases as published in a legal treatise.[4] The statistics set forth in the HCFAC reports do not identify data sources for the aggregate information included in the reports so it is not possible to review prosecutions by United States attorney, by federal court district, or by state.



Alexandra Gorman

The DOJ also does not publish listings of financial recoveries or individuals prosecuted in health care fraud cases. While the HCFAC reports identify the number of individuals charged in each fiscal year, that data does not match the statistics

on pending cases published by the federal court system. Three data sets utilized in this article thus are not a perfect match at the microeconomic level; nevertheless, they reflect the clearly visible macroeconomic trends in health care fraud enforcement.

Federal Health Care Enforcement Funding

The tip of the spear for federal health care enforcement has historically been the United States attorney community. These 93 presidentially appointed United States attorneys, while reporting to the U.S. deputy attorney general, maintain a substantial degree of independence from the DOJ. Indeed, there is a limited group of enforcement matters for which United States attorneys must obtain prior approval from the United States attorney general and health care fraud enforcement is not one of them.[5]

Prosecutors are constrained by resources: Whatever the laws in the books, there can be no enforcement without funding for prosecutors and agents. Moreover, as the chief federal law enforcement officer in their district, United States attorneys can and are expected to allocate their resources to address the crime and federal civil enforcement issues present in their jurisdiction. Nevertheless, from time to time, Congress, which ultimately controls the purse for the DOJ, will earmark monies specifically for certain types of enforcement, and has regularly done so for health care fraud enforcement since 1997. Where money is allocated for a specific purpose, the United States attorney must use those funds for that purpose. At the same time, the United States attorney, as well as the United States attorney general, can choose to, but does not have to, allocate additional discretionary funds for that same purpose.

In 2008 (the last year of the Bush administration) and 2009 (the first year of the Obama administration), the allocation of funding specifically for health care was as follows[6]:

	2008	2009	% Change
FY HCFAC Total DOJ Allocation	\$53,622,000	\$74,991,000	39% +
FY US Attorney Allocation	\$30,400,000	\$42,823,000	40% +
FY DOJ Civil Division Allocation	\$14,539,000	\$23,306,000	60% +
FY DOJ Criminal Division Allocation	\$3,080,000	\$5,386,000	75%+
FY OIG Allocation	\$169,736,000	\$196,172,000	16% +
FY CMS Allocation	\$22,997,000	\$185,045,000	804%+
Total Funds Earmarked	\$294,374,000	\$527,723,000	80% +

Congress allocated an additional \$198 million for health care prosecutions in 2009, with the DOJ and the U.S. Department of Health and Human Services providing the lion's share of these new enforcement funds to the Centers for Medicare & Medicaid Services. Unlike in prior years, where health care funding favored the United States attorney's offices, the DOJ proportionately allocated more of the discretionary health care enforcement funds to its Criminal and Civil Divisions. Moreover, the DOJ did not increase United States attorney funding at all between 2009 and 2014.

Congress dramatically increased the discretionary health care enforcement funding in 2015, providing an additional \$672 million in 2015 and \$681 million in 2016. The DOJ and HHS allocated those discretionary funds as follows:

	2015	2016
FY HCFAC Total DOJ Allocation	\$118,574,935	\$119,059,075
FY US Attorney Allocation	\$51,905,542	\$54,774,761
FY DOJ Civil Division Allocation	\$31,632,569	\$35,258,250
FY DOJ Criminal Division Allocation	\$14,742,843	\$17,594,320
FY OIG Allocation	\$253,266,026	\$254,816,623
FY CMS Allocation	\$577,820,000	\$559,403,926
Total Funds Earmarked	\$971,748,317	\$963,079,624

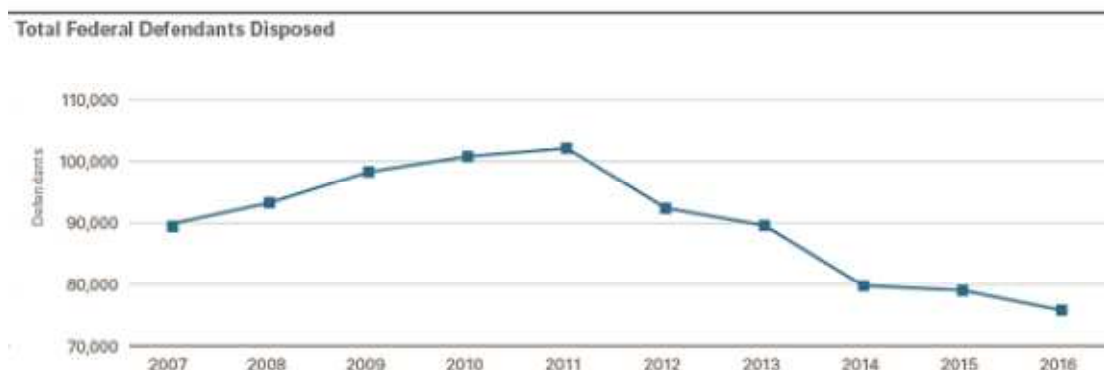
As a result, whereas in 2008, United States attorney funding was nearly double the DOJ's funding for the Criminal and Civil Divisions, by 2016, the DOJ had increased funding for those Main Justice divisions to nearly match the aggregate funding for all 93 United States attorneys' offices (\$54.8 million versus \$52.8 million). Indeed, not accounting for inflation, United States attorney funding dropped 5 percent over that time period, from \$42.8 million in 2009 to \$40.7 million in 2014. In that same period, the DOJ used discretionary dollars to increase funding for its Civil Division by 12 percent (from \$23.3 million to \$26.1 million), and for its Criminal Division by 62 percent, (from \$5.4 million to \$8.6 million). In this same time period, agency funding for OIG and CMS increased 21 percent (from an aggregate of \$381.2 million to \$463.9 million).

In doing so, between 2008 and 2016, DOJ management shifted health care law enforcement efforts from the tip of the spear — the United States attorneys — to divisions at Main Justice that are under the direct supervision of the United States attorney general. Discretionary enforcement dollars were allocated to the DOJ and CMS in Washington, D.C., at the expense of providing more money to the 93 United States attorneys charged with enforcement in their own districts. One would presume that the DOJ and HSS made these deliberate shifts in funding to increase and not diminish the DOJ's health care fraud enforcement efforts.

Did it work?

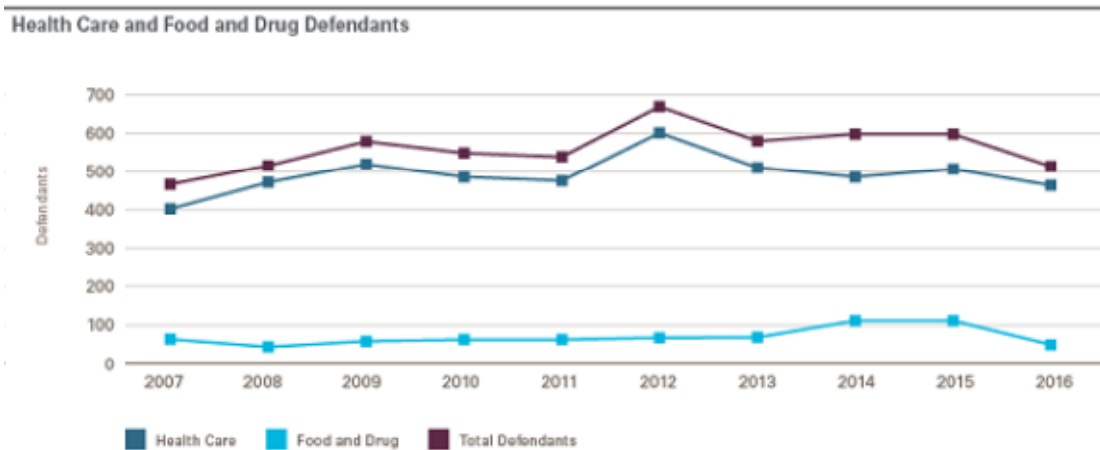
Criminal Prosecutions

Between 2007 and 2016, federal criminal prosecutions by the Department of Justice (including 93 United States attorneys), rose through 2011 and then plummeted:



At first blush, one might assume that this drop was the result of prosecutorial discretion to decrease prosecutions for low-level drug cases and for certain immigration offenses; in fact, this 26 percent drop in the prosecution of individuals was across every major category of crimes tracked by the federal courts.[7] For example, in 2011 there were 12,913 defendants disposed of in fraud cases; by 2016 that number had dropped to 7,195. Similarly, in 2007, 796 individuals were disposed of for crimes involving financial institutions; while initially rising to 845 in 2009, those prosecutions thereafter plummeted by 70 percent to 253 individuals in 2016. Defendants disposed of for drug offenses peaked in 2011 at 32,114 individuals, but then dropped over the next five years to 24,261 individuals. The number of individual defendants facing U.S. Securities and Exchange Commission charges peaked at 133 in 2007, and thereafter dropped to just 77 in 2016.

Despite the substantial increase in funding for health care cases, defendants disposed of in health care matters suffered a similar fate. The chart below reflects the defendants reported by the federal courts for health care and food and drug offenses:

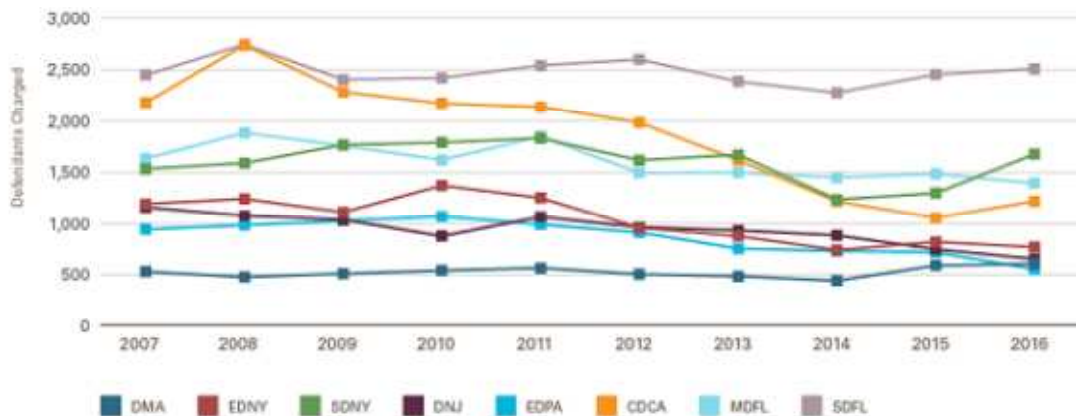


While the numbers are different, the HCFAC reports paint a similar story. The DOJ reported convicting 588 defendants in 2008, hitting a peak of 826 defendants in 2012 and dropping thereafter to just 658 defendants in 2016.

The HCFAC reports also chronicle criminal fine recoveries. The DOJ currently reports on its website that "[h]ealth care fraud costs the United States tens of billions of dollars each year" and that "[s]ome estimates put the figure close to \$100 billion a year." [8] All other things being equal, one would expect to see an increase in criminal fine recoveries with an increase in funding for health care enforcement. In 2009, criminal fine recoveries, as reported by the DOJ and HHS in the HCFAC reports, were slightly more than \$625 million; by 2012, criminal fines had doubled to \$1.4 billion. That was the high water mark: over the next four years, criminal fines plummeted to just \$24 million. [9]

While it is not possible to measure changes in health care criminal prosecutions by district, the following table of total defendants charged in each calendar year reflects prosecution activity for those United States attorney's offices that historically have been active in federal health care fraud enforcement.

Select United States Attorneys

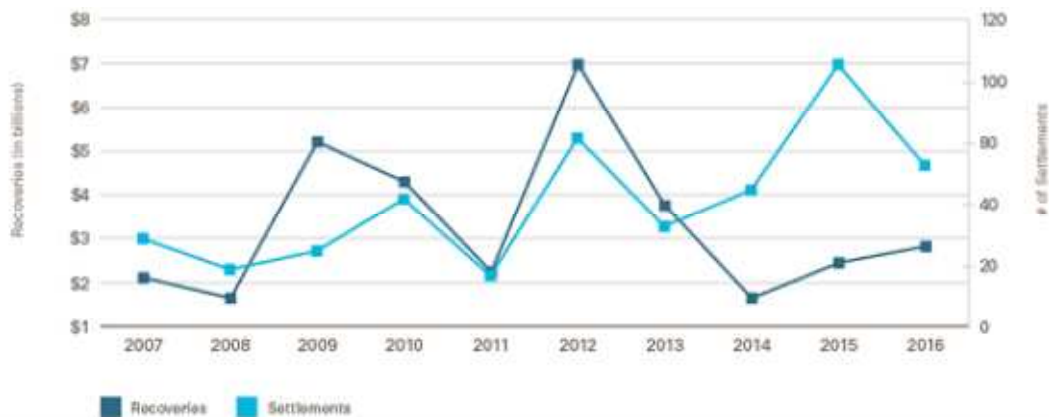


The experience at these major offices was mixed between 2007 and 2016. Between 2007 and 2016, the United States Attorney's Office for Massachusetts saw an increase in total defendants charged from 531 to 608, with a low of 443 in 2014. By comparison, the United States Attorney's Office for the Eastern District of Pennsylvania saw a 50 percent drop in defendants charged from 1,072 in 2010 to 555 in 2016. Similarly, the United States Attorney's Office for the Southern District of Florida saw a slight drop from 2,544 in 2011 to 2,510 in 2016, while the United States Attorney's Office for the Middle District of Florida dropped from 1,887 in 2008 to 1,398 in 2016. Lastly, the United States Attorney's Office for the Southern District of New York saw a drop in defendants charged from 1,834 in 2011 to 1,679 in 2016, with a low mark of 1,240 in 2014.

Civil Recoveries

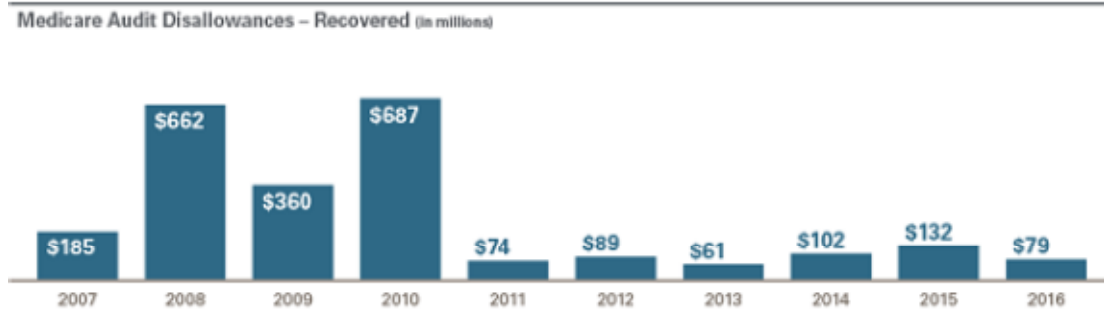
When measured by financial recoveries in federal False Claims Act litigation, recoveries peaked at \$7 billion in 2012 and then dropped to \$2.8 billion in 2016, with a 10-year low at \$1.6 billion in 2014.[10]

Total Recoveries in False Claims Act Litigation



Another measure of effective fraud enforcement are the "HHS/OIG Audit Disallowances: Recovered Medicare" totals reported in the annual HCFAC reports. Successful enforcement includes substantive and continuing audits, which, if designed correctly, can identify and stop fraud when the bills are submitted. Money allocated to CMS is used in part to support audits; increasing CMS funding should, in theory, improve audit controls. An increase in funding for audits should result in an increase in audit disallowances, if there is undetected

fraudulent billing. The table below reflects the HCFAC reported disallowances by year:



The precipitous drop in audit disallowances from 2010 to 2011 is not explained in any HCFAC report. The reader should bear in mind that the CMS and OIG allocation of the discretionary health care funds skyrocketed from \$381 million in 2009 to \$808 million in 2016.

In the 10 years from 2007 to 2016, Medicare program expenditures grew from \$431.5 billion to \$678.7 billion.[11] Thus, as a percentage of Medicare program expenditures, both False Claims Act recoveries and recovered Medicare audit disallowances have dropped substantially since 2008. When compared with the DOJ estimate of "tens of billions" of fraud each year, false claims act recoveries have been paltry.

Conclusion

The deliberative allocation of health care fraud enforcement resources by the DOJ and HHS, when measured against objective annual milestones, appears to have achieved poor results over the past eight years. While the numbers of health care defendants did not drop as precipitously as those in other crime categories over the past eight years, resources for health care prosecutions quadrupled. Put simply, there appears to be no "bang for the buck." Moreover, when measured in terms of financial recoveries, recoveries in 2016 — when nearly \$1 billion was devoted to the enforcement effort — were only \$700 million higher than recoveries in 2007 — when less than \$300 million was spent.

In other words, one could surmise from the results that the government spent \$700 million in 2016 to recover \$700 million that year. The plummeting trend in criminal fine recoveries supports either the conclusion that the criminal health care fraud problem has been largely solved — which conclusion is not supported by the relatively flat numbers in criminal defendants disposed or the DOJ's own rhetoric[12] — or that the strategic enforcement efforts are not working.

The data cited here supports the conclusion that the strategic shift in prosecution emphasis and allocated funding from the "tip of the spear" — the U.S. Attorney's offices — to the divisions at Main Justice has not resulted in a corresponding increase in health care enforcement. Nor has the discretionary allocation of the lion's share of the enforcement dollars to OIG and CMS succeeded. Given the failure of the substantial infusion of new resources for health care enforcement since 2009 to effect any material change in enforcement efforts (as measured by outcomes), allocating additional resources to health care fraud investigations and prosecutions would appear to be unnecessary. Rather, the DOJ and HHS should first engage in a smarter and more directed use of the substantial resources already allocated.

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[1] See, e.g., <https://www.justice.gov/criminal-fraud/health-care-fraud-unit>.

[2] The reports can be found at <https://oig.hhs.gov/reports-and-publications/hcfac/>.

[3] The statistical data cited in this article from the federal courts can be found at <http://www.uscourts.gov/statistics-reports/analysis-reports/statistical-tables-federal-judiciary>.

[4] The data from the legal treatise can be found in Appendix G in Loucks, *Prosecuting and Defending Health Care Fraud Cases*, Third Edition (BloombergBNA 2016).

[5] The prior approvals chart can be found at <https://www.justice.gov/usam/usam-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals#9-2.400>.

[6] <https://oig.hhs.gov/publications/docs/hcfac/hcfacreport2008.pdf>.

[7] For historical reference, in the fall of 2015, then-Deputy Attorney General Sally Yates issued a memorandum calling for the prosecution of individuals at a time when prosecutions had already plummeted to a 10-year low.

[8] <https://www.justice.gov/criminal-fraud/health-care-fraud-unit>.

[9] For comparison purposes, the numbers reported in other years were: 2010, \$1.2 billion; 2011, \$1.2 billion; 2012, \$1.4 billion; 2013, \$708 million; 2014, \$344 million; and 2015, \$57 million.

[10] Loucks, *Prosecuting and Defending Health Care Fraud Cases* (Third Edition), Appendix G.

[11] The annual reports of the Trustees of the Medicare Program, from which these figures were derived, can be found at <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/ReportsTrustFunds/index.html?redirect=/reportstrustfunds/>.

[12] One would expect to see a similar drop in criminal defendants disposed.