

Introduction to the 2026-2027 Edition

This is our 23rd edition of this book. The dynamism in Medicare and Medicaid Fraud and Abuse can be seen in the updates, even though some chapters have had less activity than others.

In Chapter 1, the overview, we have renewed statistics, addressed three major national anti-fraud initiatives—one from the OIG, one from the White House, and the third from the DOJ. The OIG published a special bulletin regarding marketing drugs to consumers, additional FAQs, and heightened screening for enrollment for home health agencies, hospice and DME with a moratorium on new provider numbers for all of those. They have increased focus on Medicare Advantage including the second industry specific Compliance Guidance and a first ever DOJ enforcement policy regarding voluntary disclosure in relation to enforcement.

Chapter 2 on the anti-kickback statute examines the first appellate court case relating to EKRA, and updates two prior cases addressed in previous years. A 5th circuit case explores further developments in when commissions for advertising services are permissible under the Anti-Kickback Statute, and when they cross into impermissible influence on referrals. New advisory opinions have been added, with a more detailed exploration of the only two unfavorable advisory opinions issued in 2025, both of which related to device manufacturers being influenced to use various third-party software for purposes that primarily benefited their customers, rather than the manufacturers.

The world of Stark addressed in Chapter 3 includes no major initiatives, but refinements and clarifications, particularly regarding profit sharing. We have cited one new case regarding the indirect compensation exception.

Chapter 4, dealing with administrative penalties has no updates.

Chapter 5, addressing False Claims Act issues, as is typical year to year, has the most analyzed and cited cases as well as policy developments. The 4th circuit reversed the dismissal of a reverse false claims act case, citing the 6th, 10th and 11th circuits as well; The updates examine scienter in the wake of the SuperValue case in the 1st, 5th, and 7th circuits; looks at falsity through one district and three circuit court cases in the 3rd, 6th, and 7th circuits; add a circuit court case on materiality; analyzes four Circuit court cases on particularity and cites another 6;

updates the volumes of qui tam cases, and notes the remarkable new collaboration between the government and data mining whistleblowers. We have added a 4th circuit case on the first-to-file requirement; two D.C. circuit cases on the “original source” exception; four circuit court cases and one district court case on the public disclosure bar; a 5th circuit case on the government’s right to intervene to dismiss an FCA case; a new DOJ memorandum on the timing of the government’s decision to intervene as well as to investigate claims, with the intent of accelerating the process. We have added a 1st Circuit case on the causation standard for an employee’s retaliation claim, citing conformity with six other circuits; 4 cases on damages where some courts lowered calculated penalties, while others upheld them despite their range. Chapter 5 is always a heavy lift.

Although the substantive processes of investigation have not changed much since 2025, Chapter 6 has been revised to reflect recent developments in what will instigate investigations. The updates incorporate FY 2025 enforcement and new content on Trump Administration enforcement initiatives such as Medicaid fraud, Medicare Advantage kickback schemes, and DEI-related FCA theories. The chapter also discusses notable recent settlements involving IBM, Aetna, and Kaiser Permanente; analyzes new appellate decisions addressing issues such as FCA causation and constitutional challenges to a private relator’s ability to bring qui tam actions; and covers the latest developments regarding proposed amendments to the U.S. Sentencing Guidelines.

Updating this book annually keeps us on our toes in this arena. Kevin and Saverio, our contributors on investigations, address the topics we don’t in our day-to-day work, but they do. We hope our readers find what is here useful as a good foundation to go further in their own work.

Alice G. Gosfield

Daniel F. Shay