

The ACA and Amendments to 18 U.S.C. § 1347: Criminalizing Health Care Practice or Something Entirely Different?

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1. Recent Publication

White Collar Crime: Healthcare Fraud
Database updated October 2010

Benson Weintraub; Robert Malove

Chapter
9. Patient Protection and Affordable Care Act of 2010

§ 9:2. Diminished mens rea in new health care law

The general criminal health care fraud statute, [18 U.S.C.A. § 1347](#) and AKS were amended to delete the term “knowingly” from its former provisions and added “With respect to violations of this section, a person need not have actual knowledge of this section or specific intent to commit a violation of this section.”^[5] Many variants of health care fraud can be prosecuted under either or both statutes; the unaccounted for *mens rea* differences appear anomalous and engender potential abuse of prosecutorial discretion in charging and sentencing.

2. In reality, the Amendment is as follows (changes are in yellow)

→ § 1347. Health care fraud

(a) Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice--

(1) to defraud any health care benefit program; or

(2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program,

in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 10 years, or both. If the violation results in serious bodily injury (as defined in [section 1365](#) of this title), such person shall be fined under this title or imprisoned not more than 20 years, or both; and if the violation results in death, such person shall be fined under this title, or imprisoned for any term of years or for life, or both.

(b) With respect to violations of this section, a person need not have actual knowledge of this section or specific intent to commit a violation of this section.

3. What does this change mean?

- a. Is it as the above authors envision?
- b. What conduct is now criminalized that was not before the revision (note, similar Stark change as well).

4. Context of Cases

- a. *United States v. Franklin-El*, 554 P.3d 903 (10th Cir. 2009)
 - i. Facts (opening)
 - ii. What Does a Provider Need Knowledge Of
 - iii. Discussion at 911 (Specific Intent)
 - iv. Do changes to 1347 impact
- b. *United States v. Dearing*, 504 F.3d 897 (9th Cir. 2007).
 - i. Facts (opening)
 - ii. Reckless Indifference as Willfulness
 - iii. Concerns with the Same
 - iv. Do changes to 1347 impact
- c. *Hidden Heights v. DHSS*, 222 P.3d 258 (Alaska 2009)
 - i. Facts
 - ii. Record Keeping
 - iii. Any 1347 implication

5. Follow-up: Intent of 1347 revisions

6. Any Difference in Advice Because of It?

7. Potential Future Discussion: Ethical Implications under Rules of Professional Conduct