

HEALTH INDUSTRY ALERT

2009 AMENDMENTS TO FALSE CLAIMS ACT POSE NEW CHALLENGES FOR HEALTH CARE INDUSTRY

On May 20, 2009, President Obama signed the Fraud Enforcement and Recovery Act of 2009 (FERA), which substantially amends the False Claims Act, 31 U.S.C. §§ 3729-3733 (FCA) for the first time since 1986. These amendments significantly expand the scope of liability for individuals and entities that receive government funds, including health care providers and suppliers receiving federal funds through Medicare or Medicaid. The FERA amendments also institute a number of important procedural changes in the FCA.

Health care fraud cases constitute the most prevalent category of FCA actions and have generated approximately two-thirds of all federal recoveries under the FCA. It is very important for all health care providers and suppliers to become familiar with the new provisions in FERA and to evaluate the new risks posed by the legislation.

BACKGROUND

Since 1986, the FCA has served as the government's principal tool to combat fraud perpetrated on the federal treasury. Until FERA, the FCA imposed liability for the knowing presentation to the federal government of false or fraudulent claims, the use of false statements to get false claims paid or a conspiracy to get false claims paid. The FCA also imposed liability for "reverse" false claims, i.e., the knowing use of false statements to conceal, avoid or decrease an obligation to pay money to the government. Lawsuits to enforce the FCA could be asserted directly by the Department of Justice (DOJ) or by private citizens known as qui tam plaintiffs or "relators," who stand to receive a 15 to 30 percent share in any recovery by the government.

SUMMARY OF AMENDMENTS TO FCA

Expansion of "reverse" false claims liability. Significantly for health care providers and suppliers, FERA expands the reverse false claims provision of the FCA. Before FERA, the reverse false claims provision imposed liability on a person who knowingly made, used or caused to be made or used, "a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the [g]overnment." Courts had construed the term "obligation" fairly narrowly, holding that it did not encompass, for example, contingent duties to pay potential fines or penalties, but only fixed obligations.

FERA extends the reverse false claims provision in several ways. First, it broadens the standard for liability by eliminating the need for a false record or statement. Instead, liability can be imposed where a person “knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.” It is not clear what the word “improperly” is intended to encompass or how it will be interpreted, but it appears likely that it is intended to serve as an analog to the word “false” in the other sections of the statute.

Second, FERA includes a definition of “obligation” that likely expands the types of duties that are actionable:

The term ‘obligation’ means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensor relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment

This definition of “obligation” does not explain what constitutes an “established” duty, but the legislative history of FERA is clear that Congress did not intend “contingent” duties, such as duties to pay potential penalties and fines, to fall within the definition of actionable duties. The definition of “obligation” includes duties that arise from a broad number of sources, including obligations arising from regulations published in the Federal Register and the Code of Federal Regulations. However, the legislative history clarifies that duties created by rules not published in the Federal Register do not fall within the definition of “obligation.”

Liability for Retention of Overpayments. Probably most important for the health care industry, the definition of “obligation” also specifies that the “retention of any overpayment” can serve as the basis for reverse false claims liability if it is done knowingly and improperly, or if an overpayment is knowingly concealed. The legislative history of this controversial provision indicates that liability should not be imposed for retention of overpayments pending return through normal processes, including Medicare, Medicaid, contract, grant and other reconciliation processes. Rather, the FCA would require proof of a knowing false record or statement, knowing concealment or knowing and improper acts to avoid or decrease an obligation to pay money to the government. Thus, liability should not attach if a person fails to immediately return an overpayment from the federal government and, instead, takes steps to return the overpayment through an applicable reconciliation process (such as a statutory, regulatory, contractual, judicial or similar process). However, liability would attach if a person falsifies information during a reconciliation period or otherwise acts knowingly and improperly to avoid repayment. Troublingly, the legislative history seems to suggest, albeit unclearly, that the failure to return an overpayment during an administrative or judicial appeal might be actionable under the FCA. Because of the broad and unclear scope of this overpayment provision, all health care companies should examine their processes for identifying and reconciling overpayments.

Presentment of claims directly to government not required. FERA provides that FCA liability attaches not only to claims presented directly to the United States, but also to claims presented to entities administering government funds. This amendment addresses several recent court decisions that had suggested that the FCA did not impose liability unless claims were directly “presented” to the United States. The issue came to a head in the Supreme Court’s decision in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008), which held that claims presented to intermediaries rather than the government were actionable only if the presenter intended that its false statements be used to get the government to pay the false claims. FERA amends the FCA to remove the language on which the *Allison Engine* decision rested and specifies that liability would attach to any claim submitted to intermediaries “if the money or property is to be spent or used on the Government’s behalf or to advance a Government program or interest.” This amendment is particularly significant for health care providers and suppliers that receive Medicare funds through intermediaries, carriers or Medicare Administrative Contractors, or Medicaid funds through the states.

Materiality. Before FERA, virtually all courts agreed that the FCA incorporated a “materiality” requirement—that is, a false or fraudulent statement must be “material” to the government payment decision. FERA may cast doubt on this conclusion because it adds an explicit “materiality” requirement in the “false statements” and “reverse false claims” subsections of the FCA, but not in the other subsections. Nonetheless, courts may still conclude that some implicit standard of “relevance” is still inherent in the phrase “false or fraudulent claim” found in both of the direct false claims provisions. Judicial developments in this area could prove very important in coming years. In addition, FERA resolves a judicial debate over whether materiality under the FCA should be determined subjectively, i.e., by establishing if the actual decision-maker in a given case was induced by the false statement to pay a claim, or objectively, i.e., by reference to a hypothetical, neutral decision-maker. FERA codified the objective standard by defining “material” as “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.”

Conspiracy provisions clarified. Before FERA, the conspiracy provision of the statute was confusingly drafted and did not encompass a conspiracy to violate the reverse false claim provision. FERA simplifies the conspiracy provision and provides that any conspiracy to violate the other FCA liability provisions is actionable.

Revised anti-retaliation provision. FERA amends the FCA anti-retaliation provision in a number of ways. First, it permits persons other than employees to sue for retaliation—including any “employee, contractor, or agent.” Second, it permits plaintiffs to sue for “lawful acts” done “in furtherance of other efforts to stop 1 or more violations of this subchapter.” It is unclear how this vague language is to be interpreted, but it is certain that qui tam lawyers will assert that the language is intended as an expansion of the type of protected conduct that can serve as the basis for liability. Companies should examine their labor and employment practices to analyze whether this new liability standard necessitates any changes.

Expanded use of Civil Investigative Demands. Since 1986, the FCA has included provisions that permit the attorney general to issue Civil Investigative Demands (CIDs) to investigate fraud allegations before filing an FCA action or joining a qui tam action. These are very powerful investigative tools that include not only document requests, but also interrogatories and depositions. However, these tools were infrequently used because the CID authority was non-delegable. FERA amends the FCA to allow the attorney general to delegate the authority to issue CIDs. It is very likely that the DOJ will use these CIDs—and in particular the ability to take pre-intervention depositions—in many cases. Furthermore, FERA specifies that “any information obtained by the attorney general or a designee ... may be shared with any qui tam relator” if deemed necessary to the investigation. FERA also provides that any information obtained through a CID can be used in any subsequent investigation or proceeding—including witness interviews, summary judgment motions, trial and a broad variety of other uses. In fact, government information obtained through CIDs can be freely shared with a relator and used by the relator even where the government declines to intervene.

In practice, the expanded use of CIDs has the potential to complicate the defense of FCA cases and investigations dramatically. These provisions afford the DOJ—and, indirectly, relators—the ability to conduct one-way discovery very early in an investigation.

Government complaint relation-back for statute of limitations purposes. FERA specifies that where the government intervenes in a qui tam action, claims asserted in its complaint in intervention will relate back to the date of the original action. This provision overrules certain decisions that had held the government’s claims do not relate back to the time of a relator’s filing, because the defendant is deprived of adequate notice.

Sharing of information with state and local governments. FERA specifies that the seal governing qui tam actions does not preclude the federal government or relators from freely sharing the complaint, other pleadings or the qui tam disclosure statement with state or local investigating authorities that are named as co-plaintiffs along with the federal government.

POTENTIAL FUTURE AMENDMENTS TO FCA

Two bills pending in the House (H.R. 1788, voted out of the House Judiciary Committee) and the Senate (S. 458, not taken up by the Senate Judiciary Committee) include additional proposed amendments, some of which are aimed at eradicating the defenses that defendants can muster against qui tam lawsuits. It is unclear whether these bills will move their way through Congress. Akin Gump lawyers will continue to follow these bills, focusing in particular on two provisions (below) that pose the greatest risk to health care companies.

Relaxation of public disclosure bar. Both the House and Senate bills would have, for all practical purposes, abolished the “public disclosure” bar on qui tam actions. The FCA currently prohibits qui tam actions based on public disclosures of information unless the relator was the “original source” of the information. The purpose of this provision is to prevent parasitic qui tam lawsuits based on stale information. The House and Senate bills would have stripped defendants of the ability to raise the public disclosure bar as a defense, instead permitting only the government to move for dismissal. The bills would also have dramatically narrowed the scope of the public disclosure bar. As the DOJ pointed out in a letter to Congress, the proposed standard was so narrow that it would have permitted many qui tam suits based almost entirely on publicly disclosed information to proceed.

Pleading standard for qui tam complaints relaxed. The House bill proposed to relax the standard that relators must meet in filing their complaints. Currently, the courts unanimously require relators to satisfy Rule 9(b) of the Federal Rules of Civil Procedure by pleading all elements of their claims with particularity. As a practical matter, Rule 9(b) is one of the principal tools that the courts have deployed to dismiss meritless and speculative qui tam suits. The House bill would have relaxed the 9(b) standard for relators (but not the DOJ) and would have allowed relators with little knowledge of fraud to plead speculative allegations. Significantly, the DOJ has opposed this relaxation of the pleading standard.

CONTACT INFORMATION

Akin Gump has substantial experience in defending FCA lawsuits asserted by the DOJ and by relators against health care companies. For more information about the development of FCA caselaw and legislation, please [click here](#) to refer to our earlier health industry alerts. If you have any questions about FERA, the FCA or pending legislation, please contact—

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