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June 4, 2009

Recent Changes to Federal False Claims Act Have Sweeping Implications For Healthcare Organizations

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On May 20, 2009, President Obama signed into law the Fraud Enforcement and Recovery Act of 2009 ("FERA"). FERA considerably expands the range of conduct subject to liability under the federal False Claims Act (the "FCA"). As a result, FERA will have significant implications for healthcare providers, health plans and other healthcare organizations doing business directly with the federal government or with recipients of federal funds. FERA also amends the FCA in certain procedural areas and expands whistle-blower protection against retaliation.

Application of the FCA to claims paid by intermediaries. Prior to the enactment of FERA, the FCA included a "presentment clause" requiring that a false claim be presented to "an officer or employee of the Government, or to a member of the Armed Forces" in order for liability to attach. FERA removes this language, effectively overturning a 2004 federal appeals court decision holding that FCA liability can attach only if the claim is presented to a government officer or employee, not just a government grantee. *See United States ex rel. Totten v. Bombardier Corp*., 380 F.3d 488 (D.C. Cir. 2004). According to the Senate Judiciary Committee report accompanying the legislation (S. Rep. No. 111-10), the amendment clarifies that FCA liability "attaches whenever a person knowingly makes a false claim to obtain money or property, any part of which is provided by the Government without regard to whether the wrongdoer deals directly with the Federal Government; with an agent acting on the Government's behalf; or with a third-party contractor, grantee, or other recipient of such money or property." The Senate Judiciary Committee report further states that removal of the presentment clause clarifies that the FCA "reaches all false claims submitted to State administered Medicaid programs." S. Rep. No. 111-10, at 11 (2009). The change also means that FCA liability extends to claims submitted to intermediaries such as Medicaid Managed Care, Medicare Advantage, and Medicare Part D plans.

Modification of the definition of "claim." FERA amends the FCA's definition of a

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"claim" to mean "any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property" that is 1) presented directly to the United States, or 2) "to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest" and the Government provides or reimburses any portion of the requested funds. The definition excludes demands for money or property the Government has provided to federal employees as compensation or as an income subsidy. The new definition makes clear that FCA liability can attach to knowingly false requests or demands for federal money, regardless of whether the Government has title to the money being sought, or whether the money is requested directly from the Government or from a recipient of such money, so long as that money is used to "advance a Government program or interest." Consistent with the elimination of the presentment language as described above, the change clarifies that requests for payment submitted to Medicaid contractors and managed care organizations are "claims" subject to liability under the FCA.

Removal of "intent" requirement for a false statement. Prior to enactment of FERA, liability under the FCA would attach if a person "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." FERA removes the language requiring that a person use a false statement "to get" a false claim "paid or approved by the Government" and replaces it with a looser requirement that the false statement be "material to" a false claim. The FCA therefore no longer requires a direct connection between the false statement and the Government's payment of the claim – liability can attach if a party's statement has a "natural tendency to influence, or is capable of influencing" the payment of government funds. The Senate Judiciary Committee report states that these changes "clarify and correct erroneous interpretations of the law" stemming from the Supreme Court's decision in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008). Relying on the prior language, *Allison Engine* held that to be liable under the FCA, a subcontractor in a government contract who knowingly submits a false claim to a prime contractor and is paid with government funds must have intended to defraud the government, not just the prime contractor. Notably, the changes to this section date back to all claims pending on or after June 7, 2008, the date the Supreme Court decided *Allison Engine*.

Expanded liability for overpayments. FERA expands liability for "reverse" false claims, and imposes liability where a party knowingly conceals or fails to return overpayments to the Government. The revised provision expands liability under this section to cover instances when a party "knowingly conceals or knowingly and improperly avoids or decreases an obligation to" pay money to the Government. The definition of "obligation" now includes "an established duty, whether or not fixed . . . arising from statute or regulation, or from the retention of any overpayment." Thus liability can arise once an overpayment is knowingly concealed, even in the absence of a false record or statement. The Senate Judiciary Committee report states that the revised provision is aimed at imposing liability "without notice [by the provider] to the Government about the overpayment." S. Rep. No. 111-10, at 15 (2009). This will affect repayment decisions by healthcare organizations when an overpayment is discovered.

The changes, which appear to target the knowing and improper retention of any discovered overpayment, create some uncertainty with respect to payments remitted through statutory and regulatory schemes that allow for the periodic reconciliation of cost reports. The Senate Judiciary Committee report specifies that the new definition "will be useful to prevent Government contractors and others who receive money from the Government incrementally based upon cost estimates from retaining any Government money that is overpaid during the estimate process." *Id*. At the same time, the Committee notes that the language is directed at the "willful" retention of overpayment, and is not intended to create liability for a "simple retention of an overpayment . . . permitted by a statutory or regulatory process for reconciliation." *Id*. It remains unclear how the language will be applied to overpayments retained by healthcare facilities in the context of reconciliation or "true-up" schemes, such as under the Medicare cost reporting process.

Expansion of anti-retaliation protections to contractors. FERA expands the grounds for retaliation claims under the FCA by broadening the category of individuals entitled to whistle-blower protection from "any employee" to "any employee, contractor, or agent," and providing that protected acts include those taken by the employee, contractor, or agent on behalf of the employee, contractor, agent, or "associated others" in furtherance of "efforts to stop 1 or more [FCA] violations." In addition, FERA eliminates the requirement that any prohibited retaliatory action be taken by an employer. The FCA will now extend whistle-blower protection to, for example, independent contractors of a healthcare company who act to prevent alleged violations of the FCA.

Effective date. The amendments to the FCA generally apply prospectively to conduct that occurs on or after May 20, 2009, FERA's date of enactment. The most notable exception is that the replacement of the "intent" requirement with a materiality standard applies retroactively to all claims pending as of June 7, 2008. In addition, changes to some of the FCA's procedural provisions apply to cases pending on May 20, 2009.

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