FIVE THINGS YOU SHOULD KNOW ABOUT THE FRAUD ENFORCEMENT AND RECOVERY ACT OF 2009

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All health care providers need to be aware of how recently enacted changes to the federal False Claims Act (FCA) may affect them, particularly in the areas of refunding overpayments to the government and filing claims with Medicare and Medicaid managed care plans.

Heralded as an enhancement to fraud enforcement in light of the "mortgage fraud, securities and commodities fraud, [and] financial institution fraud," the Fraud Enforcement and Recovery Act of 2009 (FERA) was recently signed by President Obama. This law makes sweeping changes to the FCA that will significantly impact every business and industry that does business with the federal government either directly or indirectly by encouraging the filing of new *qui tam* lawsuits and making it easier for them to succeed. Among other things, the new law retroactively overrules the key holdings articulated by the Supreme Court in *Allison Engine Co. v. United States ex rel. Sanders,* 128 S.Ct. 2123 (2008), expands the scope of statutory liability for "reverse" false claims and specifically includes the retention of an overpayment, and broadly redefines "claims" to include any request, from almost any entity, provided only that the funds were "spent or used on the Government's behalf or to advance a Government program or interest."

Below are some of the things that we believe our clients concerned with reimbursement issues should know about the changes incorporated in FERA:

1. **You May Be Liable for Knowingly Retaining An Overpayment:** Section 3729(a)(1)(G) was added to the FCA by FERA. It establishes liability for any person who "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government." Under this provision, no affirmative action need be made to establish liability, as a person can violate the FCA by merely concealing or avoiding an obligation to repay an overpayment made by the Government. A definition of the term "obligation" is also added to the FCA, and it specifically provides that the knowing retention of an overpayment, whether a fixed obligation or not, can trigger liability under the Act. Though the retention must be done "improperly," presumably a limitation on liability under this section, that term is undefined and one should expect both Government lawyers and relators' counsel to argue that any retention of an overpayment is an improper one. This is particularly alarming in the context of the Stark Law where a minor technical violation, i.e., a missing signature on a physician recruitment agreement, could lead to a large number of potentially tainted claims and there is currently no clear avenue or process to self-disclose such potential overpayments to CMS or another government agency.

Finally, it should be noted that, even though this part of FERA is not given retroactive effect, overpayments made before May 20th, but improperly retained after that date, will almost certainly be subject to FCA claims.

2. **"Claims" are Broadly Defined: Almost Every Request for Payment Can Trigger Liability:** As part of an effort to facilitate more FCA cases and to remove impediments to bringing them, FERA amends the definition of "claim" to include any request or demand for money or property that is made to the Government or a contractor, grantee or other recipient, if the money or property is being spent on the Government's behalf or to advance a Government program and the Government has provided any portion of the money or property demanded. Under this definition, claims to Medicare Advantage (MA) Plans and Medicaid Managed Care Organizations (MCOs) can surely now trigger an FCA claim whereas previously it was unclear. In an environment such as healthcare where all of the entities eventually get federal dollars, the Government could certainly claim an interest in virtually every aspect of its delivery. It is important to keep an eye on just how far this could be taken.
3. **The Intent Requirement of Allison Engine Is No Longer Required for FCA Liability:** The Supreme Court's unanimous decision in *Allison Engine Co. v. United States ex rel. Saunders* held that, in order to establish liability under the FCA, there had to be a false claim or record which was submitted with intent to get funds paid by the Government. It was not enough to "merely show" that Government funds would ultimately be involved; there needed to be both an intent that "the Government itself pay the claim," and a link between the request and the decision on whether or not to pay that claim. FERA eliminates both of these requirements by requiring only that there be a claim to a contractor, grantee or recipient of Government funds, and that the money or property at issue was "spent or used on the Government's behalf or to advance a Government program or interest." The amendment also legislatively renders *Allison Engine* a nullity by making the effective date for these changes retroactive to the date of the opinion. Whether or not this aspect of FERA will survive judicial scrutiny is questionable as retroactivity is generally not appropriate in punitive statutes.
4. **Materiality Under Allison Engine Is Still Required, But Greatly Weakened:** *Allison Engine* was also cited by a number of courts for establishing a heightened materiality standard by demanding a "direct link" between the false statements or records and the Government's decision to pay the claim. Though FERA now codifies an express materiality requirement into the FCA, it is a very weak one that is much less likely to influence the outcome of litigation. "Material" is now defined as "having the natural tendency to influence, or be capable of influencing the payment or receipt of money or property" — a standard so timid that virtually any inaccurate statement, mistake or violation is certain to meet it.

5. **The Government Has New Tools and New Money to Spend:** FERA not only tries to lessen the burden on the Government in proving claims (see above discussion of intent and materiality), but it also purports to make it easier for the Government to bring claims. First, it amends the FCA to permit the Government to add additional claims to a compliant filed by a *qui tam* relator, even if such claims would traditionally be barred by the statute of limitations. Claims added by the Government when it elects to intervene will relate back to the initial filing date of the relator's complaint for statute of limitations purposes. Second, FERA expands the authority to approve Civil Investigative Demands (CIDs) by allowing the Attorney General to appoint a designee to approve CIDs. CIDs are used by the Government to obtain documents and testimony prior to an intervention decision. This ability to delegate has long been desired by Government lawyers and, while one can hope for restrained use, there is great potential for abuse and resulting prejudice. Finally, it is noted that significant amounts of money for enforcement are appropriated for attorneys, agents and costs of investigation.

There are, of course, other aspects of FERA that are worthy of consideration. For instance, FERA amendments expand the ability of federal government agencies to share information with each other, state governments, relators and relators' counsel, amend the retaliation provisions to protect more individuals and entities, and expand liability for conspiracy under the FCA. Please be on the look out for our forthcoming *Health Law Alert* article, which will discuss these and other FERA changes in more detail. The full text of FERA can be found at frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s386enr.txt.pdf.

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