The President Signs a Significant Amendment to the Federal False Claims Act

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The authors review the key aspects of the Fraud Enforcement and Recovery Act of 2009.

On May 20, 2009, the president signed into law the Fraud Enforcement and Recovery Act of 2009 ("FERA"), which will implement significant changes to the federal False Claims Act ("FCA"). The amendments to the FCA will significantly expand the scope of FCA liability, provide for new investigative tools, and make it easier for *qui tam* relators to bring and maintain FCA suits on behalf of the government.

FRAUD ENFORCEMENT AND RECOVERY ACT OF 2009

Significant Changes to FCA Liability Provisions

The House and Senate both passed the bill with overwhelming majorities before the president signed FERA into law. While the new law is primarily targeted at potential fraud involving recipients of economic stimulus funds in the financial services industry, it also includes some very significant changes to the liability provisions of the federal False Claims Act.

First, the legislation includes amendments to the FCA's requirements that false statements or records created in support of false claims must be used "to get" a false claim paid by "the Government." The new law removes the requirement of proving that false records and statements be supplied with the "intent" of getting false claims paid, as the unanimous Supreme Court otherwise required in the *Allison Engine Co. v. United States ex rel. Sanders* decision. In an attempt to confine FCA actions to fraudulent claims directed at the U.S. Treasury, the new law provides that FCA liability will hinge on whether the false record or statement was "material" to getting a false claim paid or approved. The new law defines this new term "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property," which is a broader definition of "materiality" than has been adopted by many courts.

Second, the legislation expands FCA liability to include any false claim for government money or property regardless of whether the claim was submitted directly to a government official or employee. The new law eliminates the "presentment" requirement within the current form of 31 U.S.C. § 3729(a)(1) (to be codified as § 3729(a)(1)(A)), which required that a claim be submitted to "an officer or employee of the United States Government or a member of the Armed Forces of the United States" in order for FCA liability to attach. Under the new law, FCA liability attaches, so long as the person "knowingly presents, or causes

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to be presented, a false or fraudulent claim for payment or approval" to any entity. For example, any false or fraudulent claim submitted by a subcontractor to a prime contractor receiving federal funds could lead to FCA liability.

Third, the new law expands the scope of the types of "claims" submitted to the government that can trigger potential FCA liability. Under the new law, a "claim" now includes demands for money and property even if the United States government does not have title to the money or property. In other words, the new law would impose FCA liability for any subcontractor who submits claims to any recipient of government funds even where the claim cannot be directly traced back to money from the government. The scope of FCA liability under this standard is virtually limitless, particularly in the hands of creative relators' counsel. The new law does include one important limitation, requiring that a "claim" be a demand for money or property that is "to be spent or used on the Government's behalf or to advance a Government program or interest," thus excluding fraud that is unrelated to the government.

Fourth, the new law provides, for the first time, a definition of "obligation" under the so-called "reverse false claims" provisions of the FCA as it currently exists (31 U.S.C. § 3729(a)(7), which under the new law will become § 3729(a)(1)(G)). The reverse false claims act provisions, under the current FCA and under the new provisions, generally establish liability for a person who knowingly uses a false record or statement to conceal or avoid paying or returning government funds that it is otherwise obligated to return. Under the current FCA, there is no definition of the "obligation" and it has been left for the courts to interpret the term. The new law defines an "obligation" to pay or re-pay government funds when there is an "established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment." The practical effect of this new provision is to impose FCA liability for any alleged failure to pay or re-pay the government based on the government's or relator's interpretation of any and all statutory, regulatory, contractual and other requirements — even when there has been no prior judgment or determination that the defendant owed the money to the government. There are several concerns with this change. One concern is that contractual entities, such as Medicare providers, regularly retain overpayments subject to some reconciliation process (many Part A providers continue to cost report). One suggestion is that this language inserts FCA liability into this administrative reconciliation and cost reporting process. Secondly, the definition extends potential FCA liability to duties that are not "fixed." One potential question is the interplay between other laws, such as the strict liability Stark self-referral law. If a Medicare provider has a financial relationship with a physician that violates Stark, does that mean that all monies associated with referrals from that physician are retained overpayments under the FCA (as Stark disqualifies those referrals)?

Fifth, the new law expands the scope of liability under the conspiracy provisions of the FCA. Previously, FCA liability only applied to a conspiracy to get a false or fraudulent claim paid. Under the new law, FCA liability extends to any conspiracy to violate any requirement of the FCA (*e.g.*, retaliation against whistleblowers).

Sixth, the new law includes an expanded scope of whistleblower employment discrimination protection. While the current provision only addresses retaliation claims by "employees," the new law dramatically increases the scope of potential liability by providing an independent federal cause of action for alleged retaliation against employees, contractors and agents engaged in any "other efforts" to stop a violation of the FCA.

Seventh, the new law includes a brand new provision establishing mandatory liability for the govern-

ment's costs in recovering penalties and damages for defendants that have violated the FCA.

Significant Changes To FCA Procedural Provisions

In addition to the changes made to the liability provisions of the FCA, the bill also includes a number of changes to procedural provisions of the FCA.

First, the new law will allow the government to further delay its decision to intervene in a *qui tam* suit by specifically allowing new complaints or amendments to a relator's complaint filed by the government to "relate back" to the date of the original complaint for purposes of the statute of limitations. This new provision will undermine the ability of businesses to defend themselves (due to difficulties in dredging up documents and witnesses with personal knowledge to support defenses many years after the fact) and increase the costs of litigation, as the delayed government intervention may prolong already protracted lawsuits.

Second, the new law removes restrictions on the sharing of information obtained from a Civil Investigative Demand ("CID"). In addition, the new law allows the Attorney General to delegate the authority to issue a CID. Currently, the information obtained from a CID cannot be shared with relators or their counsel except in exceptional circumstances. Under the new provisions, "any information may be shared with any *qui tam* relator if the Attorney General or his designee determine it is necessary as part of any FCA investigation." This revision has the potential to undercut both the public disclosure jurisdictional bar and the pleading requirement of specifying instances of fraud with particularity because it specifically allows a relator to obtain information outside his personal knowledge to support a *qui tam* suit.

Third, the new law allows the government and relators to serve complaints and related information — even while those documents remain under seal in accordance with FCA procedure — on applicable co-plaintiff state and local law enforcement agencies, in *qui tam* cases where the applicable state or local government is named as a co-plaintiff in the action. This sharing of information for investigative purposes increases the likelihood that businesses, already subject to potential liability under the federal FCA, could be subject to further state or local government investigations and causes of action (e.g., under state FCA statutes).

Fourth, the new law provides for retroactive application of certain amendments to the FCA. For example, the new law provides that the amendments corresponding to section 3729(a)(2) of the current FCA (to be codified as § 3729(a)(1)(B) under the new law) shall apply retroactively to all claims pending as of June 7, 2008 — the date that *Allison Engine* became law. The new law also provides for retroactive application of the amendments to the statute of limitations provisions, the CID provisions, and the sealing provisions to all cases pending at the date of enactment. These retroactivity provisions, which are of questionable constitutionality, threaten to throw the last year of *qui tam* litigation into complete chaos. Relators who have had their cases dismissed for failing to meet the requirements of *Allison Engine* within the last year will have a second bite at the apple to meet the new standard. Further, pending *qui tam* suits on the verge of being dismissed for failing to file within the statute of limitations will be given a stay of execution.

WHAT THESE PROPOSED CHANGES MEAN

The new legislation will significantly aid a relator's ability to bring a *qui tam* case under the FCA and keep it in court once he or she does. Perhaps most significantly, the passage of these amendments to the FCA will extend potential liability to all fraud committed against contractors and grantees of the United States government. No longer will *qui tam* relators and the government be required to show that there was fraud committed directly against the United States government or that there was a direct intent to defraud the government. Instead, potential FCA liability will attach once a government contractor or subcontractor provides a false record or statement (even if it is to a contractor), so long as it is "material" to a false claim being paid by the government (even if the subcontractor has no "intent" to defraud the government). Furthermore, the expanded definition of "claim" will potentially expand the scope of FCA liability to any number of contractual relation-

ships far removed from the government, particularly in the hands of creative relators' counsel who will only need to demonstrate that the money was "to be spent or used on the Government's behalf or to advance a Government program or interest."

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Members of the health care industry should be concerned about the new definition of "obligation," which applies to retained overpayments. While the new law only imposes liability for a knowing and improper "retention" of an overpayment, it is unclear exactly when FCA liability would attach for retention of such an overpayment. Currently, Medicare providers such as hospitals and skilled nursing facilities reconcile their accounting at the end of the fiscal year to determine whether Medicare overpaid them for services, and then return the overpayment (certain providers continue to cost report - even under prospective payment systems). The Senate Judiciary Committee report suggests that the Senate bill's revision was not intended to interfere with this process and does not "create liability for a simple retention of an overpayment that is permitted by a statutory or regulatory process for reconciliation."[1] While this legislative history provides some guidance in interpreting intent of the statute, courts are not necessarily bound by the legislative history and there is not necessarily a guarantee that courts interpreting the definition of "obligation" will agree that the retention of an overpayment permitted by statute will prevent FCA liability.

In addition, while courts have generally held that potential FCA liability extends to Medicaid claims (or at least the federal share), commentary and arguments in several decisions have raised the possibility that claims to Medicaid may not satisfy the requirements of an action under the federal FCA. However, the new revisions were intended, at least in part, to dispel the notion that court decisions can be read to restrict FCA liability from attaching to Medicaid claims.[2] The Committee report makes it clear that the revisions in § 3729(a)(2) were intended to clarify that FCA liability extends to "all false claims submitted to State administered Medicaid programs."[3]

The new procedural provisions will also undermine the ability of businesses to defend themselves in *qui tam* suits. The government will now be able to sit on the sidelines for years beyond the statute of limitations before swooping into an existing *qui tam* suit with new allegations in an amended complaint. The new provisions regarding the sharing of information gathered from CIDs (which will likely now be widely used) will also stack the deck against the defendant in a *qui tam* suit. A relator with little personal knowledge of the alleged false claims will now have access to an enormous amount of information, which the relator may be able to use in support of its *qui tam* suit. Finally, the retroactivity provisions threaten to throw the status of thousands of cases currently pending into complete disarray.

The entire bill is available at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s386enr.txt.pdf.

NOTES

[1] *See* Senate Judiciary Committee Report 111-10, "Fraud Enforcement and Recovery Act of 2009," p. 15 (Mar. 23, 2009).

[2] *See* Senate Judiciary Committee Report 111-10, "Fraud Enforcement and Recovery Act of 2009" p. 11 (March 23, 2009).

[3] *Id.*