



Fraud Enforcement and Recovery Act of 2009 and Health Care Providers

On May 20, 2009 President Obama signed the Fraud Enforcement and Recovery Act of 2009 (FERA), which modifies and clarifies certain provisions of the federal False Claims Act (FCA), 31 U.S.C. §§ 3729-3733.

Background

Under the FCA, if a person presents a false or fraudulent claim for payment, makes a false statement regarding a claim, conspires to commit a violation of the FCA or has knowing and improper possession of government property, that person is subject to civil penalties of between US\$5,000 and US\$10,000, plus three times the amount of damages the government sustains as a result of the violation.

In *Allison Engine Company, Inc. v. United States ex rel. Sanders*, No. 07-214 (S. Ct. June 9, 2008), the Supreme Court narrowly interpreted the FCA language that provides for liability when a person makes a false statement to get a claim paid or approved by the government. The Court found that based on such language, FCA penalties do not apply to subcontractors who make false claims to government contractors when the subcontractors do not intend for the government itself to rely on such false statements as a condition of payment. Further, the Court ruled that conspiracy to make a false claim creates liability only when the false statement has "a material effect on the Government's decision to pay the ... claim."

Subcontractor Liability Under FERA

The Senate Report regarding the FERA states that the FERA amends the FCA in part "to clarify and correct erroneous interpretations of the law that were decided in *Allison Engine*" (S. Rep. No. 111-10, at 10 [2009]). This correction appears in two specific places:

1. Presentment - The FERA removes the "presentment"

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requirement from § 3729(a)(1), which specified that to be liable under the FCA, a person must present a false claim to an officer or employee of the US government or a member of the US armed forces. The new § 3729(a)(1)(A) provides that the FCA penalties apply to "any person who knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," regardless to whom the claim is made.

2. Government Payment - To clarify that it overrides the Supreme Court ruling in *Allison Engine*, the FERA removes the FCA requirement that to be liable, a person must make a false statement "to get a false or fraudulent claim paid" by the government. The new § 3729(a)(1)(B) states that FCA penalties apply to "any person who knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim."

These sections of the FCA have been amended to ensure that persons making false or fraudulent claims, or making false statements related to a claim, to any contractor, subcontractor or entity to whom payment is made by the government will be liable to the same extent as if they made such claims or provided such information to the government itself.

Many health care providers enter into services arrangements under which they receive payment from hospitals for services and the hospitals are reimbursed by Medicare. In these cases, the hospital is equivalent to a government contractor, and the provider is equivalent to a subcontractor. Prior to the FERA, a *qui tam* relator could not bring an action against that provider in a services arrangement, as the provider did not provide any statements or claims for reimbursement that would materially impact government payments; it was merely acting as a subcontractor.

However, the changes the FERA makes to the FCA create possible liability for providers, even in their role as a subcontractor. As a result, providers are open to risk regarding employees or others who may want to bring a *qui tam* action as a relator against them for billing where there may be possible Anti-Kickback Act or Stark Act violations. Even if a provider is not in violation of these acts, the first line of defense against such a *qui tam* action, that the provider does not present claims to the government, no longer exists.

Retroactive Application

Generally, the FERA changes take effect on the date the legislation was enacted. However, the FERA removes the requirement "to get a false or fraudulent claim paid" from § 3729(a)(2) liability for false and fraudulent statements as of June 8, 2008 - the date *Allison Engine* was decided by the Supreme Court. The FERA therefore creates a possible FCA penalty for those persons who made a false record or statement material to a false claim, even if such false statement did not impact the government's payment, prior to the passage of FERA.

Such retroactive implementation may create a constitutional issue. Although the prohibition on *ex post facto* laws generally applies only to criminal laws, the punitive nature of the FCA implicates similar fairness issues.

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Prior to the FERA, the FCA provided for penalties when a person concealed, avoided or decreased an obligation to pay or transmit money or property to the government. However, "obligation" was not defined and was left up to judicial interpretation.

The FERA provides a definition of "obligation" in the FCA at § 3729 (b)(3), which includes "an established duty, whether or not fixed, arising from ... the retention of any overpayment." The Senate Report clarifies that "the violation of the FCA for receiving an overpayment may occur once an overpayment is knowingly and improperly retained, without notice to the Government about the overpayment" (S. Rep. No. 111-10, at 15 [2009]).

In situations in which a provider may have received overpayments by Medicare, Medicaid or another federally funded health care payor, it now has a clear affirmative duty to notify the applicable agency and repay that overpayment.

For further information regarding FERA implications for health care providers, please contact your principal Squire Sanders lawyer or one of the individuals listed in this alert.

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