

Seventh Floor
1501 M Street, NW
Washington, DC 20005-1700
Phone: (202) 466-6550 Fax: (202) 785-1756

MEMORANDUM

TO: Healthcare Provider Clients and Friends of PPSV

FROM: Powers Pyles Sutter & Verville, PC

DATE: July 15, 2009

RE: FCA Amendments Raise the Stakes for Failing to Investigate Potential Overpayments

On May 20, 2009, President Obama signed the Fraud Enforcement and Recovery Act of 2009 (“FERA”). This legislation is intended to help prosecutors and other agents curb mortgage, corporate, and other financial fraud at a time when the government is “bailing out” major industries.¹ For the healthcare industry, the major import of the amendment is to increase False Claims Act (“FCA”) risk in situations where a provider discovers, but fails to repay, an overpayment.

I. Background

The FCA was originally enacted during the Civil War period in response to wartime fraud and corruption.² After substantial amendments in 1986, the FCA became the government’s “primary litigative tool for combating fraud.”³ Both the Attorney General and private persons – known as *qui tam* relators – may institute civil actions to enforce the FCA. The healthcare industry has been deeply affected by the law. In 2008, the federal government recovered \$1.12

¹ S. REP. NO. 110-10, at 2 (2009).

² 155 CONG. REC. E1295 (May 18, 2009) (speech of Rep. Berman).

³ S. REP. NO. 99-345, at 2 (1986).

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billion in settlements and judgments from the healthcare industry, which accounts for 83.5% of the year's total recoveries under the FCA.⁴

Congress amended the FCA in order to clarify the law and bolster its ability to combat waste. First, Congress changed the law so that it is now irrelevant whether the person who submits a false statement or record to the government actually intends that the government rely on it when deciding to pay a claim.⁵ If a false statement has “a natural tendency” to influence the government's decision to make a payment, a violation has occurred under the amended FCA. Second, the FCA now imposes liability on those who make false claims to non-governmental entities for funds derived from the government.⁶ This change was designed to bring subcontractors of government contract arrangements within the scope of the FCA; for example, a Pharmacy Benefit Manager (“PBM”) may now be liable under the FCA if the PBM submits a false claim to a commercial insurer that holds a government contract with the Federal Employees Health Benefit Program. Third, Congress modified the FCA to incentivize *qui tam* relators to attempt to stop violations before actually reporting them to the government, by adding language that protects employees from retaliation only for those actions that are made to stop false claims violations, rather than all acts taken in relation to the *qui tam* action.⁷ Congress also made some changes to the way FCA cases are investigated and litigated. For healthcare providers, however, the most striking changes are those made to the FCA's “reverse false claims act” provisions. This article describes the updated reverse false claims provision and discusses some possible implications of the new law.

II. Reverse False Claims After the Fraud Enforcement and Recovery Act of 2009

a. The False Claims Act's Updated “Reverse False Claims” Provision Imposes Liability in Three Situations.

A reverse false claim occurs when a claimant attempts to reduce or avoid a payment that is due to the government. In the healthcare field, this potential FCA liability can occur whenever a provider discovers that it has received an overpayment, perhaps through no fault of its own or as a result of innocent mistake, or as a consequence of a prohibited relationship such as a Stark law violation. Under the former FCA provisions, if the provider made any false record or false statement to conceal the arrangement, or avoid an obligation to repay the overpayment, the statute could be violated.

⁴ Press Release, Department of Justice, More Than \$1 Billion Recovered by Justice Department in Fraud and False Claims in Fiscal Year 2008, <http://www.usdoj.gov/opa/pr/2008/November/08-civ-992.html>.

⁵ Congress essentially overturned a 2008 Supreme Court decision that interpreted the FCA as requiring that the government must prove that a defendant intended for the government to pay a claim. *See Allison Engine Co., Inc. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008). Congress removed statutory language specifying that the defendant must make the false record or statement “to get” a false or fraudulent claim “paid or approved by the Government.” In *Allison*, the Supreme Court interpreted this language as denoting an intent requirement.

⁶ This is in response to a federal appellate court decision that held that the FCA does not reach claims that are presented to Government grantees and contractors, and paid with Government or contract funds. *See United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 448 (D.C. Cir. 2004).

⁷ 31 U.S.C.A. § 3730(h) (West 2009).

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With FERA, Congress amended the reverse claims provision to broaden the theory's applicability. Figure 1, below, is a side-by-side comparison of the old and new language of the reverse claims act provision.

FIGURE 1

REVERSE FALSE CLAIM PROVISION OF THE FALSE CLAIMS ACT	
1986 False Claims Act Amendments	2009 False Claims Act Amendments (Fraud Enforcement and Recovery Act of 2009)
<p>Any person who knowingly makes, uses, or causes 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 Government, is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person.⁸</p>	<p>Any person who knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990, plus 3 times the amount of damages which the Government sustains because of the act of that person.⁹</p>

The FCA's updated reverse false claims provision imposes liability in three new situations. First, if a person knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to transmit money or property to the government, then that person is now subject to liability. The language is no longer limited to situations where the false statement is made *to conceal, avoid, or decrease* an obligation to refund an overpayment. Instead, the false record or statement must only be material to the obligation to pay or transmit money. The lawmakers defined "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."¹⁰ This definition is consistent with prior court decisions that focused on the potential effect of a false statement when it is made, rather than the actual effect of the false statement, when determining whether the FCA had been violated.¹¹ Thus, the first category under the updated FCA imposes liability when a person makes a false statement that has the natural tendency to influence the payment or receipt of government money.

⁸ 31 U.S.C. § 3729(a)(7) (1986).

⁹ 31 U.S.C.A. § 3729(a)(1)(G) (West 2009).

¹⁰ 31 U.S.C.A. § 3729(b)(4) (West 2009).

¹¹ See, e.g., U.S. *ex rel.* Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 916-17 (4th Cir. 2003).

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Second, a person who knowingly conceals an obligation to pay or transmit money or property to the Government is now subject to liability under the FCA. This is a new addition to the reverse false claims provision, and it does not require that a defendant utilize a false statement to conceal an obligation to repay an overpayment. Instead, liability is imposed if a person “knowingly conceals” such an obligation, which includes actual knowledge of the concealment or acting in deliberate ignorance or reckless disregard of the truth or falsity of the information.¹² In essence, the Government no longer has to prove the use of a false statement.

Third, if a person knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government, then that person is now subject to liability under the FCA. This provision also does not require the defendant actually to make a false statement in order for liability to be imposed; however, the Government must show both that the defendant “knowingly” avoided or decreased an obligation to pay and that the defendant did so improperly. The FCA does not define the term “improperly,” but one of the authors of the amendment stated that the new law would not impose liability “in situations in which the law clearly permits the recipient of the overpayment to retain the overpayment without disclosure pending a reconciliation process.”¹³ Thus, where a provider is involved in appealing an overpayment through the proper administrative processes, that provider will presumably be protected from FCA liability during that time. Nonetheless, the imprecise drafting of the FCA in this regard likely means that litigants will be wrangling over the definition of “improperly” for years to come.

b. The Meaning of “Obligation”

FERA also expands FCA exposure for providers by expanding the meaning of the term “obligation.” Prior to the 2009 amendments, most courts required *qui tam* relators pursuing a reverse false claims theory to make a detailed showing that the Government was owed a specific, legal obligation at the time an alleged false record or statement was made.¹⁴ Potential liabilities, such as future fines or sanctions, were not obligations to pay under the False Claims Act.¹⁵ FERA amends the FCA to define “obligation” broadly as “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.”¹⁶

Thus, the new definition of “obligation” encompasses an established duty “whether or not fixed” arising from retention of an overpayment. In most instances, the question of whether a provider has an established duty to refund an overpayment from the Medicare program is no

¹² 31 U.S.C.A. § 3729(b)(1) (West 2009).

¹³ 155 CONG. REC. E1299 (May 18, 2009) (speech of Rep. Berman).

¹⁴ See, e.g., *Zelenka v. NFI Indus., Inc.*, 436 F. Supp. 2d 701, 705 (D.N.J. 2006).

¹⁵ See *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 459 F. Supp. 2d 1081, 1091 (D. Kan. 2006).

¹⁶ 31 U.S.C.A. § 3729(b)(3) (West 2009).

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longer seriously at issue.¹⁷ For most providers, the real issue will be the point at which the provider can be considered to be “knowingly and improperly” avoiding an obligation to repay. For example, if a hospital detects a billing error through a prospective claims review, does the fact that the same error has likely occurred in the past mean that the hospital is improperly avoiding an obligation to repay unless it conducts a full-blown retrospective claims audit? Compliance departments of providers prioritize their audit activities, and make decisions on a daily basis over what and what not to investigate. The new FCA amendments increase the stakes for these decisions by making it easier for relators to attack items at the bottom of the compliance department priority list, even where the provider has made no affirmative false statement to conceal the compliance issue. Mere inaction on a compliance item may give rise to FCA liability under a theory that the provider has knowingly and improperly avoided an obligation to repay by failing to investigate the matter.

If you have questions regarding how best to respond to the increased FCA risk affecting your compliance programs please call *Mark Fitzgerald* ((202) 872-6771) or *Larry Gondelman* ((202-872-6723) or the attorney at PPSV with whom you work regularly.

¹⁷ See, e.g., *United States ex rel. Augustine v. Century Health Servs., Inc.*, 289 F.3d 409, 415 (6th Cir. 2002) (holding that failure to file amended cost reports and repay overpayments violated the provider’s continuing duty to comply with Medicare regulations).