Two Major Developments: (1) Recent Amendments to the Federal Civil False Claims Act Significantly Expands Potential Liability for Government Contractors and (2) Obama Administration Announces New Interagency Health Care Fraud Prevention and Enforcement Action Team

On May 20, 2009, President Obama signed into law the Fraud Enforcement and Recovery Act of 2009 (FERA) that significantly amends the federal False Claims Act (FCA) and expands the potential liability for all companies doing business with the government. On the same day, Attorney General Eric Holder and Department of Health and Human Services Secretary Kathleen Sebelius announced a new “Health Care Fraud Prevention and Enforcement Action Team” (HEAT), which increases the resources available to investigate and prosecute allegations of health care fraud. The new FCA amendments create heightened risk for all individuals and companies that do business with or receive funds from the federal government and, when combined with the increased health care enforcement resources, will enhance the risks faced by participants in the health care industry.

Amendments to the Civil False Claims Act

Section 4 of FERA makes the first significant revisions to the civil False Claims Act since 1986. In recent years, the FCA has become the government’s principal weapon for recovering damages for fraud in government programs, by allowing individual “whistleblowers” (known as “qui tam relators”) to bring suits on behalf of the United States for allegations that government programs have been defrauded. The FCA amendments expand the potential liability of businesses and individuals, and change several procedural provisions to make it easier for the government to investigate and litigate FCA claims.

- reversing last year’s unanimous Supreme Court decision in Allison Engine by eliminating the FCA’s “specific intent” requirement—thereby making the FCA what the Allison Engine Court said it was not (before the amendments): an “all-purpose antifraud statute”;  

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3 The FCA Amendments contained in Section 4 of FERA are different from those contained in the Legislative Update distributed by Alston & Bird LLP on August 11, 2008, that were never passed by Congress.
• expanding the definition of what constitutes a “claim” made to the government and facts that are “material” to the government’s payment of a claim;

• extending liability for the intentional retention of an “overpayment” from the government;

• extending the statute of limitations to permit the government’s complaint to “relate back” to filing of relator’s original complaint, which can be years earlier;

• making it easier to serve Civil Investigative Demands and gather information; and

• expanding the class of persons entitled to “whistleblower” protection from retaliation.

**Liability Provisions**

Congress amended the liability provisions of the FCA in order to legislatively reverse the Supreme Court’s unanimous decision in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S.Ct. 2123 (2008). That decision limited liability under the FCA to prevent it from becoming a boundless, “all purpose fraud statute,” by requiring specific intent to defraud the government.4

**Specific Intent Not Required**

Previously, the FCA allowed businesses and individuals to be held liable for making false statements only if those statements were made “to get” a false claim paid or approved “by the Government.” In *Allison Engine*, the Court applied the “to get” and “by the Government” language in §3729(a)(1) to limit liability only to situations where there was specific intent to defraud the government, and not some other party, such as a subcontractor. The FCA amendments eliminate the specific intent requirement announced in *Allison Engine*, by eliminating the “to get” and “by the Government” language from the statute.5 The new language subjects businesses and individuals to FCA liability if they knowingly make a false statement in an attempt to obtain money or property that is “to be spent or used on the Government’s behalf or to advance a Government program or interest.” There is no further guidance other than this ambiguous language—meaning that the full scope of this broad provision will be resolved in case-by-case litigation.

**New Definition of Materiality**

FERA also codified the “materiality” requirement into the FCA, which had long been read into the law by the courts. FERA, however, adopted a weaker materiality standard than had been used by some circuits, by broadly defining “material” as “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.”6 Again, this language will now have to be litigated on a case-by-case basis to determine the parameters of exactly what actions were “capable of influencing” the government’s decision.

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4 *Allison Engine Co.*, 128 S.Ct. at 2130.
5 S.386 §4(a)(1)(a).
6 S.386 §4(a)(1)(b).
Liability for Retention of Overpayments

The FCA amendments also extend liability for the knowing retention of overpayments—the so-called “reverse false claims” liability. Businesses and individuals are now liable under the FCA if they keep any overpayment of government funds or property, where before the FCA required some affirmative act to conceal, avoid or decrease a repayment obligation. Arguably, the mere retention of an overpayment, if there is an obligation to pay, is now enough to create FCA liability. This, in essence, would amount to strict liability for retention of overpayments.

However, the overpayment provision imposes liability only if an entity “knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.” Nonetheless, this requires recipients of government funds to immediately determine whether they have received “overpayments,” and whether they should be retained or returned to the government. The amendments also raise the question of whether recipients of government funds now face FCA liability for failure to repay or at least reassess historical overpayments that they are currently aware of.

Non-Liability Provisions

In addition to the expansion of liability, there are four non-liability related amendments that make significant changes to the FCA.

Relation Back of Government’s Pleading

The FCA’s statute of limitations is six years, generally, or three years from the date the government reasonably learns of the material facts, up to 10 years after the date of the alleged fraud. While these limitations still generally apply under the amendments, § 3731 now contains a provision stating that the government’s pleading relates back to the date of the original complaint. This is a major shift in the law and means that, once a complaint has been filed and is not dismissed, the statute of limitations does not apply to the government and can adversely affect potential defendants because of the government’s delay.

Civil Investigative Demands

Under the previous version of the FCA, only the attorney general could issue civil investigative demands (CID), and the information gained from the CID could not be shared with relators and their counsel. The FCA Amendments now allow the attorney general to appoint a designee to issue the CID, and the information gained from the CID may be shared with the relator and their counsel. In addition, the FCA Amendments contain a very broad definition of “official use” that essentially allows for information gained from the CID to be shared with other government investigators, auditors, consultants, experts and others.

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7 31 U.S.C. § 3731(b)(1)-(2).
8 S.386 §4(b)(3).
10 S.386 §4(c)(1)(A)(i)(II).
11 S.386 §4(c)(3)(c).
Retaliation

Under the prior version of the FCA, businesses and individuals were liable for retaliation only against employees. The FCA amendments expand the class of persons receiving this protection by now including contractors and agents in the protected class.

Local and State Service

A person bringing the complaint under the FCA, as amended, may now serve the complaint, and any other pleadings, on state and local law enforcement agencies authorized by state law to prosecute fraud claims—and not just the United States.

Health Care Fraud Prevention and Enforcement Action Team (HEAT) Initiative

HEAT is intended to be an expansion of the Medicare Fraud Strike Force efforts currently underway in South Florida and Los Angeles that use a “data driven” approach to identify unusual billing patterns and possible fraudulent activity. According to a Department of Justice (DOJ) press release, the Medicare Fraud Strike Force team operating in South Florida has convicted 146 defendants and recovered $186 million since its implementation in 2007, and the Los Angeles strike force, established in May 2008, has already recovered $55 million and charged 37 defendants with criminal health care offenses. This combined DOJ and HHS team is tasked with “strengthening existing programs to combat fraud while also investing new resources and technology to prevent fraud, waste and abuse before it happens.” In addition to increased enforcement activity, HEAT will focus on preventing fraud from occurring by increasing training for providers on Medicare compliance, improving data sharing between CMS and law enforcement and strengthening program integrity activities to monitor and ensure Medicare Parts C and D compliance.

Conclusion

The changes to the FCA are expansive and very significant. They expose all individuals and businesses that are government contractors or that receive government funds (even indirectly) to substantial potential liability. And they make it significantly easier for the government to make its case under the FCA. The FCA amendments, combined with the implementation of HEAT, can also be expected to result in increased and expanded enforcement activity in the health care industry.

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13 Id.

14 Id.
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