

Fraud Enforcement and Recovery Act Expands Potential False Claims Act Exposures

On May 20, 2009, President Obama signed into law the Fraud Enforcement and Recovery Act (FERA), which primarily targets mortgage fraud and predatory lending. However, FERA also dramatically amends the False Claims Act, 31 U.S.C. § 3729 *et seq.*, to expand potential exposures for government contractors in general, and specifically for health care organizations which receive reimbursement from any federal health care program (such as Medicare or Medicaid).

FERA overrules a recent Supreme Court decision and lowers the evidentiary showing required to prove the elements of "intent" and "presentation" under the False Claims Act. In *Allison Engine Company v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008), the Supreme Court held that the False Claims Act imposed liability for knowingly submitting a false claim for payment by the federal government only if the defendant intended for the government itself to pay the false claim, as opposed to a contractor intermediary paying the claim with federal funds. Moreover, under a federal appeals court's ruling in *United States ex rel. Totten v. Bombardier Corporation*, 380 F.3d 488 (D.C. Cir. 2004), the False Claims Act had previously created liability only where the false claim was presented directly to the government.

As amended by FERA, the False Claims Act now requires only that the defendant intend for the false claim be paid with federal funds, and liability can attach even if the suspect claim is presented to a private intermediary and not directly to the government, so long as the false information is "material to" the decision to pay the claim.

FERA also effectively expands the statute of limitations for the government by providing that the government's intervention complaint will "relate back" to the date that the whistleblower's original, *qui tam* complaint is filed. This means that the time that the government spends investigating the whistleblower's allegations prior to deciding whether to intervene in a lawsuit cannot be used as the basis for a statute of limitations defense. This new provision essentially creates an indefinite statute of limitations period for the government to intervene in a *qui tam* action, giving it almost exclusive control over the timing of when defendants are provided with notice of pending fraud claims. This will likely increase the government's ultimate settlement leverage in False Claims Act cases, as evidence essential to mount a defense becomes unavailable over time. This is a major development, as the average *qui tam* investigation can last well over a year, and in some extreme cases take four years or more.

Under FERA, whistleblower protections were also enhanced to embrace not only "employees" but also third party "contractors" and "agents." This is noteworthy for hospitals and health systems, as whistleblower retaliation claims now may reach individuals who are associated with, but not employed by, the organization (such as physicians with clinical privileges).

Beyond "conventional" False Claims Act exposure, FERA expands exposure to also include liability for the knowing retention of overpayments by the government. Previously, under the "reverse" provisions of the False Claims Act, some affirmative fraudulent act was required to establish liability for retaining government funds. As amended by FERA, exposure now exists merely for knowingly retaining funds that the defendant has an obligation to repay to the government, even in the absence of an affirmative wrongful act. This amendment creates a risk that creating a "credit balance" or otherwise retaining government funds while performing an audit or internal investigation to determine whether there was in fact an overpayment could be viewed differently by the government employing 20/20 hindsight.

In sum, FERA greatly expands the coverage of the False Claims Act, increases the likelihood of whistleblower litigation and ups the exposures for organizations receiving payments and reimbursements from federal funds. Organizations should redouble their efforts to maintain a robust compliance program and proactively assess and monitor compliance with federal healthcare and contracting regulations.

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