



The False Claims Act Amendments: What Health Care Entities Need to Know

Speakers:

Lawrence M. Kraus, Partner, White Collar Defense Practice
Richard K. Rifenburg, Senior Counsel, Health Care Industry Team
Judith A. Waltz, Partner, Health Care Industry Team



Friday, June 26, 2009

©2009 Foley & Lardner LLP • Attorney Advertising • Prior results do not guarantee a similar outcome • Models used are not clients but may be representative of clients • 321 N. Clark Street, Suite 2800, Chicago, IL 60654 • 312.832.4500

11:30 a.m. – 12:30 p.m. CT

08 5513



Today's Presenters

- **Lawrence M. Kraus** (Boston, MA)
 - Partner
 - White Collar Defense Practice

- **Richard K. Rifenburg** (Los Angeles, CA)
 - Senior Counsel
 - Health Care Industry Team

- **Judith A. Waltz** (San Francisco, CA)
 - Partner
 - Health Care Industry Team
 - Co-Chair, Life Sciences Industry Team



©2009 Foley & Lardner LLP

2



Housekeeping

- We will take questions throughout the program via the Q & A tab located on your menu bar at the top of your screen and live questions at the end of the program
- Foley will apply for CLE credit after the Web conference. If you did not supply your CLE information upon registration, please e-mail it to mlopez@foley.com
- Today's program is being recorded and will be available on our Web site
- For audio assistance please press *0
- For full screen mode, go to "View" on your toolbar and select "Full Screen" or press F5 on your keyboard
- Materials can be found on our Web site at www.foley.com/fridayfocus or by clicking the printer icon on the bottom right hand side of your screen



Overview of the False Claims Act (FCA; 31 U.S.C. § 3729, et seq.)

- The FCA makes it illegal for any person to knowingly present a false or fraudulent claim for payment or approval by the government or certain government contractors or grantees that receive federal funds
 - Passed in 1863 to curtail false claims against the government by contractors in connection with the Civil War
 - Amended in 1943, 1986, and in 2009 as part of **Fraud Enforcement and Recovery Act (FERA)**, signed May 20, 2009



Civil vs. Criminal False Claims

- The FCA is both a civil and criminal statute
- The intent requirements are different under the criminal statute and the *qui tam* (whistleblower) provisions discussed below do not apply
- FERA amended the civil FCA



Civil vs. Criminal False Claims (cont'd)

- Other statutes also may apply: the FCA is most used because of the *qui tam* (whistleblower) provisions potentially providing large bounties to “relators”
- States may have their own FCA statutes (and Deficit Reduction Act of 2005 provides financial incentive to do so)



FCA Basics: Penalties

- Penalties: A civil monetary penalty of not less than \$5,500 and not more than \$11,000 per claim
- Treble Damages: Three times the amount of damages sustained by the government
- Litigation Expenses: Reasonable attorneys' fees and expenses of FCA action



FCA Basics: Penalties (cont'd)

- Violation of the FCA could be considered a basis for a permissive exclusion under 42 U.S.C. § 1320a-7(b)(7)



FCA Basics: What is a “Claim”?

- A claim includes any request or demand for money or property if presented to (i) an officer, employee or agent of the U.S. or (ii) certain contractors, grantees or other recipients of federal funds
 - The concept of a “claim” has been construed very broadly to include virtually any improper request for federal funds



FCA Basics: Who Can Be a Whistleblower

- Private citizens, called “relators” or whistleblowers, may bring FCA actions in the name of the government
- The relator may be barred from recovery if the underlying matter has been publicly disclosed and the claim is not brought by an original source
- The FCA protects whistleblowers from retaliatory action



Whistleblower Recoveries

- FCA relators are given a significant financial incentive to “blow the whistle”
- With some exceptions, *if the government intervenes*, the relator is entitled to not less than 15% and not more than 25% of the recovery, plus reasonable expenses and reasonable attorneys’ fees and costs
- *If the government does not intervene*, the court will decide what is reasonable. This can range from 25% to 30%, plus reasonable expenses, as well as reasonable attorneys’ fees and costs, which are paid by the defendant



Whistleblower Recoveries (cont’d)

- If the relator is convicted of criminal conduct relating to the “covered conduct,” he/she shall not recover. If no conviction, the court should consider contribution to the fraudulent activity and reduce the award



FCA Settlement Figures (per DOJ)

- Total FCA settlements and judgments from 1986 to 2008: \$21.6 billion
 - Whistleblower share over that period: \$2.2 billion
- Total *healthcare* FCA settlement and judgments from 1986 to 2008: \$14.3 billion
 - Whistleblower share over that period: \$1.6 billion



FCA Settlement Figures (per DOJ) (cont'd)

- Over the past 20 years, FCA settlements and judgments (and whistleblower recoveries) related to healthcare entities have increased significantly
- Total healthcare FCA settlements and judgments in 1988: \$2.5 million
 - Whistleblower share in 1988: \$88,750
- Total healthcare FCA settlements and judgments in 2008: \$1.1 billion
 - Whistleblower share in 2008: \$183 million



Turning up the HEAT

- Health Care Fraud Prevention and Enforcement Action Team (HEAT)
- Interagency effort between DOJ and HHS to combat Medicare fraud
- Senior officials from DOJ and HHS
- HEAT's goals:
 - Strengthen existing programs to combat fraud
 - Invest new resources and technology to prevent fraud, waste and abuse
- HEAT is another example of the government's increased focus on the prevention of healthcare fraud



FERA Legislation

- Fraud Enforcement and Recovery Act of 2009 (FERA)
- Signed into law on May 20, 2009
- Provides up to \$165 million in new funding for federal law enforcement, SEC and DOJ
- Amends several criminal statutes to cover various forms of financial fraud (e.g., mortgage fraud)
- Amends the FCA in several significant ways



Medicaid is Subject to the FCA!

- CMS Medicaid Integrity Program
 - Intense Focus on Datamining
- Increased Activity from the States as a Result of DRA
- Increased Activity from the States as a Result of Budget Pressures



Amendments to FCA

- Revisions to “Presentment” clause
- “To get”
- “Reverse” false claims
- Materiality
- Statute of Limitations
- Civil Investigative Demands
- Increased Whistleblower Protection



Presentment Clause

- FERA amends FCA to overrule case law construing the “presentment” requirement
 - Former Section 3729(a)(1) required that false or fraudulent claims be presented “to an officer or employee of the United States Government or a member of the Armed Forces of the United States”

 - Former Section 3729(a)(2) required a false record or statement be made “to get a false or fraudulent claim paid or approved by the Government”



Presentment Clause (cont'd)

- New Sections 3729(a)(1)(A) and (a)(1)(B) delete the “presentment” language

- The revised definition of “claim” clarifies that the request for payment may be made to:
 - An officer, employee or agent of the United States; OR

 - A contractor, grantee or other recipient, “if the money or property is to be spent or used on the Government’s behalf or to advance a Government program or interest” and the government provides the requested money or will reimburse the contractor, grantee or other recipient for any portion of the money which is requested or demanded



Presentment Clause (cont'd)

- The effect of these changes to the Presentment Clause is that subcontractors and other persons or entities that submit claims to government contractors or grantees may be subject to the FCA
- This reduces the strength of the argument that false claims submitted to Medicare contractors (formerly called fiscal intermediaries and carriers) are not actionable false claims
- Also addresses the arguments that a claim presented to Medicaid was not “presented to” the federal government



“To Get [a claim paid]”

- The Supreme Court had interpreted the “to get” language in former Section 3729(a)(2) as requiring an intent to make a false statement that is material to the government’s decision to pay a false claim
- Under the prior interpretation, a subcontractor that made a false statement to a contractor would not be subject to FCA liability unless the subcontractor made the false statement with the intent of defrauding the government (and not just the contractor)



“To Get”

- FERA amends FCA to overrule case law by deleting the “to get” language and incorporating the more expansive definition of “claim”



“Reverse” False Claims





“Reverse” False Claims

- FERA clarifies that failing to repay overpayments can constitute “reverse” false claims
- Section 3729(a)(1)(G) now attaches FCA liability to any person who “... knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government”



“Reverse” False Claims (cont'd)

- “Obligation” is defined as meaning “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”

– Section 3729(b)(3)



“Reverse” False Claims (cont’d)

- Government may now have stronger arguments that Stark violations equal false claims
- 42 C.F.R. 411.353(b): “An entity that collects payment for a designated health service that was performed pursuant to a prohibited [Stark] referral must refund all collected amounts on a timely basis...”



“Reverse” False Claims (cont’d)

- Open Issue: Where to disclose Stark violations?
 - OIG?
 - CMS?
 - Fiscal Intermediary or Medicare Administrative Contractor?
 - Department of Justice?



Materiality

- Sections 3729(a)(1)(B) and Section 3729(a)(1)(G) incorporate a materiality requirement
- “Material” is defined as “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property”
- Very broad definition of material
- Cf., theories re implied certification



Statute of Limitations

- New Section 3731(c)
- Allows the government complaints to “relate back” for statute of limitations purposes to the original filing date of the complaint of the person who originally filed the action
- However, the government’s complaint must arise out of the conduct or transactions that were set forth in the original complaint



Civil Investigative Demands

- FERA revised Section 3733 (Civil Investigative Demands)
- Broadens individuals who can issue a civil investigative demand to include designees of the Attorney General
- Provides that information obtained by AG or designee may be shared with relators



Increased Whistleblower Protection

- Whistleblower protection extended to contractors and agents (in addition to employees)
- Contractors and agents are protected from being “discharged, demoted, suspended, threatened, harassed, or in any manner discriminated against...”



10 “Take Aways” for Health Care Entities

- “A penny saved is a penny earned.” Now is not the time to scrimp on compliance programs. FERA includes increased funding - with increased tools in the FCA - and the focus on HEAT - all suggest enhanced scrutiny for health care providers
- “If it's not yours, you [usually] can't keep it.” Review process for addressing identified overpayments, including those received legitimately that become overpayments due to some intervening fact
- Treat allegations of fraud seriously. An internal investigation into an allegation may help show that the conduct is not “knowing,” and is time well spent if it helps safeguard the organization against an FCA action
- Remember that Medicaid is a federal health care program, to which the FCA applies - Medicaid Integrity Program is about to become visible
- For suppliers, risks may now be greater because the “to get” language has been revised



10 “Take Aways” for Health Care Entities (cont'd)

- Think like a whistleblower - does the amendment to “materiality” provide more ways to make a false claim out of a quality of care deficiency
- Don't be an ostrich. A “Whatever” Defense is Seldom Persuasive. Remember the “reckless disregard” standard - a “whatever” approach or “let the government figure out whether my claim is payable” can get you in trouble
- “Big Brother is Watching:” as data mining increases, think about your footprint and the risks under the FCA
- Review DRA compliance policies - make sure you also review for additional states which have added FCA provisions
- Consider whether any compliance policies regarding suppliers/contractors need to be revised given the new retaliation provisions



Questions and Answers



©2009 Foley & Lardner LLP • Attorney Advertising • Prior results do not guarantee a similar outcome • Models used are not clients but may be representative of clients • 321 N. Clark Street, Suite 2800, Chicago, IL 60654 • 312.832.4500

08 5313



Contact Us

Lawrence M. Kraus
Partner
111 Huntington Ave., 26th Flr.
Boston, MA 02199
Tel: 617.342.4070
lkraus@foley.com

Richard K. Rifenburg
Senior Counsel
555 S. Flower St., Suite 3500
Los Angeles, CA 90071
Tel: 213.972.4813
rrifenburg@foley.com

Judith A. Waltz
Partner
One Maritime Plaza, 6th Flr.
San Francisco, CA 94111
Tel: 415.438.6412
jwaltz@foley.com

©2009 Foley & Lardner LLP

36