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Law Empowers Agencies to Pursue False Claims; CMPs May Get Job Done

By Nina Youngstrom

Tucked into the National Defense Authorization Act passed late last year is the Administrative False Claims Act (ACFA), a fraud enforcement tool for federal agencies.[1] The law empowers them to pursue cases for false claims and false statements without more than a passing glance from the U.S. Department of Justice (DOJ) and recover penalties and double damages.

Although the AFCA sounds ominous, some lawyers doubt it will affect providers in any meaningful way because the Civil Monetary Penalties Law (CMPL) already gets the job done. Dozens of violations, such as false claims, false statements, kickbacks and retaining overpayments, are subject to the CMPL, which is enforced by the HHS Office of Inspector General (OIG). The CMPL has advantages over the AFCA, such as the threat of exclusion from federal health care programs, said attorney Greg Demske, former OIG chief counsel.

But attorney Knicole Emanuel sees the AFCA as a looming threat to providers. "It's the government's shiny new weapon in the government's ever-expanding arsenal," she said on the Aug. 18 Monitor Mondays webcast.

The AFCA updates and renames the Program Fraud Civil Remedies Act (PFCRA), the administrative remedy for smaller-dollar penalties that's available to federal agencies. It complements the federal False Claims Act (FCA) without requiring a full-fledged FCA lawsuit or criminal allegations for false statements.

That's still the case with the AFCA, but the dollar value of claims that can trigger its penalties is significantly higher —$1 million compared to PFCRA's maximum $150,000. The penalties for violations are $5,000 per claim (adjusted for inflation) plus as much as double damages.

Even with an increase in the jurisdictional limit and penalties, the AFCA isn't a game changer with respect to federal health care programs, Demske said. Violations are already penalized by civil monetary penalties, which have some advantages for the government baked in, said Demske, with Goodwin Procter LLP. "Almost all CMPs have an exclusion remedy except EMTALA," he noted.

The AFCA could be a step forward for other agencies, but the CMPL will still be "the favored statute" for OIG to pursue offenses against federal health care programs. "What [the AFCA] does is improve the Program Fraud Civil Remedies Act, which was a dead letter for many agencies because it was so restrictive to use," Demske said.

'OIG Currently Has Enough Options'

OIG will also be a linchpin of AFCA enforcement, which defines roles for an "investigating official" (OIG); a "reviewing official" (historically the HHS Office of the General Counsel (OGC)); and a "presiding official" (an administrative law judge in the HHS world), Demske explained. "Unlike a CMPL action, which is investigated and pursued by OIG, an AFCA claim would be investigated by OIG and then would have to be referred to OGC, which would decide whether to seek DOJ approval to proceed."

Another lawyer agrees that providers have little to worry about from the AFCA. "OIG currently has enough options," said attorney Judy Waltz, with Foley & Lardner LLP. "This one is probably not one to effectively pursue their mission."

Like OIG's CMPL, which requires "knowing" conduct—and defines it in a way that tracks the FCA requirement to show intent—the AFCA tracks the intent language of the FCA but doesn't require regulators to prove a specific intent to defraud, Waltz said. "That may get around situations from the past where one defense raised was that the conduct was not intentional because a defendant didn't know the conduct was unlawful," she said.

Emanuel noted that the AFCA conforms to the federal FCA's requirement of materiality (i.e., the false claim or statement must affect the federal agency's decision to pay). Unlike the FCA, however, cases under the AFCA couldn't be brought by whistleblowers, said Emanuel, with Nelson Mullins.

Also unlike the FCA, the AFCA mostly "gets DOJ out of the picture on cases up to $1 million," Waltz said.

And it penalizes reverse false claims (i.e., "also made to an authority which has the effect of concealing or improperly avoiding or decreasing an obligation to pay or transmit property, services, or money to the authority").

Although the AFCA requires every department to issue regulations or update them—and several agencies have (e.g., the Nuclear Regulatory Commission)—HHS hasn't gotten there yet.

The new law was co-sponsored by Sen. Charles Grassley (R-Iowa), architect of the 1986 amendments to the FCA.

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1 Administrative False Claims Act of 2023, 118th Cong. (2023), https://bit.ly/47CvgOW.