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Sweeping Changes to the Federal False Claims Act are on the Horizon

Summary

On April 28, both the United States Senate and the United States House of Representatives took steps that would provide sweeping changes to the federal False Claims Act ("FCA"). The bills would significantly expand the scope of FCA liability while at the same time make it easier for *qui tam* relators to bring and maintain FCA suits on behalf of the government.

In short, the bills are answers to a DOJ and relator's counsel "wish list" that would eliminate 20 years of hard-fought defense jurisprudence. In addition, the House bill, for example, would eliminate the public disclosure jurisdictional bar and defense, which could allow a sworn federal agent to utilize information obtained in the course of official investigations to file FCA lawsuits as a relator, and to receive a portion of any financial recovery. The House bill would also eliminate any basic pleading standards by relators and allow relators's attorneys to file fishing expeditions without any substantive basis of allegation.

Status

The Senate, S. 386, was approved by the full Senate and is expected to be considered by the full House as early as this week. If the House adopts the Senate measure without amendment, it would then go to the President for signature; otherwise, any differences must be reconciled. Separately, the House Judiciary Committee has approved H.R. 1788; the next step for that legislation is consideration by the full House. We will update this Alert as appropriate to reflect future legislative action.

Fraud Enforcement and Recovery Act of 2009

On April 28, 2009, the full Senate passed the Fraud Enforcement and Recovery Act of 2009 (S. 386). While the bill is primarily targeted at potential fraud involving recipients of economic stimulus funds in the financial services industry, it also includes some very significant changes to the liability provisions of the federal False Claims Act.

First, S. 386 includes amendments to the FCA that are intended to overturn recent decisions of the U.S. Supreme Court, including the decision in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008). Specifically, the Senate bill seeks to amend the FCA's requirements that the false statements or records were used "to get" a false claim paid by "the Government." This proposed change is designed to remove the requirement of proving that false records and statements be supplied with the "intent" of getting false claims paid, as the unanimous Supreme Court held in *Allison Engine*. In an attempt to confine FCA actions to fraudulent claims directed at the U.S. Treasury, S. 386 proposes to add a "materiality" requirement. In short, while the *Allison Engine* decision required that the false statement or record must have been "intended" to get a false claim paid, under the revised language, FCA liability will hinge on whether the court determines that the false record or statement was "material" to getting a false claim paid or approved. The Senate bill defines this new term "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." However, it is unclear how far courts will interpret this "capable of influencing" language.

Second, S. 386 expands FCA liability to include any false claim for government money or property regardless of whether the claim was submitted directly to a government official or employee. The proposed revisions eliminate the "presentment" requirement within 31 U.S.C. § 3729(a)(1), which required that a claim be submitted to "an officer or employee of the United States Government or a member of the Armed Forces of the United States," in order for FCA liability to attach. Under S. 386, FCA liability attaches so long as the person "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to any entity. For example, any false or fraudulent claim submitted by a subcontractor to a prime contractor receiving federal funds could lead to FCA liability.

Third, S. 386 expands the scope of the types of “claims” submitted to the government that can trigger potential FCA liability. Under S. 386, a “claim” now includes demands for money and property even if the United States government does not have title to the money or property. In other words, the proposed amendment potentially would impose FCA liability for any subcontractor who submits claims to any recipient of government funds, even where the claim cannot be directly traced back to money from the government. However, in an attempt to limit the extension of potential FCA liability to all types of fraud, the definition of “claim” now includes a requirement that the demand for money or property made to a contractor, grantee, or other recipient, must be for money or property that is “to be spent or used on the Government’s behalf or to advance a Government program or interest.”

Fourth, the bill provides, for the first time, a definition of “obligation” under the so-called “reverse false claims” provisions of the FCA as it currently exists (31 U.S.C. § 3729(a)(7)). The reverse false claims act provisions, under the current FCA and the proposed revisions, generally establish liability for a person who knowingly uses a false record or statement to conceal or avoid paying or returning government funds that it is otherwise obligated to return. Under the current FCA, there is no definition of the “obligation,” and it has been left for the courts to interpret the term. The legislation, at least according to the Committee report, is an attempt to address the “current confusion among courts” regarding the proper interpretation of the term. The Senate bill defines an “obligation” to pay or re-pay government funds when there is 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.” There are several concerns with this change. One is that contractual entities, such as Medicare providers, regularly retain overpayments subject to some reconciliation process (many Part A providers continue to cost-report). One suggestion is that this language inserts FCA liability into this administrative reconciliation and cost-reporting process. Secondly, the definition extends potential FCA liability to duties that are not “fixed.” One potential question is the interplay between other laws, such as the strict liability Stark self-referral law. If a Medicare provider has a financial relationship with a physician that violates Stark, does that mean that all monies associated with referrals from that physician are retained overpayments under the FCA (as Stark disqualifies those referrals)?

False Claims Correction Act of 2009

On April 28, 2009, the False Claims Correction Act of 2009 (H.R. 1788) was reported out of committee by the House Judiciary Committee. The bill proposes extensive revisions to the False Claims Act that would expand the scope of liability under the FCA, and eliminate the availability of statutory and rule-based defenses used to seek dismissal of non-meritorious suits.

The key changes to the FCA under H.R. 1788 would include:

- New definition of “government money or property” that includes money and property to which the government does not have title. Part of this revision is consistent with the proposed revision passed by the Senate in S. 386. However, H.R. 1788 extends the definition of “government money and property” to include money held in trust or that administers for an “administrative beneficiary” of the United States (e.g., the Iraqi Coalition Authority). This broad definition could be read to include FCA liability reaching Social Security recipients or federal employees (S. 386 expressly excludes compensation for federal employment and the receipt of federal income subsidies, as a basis for FCA liability).
- Exempt *qui tam* relators from the pleading requirements of pleading claims of fraud with particularity and specificity, as required by Federal Rule of Civil Procedure 9(b). *Qui tam* relators – but not the government – would no longer be required to identify false claims with “particularity.” Compliance with 9(b) has been a key tool in preventing meritless (and expensive) “fishing expeditions” from relators. Removal of this requirement will likely significantly increase litigation costs resulting from “declined” FCA actions.
- Remove the public disclosure jurisdictional defense, which is currently available as a basis for courts to dismiss parasitic lawsuits by *qui tam* relators whose FCA claims are based upon information that has been publicly disclosed. Under H.R. 1788, only the government would be permitted to challenge a *qui tam* whistleblower’s right to bring suit based on information that is available in the public domain. The removal of the public disclosure defense will increase the likelihood of government employees, including sworn federal agents who are tasked with identifying false claims, such as allegations of health care fraud, becoming eligible to file suits as whistleblowers.
- Expand calculation of treble damages to include damages sustained by “administrative beneficiaries.” The bill defines an “administrative beneficiary” as “any entity including any governmental or quasi-governmental entity, on whose behalf the United States Government,

alone or with others, serves as a custodian or trustee of money or property owned by that entity.” This definition could include contractors and other entities administering funds on behalf of the government, such as Amtrak and the United States Postal Service.

- Impose liability for failure to disclose overpayments, even where the failure was not “knowing.” This revision is inconsistent with the revision in S. 386 that imposes liability for knowing and improper “retention” of an overpayment, as opposed to the mere “receipt” of an overpayment as contemplated in H.R. 1788. This provision has very serious consequences for Medicare care providers.
- Clarify and extend the statute of limitations from six years to eight years for all FCA suits, including FCA actions instituted by the government, *qui tam* relators, and also whistleblower retaliation suits brought under the FCA.
- Provide for retroactive application of all amendments to the FCA to pending cases, with the exception of the revisions to the statute of limitations; the revisions to Section 3729(a)(1)(C) (j), relating to the failure to comply with a statutory or contractual obligation to disclose an overpayment; and Section 3730(h), to the extent it applies to discrimination against a person because of lawful acts done by others associated with that person.

There is also a pending companion bill (apart from S. 386) in the Senate, the False Claims Act Clarification Act of 2009 (S. 486), which includes many of these same revisions. This companion bill is currently pending before the House Judiciary Committee. In light of the passage of S. 386 and the differences between S. 386 and H.R. 1788, it is unclear whether S. 486 will receive more attention or be rendered moot. Notably, a number of provisions in S. 486 conflict with portions of S. 386 that have now been approved by the full Senate. For example, S. 486 (like H.R. 1788) defines “obligation” to include “contingent duties” and extends to “quasi-contractual” relationships, while the definition of “obligation” passed by Senate in S. 386 did not include contingent duties or quasi-contractual relationships.

What it Means for You

The passage of S. 386 means that FCA liability will potentially extend to all fraud committed against contractors and grantees of the United States government. No longer will *qui tam* relators and the government be required to show that fraud was committed directly against the United States government, or that there was an intent to defraud the government. Potential FCA liability will attach once a government subcontractor provides a false record or statement (even if it is to a contractor) so long as it is “material” to a false claim being paid by the government (even if the subcontractor has no “intent” to defraud the government).

Members of the health care industry should be concerned about the new definition of “obligation,” which applies to retained overpayments. While S. 386 only imposes liability for a knowing and improper “retention” of an overpayment, the House bill would potentially extend this liability to the mere receipt of any overpayment, provided the person has a “statutory or contractual obligation to disclose an overpayment.” It is also unclear exactly when FCA liability would attach for retention of an overpayment under either bill. Currently, Medicare providers, such as hospitals and skilled nursing facilities, reconcile their accounting at the end of the fiscal year to determine whether Medicare overpaid them for services, and then return the overpayment. The Senate Judiciary Committee report suggests that the Senate bill’s revision was not intended to interfere with this process and does not “create liability for a simple retention of an overpayment that is permitted by a statutory or regulatory process for reconciliation.” Senate Judiciary Committee Report 111-10, “Fraud Enforcement and Recovery Act of 2009,” p. 15 (March 23, 2009). While this legislative history provides some guidance in interpreting intent of the statute, courts are not necessarily bound by the legislative history, and there is not necessarily a guarantee that courts interpreting the definition of “obligation” will agree that the retention of an overpayment permitted by statute will prevent FCA liability. Furthermore, the House bill seems to be completely at odds with the entire reconciliation process because it creates liability for any retention, so long as there is an obligation to disclose the overpayment.

In addition, while courts have generally held that potential FCA liability extends to Medicaid claims, commentary and arguments in several decisions have raised the possibility that claims to Medicaid may not satisfy the requirements of an action under the federal False Claims Act. However, the revisions in S. 386 were intended, at least in part, to dispel the notion that court decisions can be read to restrict FCA liability from attaching to Medicaid claims. See Senate Judiciary Committee Report 111-10, “Fraud Enforcement and Recovery Act of 2009” p. 11 (March 23, 2009). The Committee report makes it clear that the revisions in § 3729(a)(2) were intended to clarify that FCA liability extends to “all false claims submitted to State administered Medicaid programs.” *Id.*

While S. 386 contains some concerning provisions, the real problems lie in the extensive revisions to the FCA contained in H.R. 1788 (and its companion S. 486). H.R. 1788 has the potential to extend the scope of the FCA into an all-purpose fraud statute by its obliteration of the nexus between FCA liability and government involvement. The expanded scope of liability and damages under the FCA carries the potential to increase the cost of doing business with the government and to increase the costs of government procurement. This expanded scope of liability also could discourage nonprofits, universities, hospitals, and businesses from competing for business (or becoming grantees) with the government because of the enormous burden potential FCA liability could impose.

The proposed revisions will encourage an exponential increase in the number of non-meritorious, parasitic lawsuits (and the costs to defend against them) by removing the tools available to defendants to seek dismissal of cases that fail to comply with the FCA's jurisdictional requirements and the Federal Rules of Civil Procedure, among others. There is also concern about potential conflicts of interest that could develop if government employees, particularly federal agents who are otherwise obligated to report and pursue fraud, become eligible to bring suits as whistleblowers, based on information obtained in the course of their investigations. Allowing federal agents to become whistleblowers may eliminate a prosecutor's discretion to intervene in cases, because the federal agents may take up cases (as relators) that have been declined by prosecutors. Finally, the retroactivity provisions threaten to throw the status of thousands of cases currently pending into complete disarray.

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