fraud and abuse in health care programs is a top priority of the Obama administration as evidenced by the recent enactment of the Fraud Enforcement and Recovery Act (FERA) on May 20, 2009. FERA amends the civil False Claims Act (FCA), increasing the scope of liability under the FCA as well as strengthening government’s investigatory powers. FERA changes the FCA and creates new opportunities for FCA actions to be sustained. The decreased level of proof, the broadening of the statute of limitations and the expanded authority given to government officials to share documents will likely cause an increase in FCA enforcement actions in the near future. Providers should review their compliance programs, FCA written policies, and over/underpayment policies in response to this new law.

The amendments to the FCA highlighted in this communication focus on the changes that are likely to have the most significant impact on health care providers.
As amended, a health care provider violates the FCA if a provider “knowingly conceals, or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the government.” The definition of “obligation” expressly includes the retention of an overpayment. The legislature included such language in the definition of obligation to address conflicting court interpretations. Although the legislature defined obligation, the recent amendments to the FCA do not define “improper,” therefore there may be future litigation to determine how a provider could violate the FCA by “improperly avoid[ing] an obligation.” A provider’s FCA liability will be left up to how the courts interpret “improper.”

While the definition of “improper” may not be clear, health care providers should put in place a process to repay amounts that its internal auditing confirms as “overpayments,” retain those payments where there is an ongoing investigation into a potential overpayment, and seek counsel about those situations that are unclear. For amounts that are retained during an internal review or ongoing investigation, providers must clearly document the reason that repayment is not promptly made. Given the change to the FCA, it is now possible that retention of the overpayment, even if temporary, might be construed to be a FCA violation. Also, provider written policies should be in place to reflect that process.

FERA further changes the FCA by overturning two key FCA cases — Allison Engine Co. v. United States ex rel. Sanders, 128 S. Ct. 2123, and United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488 (D.C. Cir. 2004) — which limited the application of the FCA under certain circumstances. Allison Engine required the government to prove that a provider submitted a false claim with the intent that the government would pay the false claim. Now, the standard is relaxed, and the government only has to prove that the defendant submitted a false claim that was “capable of influencing” payment of such claim by the government. In Totten, the court found that liability under the FCA attaches only if the claim is “presented to an officer or employee of the Government.” This requirement is known as the “presentment clause.” FERA eliminates the “presentment clause” in section 3729(a)(1) of the FCA; therefore direct presentment of a false claim to the government is not required for liability to attach.

In addition to increasing the scope of liability under the FCA, FERA expanded the authority of government officials to share documents obtained through subpoenas with qui tam relators. Government officials can share information obtained under a Civil Investigative Demand with a qui tam relator allowing the relator to bolster its complaint against a health care provider.

FERA also made procedural changes to the FCA. Notably, if the government chooses to intervene in a qui tam action, the government may file its own complaint or amend the relator’s complaint and add additional claims, and any government pleading will relate back to the
filing date of the relator’s original complaint. This change can act to eliminate the statute of limitations defense where the government opts to file its own complaint or add new claims to the relator’s complaint.

The additional text of the FCA can be accessed at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s386enr.txt.pdf.

If you have any questions regarding the recent changes to the FCA, please contact one of the Polsinelli Shughart attorneys listed on this communication.
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