

FERA Gives Health Care Fraud Enforcement a Boost

By Andrew B. Wachler and Amy K. Fehn, Wachler & Associates, P.C.

The Federal False Claims Act (FCA) has long been a key weapon in the government's arsenal to fight health care fraud and abuse. With the passage of the Fraud Enforcement and Recovery Act of 2009 (FERA), the government will have an even easier time making a case against health care providers accused of defrauding federal health care programs.

One way that FERA expands the scope of the FCA is by removing the "presentment requirement." Under the previous version of the FCA, a person or entity would be exposed to potential liability only if the allegedly false claim was specifically presented to government. FERA expands the scope of the FCA to claims presented to an agent or contractor acting on behalf of the government. Language was also added to the definition of "claim" to include "requests or demands for money or property where the government has paid or will pay any portion of the money, regardless of whether the government actually has title to the property at the time of the request or demand." These revisions will ensure that the FCA can be used to prosecute false claims submitted to state Medicaid programs, as well as to contractors such as Medicare Advantage Plans.

Another significant amendment to the FCA removes language that was interpreted by the Supreme Court as requiring the government to prove that a defendant had "specific intent" to defraud the government. Now liability under the FCA may exist as long as the false record or statement is "material to" a false or fraudulent claim. Material is defined broadly as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."

Perhaps the most significant change that will impact health care providers is the change to the "reverse" false claims provision, i.e., that section of the FCA that extends liability to funds retained, as opposed to false claims submitted, by a person or entity that does not have a right to such funds. FERA eliminates the requirement of an affirmative act of concealment and extends liability to an individual who "knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government." FERA also adds a definition of "obligation", which is very broadly defined as "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." To avoid liability under the FCA, healthcare providers and their counsel should carefully analyze statutory and regulatory provisions in which an "obligation" could arise. For example, a technical violation of the Stark regulations could be construed as an "obligation" to return payments to the government. Decisions related to repayment of government funds are difficult and should always involve a fact specific analysis and judgment of experienced healthcare counsel.

Because the FCA defines "knowingly" as including "deliberate ignorance" and "reckless disregard", an effective compliance plan provides significant protection for

providers. However, difficult decisions can arise when compliance activities uncover billing problems that may have been taking place for some time, especially in light of the new broad definition of “obligation”. While we have always recommended that providers conduct compliance audits prospectively, and, at a minimum, retain counsel in order to protect compliance activities through the attorney client and/or work product privilege, the FERA amendments make this decision more important than ever.

FERA also includes several amendments that will make it easier for *qui tam*, i.e., “whistleblower” lawsuits to proceed. Specifically, FERA expands “whistleblower” protection to government contractors and agents and expands the statute of limitations with regard to government intervention in *qui tam* lawsuits by allowing the government’s complaint to “relate back” to the “whistleblower’s” filing.

In addition, FERA gives the federal government greater flexibility in the discovery process, by allowing the Attorney General to delegate its authority to issue Civil Investigative Demands (“CIDs”) to other officials. This will make it easier for federal officials to conduct discovery such as depositions, interrogatories and requests for production. Also, this information can now be shared with “whistleblowers” making it easier to cure defects in the whistleblower’s complaint.

Although most of the amendments to the FCA apply prospectively, the elimination of the “intent” requirement is an exception. Specifically, the amendments that require a false record or statement to be “material to a false or fraudulent claim” will apply retroactively to all claims pending as of June 7, 2008.

The FERA amendments make it easier for the federal government to prosecute health care providers and entities who violate the FCA. To minimize risk, healthcare providers must be aware of their obligations with regard to all healthcare related statutes and regulations and must have an effective compliance plan in place that will enhance compliance and promptly identify overpayment obligations.



ANDREW B. WACHLER is the principal of WACHLER & ASSOCIATES, P.C. Mr. Wachler has been practicing healthcare law for over 25 years. He counsels healthcare

providers and organizations nationwide in a variety of healthcare legal matters. In addition, he writes and speaks nationally to professional organizations and other entities on healthcare law topics such as Medicare RAC appeals, Medicaid Integrity, Stark and fraud and abuse, HIPAA, and other topics. He can be reached at (248) 544-0888 or awachler@wachler.com.



AMY K. FEHN is a health care attorney at Wachler & Associates, P.C. Ms. Fehn is a former registered nurse who has been counseling healthcare providers for the past eleven years on regulatory and compliance matter such as HIPAA, Stark, Fraud & Abuse and the defense of RAC and other Medicare and Third Party Payor Audits. She can be reached at (248) 544-0888 or afehn@wachler.com.