

## ***Fraud Enforcement Recovery Act (FERA) and False Claims Act (FCA) Implications for Health Care***

# 2009

*Written by Carl James Byron, III, EMT-I, ATC-L, CHA, CPC June, 2009*

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With the new Presidential push for increased health care coverage for the under/uninsured, it has been anticipated one of the ways federal funds will be increased is through increased recoupment of funds from hospitals and providers. If recent events are any indications, this anticipation could very well become fact.

On 20 May President Obama signed FERA into law. **This law brings the first major amendments to the Civil False Claims Act in 23 years.**

The law significantly expands the liability for all entities doing business with the U.S. government. Interestingly, this Bill's primary target was financial fraud in the civil financial, especially mortgage, white collar fraud environment relating to misuse of government stimulus and Troubled Asset Relief Program (TARP) monies.



In his address to President Obama one of the Bill's initiators, Senator Leahy, specifically spoke over the impetus of the Bill: *“Mortgage fraud has reached near epidemic levels in this country. Reports of mortgage fraud are up 682 percent over the past 5 years, and more than 2800 percent in the past decade. And massive, new corporate frauds, like the \$65 billion Ponzi scheme perpetrated by Bernard Madoff, are being uncovered as the economy has turned worse, exposing many investors to massive losses. We can now finally take action to better protect the victims of these frauds. These victims include homeowners who have been fleeced by unscrupulous mortgage brokers who promise to help them, only to leave them unable to keep their homes and in even further debt than before. They include retirees who have lost their life savings in stock scams and Ponzi schemes, which have come to light.”*

*“This legislation will immediately give Federal law enforcement agencies the tools and resources they need to combat fraud effectively. In the last 3 years, the number of criminal mortgage fraud investigations opened by the Federal Bureau of Investigation, FBI, has more than doubled, and the FBI anticipates that number may double yet again. Despite this increase, the FBI currently has fewer than 250 special agents nationwide assigned to financial fraud cases, which is only a quarter of the number the Bureau had more than a decade ago at the time of the savings and loan crisis. At the current levels,*

*the FBI cannot even begin to investigate the more than 5000 mortgage fraud allegations referred by the Treasury Department each month.”*

However, the implications for health care are equally enormous.



**It must be noted the same day President Obama signed FERA into law, Attorney General Eric Holder and Department of Health and Human Services Secretary Kathleen Sebelius announced the new “Health Care Fraud Prevention and Enforcement Action Team (HEAT)”, which was written about in a previous AIHC newsletter.**

The greatly enhanced assets assigned to investigate and prosecute allegations of health care fraud combined with the relaxed restrictions on proving a civil false claim arising from FERA will make health care providers, contractors and even outside parties far more vulnerable. Even the Recovery Audit Contractors (RACs) become involved.

### **Intent Redefined**

The foremost change recognized by numerous legal and health care groups is that now intent to commit fraud does not need to be positively proven. In the past many prosecuting entities realized this was the most difficult to prove in health care fraud cases. This change comes as a conscious overturning of a case last year, *Allison Engine Co. v. United States ex rel. Sanders*; wherein businesses or individuals were liable for sending false statements when those statements were made knowingly to get a false claim paid (by the government). This ruling limited guilt to clear intent to defraud the government, and not another third entity (such as a subcontractor). The new wording in the FCA does not look very different when simply glanced at since it still states the statement is knowingly made in an attempt to acquire monies or properties that will “be spent or used on the Government’s behalf or to Advance a Government program or interest”. Instead of specifying the regulation to cover many entities, this new wording is far more vague, which leaves every case open to interpretation and argument on a case-by-case basis. What this means in one statement is that clear intent is no longer required. In the June 2009 *Jones Day Jones Day Commentary* commentators on the effects of FERA go so far as to say the claim becomes prosecutable whether the party submitting the claim had intent to defraud the government or not! The strength of the inaccuracy of the claim becomes the key element not the purpose of the submitting party.

### **The “Finders, Keepers” Allowance Gets a New Look**

In the past entities retaining overpayments received some measure of lenience if they did not make a conscious decision to hold onto, hide or reduce repayment of overpayments from government programs (sometimes referred to as the “reverse false claim”), whether the repayment was or was not made. With FERA’s upgrade in prosecutability, an entity is now fully liable just for receiving the overpayments and held responsible for their

appropriate repayment. In a confusing portion of the new wording the liability is held when the party knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government”. Although this *sounds like* the old wording, what it does is force the health care entity to **immediately determine** if it has received an overpayment or not. More disconcerting yet is the question of where an entity stands with an historical overpayment it still knowingly owes. An example of this could be a physician who billed Medicaid and received an overpayment and the repayment came past due. Although the physician made no false representation to the government, since the debt was owed the government could bring a suit against the physician.

### **FCA Statute of Limitations Changes**

Up to the signing of FERA the statute of limitations on false claims was six years from the date the government “reasonably learned of the material facts, and up to 10 years after the date of the alleged fraud. Although this still generally applies, there is a clear benefit to the government: if the government is slow to act, act on the allegation or process the case, the statute of limitations no longer applies. Now the government can relate back to the date of the original complaint, which for them nullifies the statute of limitations’ requirement. To see the wide implications of this we need to remember several points. First, a whistleblower (addressed in the next section, below) begins the action against an entity- this entity usually has no idea it has been reported, and the record (complaint or allegation) is sealed and tightly protected. Between the time of the original complaint and the government acting on the complaint, several years may have passed. Heretofore the statute of limitations clock would be running, and lags in government activity would count against the prosecution of the case. However the current wording evidently overrides the statute when these lags occur and for purposes of prosecution and recoupment can be disregarded as long as the government keeps the case active. Since the accused has little or no time to build a strong defense in qui tam (whistleblower) cases because of the sealed time during initiation and investigation, the defense will be much harder put to bring an effective counterargument to court.

### **The New “Non-Materially” of the Term Materially**

To this point the FCA left the meaning of “material up to the courts, and this (unlike intent) has traditionally been judged on a case-by-case basis. With the new wording from FERA materiality has now been stamped into statutory code, with material now meaning “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.” What makes this part so cloudy is what will constitute “...a natural tendency to influence, or be capable of influencing...”. In simpler terms, previously the false claim could be prosecutable (only) if the false statement materially affected the government’s decision to pay the claim. This meant that an error on the claim was not truly actionable under the FCA if it did not affect the total amount the government would pay for the claim. This historically caused significant variances in interpretation throughout the judicial system. The new wording in FERA liberalizes the ability to interpret the meaning of “material”. In its broadest sense, an individual or entity was not necessarily liable under the FCA if the claim went to *a contractor* of a federal agency (Medicare has many of these, and in certain situations even subcontractors). With the updates to FCA through FERA now the submission of the claim to the contractor or

subcontractor is prosecutable. Another effect of the new amendments is that although the government is allowed to fully challenge and prosecute an entity for submitting a false claim submitted to a *private entity* receiving federal funds, that private entity is given no legal recourse against the submitter of the false claim(s). Therefore a company submitting a claim relying on federal funds, originally submitted by a subcontractor to it (the primary company), is left with no avenues of restitution even if the government was not harmed by the claim.

### **Whistleblowers Become a More Greatly Encouraged and Protected Species**

Perhaps surprisingly, the protections against retaliation for whistleblowers are not the changes garnered from FERA: the protected classes are.



The wording of the FCA has been amended to include protection for contractors and agents in the protected class. Previously the protection extended only to direct employees. Although separate in the FCA the person reporting the complaint/allegation may bring the complaint to **any** state or local law enforcement authority authorized by state law to prosecute fraud claims- not just United States authorities. In addition whistleblowers have access to information acquired from government subpoenas. The new wording also expands government agencies' ability to share whistleblowers' information with local and state law enforcement agencies.



### **Additions to Federal Agencies' Arsenals**

Depending on where one looks between \$466,000,000 and over \$500,000,000 has been allotted by President Obama for increased aggressiveness in investigating and prosecuting fraud against the government. The Department of Justice (DOJ) through FERA has been granted the *Civil Investigative Demand*, allowing the DOJ to subpoena witnesses, documents and other evidence before filing a FCA case.

FERA also relaxes a number of restrictions on use and allowance of evidence in court, and last but not least, the DOJ is now allowed to recover all costs associated with a FCA case from the defendant. And do not falsely believe we are only talking about the FBI,

although their name will probably be the most commonly heard: DOJ encompasses all of the following agencies:

*(Each listing below is a web page link)*

[Antitrust Division](#)

[Asset Forfeiture Program](#)

[Attorney General](#)

[Bureau of Alcohol, Tobacco, Firearms and Explosives](#)

[Bureau of Justice Assistance \(OJP\)](#)

[Bureau of Justice Statistics \(OJP\)](#)

[Civil Division](#)

[Civil Rights Division](#)

[Community Capacity Development Office \(OJP\)](#) *(includes Weed and Seed and American Indian and Alaska Native Affairs Desk)*

[Community Oriented Policing Services - COPS](#)

[Community Relations Service](#)

[Criminal Division](#)

[Diversion Control Program \(DEA\)](#)

[Drug Enforcement Administration - DEA](#)

[Environment and Natural Resources Division](#)

[Executive Office for Immigration Review](#)

[Executive Office for U.S. Attorneys](#)

[Executive Office for U.S. Trustees](#)

[Federal Bureau of Investigation - FBI](#)

[Federal Bureau of Prisons - BOP](#)

[Foreign Claims Settlement Commission of the United States](#)

[Department of Homeland Security](#)

[U.S. Citizenship and Immigration Services - USCIS](#)

[Bureau of Customs and Border Protection - BCBP](#)

[Bureau of Immigration and Customs Enforcement - ICE](#)

[Office of Immigration Statistics](#)

[INTERPOL -- U.S. National Central Bureau](#)

[Justice Management Division](#)

[National Criminal Justice Reference Service \(OJP\)](#)

[National Drug Intelligence Center](#)

[National Institute of Corrections \(FBOP\)](#)

[National Institute of Justice \(OJP\)](#)

[National Security Division - NSD](#)

[Office of the Associate Attorney General](#)

[Office of the Attorney General](#)

[Office of Attorney Recruitment and Management](#)

[Office of the Chief Information Officer](#)

[Office of the Deputy Attorney General](#)

[Office of Dispute Resolution](#)

[Office for Domestic Preparedness](#) - now part of the

[Department of Homeland Security](#)

[Office of the Federal Detention Trustee](#)

Office of Information Policy  
Office of the Inspector General  
Office of Intergovernmental and Public Liaison  
Office of Justice Programs  
Office of Juvenile Justice and Delinquency Prevention - OJJDP (OJP)  
Office of Legal Counsel  
Office of Legal Policy  
Office of Legislative Affairs  
Office of the Pardon Attorney  
Office of Privacy and Civil Liberties  
Office of Professional Responsibility  
Office of Public Affairs  
Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking - SMART (OJP)  
Office of Special Counsel  
Office of the Solicitor General  
Office of Tribal Justice  
Office for Victims of Crime (OJP)  
Office on Violence Against Women  
Professional Responsibility Advisory Office  
Tax Division  
U.S. Attorneys  
U.S. Marshals Service  
U.S. Parole Commission  
U.S. Trustee Program

***Are the RACs Involved?***



As we read about FERA and its impact on the False Claims Act the question gets begged whether the FCA/FERA union will impact how the RACs conduct business. Although there are few clear signs, a few theories can be brought forward. First, the RACs must look strictly at medical necessity to treat from a documentation angle. They do not concern themselves with coding specifically. What they can do is look at documentation for manipulation of patient records, changes with no signatures and dates to show that a qualified person made the changes and proof the physician indeed performed critical elements of patient treatment and diagnosing. Any RAC allegation of improper documentation/lack of medical necessity could be viewed as a false claim. In addition the RACs have the authority to report aberrations, errors or other findings to Medicare, its contractors and the OIG. Though not common some providers do put diagnosis and procedure codes in the charts as well as on the claims actually going to insurance. If a RAC auditor finds these and some inquiry arises the RAC audit can be followed up by a

Medicare audit or worse (OIG). As the FCS impact of FERA becomes more widespread more information will probably come out when and if the RACs are affected or using FERA in other ways.

**Conclusion**

As we have seen the changes in the False Claims Act through FERA are far-reaching indeed. All types of providers will be affected, from solo practices to hospitals. It appears direct knowledge and intent rules have been considerably relaxed, making defense against fraud charges much more difficult than before. It is obvious the government wants whistleblowing to not only continue, but increase: now not only individual employees but indirect contractors and entities are encouraged to participate. By the same token these indirect entities are also much more vulnerable to actionable prosecution under the False Claims Act.

This has been a summary analysis of research over FERA and its ramifications for health care through the False Claims Act changes. It is not intended as legal advice. The potential for serious consequences makes it imperative health care providers at all levels update and practice their compliance plans and work closely with their risk assessment attorneys. Each provider has unique aspects that require individual attention.

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*1 CEU for CHA, CMC, MCMC professionals*