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The Fraud-and-Abuse Provisions of the Health Care Reform Act

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The recently enacted Affordable Care Act[1] includes a number of extremely important fraud-and-abuse provisions affecting health care providers, including amendments to the False Claims Act (FCA), changes to the Anti-Kickback Statute (AKS), and new requirements related to the return of overpaymemts, as well as additional funding and new enforcement powers to fight fraud and abuse. Many of these changes are effective immediately. The developments that are most significant for health care providers are as follows.

FCA Amendments

The FCA applies to all industries, not just health care, but has, of course, assumed tremendous importance to health care providers. The Affordable Care Act broadens the sources of information that can be used to bring a FCA qui tam suit to include, for example, such items as state inspection reports. These changes do not have a stated effective date and so were effective on the date of enactment (March 23, 2010).

Before March 23, 2010, the FCA's public disclosure bar divested courts of jurisdiction over qui tam suits based on allegations or transactions publicly disclosed in a "criminal, civil, or administrative hearing, in a congressional, administrative, [U.S. Government Accountability Office Report], hearing, audit, or investigation," or in the news media, unless the qui tam relator was an "original source" of the information.[2] The Affordable Care Act implements three significant changes to the public disclosure bar.

First, the amended statute now provides that the government has discretion to waive the public disclosure bar even in cases where it obviously would apply (e.g., a qui tamsuit based on a front-page story in the New York Times).[3]

Second, the statute now provides that only federal criminal, civil, or administrative proceedings in which the government or its agent is a party, and only congressional, Government Accountability Office, or other federal reports, hearings, audits or investigations trigger the public-disclosure bar.[4] In *Graham County Soil and Water Conservation District v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1411 (March 30, 2010), a case decided after the enactment of the Affordable Care Act that construed the extent of the public-disclosure bar before it was amended, the Supreme Court held that state disclosures do trigger the old version of the public disclosure bar. Thus, the amendments effectively overrule *Graham County* with respect to alleged FCA violations occurring after March 23, 2010.

Third, a relator now can qualify for the original source exception to the public-disclosure bar if he or she has "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions."[5] Previously, the original-source exception to the public- disclosure bar required both direct and independent knowledge of the information on which allegations are based.[6] Although the new "materially adds to the publicly disclosed allegations or transactions" standard is not defined in the statute, the replacement of the requirement for direct knowledge with this new standard potentially expands the universe of circumstances under which a person can qualify as an original source.

Taken together, these three changes significantly erode the protection afforded by the public-disclosure bar against parasitic suits. Indeed, in light of the practice of some state authorities, such as New York's Medicaid Inspector General, of posting audit reports concerning audits of specific providers on a public website, the Affordable Care Act's amendments to the public disclosure bar potentially open the doors to qui tam actions based on such reports.

AKS Amendments

The AKS prohibits the offering, payment, solicitation, or receipt of payment for certain referrals. The Affordable Care Act includes two significant amendments to the AKS, both of which were effective on the date of enactment.

The first change instructs that a claim for services provided in violation of the AKS violates the FCA as well.[7] This amendment is of significant import in that it eliminates some of the limits courts have placed on "false certification" FCA cases—cases that do not allege an actual false claim (such as a claim for services that were never provided), but instead allege that a false implied or express certification of compliance with certain laws or regulations renders a claim false. Prior case law established that a false certification is actionable only if the defendant expressly certifies compliance with the statue or regulation in question, or where such statute or regulation expressly states that a provider must comply in order to be paid.[8] The amendment removes these limitations for AKS violations.

The second amendment to the AKS reduces the intent standard under the AKS, so that it now reads: "With respect to violations of this section, a person need not have actual knowledge of this section or specific intent to commit a violation of this section."[9] This amendment specifically overrules the Ninth Circuit's holding in *Hanlester Network v. Shalala*, 51 F.3d 1390, 1400 (9th Cir. 1995), that the scienter standard of the AKS requires a showing that the defendant knew of the AKS and specifically intended to violate the AKS.

Amendments Concerning Overpayments

The Affordable Care Act creates a specific requirement to report and return "overpayments" within the later of 60 days after the overpayment is identified or the date any corresponding cost report is due.[10] An "overpayment" is defined in the statute as "any funds that a person receives or retains under [Medicare and Medicaid] to which the person, after applicable reconciliation, is not entitled under such title."[11] The term "identified" is not defined in the Affordable Care Act, but the use of that term instead of a "known, or should have known" standard suggests that the term should be interpreted to mean actual knowledge.

The Affordable Care Act further provides that an overpayment retained after the deadline for repayment is an "obligation" under the FCA.[12] The significance of this provision in the Affordable Care Act is somewhat unclear in light of statutory changes already made last year. The Fraud Enforcement and Recovery Act of 2009 (FERA) amended the "reverse false claim" provision of the FCA and made it a violation of the FCA to (i) knowingly make a false statement material to an obligation to pay money to the government, or (ii) knowingly conceal or improperly decrease an obligation to pay or transmit money or property to the Government.[13] The FERA amendments to the FCA also defined the term "obligation" to include "the retention of the overpayment."[14]

Given that the knowing retention of an overpayment was already actionable under the FCA before the enactment of the Affordable Care Act, it appears that the Affordable Care Act's overpayment provisions may be intended to create something of a safe harbor for overpayments that are returned within 60 days after the overpayment is identified, so that providers who promptly return overpayments will not be subject to FCA liability. This is less than clear, however.

Increased Funding and Investigatory Powers

The Affordable Care Act provides $350 million in new funding to fight fraud and abuse over the next ten years,[15] indicating that the substantive changes to fraud and abuse laws will be used aggressively. The Affordable Care Act also expands the subpoena power of the Department of Health and Human Services (HHS), allows for the delegation of that power to HHS's Office of Inspector General, and establishes a penalty of $15,000 per day for delaying or refusing to grant HHS access to information in connection with audits and investigations.[16] Most importantly, the Affordable Care Act authorizes HHS to withhold Medicare payments to providers, and withhold the federal portion of Medicaid payments, based on a "credible allegation of fraud," unless there is good cause not to suspend such payments.[17] The authority to suspend payments is of course an extremely powerful tool. All of these provisions were effective the date of enactment (March 23, 2010).

Conclusion

The fraud-and-abuse provisions of the Affordable Care Act include a number of significant adverse changes for health care providers. They include amendments to the FCA that limit the public-disclosure bar, one of the key defenses available under the FCA, by, among other things, allowing whistleblowers to pursue disclosures made in state investigations, reports, and hearings; amendments to the AKS that make AKS violations actionable under the FCA, even where the requirements related to so-called false certification cases have not been met; additional amendments to the AKS codifying a reduced standard of scienter; and new provisions relating to overpayments that protect providers who return overpayments within 60 days of identifying such payments from FCA liability, but leave providers who do not meet this tight timeline subject to FCA liability for knowingly retaining such payment. These changes invite FCA whistleblower suits based on a variety of state public disclosures, on alleged AKS violations, and with respect to overpayments. The FCA relators' bar is sure to accept the invitation. As indicated by the increase in funding to fight fraud and abuse and the enhancement of the government's investigatory powers implemented under the Affordable Care Act, including the authority to withhold Medicare and Medicaid payment based upon a credible allegation of fraud, the government is likely to wield these new tools aggressively as well.

[1] "Affordable Care Act" or the "Act" means the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010.

[2] 31 U. S. C. § 3730(e)(4)(A) (2006).

[3] H.R. 3590, 111th Cong. § 10104(j) (2010).

[4] *Id*.

[5] *Id*.

[6] *See* 31 U. S. C. § 3730(e)(4)(A) (2006).

[7] H.R. 3590, 111th Cong. § 6402(f)(1) (2010).

[8] *See*, *e.g.*, *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 700 (2d Cir. 2001).

[9] H.R. 3590, 111th Cong. § 6402(f)(1) (2010).

[10] H.R. 3590, 111th Cong. § 6402(a) (2010).

[11] *Id*.

[12] *Id*.

[13] 31 U.S.C. 3729(a)(1)(G).

[14] 31 U.S.C. 3729(b)(3).

[15] H.R. 3590, 111th Cong. § 6506 (2010); H.R. 4872, 111th Cong. § 1303(a) (2010).

[16] H.R. 3590, 111th Cong. § 6402(e) (2010).

[17] H.R. 3590, 111th Cong. § 6402(h) (2010).

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