

Health Care Fraud Alert

5/21/2009

In This Issue

- [Where There's HEAT, There's Enforcement Activity](#)
- [The Fraud Enforcement and Recovery Act of 2009: Greater Liability; Increased Resources](#)

* * *

Where There's HEAT, There's Enforcement Activity

There's a new taskforce in town. And it's packing HEAT. On May 20, 2009, Attorney General Eric Holder and Department of Health and Human Services (HHS) Secretary Kathleen Sebelius announced the formation of the Health Care Fraud Prevention and Enforcement Action Team ("HEAT"). This new taskforce, which is comprised of "key stakeholders at the highest levels" of the Department of Justice (DOJ) and HHS, has been charged with expanding the agencies' efforts to combat Medicare fraud by expanding and strengthening existing programs and investing in new resources and technology to prevent fraud and abuse. HEAT's efforts to address Medicare fraud — which costs taxpayers as much as \$60 billion annually — will include:

- continuing to operate the highly successful Medicare Fraud Strike Force teams established in Miami in 2007 and Los Angeles in 2008;
- establishing new Medicare Fraud Strike Force teams in Detroit and Houston;
- building upon demonstration projects that call for increased site visits to potential durable medical equipment (DME) suppliers to prevent imposters from posing as legitimate DME suppliers;
- strengthening program integrity activities to monitor Medicare Parts C and D;
- improving data and information sharing between Centers for Medicare & Medicaid Services (CMS) and law enforcement agencies to help identify patterns that indicate fraud; and
- working with the public to identify fraud through the use of hotlines and websites, including the new HHS and DOJ [Stop Medicare Fraud](#) website.

The website states that new initiatives will be added "in the weeks ahead" but does not provide a timeline for the above initiatives or any anticipated new ones. Although no specific timeline for the new Strike Force teams has been provided, the existing Miami and Los Angeles teams have secured a combined total of \$241 million in criminal fines, civil recoveries, and restitution, so the creation of the Detroit and Houston teams likely will be a high priority. The Obama Administration's Fiscal Year 2010 budget proposal allocates substantial resources to health care fraud recovery and prevention efforts, with \$311 million in discretionary funding for the Health Care and Fraud and Abuse Control Program, including approximately \$30 million allocated to DOJ.

Read the full Department of Justice press release [here](#).

The Fraud Enforcement and Recovery Act of 2009: Greater Liability; Increased Resources

President Obama signed into law the [Fraud Enforcement and Recovery Act of 2009](#) (FERA) on May 20, 2009. FERA affects several sectors of the United States economy by amending existing anti-fraud statutes, including the civil False Claims Act (FCA or the “Act”), 31 U.S.C. § 3729 et seq. Although FERA amends and clarifies numerous provisions of the FCA, the two key changes discussed here are the broadening of liability under the Act and the removal of certain administrative hurdles faced by federal and state governments in investigating FCA allegations. Coupled with the increased funding allocated to investigative agencies under FERA, these changes will undoubtedly increase health care fraud prosecution.

Expanded Liability

FERA expands FCA liability in three significant ways:

1. by amending § 3729(a) to clearly overturn the Supreme Court’s 2008 decision in *Allison Engine Co., Inc. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008);
2. by clarifying that liability attaches to a conspiracy to violate any of the substantive provisions of the FCA; and
3. by closing a loophole in the reverse false claims provision.

The Allison Engine Case

FERA amends § 3729(a) to clarify that liability attaches to anyone who presents a claim for payment, or makes or uses a false statement or record for that purpose if the federal government will provide any portion of the payment requested. The FCA previously had a “presentment” requirement, such that a person was liable for presenting (or causing to be presented) a claim to an officer of the federal government. Read literally, this provision could allow subcontractors who do not typically present claims directly to the government to escape liability under the FCA; the U.S. Supreme Court embraced this interpretation in the *Allison Engine* case.

The Supreme Court’s holding in *Allison Engine* potentially insulated subcontractors from culpable conduct under the FCA. In that case, the Court held that if a subcontractor submits a false record to a prime contractor but does not “intend the Government to rely on that false statement as a condition of payment, the statement is not made with the purpose of inducing payment of a false claim ‘by the Government.’”¹ In other words, for liability to attach, the government would have to prove that the subcontractor intended to defraud the government as well as the prime contractor (a private entity operating under a government contract). To eliminate this unintended specific intent requirement, FERA removes the presentment language. As amended, the FCA imposes liability upon a person who knowingly presents a false or fraudulent “claim” to anyone. The FCA’s definition of “claim,” as amended by FERA, clarifies

that the prohibition applies to any request or demand for money, any portion of which will come from the federal government.

Similarly, and also as a result of the *Allison Engine* decision, FERA amends § 3729(a)(2) by removing another intent requirement. Section 3729(a)(2) previously imposed liability on a person who knowingly made, used, or caused to be made or used a false record or statement “to get” a false claim paid or approved by the federal government. FERA removes the reference to the government in this provision and clarifies that liability results from making or using a false record or statement that is “material to” a false or fraudulent claim.

In the health care context, some argued that, as a result of *Allison Engine*, the federal government’s ability to prosecute providers for submission of false claims to the Medicare and Medicaid programs may be hindered because Medicare and Medicaid claims are submitted to private contractors or managed care organizations, rather than directly to the government. By removing the presentment requirement, FERA eliminates this possible defense. Moreover, by amending the definition of “claim” to include money, “any portion of” which comes from the federal government, FERA clarifies that Medicaid claims are “claims” because the program is jointly funded by the federal and state governments.

Liability for Conspiracy

FERA also expands liability for conspiracy to violate the FCA. Some courts have interpreted the conspiracy provision narrowly because, by its terms, the provision appeared to relate only to those who conspired to get a false claim allowed or paid. FERA amends former § 3729(a)(3) to clarify that any person who conspires to violate any substantive provision of § 3729(a) is liable under the Act.

Reverse False Claims

FERA also closes a loophole in the reverse false claims provision of the FCA. A “reverse” false claim occurs when a person makes or uses false records to conceal or decrease an obligation to pay the government. However, the reverse false claims provision mirrored only the language of § 3729(a)(2), which imposes liability on those who make or use a record to conceal or decrease an obligation to pay. FERA amends the reverse false claims provision to extend liability to obligations directly owed to the government (*i.e.*, the amended provision also incorporates language from § 3729(a)(1)), as opposed to only applying to money improperly retained.

Administrative Hurdles

To facilitate state and federal investigations under the FCA, FERA amends both the jurisdiction provision found at § 3732 and the civil investigative demands provision at § 3733. FERA also adds a new subsection to § 3732 that permits the government (or a relator) to serve the sealed complaint, pleadings, and “substantially all material evidence and information” about the FCA action, on a state law enforcement agency authorized to investigate and prosecute such actions if that agency is a co-plaintiff in the case. Although state agencies must keep the information under

seal, the ability to receive the benefit of the federal government's work will greatly assist states in their own investigations.

Finally, FERA permits the Attorney General to delegate certain duties, which may help reduce the backlog of fraud investigations. FERA amends § 3733 to permit the Attorney General "or a designee" to issue civil investigative demands whenever the Attorney General or the designee has reason to believe that a person may have relevant information. FERA strikes similar restrictive references throughout § 3733 to make clear that the Attorney General may delegate certain functions to a designee.

* * *

By advocating for this legislation and signing it into law so quickly, the Obama Administration has made it clear that it is serious about both cracking down on future fraud possibilities and recovering monies owed to the government as a result of past fraud. In addition to the expansion of liability provisions discussed above, FERA also strengthens protections for whistleblowers and appropriates \$165 million to the DOJ to investigate and prosecute suspected cases of fraud against the programs and institutions covered by FERA. Between FERA's new anti-fraud amendments, greater funding, and the HEAT taskforce discussed above, the Administration is making it a priority to ensure that federal agencies have the resources they need to combat health care fraud.

Endnotes

¹ *Allison Engine*, 128 S. Ct. at 2130.

For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

MEMBERS

Robert D. Clark
Managing Member, Health Law Practice
(202) 434-7402
RDClark@mintz.com

Stephen M. Weiner
Chairman, Health Law Practice

(617) 348-1757
SWeiner@mintz.com

Susan W. Berson
Managing Member,
Washington, D.C. Office
(202) 661-8715
SBerson@mintz.com

Thomas S. Crane
(617) 348-1676
TSCrane@mintz.com

Stephen C. Curley
(212) 692-6217
SCCurley@mintz.com

Deborah A. Daccord
(617) 348-4716
DADaccord@mintz.com

Hope S. Foster
(202) 661-8758
HSFoster@mintz.com

Ellen L. Janos
(617) 348-1662
EJanos@mintz.com

Karen S. Lovitch
(202) 434-7324
KSLovitch@mintz.com

M. Daria Niewenhous
(617) 348-4865
DNiewenhous@mintz.com

Andrew B. Roth
(212) 692-6889
ARoth@mintz.com

OF COUNSEL

Michael D. Bell
(202) 434-7481
MDBell@mintz.com

ASSOCIATES

Stephen R. Bentfield
(202) 585-3515
SRBentfield@mintz.com

Dianne J. Bourque
(617) 348-1614
DBourque@mintz.com

Theresa C. Carnegie
(202) 661-8710
TCCarnegie@mintz.com

Brian P. Dunphy
(617) 348-1810
BDunphy@mintz.com

Garrett G. Gillespie
(617) 348-4499
GGGillespie@mintz.com

Lauren N. Haley
(202) 434-7386
LNHaley@mintz.com

Rachel M. Irving
(617) 348-4454
RMIrving@mintz.com

Krietta Bowens Jones
(617) 348-3042
KBowensJones@mintz.com

Sarah A. Kaput
(202) 434-7423
SAKaput@mintz.com

Katina W. Lee
(202) 661-8729
KLee@mintz.com

Carrie A. Roll
(202) 434-7350
CARoll@mintz.com

Tara E. Swenson
(202) 585-3504
TESwenson@mintz.com

Andrea P. Testa
(617) 348-4407
ATesta@mintz.com

Melissa O'Neill Thatcher
(617) 348-3015
MOThatcher@mintz.com

Heather L. Westphal
(202) 585-3538
HLWestphal@mintz.com

Jennifer E. Williams
(202) 585-3542
JEWilliams@mintz.com

Nili S. Yolin
(212) 692-6799
NSYolin@mintz.com