

## Patient Protection and Affordable Care Act Increases Potency of Qui Tam Suits Under the False Claims Act

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### Introduction

As part of the current administration's efforts to expand the availability and decrease the costs of health care in the United States, President Obama signed into law the Patient Protection and Affordable Care Act ("PPACA") on March 23, 2010. In addition to expanding the scope of health care coverage, the PPACA affects other statutory provisions designed to combat fraud against the health care system, including changes to the False Claims Act ("FCA").<sup>1</sup>

### Retention of Overpayments

In 2009, President Obama signed into law the Fraud Enforcement and Recovery Act ("FERA"). The FCA had a relatively narrow "reverse false claims" provision prior to FERA, but FERA expanded the potential for liability for reverse false claims.<sup>2</sup> It made liable a person who "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government."<sup>3</sup> But, FERA was somewhat vague on what constituted an "obligation."

PPACA provides some clarity. It explicitly states that "[a]ny overpayment retained by a person after the deadline for reporting and returning the overpayment [] is an obligation [under the FCA]."<sup>4</sup> An overpayment must be reported by the later of sixty days after the date on which the overpayment was identified or the date any corresponding cost report is due.<sup>5</sup> Thus, retention beyond this period may subject the retaining person or entity to liability under the FCA. Considering the steep penalties, up to \$11,000 per claim plus treble damages, and Congress' direct link from PPACA to the FCA, health care providers and others receiving federal money must proceed with caution and enhanced vigilance. Erring on the side of explanation and disclosure will likely be in the provider's best interest.

### Changes to the FCA

PPACA made several critical changes to the FCA that will affect *qui tam* lawsuits<sup>6</sup> against those receiving federal dollars, such as health care providers billing Medicaid and Medicare. A person is able to bring such an action under the FCA unless it is based on "publicly disclosed" allegations or transactions. An exception exists to the public disclosure bar if the person bringing the suit is the "original source" of the publicly disclosed information. PPACA alters these dynamics by narrowing the information that is considered "publicly disclosed" and expanding the number of individuals who are considered "original sources."

Prior to PPACA, allegations or transactions contained in criminal, civil, or administrative hearings, whether state or federal; congressional, administrative, or Government Accounting Office reports, hearings, audits, or investigations; or the news media were considered publicly disclosed. Hence, a *qui tam* suit could not be based on this information. Under the new FCA as amended by PPACA, allegations or transactions are "publicly disclosed," thus barring suit, only if they are contained in a *federal* criminal, civil, or administrative hearing *in which the government or its agent is a party*; congressional, Government Accountability Office, or other *federal* report, hearing, audit, or investigation; or the news media. This significantly narrows the public

disclosure bar to FCA *qui tam* suits, vitiating one of the major, effective defenses to this type of suit.

Further increasing the viability of a *qui tam* suit, PPACA expands the scope of the "original source" exception to the public disclosure bar. The previous FCA made an original source one who had "direct and independent knowledge" of the information providing the basis of the complaint and who had voluntarily provided the information to the government prior to the *qui tam* suit. Now, an original source must merely have "knowledge that is independent of and materially adds to" the publicly disclosed information and must voluntarily provide that information to the government prior to the *qui tam* action. Consequently, the public disclosure bar does not preclude someone from obtaining second hand, indirect knowledge from bringing suit. Although it appears up the courts to interpret the meaning of the language "materially adds to," Congress seems to intend to broaden the scope and availability of *qui tam* actions under the FCA.

Additionally, PPACA alters the nature of the public disclosure bar. Under the previous FCA, no court had *jurisdiction* over an action based on publicly disclosed information. This permitted discovery early in the course of litigation to resolve the jurisdictional issue. Upon a lack of jurisdiction, dismissal of the action was proper under Rule 12(b)(1) of the Federal Rules of Civil Procedure. Quite differently, the new FCA provides that "[t]he court shall dismiss an action or claim [because of the public disclosure bar], *unless opposed by the government.*"<sup>2</sup> Thus, even if the claim falls within the public disclosure bar, a court cannot dismiss the action if the government opposes. It remains unclear what level of opposition the government must impose or how this implication will play out, but this language places some discretion in the government regarding the stage at which these cases may be dismissed. As a result, it seems likely that FCA *qui tam* actions will not be as easily or as quickly dismissed, and the frequency and duration of the suits will increase.

## Conclusion

PPACA's changes to the FCA will likely increase the potency and frequency of *qui tam* actions under the FCA. Health care providers and other persons and entities contracting with the government or receiving federal money must proceed with caution to ensure compliance with the new law. Prudent providers should review their compliance manuals, policies and procedures, and employee familiarity in this area to ensure return of overpayments and abidance with the law.

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(1) 31 U.S.C. § 3729-3733 (2010).

(2) The reverse false claims provision essentially requires a person receiving overpayment from the government to return the overpayment.

(3) 31 U.S.C. § 3729(a)(1)(G).

(4) PPACA, Pub. L. No. 111-148, § 6402(d)(3).

(5) *Id.* at § 6402(d)(2).

(6) A *qui tam* lawsuit is an action brought under a statute that allows a private person to sue for a penalty, part of which the government will receive and part of which the person bringing the action will receive. Generally under the FCA, whistleblowers bring *qui tam* actions.

(7) 31 U.S.C. § 3730(e)(4)(A) (emphasis added).