HEALTHCARE REFORM STATUTE BROADENS THE SWEEP OF THE FALSE CLAIMS ACT—AGAIN

In May 2009, President Obama signed into law the Fraud Enforcement Recovery Act (FERA), which made sweeping changes to the False Claims Act (FCA) that relaxed key requirements necessary to prove an FCA violation and dramatically increased the scope and reach of the Act.[1] Now, less than one year later, the recently enacted healthcare reform statute—formally known as the Patient Protection and Affordable Care Act (PPACA)—contains provisions that make it easier for whistleblowers to proceed with actions independent of government intervention.[2]

FERA leaves the precise boundaries of FCA liability unclear, while PPACA could unleash a new wave of private FCA litigants. As a result, the combination of FERA and the PPACA could profoundly increase the number of FCA cases.

SUMMARY OF FERA

FERA amended many of the key provisions of the FCA, often with the express intent of reversing legislatively case law that Congress found objectionable. For example, FERA states that the FCA extends to false claims for government money or property without regard to whether the claim was presented to a government employee or official. A false claim after FERA includes any knowing request for money or property made to "a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest," and the government either provides, or will reimburse, a portion of the requested money or property. This new language unquestionably reaches lower tier contractors, but the full extent of this expansion is unclear. The phrase "on the Government's behalf or to advance a Government program or interest" is undefined.

In addition, FERA expands the scope of so-called "reverse false claims," which previously arose when an entity made a false statement or record to avoid or decrease an obligation to pay money to the government, such as a royalty for extracting natural resources from federal land. Under the new law, liability for a reverse false claim will exist wherever one "knowingly conceals or knowingly

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1 *See* Arnold & Porter LLP Advisory "Fraud Enforcement and Recovery Act Increases the Scope of False Claims Act Liability," http://www.arnoldporter.com/public_document.cfm?id=14372&key=15C0.

2 Although buried within the massive healthcare statute, PPACA's changes apply to all FCA cases, not just those arising in the healthcare area.

and improperly avoids or decreases an obligation to pay or transmit money or property to the Government." A false statement or record is no longer required for liability to attach; a knowing retention of an overpayment, without more, violates the FCA.

FERA also relaxed the intent required for an FCA violation as it applies to subcontractor claims. Previously, a subcontractor FCA violation required proof that the subcontractor intended the government to rely upon the false claim that the subcontractor submitted to the prime. Under FERA, the subcontractor may be liable if its claim would have "a natural tendency to influence" the government's decision to make payment. Once again, however, the outer limits of this expanded liability are unknown.

Procedurally, FERA made it easier for the government to obtain extensive discovery through civil investigative demands (CIDs) before deciding whether to intervene in a case brought by a whistleblower. FERA also permits the government to share information obtained through CIDs with the whistleblowers and their counsel. These provisions apply retroactively.

NEW CHANGES IN PPACA

While FERA expanded the scope of FCA liability, PPACA expands the rights of whistleblowers bringing suits on the government's behalf. To counterbalance the large financial incentives offered to whistleblowers (who are entitled to between 15 and 30 percent of the recovery in a successful FCA suit), the FCA bars whistleblower cases that are based upon publically disclosed information, unless the whistleblower is the "original source" of that information. PPACA greatly weakens this prohibition by narrowing the scope of public disclosures, expanding the definition of "original source" and making the bar applicable at the government's discretion, rather than jurisdictional.

Initially, PPACA limits the concept of a public disclosure. The FCA bars suits that are based upon allegations or transactions that have been publically disclosed in certain hearings, proceedings, or in the news media. PPACA limits the types of proceedings that will trigger a public disclosure bar to "Federal" proceedings, and limits the "criminal, civil, or administrative hearing[s]" to those "in which the Government or its agent is a party." Accordingly, information derived from certain state, local or private proceedings, or hearings apparently would not qualify as publically disclosed information after PPACA. Ironically, in *Graham County Soil and Water Conservation District* v. *U.S. ex rel. Wilson*, decided on March 30, 2010, one week after President Obama signed PPACA, the Supreme Court held that whistleblowers' allegations based on publicly disclosed information in state or local reports and investigations are barred. The decision acknowledged the PPACA amendments, but noted that PPACA was not retroactive and stated that the Court was interpreting pre-PPACA FCA.

In addition, PPACA expands the "original source" exception to the public disclosure bar. Before PPACA, FCA defined an original source as "an individual who has **direct** and independent knowledge of the information on which the allegations are based…." (Emphasis added.) PPACA changes the definition to an individual "who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions." As a result, whistleblowers no longer need direct (i.e., first hand) knowledge of the allegations or transactions underlying an FCA case, so long as the knowledge is independent of and materially adds to publically disclosed allegations or transactions.

Finally, PPACA provides that the public disclosure bar is no longer a jurisdictional impediment to a whistleblower suit, but instead applies only if the government does not object. Previously, the FCA stated that "no court shall have jurisdiction over" a whistleblower case based on publically available information, unless the whistleblower was an original source. PPACA provides that, in such cases, "the court shall dismiss [the] action…**unless opposed by the Government**." (Emphasis added.) Thus, PPACA apparently will allow whistleblower suits that would otherwise be barred if the government opposes dismissal of the case.

OUTLOOK FOR THE FUTURE

Together FERA and PPACA could have a snowballing effect on future FCA litigation. FERA clearly expands the scope of FCA liability, but creates substantial confusion regarding the outer limits of the statute's reach. At the same time, FERA makes it easier for the government to obtain information from an FCA defendant, and share that information with a whistleblower and counsel. PPACA, in turn, all but removes one of the most substantial restrictions on whistleblower suits. In short, FERA invites cases testing the new bounds of FCA liability, while PPACA expands the rights of the group most likely to test those limits. If the Government chooses to arm whistleblowers with extensive information from CIDs, and free them from the public disclosure bar, the number of FCA cases is certain to increase dramatically.

We hope that you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

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