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CIVIL FALSE CLAIMS ACT: Here They Go Again – Newly Enacted Comprehensive Health Care Reform Law Contains More FCA Amendments

In May of last year, Congress enacted a dramatic revision to the substantive provisions of the civil False Claims Act, but left alone the key jurisdictional "public disclosure / original source" bar put in place by Congress in 1986 to avoid parasitic *qui tam* suits. *See* FraudMail Alert No. 09-05-21 (discussing FCA amendments in the Fraud Recovery and Enforcement Act of 2009 ("FERA")). In the FCA amendments in FERA, Congress refused to weaken the public disclosure bar, but that restraint did not last a full year.

The Patient Protection and Affordable Care Act, signed into law by the President on March 23, 2010, directly amends the FCA's public disclosure bar and original source exception to expand private enforcement of *qui tam* actions beyond these long-established boundaries. The FCA-related amendments are not limited to FCA actions against health care companies, but instead apply to all individuals and organizations covered by the FCA. The new law also contains confusing provisions that attempt to bootstrap FCA definitions such as "knowingly" and "obligation" to enforcement actions against participants in health care programs without amending the FCA. Similarly, it defines certain conditions of eligibility as "material" conditions of entitlement to receive payment, a designation that does not necessarily accord with FCA case law on conditions of eligibility. There is no substantive legislative history on these FCA-related provisions and amendments, which is unfortunate for those trying to understand and abide by them. As with past FCA amendments, these changes will trigger extensive litigation, and courts will be forced to grapple with how to apply them in the years to come.

A red-line version of the new public disclosure provision can be found here.

The FCA's Public Disclosure Bar is Amended

> The FCA's public disclosure bar is amended in major ways. The new law provides:
>
> (4)(A) The court shall dismiss an action or claim under this section, *unless opposed by the Government*, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed--

> (i) in a *Federal* criminal, civil, or administrative hearing *in which the Government or its agent is a party*;
>
> (ii) in a congressional, Government Accountability Office, or other *Federal* report, hearing, audit, or investigation; or
>
> (iii) from the news media,unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and *materially adds to* the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

H.R. 3590, § 10104(j), 111th Cong. (2009) (emphasis added).

The new public disclosure bar maintains the essential structure of the prior bar by requiring a court to dismiss a whistleblower's *qui tam* suit if the allegations were "publicly disclosed," unless the relator is an "original source" of the information underlying the allegations. However, the reach of the new public disclosure provision is limited by the following revisions:

- Dismissal is not required if the government opposes it;
- Only *federal* hearings in which the government "or its agent" is a party are considered public disclosures of *qui tam* allegations;
- Only a *federal* report, hearing, audit or investigation qualifies as a public disclosure.

While the word "jurisdiction" has been removed, the use of the words "shall dismiss" means that the provision is similar to jurisdiction in that this issue should be resolved before the substantive case goes forward. Because the public disclosure bar is limited to federal hearings, however, fewer proceedings will be considered "public" and trigger the bar; fewer reports, audits, or investigations will trigger it for the same reason. Thus, although the question of whether a state report qualifies as a public disclosure is currently pending before the Supreme Court in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson,* No. 08-304, that issue would be moot in future cases to which the amendment applies. *See* FraudMail Alert No. 09-11-30. Importantly, the "news media" prong of the public disclosure bar is unchanged.

The new "original source" amendments also expand the exception to the public disclosure bar by eliminating the requirement that a person must have "direct" knowledge of the information underlying the allegations. This revision, however, does not eliminate the need for some firsthand knowledge, which is the very essence of a true whistleblower; otherwise, it would allow anyone who acquired information secondhand from public sources to bring a *qui tam* suit and share in any recovery. With the new changes, a person with such "independent" knowledge must "materially add" to the publicly disclosed allegations to qualify as an original source. It is not clear exactly what is intended by the language "materially add," which is not defined in the law. There does not appear to be any intent by Congress, however, to overturn the result in *Rockwell International Corp. v. United States ex rel. Stone,* 549 U.S. 457 (2007), where the Supreme Court required the relator's knowledge to encompass the allegations of fraud that were actually tried in the case, rather than simply to predict the ineffectiveness of a planned method of waste disposal that was never used. *See* FraudMail Alert Nos. 07-04-11 and 07-03-27. More importantly, the dual purposes of the bar--encouraging whistleblowers to alert the government to fraud while preventing parasitic suits--which date back to the statute's origins, appear to remain intact after this revision.

Nothing in the new amendments to the FCA appears to express congressional intent for any of these changes to apply retroactively. Under the teaching of *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), that should mean that this new language would apply only to conduct occurring after March 23, 2010.

Attempts to Apply FCA Liability and Definitions in New Health Care Contexts

The other FCA "amendments" in the new health law are truly bizarre. The new law attempts to apply several of the FCA's definitions to various health care transactions without amending the FCA's liability provisions to cover these transactions. For example, a program integrity provision governing enforcement of retained overpayments states that an overpayment retained beyond the deadline for reporting and returning it is an "obligation" as defined in the FCA. *See* H.R. 3590, § 6402(a). The provision also states that "knowingly" is defined as it is defined for purposes of the FCA, but the term "knowingly" does not appear in the provision on overpayments. Rather, the new provision requires reporting or return of an overpayment within 60 days after it was "identified"--a term that the provision does not define.

Despite this attempt to attach FCA liability using the definitions (or lack thereof) provided in the new enforcement provisions, the FCA itself governs liability based on "knowingly" avoiding or decreasing an "obligation." Under the FCA, "obligation" is defined to include retention of an overpayment, but the FCA's reverse false claims liability is limited to "knowingly and improperly" avoiding or decreasing an obligation, which requires the element of bad faith rather than the "identification"--however that term is defined--of an overpayment. *See* John T. Boese, Civil False Claims and *Qui Tam* Actions § 2.01[L] (Aspen Law & Business) (3d ed. 2006 & Supp. 2010-1).

The amendments provide a sense of the Congress relating to false claims and "payments made by, through, or in connection with an Exchange." For example, the law's tax credit and cost-sharing reduction provisions, which apply to health insurance exchanges, contain the statement that any payment in connection with an exchange that includes federal funds is subject to the FCA. The amendments contain language that would raise the FCA damages for such false claims to exchanges to an amount "not less than 3 times and not more than 6 times the amount of damages which the Government sustains," but in another amendment, that language is declared null and void. See H.R. 3590, § 10104(j)(1).

Finally, the amendments provide:

> Compliance with the requirements of this Act concerning eligibility for a health insurance issuer to participate in the Exchange shall be a material condition of an

> issuer's entitlement to receive payments, including payments of premium tax credits and cost-sharing reductions, through the Exchange.

H.R. 3590, § 1313(a)(6). This provision equates requirements for eligibility--whether important, unimportant, general, or specific--with a material condition of entitlement to payment. But, under the FCA, conditions of eligibility are not necessarily conditions of payment without a strong showing of materiality. *See, e.g., United States ex rel. Conner v. Salina Reg'l Health Ctr.,* 543 F.3d 1211 (10th Cir. 2008); *United States ex rel. Landers v. Baptist Mem'l Health Care Corp.,* 525 F. Supp. 2d 972 (W.D. Tenn. 2007). While these conditions of eligibility--many of which are yet to be established--may indeed be material under the FCA, a general statement that includes all of them does not necessarily suffice under the FCA. *See* John T. Boese, Civil False Claims and *Qui Tam* Actions, § 2.04 & n. 637 (citing cases). Also, the new law does not explain whether or how improper tax credit claims could be subject to FCA liability in light of the FCA's tax exception. *See* 31 U.S.C. § 3729(d).

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Authors

For more information regarding this client alert, please contact your usual Fried Frank attorney or any of the attorneys listed below:

Washington, DC

John T. Boese	Douglas W. Baruch	Beth Collins McClain
+1.202.639.7220	+1.202.639.7052	+1.202.639.7042

Fried, Frank, Harris, Shriver & Jacobson LLP

New York
One New York Plaza
New York, NY 10004-1980
Tel: +1.212.859.8000
Fax: +1.212.859.4000

Washington, DC
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2505
Tel: +1.202.639.7000
Fax: +1.202.639.7003

Frankfurt
Taunusanlage 18
60325 Frankfurt am Main
Tel: +49.69.870.030.00
Fax: +49.69.870.030.555

Shanghai
40th Floor, Park Place
1601 Nanjing Road West
Shanghai 200040
Tel: +86.21.6122.5500
Fax: +86.21.6122.5588

Fried, Frank, Harris, Shriver & Jacobson (London) LLP

London
99 City Road
London EC1Y 1AX
Tel: +44.20.7972.9600
Fax: +44.20.7972.9602

Fried, Frank, Harris, Shriver & Jacobson (Europe)

Paris
65-67, avenue des Champs
Elysées
75008 Paris
Tel: +33.140.62.22.00
Fax: +33.140.62.22.29

Fried, Frank, Harris, Shriver & Jacobson

Hong Kong
9th Floor, Gloucester Tower
The Landmark
15 Queen's Road Central
Hong Kong
Tel: +852.3760.3600
Fax: +852.3760.3611