

## **Fraud Enforcement and Recovery Act Amends the Civil False Claims Act**

Health care providers, including physical therapists, should pay attention to recently enacted changes to the federal False Claims Act. President Obama signed into law the Fraud Enforcement and Recovery Act (FERA) (PL-111-021) on May 20, expanding the scope of liability under the False Claims Act and giving the government enhanced investigative authority.

### **Background on the False Claims Act**

The False Claims Act (FCA) imposes liability on any person who submits a claim to the federal government that he or she knows (or should know) is false. An example may be a health care professional who submits a bill to Medicare for medical services that he knows he has not provided. In addition, the False Claims Act imposes liability on an individual who knowingly submits a false record in order to obtain payment from the government. An example would be a hospital that knowingly submits false records to obtain payment from Medicare government for health care services. In addition to its substantive provisions, the FCA also allows private parties to bring an action on behalf of the United States. These private parties, known as “*qui tam* relators,” may share in a percentage of the proceeds from an FCA action or settlement.

### **Changes to the False Claims Act in the Legislation**

The new legislation, FERA, makes sweeping changes to the FCA that will particularly impact health care providers in the areas of refunding overpayments to the government and filing claims with Medicare and Medicaid managed care plans.

The new legislation, FERA, specified that an entity violates the False Claims Act if it “knowingly and improperly avoids or decreases an obligation” to pay money to the United States, including an obligation arising from the retention of any overpayment. This law does not set forth any new obligations to return overpayments; however knowing an improper failure to return an overpayment (if there is an “established duty to do so) is now the basis for a FCA action. Providers will need to establish mechanisms to track and return overpayments when there is an obligation to do so. Otherwise, they may be at risk for a FCA violation.

The legislation also amends the definition of a “claim” to include any request or demand for money or property that is made to the Government or a contractor, grantee or other recipient, if the money is being spend on the Government’s behalf or to advance a Government program. Liability will be attached to funds dispensed by the government through intermediaries, which may have broad application to funds distributed and disbursed by states and state agencies through the American Recovery and Reinvestment Act of 2009 (the Stimulus bill). This would mean that claims to

Medicare Advantage Plans and Medicaid Managed Care Organizations could now trigger a FCA claim, which was previously unclear.

### **Retaliation Provisions Expansion**

The amendments to the legislation expand the bar on retaliation against “employees” (e.g. whistleblowers) who may report false claims, and includes a bar on retaliatory actions take against any “contractor or “agent. Therefore, the likelihood of a former employer or other agent becoming a whistleblower may increase.

### **Expanded Investigative Authority and Money for Investigations**

The legislation lessens to burden on the government to prove FCA claims making it easier for the government to bring claims. The amendments expand the Attorney General’s authority to issue Civil Investigative Demands and the government’s authority to share documents obtained through subpoena with relators and other parties. Also, significant amounts of money for enforcement are appropriated for attorneys, agencies and to cover the costs of investigations.

The full text of FERA is available at the following link:

[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:s386enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s386enr.txt.pdf)