
Attachment I

Summary of Federal False Claims Act, as amended by the Fraud Enforcement and Recovery Act of 2009 (“FERA”) (collectively “Federal FCA”), Federal Program Fraud Civil Remedies Act of 1986 (“Program Fraud Civil Remedies Act”), and Relevant Provisions of the Patient Protection and Affordable Care Act of 2010 (“PPACA”)

I. FEDERAL FCA

1. Overview. The Federal FCA is one of the laws the government uses to prevent and detect fraud, waste and abuse in federal health care programs. The Federal FCA provides that anyone who “knowingly” submits false claims to the government is liable for damages up to three times the amount of the erroneous payment (often referred to as “treble damages”), mandatory penalties between \$10,781 and \$21, 563 for each false claim submitted, and potential administrative remedies, such as exclusion from future participation in government health care programs.

The Federal FCA defines “knowingly” to mean that a person, with respect to information (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information.

Specifically, there are several actions that may form the basis for liability under the Federal FCA including, by way of example:

- Knowingly presenting, or causing to be presented, a false or fraudulent claim for payment or approval;
- Knowingly making or using, or causing to be made or used, a false record or statement material to a false or fraudulent claim;
- Conspiring to commit a violation of the False Claims Act;
- Having possession, custody, or control of property or money used, or to be used, by the government and knowingly delivering, or causing to be delivered, less than all of that money or property; or
- Knowingly making, using, or causing to be made or used, a false record or statement material to an obligation to pay money or transmit property to the government, or knowingly concealing or knowingly and improperly avoiding or decreasing an obligation to pay or transmit money or property to the government. That is, merely retaining an overpayment can constitute a false claim. The Patient Protection and Affordable Care Act further requires a person who receives an overpayment to report and return the funds to the appropriate agency or carrier in writing by the later of 60 days after identifying the overpayment or the date any corresponding cost report is due.

As a result of FERA, false claims or false statements presented to the government, as well as false claims and false statements made to Contractors of the federal government, such as FCHP, can give rise to liability. Not all false statements negate the

validity of the entire claim; rather, the false statement must be “material.” FERA interprets materiality by considering if the statement has the natural tendency to influence, or is capable of influencing, the payment or receipt of money or property.

2. Applicability. Among other things, the Federal FCA applies to claims submitted for payment in connection with federal health care programs, including Medicare and Medicaid. A “claim” is broadly defined to include any request or demand, whether under a contract or otherwise, for money or property that is presented to an officer, employee, or agent of the United States. The FCA also applies to claims 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 if the government has actually provided or will reimburse a portion of the money or property which is requested or demanded.
3. Methods of Enforcement. Both the government and private citizens can bring actions under the Federal FCA in federal court. When private citizens bring actions under the Federal FCA, those actions are referred to as *qui tam* actions and the private citizen is referred to as a Relator. If a Relator brings an action under the Federal FCA, the government has a period of time to investigate the allegations and decide whether to join the lawsuit. If the government elects to join the lawsuit, the Relator is entitled to 15-25% of any recovery. If the government declines to join the lawsuit, the Relator may still proceed with the action and is entitled to 25-30% of any recovery.
4. Employee/Whistleblower Protection. The Federal FCA prohibits discrimination by FCHP against an Employee, Contractor, or Agent for taking lawful actions in furtherance of an action under the Federal FCA. Under the Federal FCA, any Employee, Contractor, or Agent who is discharged, demoted, harassed, or otherwise discriminated against because of lawful acts by the Employee, Contractor, or Agent or associated others in furtherance of other efforts to stop one or more violations of the Federal FCA is entitled to all relief necessary to make the Employee, Contractor, or Agent whole. The individual, often referred to as a “whistleblower,” may bring an action in the appropriate federal district court and is entitled to reinstatement with the same seniority status, two times the amount of back pay, interest on the back pay, and compensation for any special damages as a result of the discrimination, such as litigation costs and reasonable attorney’s fees. It should be noted, that being a participant in the activity in question does not prohibit a Relator from bringing a *qui tam* action.
5. Procedural & Other Requirements. The Federal FCA contains a number of procedural and other requirements. For example, in order to be a Relator, the person must be the “original source” of the information reported to the government. Specifically, the Relator must have direct and independent knowledge of the false claims activities and voluntarily provide this information to the government. If the matter disclosed is already the subject of a federal investigation, or if the health care provider or supplier has previously disclosed the problem to a federal agency, the Relator may be barred from obtaining recovery under the Federal FCA.

II. FEDERAL PROGRAM FRAUD CIVIL REMEDIES ACT OF 1986

The Program Fraud Civil Remedies Act of 1986 (the “PFCRA”) is similar to the federal False Claims Act. This law also promulgates penalties for knowingly submitting false claims and statements. A false claim or statement includes submitting a claim or making a written statement that is for services that were not provided, or that asserts a material fact that is false, or that omits a material fact. A violation of the PFCRA results in a maximum civil penalty of \$5,000 per claim plus an assessment of up to twice the amount of each false or fraudulent claim.

Attachment II

Summary of Massachusetts False Claims Act (“Massachusetts FCA”)

1. **Overview.** Massachusetts has state laws similar to the federal FCA which allow both the state attorney general and private citizens to bring suits against individuals and/or corporations who knowingly submit false claims to the commonwealth or a political subdivision thereof, for reimbursement or payment. The Massachusetts FCA defines, "knowing and knowingly," as “possessing actual knowledge of relevant information, acting with deliberate ignorance of the truth or falsity of the information or acting in reckless disregard of the truth or falsity of the information and no proof of specific intent to defraud is required.” M.G.L. c. 12, § 5A.

The Massachusetts FCA specifically provides for liability when a person:

- (1) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
- (2) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
- (3) conspires to commit a violation of this subsection;
- (4) knowingly presents, or causes to be presented, a claim that includes items or services resulting from a violation of the federal FCA;
- (5) has possession, custody, or control of property or money used, or to be used, by the Commonwealth or a political subdivision thereof and knowingly delivers, or causes to be delivered, to the Commonwealth or a political subdivision thereof less than all of that property;
- (6) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Commonwealth or a political subdivision thereof and, with the intent of defrauding the Commonwealth or a political subdivision thereof, makes or delivers the receipt without completely knowing that the information on the receipt is true;
- (7) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Commonwealth or a political subdivision thereof, who may not lawfully sell or pledge such property;
- (8) enters into an agreement, contract or understanding with an official of the Commonwealth or a political subdivision thereof knowing the information contained therein is false;
- (9) knowingly makes, uses or causes to be made or used a false record or statement material to conceal, avoid, or decrease an obligation to pay or to transmit money or property to the Commonwealth or political subdivision thereof; or
- (10) is a beneficiary of an inadvertent submission of a false claim to the Commonwealth or a political subdivision thereof, or is a beneficiary of an overpayment from the commonwealth or a political subdivision thereof, and who subsequently discovers the falsity of the claim, and fails to disclose the false claim or receipt of overpayment to the Commonwealth or a political subdivision by the later of:
 - i. the date which is 60 days after the date on which the false claim or receipt of overpayment was identified; or
 - ii. the date any corresponding cost report is due, if applicable.

M.G.L. c. 12, § 5B(a).

A person who violates the Massachusetts FCA is liable for a civil penalty of not less than \$5,500 and not more than \$11,000 per violation. M.G.L. c. 12, § 5B(10). The Massachusetts FCA provides for up to three times the actual damages (“treble damages”), and consequential damages, that the Commonwealth or political subdivision sustains because of the act of that person. M.G.L. c. 12, § 5B(9).

Voluntary Disclosure: However, damages may be reduced to not less than two times the actual and consequential damages where the court finds that the person committing the Massachusetts FCA violation:

- Informed the Attorney General with all information known to the person within 30 days after discovering the information;
- Fully cooperated with any Commonwealth investigation of such violation; and
- No criminal prosecution, civil or administrative action had commenced with respect to the violation, and person did not have actual knowledge of an investigation into such violation.

M.G.L. c. 12, § 5B(b).

2. Applicability. The Massachusetts FCA defines “Claim,” as “a request or demand, whether pursuant to a contract or otherwise, for money or property whether or not the commonwealth or a political subdivision thereof has title to the money or property, that: (1) is presented to an officer, employee, agent or other representative of the commonwealth or a political subdivision thereof; or (2) is made to a contractor, subcontractor, grantee or other person, if the money or property is to be spent or used on behalf of or to advance a program or interest of the commonwealth or political subdivision thereof and if the commonwealth or any political subdivision thereof: (i) provides or has provided any portion of the money or property which is requested or demanded; or (ii) will reimburse directly or indirectly such contractor, subcontractor, grantee or other person for any portion of the money or property which is requested or demanded. A claim shall not include requests or demands for money or property that the commonwealth or a political subdivision thereof has paid to an individual as compensation for employment with the commonwealth or a political subdivision thereof or as an income subsidy with no restrictions on that individual's use of the money or property...” M.G.L. c. 12, § 5A. Thus, the Massachusetts FCA applies to the Medicaid program.

The Massachusetts FCA defines “political subdivision” as “a city, town, county or other governmental entity authorized or created by law, including public corporations and authorities.” M.G.L. c. 12, § 5A.

The Massachusetts FCA defines “person” as “a national person, corporation, partnership, association, trust or other business or legal entity.” M.G.L. c. 12, § 5A.

3. Methods of Enforcement/Whistleblower Provisions.

- a) Responsibilities of the Attorney General:

The Attorney General is required to investigate violations of the Massachusetts FCA, and if a violation has occurred, may bring a civil action in superior court. M.G.L. c. 12, § 5C(1).

- b) Scope of who can be a Relator:

When a Relator brings an FCA action, only the Attorney General may intervene or bring a related action based on the underlying pending action. M.G.L. c. 12, § 5C(6).

c) Standing for Relators:

An individual may bring a civil action in superior court for a violation of the Massachusetts FCA. The action shall be brought in the name of the Commonwealth or the political subdivision thereof. M.G.L. c. 12, § 5C(2).

d) Relator's Rights if Government Intervenes:

If the Attorney General proceeds with the action, he shall have primary responsibility for prosecuting the action and is not bound by any act of the Relator; however, Relator continues as a party to the action, subject to certain limitations. M.G.L. c. 12, § 5D(1). The Attorney General may dismiss the action notwithstanding Relator's objections, provided Relator has an opportunity for a hearing on the motion to dismiss. M.G.L. c. 12, § 5D(2). The Attorney General may settle the case notwithstanding Relator's objections if the court determines, after a hearing, that the proposed settlement is fair, adequate and reasonable. M.G.L. c. 12, § 5D(3).

e) Limiting Relator's Role

If unrestricted participation by the Relator would interfere with or unduly delay the state Attorney General's prosecution, or would be repetitious or irrelevant or for purposes of harassment, the court may impose limitations on the Relator's participation in the case, such as limiting the number of witnesses, limiting the length of testimony, limiting the person's cross-examination, or otherwise limiting the person's participation in the litigation. M.G.L. c. 12, § 5D(4).

If the defendant shows that unrestricted participation by the Relator would be for harassment or would be an undue burden to the defendant or would cause unnecessary expense, the court may limit the Relator's participation in the litigation. M.G.L. c. 12, § 5D(5).

Whether or not the Attorney General proceeds with the action, upon a showing by the Attorney General that certain acts of discovery by the Relator initiating the action would interfere with the Attorney General's investigation or prosecution of a criminal or civil matter arising out of the same or similar facts, the court may stay such discovery. M.G.L. c. 12, § 5D(7).

f) Relator's Rights if Government Declines:

If the Attorney General elects not to proceed with the action, the Relator has the right to conduct the action. M.G.L. c. 12, § 5D(6). The court may permit the Attorney General to intervene at a later date upon showing of good cause. M.G.L. c. 12, § 5D(6).

g) Government's Election of Other Proceeding:

The Attorney General may elect to pursue its claim through any alternative remedy available to it, including any administrative proceeding to determine a civil penalty. M.G.L. c. 12, §5E. During such proceeding, the Relator has the same rights in the proceeding as such person would have had if the original action had continued. Any finding of fact or conclusion of law made in such other proceeding that has become final is conclusive on all parties to the Massachusetts FCA. M.G.L. c. 12, § 5E.

h) Relator's Share of Recovery:

Successful Relators are entitled to 15-25% of the judgment when the Attorney General intervenes; 25-30% if the Attorney General does not intervene. M.G.L. c. 12, §5F. Also, a successful Relator is entitled to reasonable expenses necessarily incurred, plus reasonable attorney's fees and costs. All such expenses, fees and costs shall be awarded against the defendant.

Where action is based on certain disclosures of specific information in a criminal, civil or administrative hearing, or legislative, administrative, auditor or inspector general hearing,

audit, investigation or from the news media, the court may award sums it finds appropriate up to 10% of the proceeds. M.G.L. c. 12, § 5F(2). If a court finds that Relator planned and initiated the FCA violation, the court may reduce or eliminate the Relator's share of proceeds. M.G.L. c. 12, § 5F(5). If a Relator is convicted of criminal conduct arising from his/her role in the violation, the Relator shall be dismissed from the civil action and not receive any share of proceeds. M.G.L. c. 12, § 5F(5).

4. Employee Protection.

The Massachusetts FCA prohibits employers from making, adopting or enforcing "any rule, regulation, or policy preventing an employee, contractor or agent from disclosing information to a government or law enforcement agency or from acting to further efforts to stop" violations of the Massachusetts FCA. M.G.L. c. 12, § 5J(1). Employment agreements that limit or deny the employee's right to bring an FCA action is void. M.G.L. c. 12, § 5J(1).

In addition, the Massachusetts FCA prohibits an employer from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against an employee for disclosing information to a government or law enforcement agency or in furthering a false claims action, including investigation, initiation of, testimony for or assistance in the action filed or to be filed under the Massachusetts FCA. M.G.L. c. 12, § 5J(2). Any employer who violates Section 5J(2) shall be liable for such damages or equitable relief as a court shall deem appropriate, including reinstatement with same seniority status, two (2) times the amount of back pay, interest on the back pay, and compensation for any special damage sustained as a result of the employer's violation plus litigation costs and reasonable attorney's fees. M.G.L. c. 12, § 5J(3).

5. Procedural & Other Requirements.

(a) Burden of Proof:

Under the Massachusetts FCA, all essential elements including damages must be proved by a preponderance of the evidence. M.G.L. c. 12, § 5L.

(b) Public Disclosure/Original Source:

A Massachusetts FCA action can only be brought by the state Attorney General or by a Relator who is an "original source" of the information, where the action is based on public disclosure of the allegations or transactions in a criminal, civil or administrative hearing; in a legislative, administrative, auditor's or inspector general's report, hearing, audit or investigation; or from the news media. M.G.L. c. 12, § 5G(c). "Original source" means "an individual who: (1) prior to a public disclosure [], has voluntarily disclosed to the commonwealth or any political subdivision thereof the information on which allegations or transactions in a claim are based; or (2) 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 commonwealth or any political subdivision thereof before filing a false claims action M.G.L. c. 12, § 5A.

(c) Statute of Limitations:

A civil action may not be brought under the Massachusetts FCA (1) more than six years after the date on which the violation occurred, or (2) more than three years after the date when material facts are known or should have been known by the Attorney General, but in no event more than ten years after the date on which the violation is committed, whichever occurs last. M.G.L. c. 12, § 5K(1).

(d) Collateral Estoppel:

A final judgment rendered in favor of the Commonwealth in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or *nolo contendere*, shall estop the defendant from denying the essential elements of the offense in any action which involves the same act, transaction or occurrence which is brought under the Massachusetts FCA. M.G.L. c. 12, § 5K.

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