

## *Fraud Enforcement and Recovery Act of 2009 (FERA)*

On April 28, 2009 the US Senate passed the Fraud Enforcement and Recovery Act (FERA, S. 386), a bipartisan bill co-sponsored by Patrick Leahy (D-VT) and Chuck Grassley (R-IA). While the bill primarily focuses on expanding government resources to combat fraud in the housing and mortgage arena, it also expands the scope of the False Claims Act (FCA).<sup>1</sup> On May 6, 2009, the House of Representatives approved the bill with a few textual changes to the FCA provisions. On May 14, 2009, the Senate concurred with the House of Representatives' textual changes and the bill will be sent to President Obama for his signature.<sup>2</sup>

FERA changes the definition of "*knowingly*" used in the FCA to ensure the definition is more in line with the intent of the law. In *Allison Engine v. US*, the Supreme Court held that the FCA requires prosecutors to prove that "*a defendant must intend that the Government itself pay the claim,*" excluding subcontractors from liability for claims if they intended to defraud only the general contractor.<sup>3</sup> FERA co-sponsor Chuck Grassley called the decision in the Allison-Engine ruling a "*loophole*" that would allow those who violated the FCA to avoid responsibility for their actions.<sup>4</sup> If FERA is enacted, the bill will overturn the Supreme Court's definition of "*knowingly*" and it will be redefined as a person who "*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.*" Further, the government's burden of proof will be reduced as it will not be required to provide "*proof of specific intent to defraud.*"<sup>5</sup>

FERA also expands the definition of "*claim*" to include any request for money or property offered to a government employee or official as well as requests to contractors working on behalf of the government.<sup>6</sup> The expanded definition would also include *any* attempt to fraud the government regardless of whether the government is currently in possession of the money or whether the accused party intended to defraud the government.<sup>7</sup> Further, changes proposed by the House of Representatives clarified that organizations are only liable if they "*knowingly*" retained improper payments, as opposed to the Senate's original wording that imposed liability for the mere acceptance of overpayment.<sup>8</sup>

Several recent decisions highlight the effects these changes would have in expanding the net the FCA uses to catch those who are involved in making fraudulent claims and strengthening the legal framework already in use. Although several companies have unsuccessfully claimed that they were unaware they were causing false claims to be filed with Medicare, at least one physician has been dismissed from a FCA suit under this theory.<sup>9</sup> The American Hospital Association and eleven [11] other organizations have expressed concern that the bill's retroactivity could complicate pending cases where action has already been taken under the old interpretation of the law, and that the new language could be interpreted too broadly, imposing liability on recipients of federal funds who shouldn't be subject to the FCA's damage provisions.<sup>10</sup> An overly expansive interpretation of the new provisions could find almost anyone making false statements or claims to a Medicare provider liable on the theory that the fees charged or claims made are included in the hospitals cost reports made to the federal government.<sup>11</sup>

Co-sponsor of the bill, Senator Leahy asserts that the broadened definitions of the FCA will bring the United States one step closer to successfully prosecuting individuals who have defrauded the government and harmed the U.S. economy.<sup>12</sup> According to Senators Leahy and Grassley, the FCA has assisted the government in recovering \$15 billion since 2000, for a total of \$22 billion since its enactment in 1986. Therefore, an expansion of its scope will likely uncover more fraudulent activities and return money to the government.<sup>13</sup>

The bill has received support from the Obama Administration, the FBI, and the Inspector General of the Department of Housing and Urban Development.<sup>14</sup> The Obama administration "*strongly supports*" the bill, adding that the amendments to the FCA would ensure the FCA is a "*potent and useful weapon against the misuse of taxpayer funds.*"<sup>15</sup>

<sup>1</sup> Sec. 4 Clarifications to the False Claims Act to Reflect the Original Intent of the law," United States Senate, Fraud Enforcement and Recovery Act S.386, April 2009, <http://thomas.loc.gov/cgi-bin/query/F?c111:3:./temp/~c111f3yFGF:e10867>: (Accessed 5/01/09)  
<sup>2</sup> "S. 386," The Library of Congress, May 14, 2009, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:s.00386>: (Accessed 5/18/09)

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<sup>3</sup> “Allison Engine Co, Inc et al. vs. United States ex rel Sanders et al.,” By the United States Supreme Court, No. 07-214, June 9, 2008, <http://www.supremecourt.us/opinions/07pdf/07-214.pdf> (Accessed 5/1/09)

<sup>4</sup> “False Claims Act and Fraud Enforcement,” By Senator Chuck Grassley, Prepared Statement for Senate Floor Debate on FERA, April 20, 2009, [http://grassley.senate.gov/news/Article.cfm?customel\\_dataPageID\\_1502=20209](http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=20209) (Accessed 5/01/09)

<sup>5</sup> “Sec. 4 Clarifications to the False Claims Act to Reflect the Original Intent of the law,” United States Senate, Fraud Enforcement and Recovery Act S.386, April 2009, <http://thomas.loc.gov/cgi-bin/query/F?c111:3:./temp/~c111f3yFGF:e10867>: (Accessed 5/01/09)

<sup>6</sup> “Sec. 4 Clarifications to the False Claims Act to Reflect the Original Intent of the law,” United States Senate, Fraud Enforcement and Recovery Act S.386, April 2009, <http://thomas.loc.gov/cgi-bin/query/F?c111:3:./temp/~c111f3yFGF:e10867>: (Accessed 5/01/09)

<sup>7</sup> “Fraud Recovery Bill Has Healthcare Implications,” By Ben Amirault, Healthleaders Media, April 29, 2009

<sup>8</sup> “Letter to the United State Senate,” American Hospital Association, April 21, 2009, <http://www.aha.org/aha/letter/2009/090421-FCA-Sen-ltr.pdf>

<sup>9</sup> “USA ex. rel. Barlett v. Tyrone Hospital, Inc.” By the United States District Court for the W. District of Pennsylvania, 2009 U.S. Dist. LEXIS 31609, April 14, 2009, pg. 3-4.

<sup>10</sup> AHA letter to Patrick Leahy and Arlen Specter, March 5th 2009.

<sup>11</sup> “USA ex. Rel. Katy Kennedy v. Aventis Pharmaceuticals, Inc.” By the United States District Court for the N. District of Illinois, E. Division, 2009 U.S. Dist. LEXIS 34107, April 20, 2009, pg. 4-5.

<sup>12</sup> “Closing Statement of Senator Patrick Leahy (D-Vt), Chairman, Senate Judiciary Committee, On S. 386, The Fraud Enforcement and Recovery Act of 2009,” By Senator Patrick Leahy, United States Senate, April 28, 2009, <http://leahy.senate.gov/press/200904/042809c.html> (Accessed 5/01/09)

<sup>13</sup> “Closing Statement of Senator Patrick Leahy (D-Vt), Chairman, Senate Judiciary Committee, On S. 386, The Fraud Enforcement and Recovery Act of 2009,” By Senator Patrick Leahy, United States Senate, April 28, 2009, <http://leahy.senate.gov/press/200904/042809c.html> (Accessed 5/01/09); “False Claims Act and Fraud Enforcement,” By Senator Chuck Grassley, Prepared Statement for Senate Floor Debate on FERA, April 20, 2009, [http://grassley.senate.gov/news/Article.cfm?customel\\_dataPageID\\_1502=20209](http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=20209) (Accessed 5/01/09)

<sup>14</sup> “Leahy-Authored Anti-Fraud Bill Overwhelmingly Passes Senate,” By the Office of Senator Leahy, United States Senate, April 28, 2009, <http://leahy.senate.gov/press/200904/042809c.html> (Accessed 5/01/09)

<sup>15</sup> “Statement of Administration Policy: S.386 – Fraud Enforcement and Recovery Act of 2009,” By the Executive Office of the President Office of Management and Budget, April 20, 2009, <http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/saponfraudact.pdf> (Accessed 5/01/09)



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