

News from our Government Contracts and Employment & Labor groups

Fraud Enforcement and Recovery Act Expands the False Claims Act

Reacting to the Wall Street scandals and a recent Supreme Court decision, Congress expanded the tools available to the federal government to combat financial fraud by contractors and fund recipients with the Fraud Enforcement and Recovery Act of 2009 (“FERA”). Signed into law on May 20, 2009, FERA clarifies that the False Claims Act (“FCA”) reaches the Troubled Asset Relief Program (“TARP”) and the American Recovery and Reinvestment Act (“ARRA”). This clarification, which responds to recent court decisions that narrowed the FCA’s reach, significantly expands the potential liability of federal contractors and companies and institutions receiving federal funds under the FCA and other federal statutes. FERA also expands the protection of whistleblowers, increases funding to antifraud enforcement agencies, and establishes a Financial Crisis Inquiry Commission.

Expansion of the FCA

The FCA provides a causes of action when fraudulent claims for payments are made to the federal government. FERA’s amendments to the FCA substantially expand upon the FCA, increasing the potential for liability of federal government contractors and companies and institutions receiving federal funds. Some of the FCA’s most significant amendments include:

Applies the FCA to a broader array of transactions. First, the FCA expands liability to a) any person who has possession or control of property or money used, or to be used, by the government and knowingly delivers less than all of that money

or property; b) any person who falsely certifies receipt of property used, or to be used, by the government; or c) any person who knowingly buys or receives an illegal pledge of property from a government employee. Second, the FCA eliminates the requirement that false claims be presented to a representative of the United States government, allowing presentation 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.

Reduces intent standard. FERA loosens the requirement of a connection between a false record or statement and the fraudulent claim, requiring only that the false record be “material to” a fraudulent claim. FERA goes on to define “material” as “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.”

Expands definition of “reverse false claim.” Reverse false claims now include all efforts to knowingly and improperly avoid or decrease an obligation to pay or transmit money or property to the government, even without the use of a false record or statement, and regardless of whether the false claim is fixed or contingent. “Obligation” is amended to include duties arising from the retention of overpayments.

Allows the Department of Justice to share information obtained via a civil investigative demand. The Department of Justice may now share information with other government agencies, *qui tam* whistleblowers,

and state agencies in pursuance of an FCA case. FERA also allows the Attorney General to delegate authority to approve prosecutors’ requests for civil investigative demands.

Allows the government to use the initial *qui tam* filing date for additional claims.

Claims that would otherwise be barred by the statute of limitations will now be considered to have been filed as of the date of the initial *qui tam* action.

Expands conspiracy liability. Contractors and fund recipients are now liable for a conspiracy to commit a violation of any substantive section of the FCA. Further, there is no longer a need for the false claim to be paid or approved in order to assess liability; conspiring to commit the violation is now covered.

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Other expansions of federal fraud statutes

Broadens definition of “financial institution.” Under FERA, the definition of financial institution is amended to include mortgage lending business. A mortgage lending business is defined to mean any “organization which finances or refinances any debt secured by an interest in real estate, *including private mortgage companies and any subsidiaries of such organizations.*” (emphasis added) FERA also provides that false statements in mortgage applications include false statements by mortgage brokers and agents.

Expands securities fraud provisions to commodities. Securities fraud provisions now apply to fraud involving options and futures in commodities.

Applies antifraud statutes to TARP. FERA applies the FCA to fraud relating to the Troubled Asset Relief Program (“TARP”) and the government’s purchase of any asset as defined in the Emergency Economic Stabilization Act.

Expands definition of “proceeds” in money laundering statutes. Proceeds now include the gross receipts of an unlawful activity, not just the profits garnered from such activity.

Expansion of protection for whistleblowers

Retaliation claims under the FCA, which had been limited to claims by employees, are now also available to contractors and agents who claim they were retaliated against for reporting potential fraud violations. In particular, FERA provides relief from retaliatory actions for employees, contractors, and agents “discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against” because of reporting violations. FERA goes on to define relief available to a whistleblower to include a) reinstatement with the same seniority status the whistleblower

would have had; and b) two times the amount of back pay, interest, and compensation for any special damages.

Allocation of funding to antifraud enforcement agencies

FERA allocates just under \$500 million over the next two years to enforcement agencies to combat mortgage fraud, securities and commodities fraud, and other frauds involving federal economic assistance. The Attorney General will receive \$330 million, which will then be allocated between the Federal Bureau of Investigation (\$140 million), the United States Attorneys (\$100 million), and the criminal, civil, and tax divisions of the Department of Justice (\$40 million). The Securities and Exchange Commission will also receive an additional \$20 million over the next two years to fund its enforcement efforts.

Establishment of the Financial Crisis Inquiry Commission

FERA establishes the Financial Crisis Inquiry Commission (“Commission”) to “examine the causes, domestic and global, of the current financial and economic crisis in the United States.” The Commission is to be composed of ten members who are prominent United States citizens with significant experience in fields such as the regulation of markets, finance, economics, and housing. FERA gives the Commission power to hold hearings and issue subpoenas and requires that on December 15, 2010, the Commission submit to Congress and the President a report containing its conclusions and findings. ■