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New Law Expands Liability Under Federal False Claims Act

by C. Joël Van Over and Evan D. Wesser

The civil False Claims Act (the "FCA")[1] has not been significantly amended since 1986. In the past several years, however, the federal judiciary has decided a series of cases narrowly interpreting the terms of the FCA, increasing hurdles to successful civil prosecution of false claims cases. Congress is actively debating several measures in an effort to eliminate these judicially imposed hurdles and to expand liability under the FCA. One such measure implementing significant changes was signed into law yesterday by President Obama. Parties doing business with the federal government or entities receiving federal funds should take the opportunity to increase internal compliance procedures and ethics policies.

Parties receiving federal funds are generally held to a high ethical standard and violations of statutory or regulatory provisions can carry significant penalties. The FCA provides for civil liability arising from the submission of false or fraudulent claims for payment from the United States Treasury. The FCA may be enforced by the Department of Justice ("DOJ") or by private parties, otherwise known as "relators," in a qui tam suit on behalf of the United States government. If found guilty, defendants are liable for three times the amount of damages the government sustained because of the false claim, plus other statutory penalties for each false claim (e.g., invoice, demand, voucher).

Over the past few years, the federal judiciary has issued several opinions that have narrowly construed the FCA, making enforcement under the FCA more difficult for plaintiffs. Of particular note are two cases that the Senate Judiciary Committee recently criticized as being "erroneous interpretations of law" and "inconsistent with the spirit and intent of the [FCA]."[2] In *Allison Engine v. United States ex rel Sanders,*[3,] the

[1] 31 U.S.C. 3729 *et seq*.

[2] S. Rep. No. 111-10, at 10 (2009). The Senate Judiciary Committee also criticized United States ex rel. DRC, *Inc. v. Custer Battles, LLC*, 376 F.Supp.2d 617 (E.D. Va. 2008).

[3] 128 S. Ct. 2123 (2008).

Supreme Court held that under § 3729(a)(2) of the FCA, plaintiffs have the burden of proving that the defendants submitted the claim with the intent of defrauding the federal government. The Senate Judiciary Committee argued that this interpretation violated the intent of the FCA by permitting, as in *Allison Engine*, subcontractors to avoid liability where the subcontractor intended to defraud the prime contractor with no specific intent to defraud the federal government.

The Senate Judiciary Committee also criticized *United States ex rel Totten v. Bombardier Corp.*,[4] which, in addition to imposing the same intent requirement as required in *Allison Engine*, also required that the false claim be presented to a government agent, officer, or member of the armed services. The defendant in *Bombardier* avoided liability, despite being paid partially with federal funds, because it had presented its claim to Amtrak and, thus, had not satisfied the presentment requirement. The Senate Judiciary Committee stated that the intent and clear language of the FCA extended to payment of false claims where federal funds were used, not simply to scenarios where the claim was submitted directly to the government.

The Fraud Enforcement and Recovery Act of 2009 ("FERA") is a multifaceted bill designed to impose stronger penalties for mortgage fraud. Buried within the bill are several proposed changes to the FCA. On April 20, 2009, the Executive Office of the President issued a Statement of Administration Policy asserting that the proposed changes would ensure that the FCA "remains a potent and useful weapon against the misuse of taxpayer funds." On April 28, 2009, the Senate passed FERA by the significant margin of 92-4. The House, with some amendments, passed FERA on May 6, 2009 by a wide, bipartisan margin of 367-59. The Senate and House resolved minor technical amendments, with the House providing final approval of the bill on May 18, 2009 and President Obama signed FERA into law yesterday.

The major changes include:

Elimination of the Presentment Requirement: FERA will amend the FCA to provide for liability for any false claim provided to contractors, grantees or other non-governmental recipients if (a) the money sought by the claim is intended (1) to be spent on the government's behalf or (2) to advance a government program; or (b) the government has paid or will reimburse any portion of the claim. This change will permit false claim liability for claims presented to prime contractors by their subcontractors or to government-funded corporations (e.g., Amtrak), and to state or local governments, as long as the claim is paid, in whole or in part, with federal funds.

Elimination of the Intent Requirement: FERA will eliminate the requirement that the plaintiff prove that the defendant intended to defraud the federal government. Plaintiffs must show only that the defendant's false statement was "material" to the payment of government funds, meaning that the claim had a natural tendency to influence the payment or be capable of influencing the payment. FERA will impose this provision retroactively to all pending false claims made on or after June 7, 2008, the date of the *Allison Engine* opinion.

Extension of Liability to Claims Made on Funds to which the United States does not Hold Title: FERA will extend liability to instances where the false claim is made against money that the United States administers or holds in trust but does not hold title to. This provision repudiates *United States ex rel DRC,*

[4] 380 F.3d 488 (D.C. Cir. 2004).

Inc. v. Custer Battles, LLC,[5] where the defendant escaped liability for false claims presented to U.S. officials administering Iraqi assets as part of the Coalition Provisional Authority.

Extension of Liability for "Reverse" False Claims: FERA will extend liability for so called "reverse" false claims, where a defendant knowingly conceals or fails to return overpayments to the government. FERA amends the definition of "obligation" to make clear that a party may be subject to liability under the FCA for the improper retention of overpayments by the government even in the absence of an affirmative false claim or false statement. The Senate Judiciary Committee emphasized that the changes in FERA would only apply to the willful retention of overpayments to which the party is not entitled. However, the statute does not specifically include this limitation on its reach. Thus, FERA's application to instances where a statutory or regulatory scheme permits the periodic reconciliation or true-up of payments by the government is unclear.

The Government may file its own complaint or amend the complaint of a relator to clarify or add detail or additional claims to which the government is entitled to relief.

The Attorney General may delegate the authority to issue civil investigative demands and share information gained through government investigations with qui tam relators.

Information obtained through civil investigative demands may be shared freely with other interested federal agencies.

FERA increases the anti-retaliation protections afforded to false claim whistleblowers and broadens the scope of persons/entities protected under the FCA.

FERA, however, is not the only bill pending that proposes significant changes to the FCA. Further liberalizing changes to the FCA under consideration include: (1) permitting government employees, in limited circumstances, to bring qui tam actions; (2) extending the statute of limitations; and (3) permitting actions to survive even where part of the information forming the basis of a qui tam action was derived from publicly available information. The latter proposed change would represent a significant sea-change in FCA precedent by expanding the potential sources of information that may form the basis of a qui tam action.

In addition to expanding the reach of the FCA, Congress is also expanding the government's enforcement assets. Through its Recovery Act[6] initiatives, Congress has focused upon the accountability of those who receive federal funding. Congress has significantly increased enforcement budgets of Inspectors General, the Government Accountability Office, the DOJ, and other enforcement agencies. Increased funding will no doubt lead to more robust oversight, investigations, and enforcement activities related not only to the FCA, but also to the Criminal False Claims Act[7] and the False Statements Act[8,] and other requirements imposed through statutory and regulatory mandates, such as the mandatory reporting requirements imposed on federal contractors and grant recipients to self-report fraud and to strengthen ethics and compliance programs.[9] The stakes have never been higher for the direct and indirect recipients of federal funds. The

[5] 376 F.Supp.2d 617 (E.D.Va. 2006). The Senate Judiciary Committee Report specifically criticized this opinion; in the interim, the United States Court of Appeals for the Fourth Circuit reversed several components of the case. *United States ex rel DRC, Inc. v. Custer Battles*, LLC, No. 07-1220, 2009 WL 971017 (4th Cir. April 10, 2009).

[6] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5.

[7] 18 U.S.C. § 287.

[8] 18 U.S.C. § 1001.

[9] *E.g.* 48 C.F.R. §§ 9.406-2, 52.203-13.

corresponding need for proactive compliance measures and active ethics programs, and the need for procedures to detect, assess, and remediate risk, is also higher.

For further information, please contact:

C. Joël Van Over
Northern Virginia
+1.703.770.7604
joel.vanover@pillsburylaw.com

Mark R. Hellerer
New York, NY
+1.212.858.1787
mark.hellerer@pillsburylaw.com

Jacob R. Sorensen
San Francisco, CA
+1.415.983.1893
jake.sorensen@pillsburylaw.com