

New US Law Combats Fraud, Waste and Abuse in Federal Contracts, Programs, and Financial Institutions, Including New Federal Bailout/Stimulus Programs

The Fraud Enforcement and Recovery Act of 2009 (FERA), signed into law by President Obama on May 20, 2009, contains a number of measures intended to combat mortgage, securities and commodities fraud, and to protect against fraud, waste and abuse in federal contracts and programs (including bailout/stimulus programs). The statute includes both criminal and civil provisions, as well as provisions authorizing funding for more investigators and prosecutors, and authorizing a new federal commission to investigate the financial crisis.

Criminal Provisions

- Redefines “Financial Institution” to include “mortgage lending business” within the definition of institutions covered by many financial crimes statutes. 18 U.S.C. § 20(10).
 - » The term “Mortgage Lending Business” will be added as a separately defined term in 18 U.S.C. § 27 and generally means an organization which finances or refinances any debt that is secured by an interest in real estate, and whose activities affect interstate and/or foreign commerce.
 - » Some former businesses which were not subject to the financial crimes statutes because they were not defined as a “Financial Institution” will now be subject to a wide group of laws.
 - » Will expand the laws available to the federal government to investigate institutions under various laws, such as the receipt of commissions or gifts for processing loans, 18 U.S.C. § 215, maintaining false statements or reports of a financial institution, 18 U.S.C. § 1005, and Bank Fraud, 18 U.S.C. § 1344.
- » Includes an amendment of 18 U.S.C. § 1014 for false statements in mortgage applications made to mortgage lending businesses — including inflated property appraisals
 - Criminal liability would seemingly not only apply to individuals for their role in harming or victimizing financial institutions, but also would appear to put the institutions under a new microscope.
- » Does not modify the Bank Secrecy Act which has its own definition of “Financial Institution” 31 U.S.C. § 5312(a)(2).
- Augments the Troubled Asset Relief Program (TARP) by amending the Major Fraud Against the Government Statute to provide for criminal penalties for institutions that misuse or otherwise abuse TARP funds — including making false statements to obtain the funds. 18 U.S.C. § 1031.
 - » Specifically includes TARP language by bringing within the ambit of the Major Fraud Statute: “any grant, contract, subcontract, subsidy, loan, guarantee, insurance or other form of Federal assistance, including through the *Troubled Asset Relief Program, an economic stimulus, recovery or rescue plan provided by the Government...*”
 - » The goal of this change is to use federal criminal statutes to protect TARP funds, including in those circumstances where the government has purchased stock in companies to provide that company with economic relief. The false statements now covered would appear to include those made by the institution to obtain TARP funds or otherwise through its certification processes.

- » Still maintains a \$1 million threshold before the statute is applicable.
- Amends the Federal Criminal Securities Statute to specifically include commodities. 18 U.S.C. § 1348
- Amends the Federal Money Laundering statute to define proceeds as including gross receipts.
 - » Amendment is a “legislative fix” to the *United States v. Santos* decision last term, wherein the Supreme Court determined that the term “proceeds” was ambiguous and should only relate to “net profits” instead of gross receipts of an illegal enterprise. 18 U.S.C. § 1956(c)(9)
- Amends the International Money Laundering statute to include all off shore transfer of money with the intent to evade taxes. 18 U.S.C. § 1956(a)(2)(A).

Amendments to the Civil False Claims Act

In addition to the modifications of criminal law, the bill amends the civil False Claims Act (FCA), 31 U.S.C. §§ 3729–3733, to both broaden liability and enhance the ability of the US Department of Justice (DOJ) and *qui tam* plaintiffs (whistleblowers) to bring actions and share information. Among other reasons, Congress believed these changes to the FCA were necessary due to the huge amount of federal bailout/ stimulus funds. The FCA is a civil fraud statute that does not require intent to defraud (“knowingly” is defined as, among other things, “deliberate ignorance” or “reckless disregard”), contains a low burden of proof (preponderance of the evidence), provides for both treble damages and penalties, and allows private citizen whistleblowers to sue as *qui tam* relators in the name of the United States and obtain a share of the recovery.

The amendments increase the reach of the FCA by:

- Allowing whistleblowers (and DOJ) to bring actions based on claims made to a “contractor, grantee or other recipient” where the federal government provides any portion of the money or property requested or will reimburse any portion of it, and where the money or property is “used on the Government’s behalf” or “to advance a Government program or interest.” Under this

expansion of FCA liability, the government need not have title to the funds. As a result of these changes, actions may be brought against any entity that benefited from a federal program or contract. The breadth of the language opens the possibility that FCA actions may be brought by DOJ or a relator even where federal funds are not directly involved, but where the United States has custody or control of the funds for another party (such as the former Iraq Coalition Provisional Authority). In addition to government contractors and subcontractors, these changes are significant for recipients of federal stimulus funds. For example, participants in all TARP programs, including the Capital Assistance Program (CAP) and the Capital Purchase Program (CPP), should strengthen their compliance procedures and/or programs to address the amended FCA. These sweeping amendments also raise questions with respect to potential actions involving the Term Asset-Backed Securities Loan Facility (TALF) which is back-stopped by federal dollars — TALF uses federal funds to advance a government program, but does not directly hand out federal dollars.

- Overturning the impact of the Supreme Court’s holding in *Allison Engine* and other cases. The legislation directly overturns the Court’s holding that a defendant must intend “to get” a false claim paid by the government by removing the words “to get” from the statute and making the change effective before the date of the Court’s *Allison Engine* decision.
- Expanding the reach of “reverse” false claims by establishing liability for (i) knowingly making or using a false statement or record that is “material to an obligation to pay or transmit money or property to the Government” or (ii) “knowingly conceal[ing] or knowingly and improperly avoid[ing] or decreas[ing] an obligation” to pay money to or transmit property to the government. The term “obligation” is new and is defined to include “an established duty, whether or not fixed,” arising from, among other things, an “implied contractual, grantor–grantee, or licensor–licensee relationship,” “from statute or regulation,” or from “retention of any overpayment.”

The legislation also makes it easier for FCA actions to be brought and maintained. For example, the amendments:

- Create a “relation back” provision that allows DOJ to intervene in a *qui tam* action to add claims that would otherwise be untimely for statute of limitations purposes if such claims arise out of the “conduct, transactions, or occurrences set forth, or attempted to be set forth” in the whistleblower’s original complaint.
- Greatly expand the use of Civil Investigative Demands (CID) by DOJ personnel by permitting the Attorney General to delegate the authority to approve CID requests to line DOJ attorneys. Additionally, it will allow DOJ to share with whistleblowers information obtained by federal investigators from CIDs, such as documents, interviews, depositions and other materials.

While the FCA already was a powerful tool to pursue participants in federal programs and contracts, the amendments dramatically expand the possible uses of the statute. Participants in federal programs, even those who benefit indirectly, should expect their compliance with every aspect of the terms of participation, contract, subcontract or other agreement to be microscopically examined for possible claims of fraud, waste or abuse.

New Funds for Enforcement

Further, to demonstrate that enforcement of all of the above statutes is a priority, the legislation authorizes the expenditure of several million dollars to hire and retain agents and investigators in the FBI, HUD, SEC, United States Postal Service and United States Secret Service to vigorously enforce all federal fraud statutes. In addition, the legislation authorizes the government to hire attorneys in the US Attorneys Office and the Criminal, Civil and Tax divisions of the Department of Justice to investigate and prosecute the matters.

Financial Crisis Inquiry Commission

Finally, the legislation creates the Financial Crisis Inquiry Commission (the “Commission”) to examine the causes, domestic and global, of the current financial and economic crisis in the United States. The Commission will comprise 10 members appointed by the majority and minority leaders in the House of Representatives

and the Senate. In addition to considering certain potential factors specified in the law, the Commission will (i) examine the causes of the collapse of each major financial institution that failed or would have failed absent government support during the period August 2007-April 2009, (ii) submit a report to the President and Congress by December 15, 2010, containing its findings and conclusions, and (iii) refer to the Attorney General of the United States or the appropriate state attorney general, any person that the Commission finds may have violated the laws of the United States. The Commission may, for purposes of carrying out its role, hold hearings, take testimony, receive evidence, issue subpoenas, and obtain information from federal agencies and other governmental entities.

The severity of the financial crisis and the expected cost to the taxpayers will undoubtedly lead the Commission to conduct an extensive investigation of the origins of the crisis and potentially reach very pointed conclusions about the leading factors. Whether Congress and the taxpayers will still be interested in this topic when the Commission’s report is issued in December 2010 is unknown and may depend in part upon the extent of the economic recovery over the next 18 months.

For more information about the Fraud Enforcement and Recovery Act of 2009, or any other matter raised in this Client Update, please contact your regular Mayer Brown lawyer or one of the following lawyers.

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