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Federal Program Participants: **Beware** the **Amended** False Claims Act

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AT A TIME WHEN the U.S. government is undertaking widespread bailouts of banks, insurers, automobile manufacturers and other traditionally private businesses, Congress has enacted legislation that threatens to turn many run-of-the-mill commercial disputes involving those businesses into federal lawsuits. Recent amendments to the False Claims Act (FCA, or the act)[1] that relax the required nexus between fraud and the payment of government funds could give the plaintiffs' bar a new tool with which to prop open federal courthouse doors to a raft of new cases.

First enacted in 1863 to combat widespread fraud among government contractors during the Civil War, the FCA has long provided the government with a powerful, some say coercive, tool with which to combat federal program fraud. One of the FCA's most distinct features is that it allows private citizens, known as "qui tam plaintiffs," "relators," or, simply, "whistleblowers," to file lawsuits on behalf of the United States asserting violations of the FCA. The act encourages whistle-blowing by offering the whistleblower a percentage of the ultimate recovery.

Now whistleblowers may have greater license to bring claims than ever before. As part of the Fraud Enforcement and Recovery Act of 2009 (FERA), Congress included comprehensive amendments to the FCA. Although packaged with financial fraud legislation, Congress has had major revisions to the FCA in mind since 2007.[2]

These revisions were intended to overturn a series of judicial decisions that imposed boundaries on the FCA, but were perceived by the plaintiff's bar to undercut the act. See, e.g., *United States ex. rel. Sanders v. Allison Engine Co.*, 128 S.Ct. 2123 (2008) (presentment to federal official not required, but defendant must intend "to get" a false claim paid "by the Government"); *United States ex rel. DRC Inc. v. Custer Battles, LLC*, No. 07-1220, 2009 WL 971017 (4th Cir. April 10, 2009) (district court holding that presentment to a U.S. government official was required overturned on appeal due to *Allison Engine*'s rejection of the requirement for presentment); *Rockwell Internat'l. Corp. v. United States*, 549 U.S. 457 (2007) (relator not an original source for claims based on

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events occurring after he left his employment); *ex. rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004) (presentment of claim to federal official required for liability).

As House Judiciary Committee member, Rep. Howard Berman (D-Cal.) viewed it: "Unfortunately, over the last several years, a series of judicial decisions have severely weakened key provisions of the [FCA] and narrowed its application."[3]

The Background of the Modern FCA

The modern civil False Claims Act came into existence in 1986, revitalizing the 1863 procurement fraud statute, but broadening its reach. The modern FCA is an extremely powerful tool against fraud, waste and abuse in federal programs. Its hallmarks are:

- a low standard of intent. Though commonly referred to as a "fraud" statute, no specific intent to defraud is required. Rather liability is established by showing "deliberate ignorance" or "reckless disregard of the truth or falsity" of information. 31 U.S.C. §3729(b).
- a lenient burden of proof—preponderance of the evidence. 31 U.S.C. §3731(d).
- treble damages and penalties (up to $11,000 per claim). 31 U.S.C. §3729(a)(1)(G) (formerly 3729(a)(7)).
- encouragement for actions by whistleblowers. In addition to actions by the United States, private plaintiffs are authorized to sue on behalf of the government and share in the recovery, between 15 and 30 percent. 31 U.S.C. §3730(d)(1) & (2).
- payment of attorney's fees and costs to successful relators. Id.
- protection from retaliation for whistleblowers who bring an FCA action. 31 U.S.C. §3730(h).

The combination of a low standard of intent, low burden of proof and punitive damages and penalties have made the FCA, as Senate Judiciary Committee Chairman Leahy noted, the government's "most effective tool against fraud."[4]

In cases brought by the U.S. Department of Justice, or where DOJ intervenes, the FCA is highly successful in targeting fraud and obtaining recoveries. DOJ statistics show that more than $21.6 billion was recovered in the period since the 1986 amendments.[5]

The FCA is a favored weapon of DOJ in pursuing recipients of government contracts and subcontracts, and participants in federal programs. In cases where DOJ either proceeds directly or intervenes, the machinery of the federal prosecutorial process is brought to bear. In describing its role with respect to the FCA, DOJ's Web site notes, "[u]nder the [FCA], the Attorney General (or a Department of Justice attorney) must 'diligently' investigate the allegations of violations of the [FCA]. The investigation usually involves one or more law enforcement agencies (such as the Office of Inspector General of the victim agency, the Postal Service Inspection Service, or the FBI)."[6]

As discussed further below, the recent amendments substantially enhanced DOJ's investigative powers.

As noted above, the FCA, often referred to as a "fraud statute," does not require specific intent to commit fraud, liability being based instead on a "deliberate ignorance" or "reckless disregard" standard. Consequently, entities receiving federal funds and participating in federal programs must be knowledgeable of the statutes, regulations, and terms and conditions that apply to their participation.

> While the FCA already was a **powerful weapon** to pursue participants in federal programs and contracts, the amendments **dramatically expand** the possible uses of the statute and the incentives for DOJ and qui tam plaintiffs to pursue FCA actions.

DOJ and federal agencies expect that participants are knowledgeable of the requirements for and limitations or restrictions involving their contracts, subcontracts, agreements, or other arrangements for participation in federal programs. A defense of "I didn't know" is not a meaningful excuse when the entity has accepted federal funds or participation in a federal program; one is expected to be diligent regarding the obligations accepted as a participant in a federal contract, subcontract, or other arrangement.

The Amendments: a Major Expansion

The 2009 amendments both broaden liability and enhance the ability of the DOJ and qui tam relators to bring actions and share information.

The amended statute retains the same types of liability provisions (i.e., false claims, false statements, conspiracy, and reverse false claims), but in a major expansion of potential liability, the amendments change the definition of "claim" to eliminate any requirement for presentment, and overturn the holding in *Allison Engine* that the defendant must have intent "to get" the false claim paid or approved "by the government." See 128 S. Ct. 2123 (2008). The amendments thus specifically eliminate the requirement for a clear relationship between the claim that is alleged to be false and any payment or approval by the government. The amendments specifically target the *Allison Engine* holding by making the changes retroactive to the date the case was decided.

The amendments also expand liability to cover 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 to be spent or used on the Government's behalf" or to "advance a Government program or interest."[7] No definitions of the key terms "spent on the Government's behalf" or to "advance a Government program or interest" are provided. In addition, the government need not have title to the funds (i.e., may merely be a custodian).

The reach of the amendments is unclear and the extent of any link or nexus between the request for payment or approval and the government is murky. The scope will be determined in litigation over many years as courts are forced to examine case-specific facts.

Potential liability is enormous, but perhaps less visible are litigation costs. Relators have every incentive to bring cases and let the courts sort out boundaries.

Participants in the Troubled Asset Relief Program (TARP) are likely targets of such claims. Both the Capital Assistance Program (CAP) and the Capital Purchase Program (CPP) involve government bailout funds. The Term Asset-Backed Securities Loan Facility (TALF) is backstopped by federal dollars; TALF uses federal funds to advance a government program, but does not directly hand out federal dollars. Until claims testing these programs are brought and resolved, the reach of the amendments to those participating in TARP programs will remain unclear.

The degree to which actions may now be brought against entities that benefit from the American Reinvestment and Recovery Act of 2009 (Recovery Act) is similarly unclear. Recovery Act funds will flow to businesses and individuals in virtually every sector of the economy. Once again, whether a supplier to a project that receives Recovery Act support in some respect is subject to liability under the FCA is a matter that litigation will resolve.

Mindful of these sweeping amendments and their potential impact, any firm or person participating in any manner in a federal program would do well to pay careful attention to compliance with the requirements of that program and of the particular contract, subcontract, grant, subgrant or other arrangement.

Other Significant Changes

In another major change, Congress expanded the reach of so-called "reverse" false claims (circumstances where the person or company may owe the government, e.g., royalty payments). The amendments establish liability for a person who:

> [K]nowingly makes, uses…a false record or statement material to an obligation to pay or

> transmit money or property to the Government, or knowingly conceals or…avoids or decreases an obligation to pay or transmit money or property to the Government[.]

31 U.S.C. §3729(a)(1)(G). The term "obligation" is new and is defined to mean:

> [A]n established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment[.]

31 U.S.C. §3729(b)(3).

The specific references to statute and regulation clearly require new attention to compliance for persons and firms involved in federal programs. Not only must the person or firm be familiar with its contract, subcontract or other arrangement, but also with the requirements of the statute and regulation implementing the program (e.g., the reporting requirements under the Recovery Act).

Further, the inclusion of overpayments is particularly significant. The term "overpayment" is not defined, nor is the period of "retention." Id. The recipient is not required to have taken any act (e.g., make a false statement) to obtain the overpayment; if the participant receives funds to which it is not entitled and fails to return them promptly, the recipient may be liable not only for the overpayment, but for multiple damages and penalties. The addition of the word "improperly" apparently imposes some limitation on liability for overpayments where the relevant program regulations or the agreement provide a mechanism for addressing overpayments. However, this term is not defined and its application will necessarily be resolved by litigation.

Incentives Expanded for FCA Actions

The amendments also include several provisions that create incentives for FCA actions and that will make it easier for DOJ and relators to obtain recoveries.

First, the amendments create a "relation back" provision that allows DOJ to intervene in a qui tam action to add claims that otherwise would 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. 31 U.S.C. §3731(c). With this amendment, DOJ can delay intervention, monitor the relator's case for years, then jump in late with tangential claims (i.e., claims "attempted to be set forth" in the original complaint). This provision may impose huge additional burdens on defendants and compromise a defendant's ability to defend its case.

Second, the anti-retaliation provision has been expanded to protect not only an employee, but a "contractor" or "agent." Employers that retaliate against contractors or agents are thus exposed to liability for actions under relationships outside of employment.

Further, the protected conduct has been redefined from "lawful acts…in furtherance of an [FCA] action, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section," 31 U.S.C. §3730 (amended 2009), to "efforts to stop one or more violations of this subchapter." 31 U.S.C. §3730(h)(1). It is unclear what conduct may be covered by an "effort to stop a violation" An employer may be liable for retaliation to include reinstatement, two times the amount of back pay, interest on the back pay, litigation costs and special damages. An action for retaliation may be successfully maintained regardless of whether liability for a false claim is ultimately imposed.

Third, the amendments 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. While CIDs have been used sparingly to date, this change portends much greater use of this powerful investigative tool. The amendments allow DOJ to share with whistleblowers the information obtained by federal investigators from CIDs, such as documents, interviews, depositions and other materials. This provision may impose huge new burdens on defendants to respond to federal investigators and submit employees to interviews and depositions.

Conclusion

While the FCA already was a powerful weapon to pursue participants in federal programs and contracts, the amendments dramatically expand the possible uses of the statute and the incentives for DOJ and qui tam plaintiffs to pursue FCA actions.

Participants in federal contracts, subcontracts, grants, subgrants and other arrangements, even those who participate indirectly, should expect their compliance with every aspect of the terms of participation to be examined microscopically for possible claims of non-compliance—which are likely to be brought most often not by the government itself but by private litigants wielding the new tools that Congress has provided through FERA.

1. 31 U.S.C. §3729-3733.
2. See the False Claims Correction Act of 2007, S. 2041, 110th Cong. (2007) (introduced on Sept. 12, 2007, by Senators Grassley (R-Iowa), Durbin (D-Ill.), Leahy (D-Vt.), Specter (D-Pa.) and Whitehouse (D-R.I.)).
3. Joint Hearing on H.R. 4854 Before the Subcomm. on Courts, the Internet, & Intellectual Pro., and Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary,, 110th. Cong. 1-2 (2008). (Statement of Rep. Berman). Rep. Berman was a sponsor of the 1986 FCA amendments.
4. The False Claims Correction Act of 2007 (S. 2041)—Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century: Hearing Before the S. Comm. on the Judiciary, 110th Cong. 1 (2008) (statement of Sen. Leahy).
5. See Fraud Statistics—Overview, Oct. 1, 1986–Sept. 30, 2008, Civil Division, U.S. Department of Justice, http://www.usdoj.gov/opa/pr/2008/November/fraud-statistics1986-2008.htm
6. U.S. Dep't. of Justice, False Claims Act Cases: Government Intervention in Qui Tam Suits, http://www.usdoj.gov/usao/pae/Documents/fcaprocess2.pdf (last visited on Aug. 1, 2009).
7. 31 U.S.C. §3729(b)(2)(A)(ii).