

# Client Alert

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Litigation Department

## Significant False Claims Act Amendments Enacted as Part of the Fraud Enforcement and Recovery Act of 2009

On May 20, 2009, US President Obama signed the Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21 (S. 386) (FERA)—a broad antifraud initiative designed to increase oversight of, and protection against, the misuse of Government spending under a variety of recently enacted federal programs, including those authorized by the Emergency Economic Stabilization Act of 2008 (such as the Troubled Assets Relief Program) and the American Recovery and Reinvestment Act. FERA toughens federal laws against mortgage and securities fraud, increases the number of federal personnel responsible for investigating and prosecuting financial crimes, and establishes a bipartisan commission to investigate the ongoing economic crisis and recommend preventive steps.

Among the most significant provisions of the new law are its amendments to the False Claims Act, 31 USC §§ 3729-33 (FCA). According to the Senate Judiciary Committee Report, these amendments—the first substantive revisions to the FCA in more than 22 years—were enacted to reverse judicial interpretations which “undermined” the statute by “limiting the scope of the law and allowing subcontractors and non-Governmental entities to escape responsibility for proven frauds.” S. Rep. No. 111-10, at 10 (Mar. 23, 2009).<sup>1</sup>

Not surprisingly then, FERA expands significantly the scope of FCA liability, effectively transforming what was once a weapon designed only to combat dishonesty in federal contracting into a general all-purpose antifraud statute.

### Review of the Principal Amendments to the False Claims Act

FERA makes three principal revisions to the FCA: First, the statute widens the net of liability to reach all fraudulent requests for money or property presented to Government contractors, grantees or any other recipients of funds that are either spent on the Government's behalf or used to advance a Government interest. Second, FERA increases the statute of limitations for FCA claims by allowing Government pleadings to relate back to the filing date on which a relator initially submitted his or her *qui tam* complaint. And third, FERA expands the Department of Justice's authority to obtain and share investigative information with relators. The practical impact of these amendments is significant—all persons with any nexus to Government funds or programs should remain mindful of the increased potential for devastating FCA liability.

“In the upcoming months, both the Government and *qui tam* litigators will undoubtedly take advantage of their new enforcement tools, and 2009 and 2010 will likely involve extensive FCA litigation activity.”

### The Amendments Expand the Scope of FCA Liability

FERA's amendments reverse judicial interpretations rendered in recent FCA decisions, including *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008), and *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004)—cases which the Senate Judiciary Committee characterized as erroneously and unduly restricting the scope of liability. S. Rep. No. 111-10, at 10.<sup>2</sup> The amendments to the FCA "reverse" these decisions by deleting the text critical to the courts' rationale in both *Allison Engine* and *Totten* from former sections 3729(a)(1) and (a)(2):

- (1A) knowingly presents, or causes to be presented, ~~to an officer or employee of the United States Government or a member of the Armed Forces of the United States~~ a false or fraudulent claim for payment or approval;
- (2B) knowingly makes, uses, or causes to be made or used, a false record or statement material to get a false or fraudulent claim paid or approved by the Government;

FERA, Publ. L. No. 111-21, § 4 (May 20, 2009) (redline comparison with 31 USC § 3729(a) (2007)).<sup>3</sup>

The amendments make other changes to the FCA which similarly expand the scope of liability. For example, the revised definition of "claim" widens the categories of money or property subject to FCA liability.<sup>4</sup> Statements made to private non-Governmental entities in connection with a request for funds to which the United States has no title and which are not expended on the Government's behalf may nevertheless implicate FCA liability if the funds were meant to advance a federal program or interest:

- (c) ~~CLAIM DEFINED. For purposes of this section, "claim" includes~~
  - (2) the term 'claim'—
    - (A) means any request or demand, whether under a contract or

otherwise, for money or property ~~which~~ and whether or not the United States has title to the money or property that —

- (i) is presented to an officer, employee, or agent of the United States; or
- (ii) is made 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, and if the United States Government —
  - (I) provides or has provided any portion of the money or property ~~which is~~ requested or demanded; ~~or if the Government~~

- (II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

- (B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

FERA, Publ. L. No. 111-21, § 4 (May 20, 2009) (redline comparison with 31 USC § 3729(c) (2007)). Depending on how broadly courts construe "Government interest,"<sup>5</sup> *qui tam* relators and the Government may be able to litigate nearly every breach of contract or fraud case involving a recipient of Government funds by invoking the FCA and its attendant sealed complaint procedures. The recent outlay of hundreds of billions of dollars of Government funds under the TARP program and other stimulus and bailout programs creates an entirely new class of potential FCA defendants. If these new provisions are applied broadly (as

relators and their counsel are already suggesting they will attempt to do), a contract dispute involving, for example, General Motors or a false insurance claim submitted to AIG could implicate the amended FCA.<sup>6</sup>

Other changes that expand the scope of liability include the addition of a relaxed materiality requirement—defined in 31 USC § 3729(b)(4) (May 20, 2009)—to former section 3729(a)(2). This materiality requirement conditions FCA liability on whether the submission of a false statement has a “natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.” This change particularly affects FCA actions that are based on underlying violations of law or regulation having some nexus to payment. This weaker materiality standard stands in contrast to the line of case law holding that FCA liability would attach only when compliance with a law or regulation was a clear prerequisite to payment. *See, e.g., Mikes v. Straus*, 274 F.3d 687, 696 (2d Cir. 2001).

The amendments also revise former section 3729(a)(4) by removing the intent-to-defraud element from situations in which a person with possession, custody or control of property or money used or to be used by the Government delivers less than all of that money or property. Instead, the amendments provide that “knowingly” submitting less than all of the money or property used or to be used the Government is sufficient for FCA liability. Moreover, the “reverse false claims” provision, former section 3729(a)(7), is expanded to include the improper retention of Government overpayments. While the former provision associated liability with the making or using of a false statement to “conceal, avoid, or decrease an obligation to pay” the Government, the new provision mandates liability for (1) the making or using a false statement “material to an obligation to pay” the

Government, or (2) “knowingly and improperly avoid[ing] or decreas[ing] an obligation to pay” the Government. 31 USC § 3729(a)(1)(G) (May 20, 2009). The amendments define the term “obligation” to include the retention of an overpayment from the Government. 31 USC § 3729(b)(3) (May 20, 2009).

The cumulative impact of these amendments is to alter significantly the landscape of FCA jurisprudence. In particular, the types of persons potentially liable under the statute and the category of funds subject to the revised FCA—money or property spent or used on the Government’s behalf or used to advance a Government program or interest—threaten to create an onslaught of *qui tam* litigation. However, these substantive revisions to the FCA are not alone; FERA also contains important procedural changes to the statute which will make it more likely than any person having a nexus with Government funds, programs or interests could face the risk of FCA liability.

## **FERA Mandates the Application of the “Relation-Back Doctrine” to FCA Matters**

As FCA matters have grown in size and complexity, the amount of time between the filing of a relator’s initial sealed complaint and the Government’s intervention decision has increased substantially.<sup>7</sup> And if the Government intervened and file an amended complaint, it contended that the complaint’s allegations were not time-barred because they “related-back” to the date on which the relator filed his or her sealed complaint. In recent years, courts have paid increased attention to whether the *ex parte* and secrecy provisions of the FCA’s sealed complaint procedures were consistent with the “relation-back” doctrine and challenged the Government to explain the often inordinate delay in its intervention decisions.<sup>8</sup> FERA’s

procedural amendments to the FCA are a response to this jurisprudential development. Under FERA, the Government's amended FCA complaint automatically relates back to the sealed complaint filed *ex parte* by adding a new subsection (c) to 31 USC § 3731:

(c) If the Government elects to intervene and proceed with an action brought under 3730(b), the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

31 USC § 3731 (May 20, 2009).

### **FERA Authorizes Expanded Use of Civil Investigative Demands and Allows the Government to Share Information with *Qui Tam* Relators**

FERA expands provisions of the FCA relating to the Department of Justice's ability to obtain and share information with a claimant. When the Department of Justice is investigating to decide whether to file an FCA complaint, or whether to intervene in or decline a *qui tam* action, it has the power to issue CIDs—a type of administrative subpoena that may be used to obtain documents, testimony and interrogatory responses. See 31 USC § 3733. Under former section 3733(a)(1), only the Attorney General was authorized to approve a

CID, and the information received in response to the CID could not be shared with relators or their counsel. FERA significantly enlarges the use of CIDs and the sharing of CID responses: (1) the Attorney General is permitted to appoint a designee to approve a CID; (2) the information obtained from the CID can be shared with a relator even before a *qui tam* complaint is unsealed; and (3) the "official uses" for which the Department of Justice can use CID information are now broadly defined to include "any use that is consistent with the law, and the regulations and policies of the Department of Justice," including communications with federal and state Government personnel, consultants and counsel for other parties in matters concerning an investigation, case or proceeding. 31 USC § 3733(l)(8) (May 20, 2009).

The Attorney General's power to designate others within Department of Justice to approve CIDs will almost certainly result in an increase in the use of CIDs, if for no other reason than that it will be significantly easier to get CIDs approved if there are more DOJ attorneys authorized to approve them. Because CIDs can be used to compel not only the production of documents, but also attendance at depositions, FCA defendants need to be prepared to provide more information to the Government during the course of an investigation. And in light of FERA's broad definition of "official uses" for which CID information can be shared among Government personnel, defendants facing parallel civil FCA and criminal proceedings will have to carefully consider whether to invoke their Fifth Amendment rights when responding to CIDs that request testimony.

Perhaps most significantly, under FERA, this highly sensitive information can be shared with relators, consultants and their counsel. Thus, the Government will be helping one private party in its litigation against another, instead of

acting as an objective and impartial investigator of the FCA allegations. This revision problematically turns on its head the purpose of the *qui tam* realtor provision of the FCA—to encourage private citizens to bring *new* information on fraud to the Government's attention. Now, relators with limited knowledge of fraudulent conduct may be able to use CID material to overcome Rule 9(b) challenges to their complaints.

## Conclusion

FERA provides valuable oversight and resources to combating fraud against the Government, but its amendments to the FCA will have the added effect of increasing and prolonging meritless *qui tam* suits, and consequently increasing the cost of doing business with the Government. Contractors and subcontractors now face amplified risk of defending against FCA suits and incurring FCA liability, and should consider revising their internal controls and loss prevention strategies. In the upcoming months, both the Government and *qui tam* litigators will undoubtedly take advantage of their new enforcement tools, and 2009 and 2010 will likely involve extensive FCA litigation activity.

### Endnotes

<sup>1</sup> In *Allison Engine, Subcontractor Liability and Politics of False Claims*, Latham & Watkins Client Alert No. 735 (Aug. 4, 2008), we predicted that the Court's decision in *Allison Engine Co. v. United States ex. rel. Sanders*, 128 S. Ct. 2123 (2008), was likely to breathe new life into legislative efforts to amend the FCA.

<sup>2</sup> In *Allison Engine*, a unanimous Supreme Court held that liability under former 31 USC § 3729(a)(2) required proof that the person making a false statement “have the purpose of getting a false or fraudulent claim ‘paid or approved by the Government.’” 128 S.Ct. at 2128. Pursuant to the Court's interpretation of the infinitive phrase “to get” in former section 3729(a)(2), a Government subcontractor who submits a false statement to a Government prime contractor is excused

from FCA liability absent evidence that the subcontractor *intended* for the prime contractor to use that false statement in connection with getting its own claim paid by the United States. See *id.* at 2130. And in *Totten*, the D.C. Circuit held that liability under former section 3729(a)(1) rested on the “presentment” of a false claim to an officer or employee of the United States. 380 F.3d at 492. Presenting a false claim to a Government grantee—such as Amtrak—was insufficient under former section 3729(a)(1) because the text of that provision expressly rested FCA liability on the act of presenting false claims to a Government official.

<sup>3</sup> The revisions to § 3729(a)(2) are the only ones that apply retroactively, and purportedly will take effect on June 7, 2008, the date of the *Allison Engine* decision. However, this retroactivity will almost certainly be challenged in the courts as unconstitutional. See, e.g., *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 US 827, 837 (1990) (“[R]etroactivity is not favored in the law . . . Congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.” (internal quotation marks and citation omitted)); *United States v. Murphy*, 937 F.2d 1032, 1038 (6th Cir. 1991) (holding that the 1986 FCA amendments affect substantive rights and liabilities and consequently do not apply retroactively).

<sup>4</sup> This change was prompted, in part, by a district court decision in *United States ex. rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617 (E.D. Va. 2005). See S. Rep. No. 111-10, at 12. In *Custer Battles*, “a district court set aside a jury award finding that Iraqi funds administered by the US Government on behalf of the Iraqi people were not US Government funds with the scope of the FCA.” *Id.* But almost two weeks after the Senate Judiciary Committee issued its Report on FERA, the United States Court of Appeals for the Fourth Circuit reversed the Eastern District of Virginia's decision in *Custer Battles*. *United States ex. rel. DRC, Inc., v. Custer Battles, LLC*, 562 F.3d 295 (4th Cir. Apr. 10, 2009). Indeed, the Fourth Circuit reasoned that the definition of “claim” in former section 3729(c) did, in fact, cover requests for money or property “‘made to a . . . grantee, or other recipient’ of US funds, so long as the United States ‘provides any portion’ of the funds that the grantees or recipients would use to pay the claim.” *Custer Battles*, 562 F.3d at 304 (emphasis in original) (quoting former section 3729(c)). In light of the Fourth Circuit's decision, revising the definition of “claim” to

include requests for money or property “made 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” is likely unduly and unnecessarily expansive.

- <sup>5</sup> One senator advocated a narrow interpretation of this revised provision: “[A] particular transaction does not ‘advance a Government program or interest’ unless it is predominantly federal in character—something that at least would require . . . that the claim ultimately results in a loss to the Government,” rather than “any garden-variety dispute between a general contractor and a subcontractor simply because the general receives some federal money.” 155 Cong. Rec. S4540 (daily ed. Apr. 22, 2009) (statement of Sen. Kyl (R-Ariz.)). This limited interpretation is not part of the Senate Judiciary Committee’s Report.
- <sup>6</sup> In *Allison Engine*, the Supreme Court warned against this expansion of FCA liability for merely “getting [a claim] paid using ‘government funds,’” because “liability could attach for any false claim made to any college or university, so long as the institution has received some federal grants—as most of them do.” 128 S.Ct. at 2128. The Court noted that this “would expand the FCA well beyond its intended role of combating fraud against the Government.” *Id.*; see also [http://www.whistleblowerlawyerblog.com/2009/04/false\\_claims\\_act\\_amendments\\_ga.html](http://www.whistleblowerlawyerblog.com/2009/04/false_claims_act_amendments_ga.html) (“With hundreds on billions of new federal spending underway in the TARP program and other ‘bailout’ and ‘stimulus’ efforts, the need is urgent to protect these funds with the most effective anti-fraud measures. That protection begins with the amendments to the False Claims Act, and we applaud this bipartisan effort to restore that critical law to its original intent.”).
- <sup>7</sup> Courts are generally receptive to Government requests to keep the relator’s complaint sealed for the months and years it often took to investigate the allegations and consider filing an amended complaint. Pursuant to 31 USC § 3730(b)(1), a *qui tam* complaint remains under seal—and hidden from the identified defendant—for an initial period of 60 days. See

31 USC § 3730(b)(2). During this period, the Government has access to the sealed complaint and investigates the allegations to determine whether to (a) intervene and assume prosecution of the action, or (b) decline intervention and allow the relator to proceed with prosecution of the matter. See 31 USC § 3730(c)(3). Upon a showing of “good cause,” the FCA permits the Government to extend the 60-day period during which the complaint remains under seal and it continues to investigate the allegations. See 31 USC § 3730(b)(3).

- <sup>8</sup> See, e.g., *United States ex rel. Cosens v. Baylor Univ. Med. Ctr.*, 469 F.3d 263 (2d Cir. 2006) (reversing the district court’s denial of the defendants’ motion to dismiss FCA claims on statute-of-limitations grounds and explaining that the automatic application of the relation-back doctrine was improper in the FCA context).

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