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Legal Updates

The Government Revamps Its Weapon Against False Claims: The New Amendments to the False Claims Act

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Federal government funding now comes with increased potential liability and treble damages exposure for a broader scope of entities as a result of new amendments to the federal False Claims Act ("FCA"),^[1] signed into law last week by President Obama. All government contractors and subcontractors, healthcare providers, public and private grantees and sub-grantees, and other entities doing business with the federal Government or with an entity that receives federal funds, should be mindful of these changes. The Government has recovered more than \$21 billion from FCA actions since the last substantial amendments to the FCA in 1986, and over two-thirds of those recoveries were from the healthcare industry alone. These new amendments expand the scope of parties potentially liable for treble damages, narrow available defenses, and otherwise strengthen one of the Government's most successful civil weapons in its fight against suspected fraud on the United States.

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Amendments to Liability Provisions

The FCA imposes liability on any person or entity that makes a false "claim" or false statement to obtain federal funds. The *qui tam* provisions of the FCA permit a whistleblower to file an FCA action on behalf of the United States in exchange for protection from retaliatory action and a bounty if the action results in a monetary recovery. In actions by either the Government or a whistleblower, proven damages are automatically trebled unless the defendant made a voluntary disclosure to the Government concerning the alleged wrongdoing. The new amendments now make it easier for the Government and whistleblowers to successfully prosecute FCA claims, and thus to recover significant damages.

First, the new amendments, entitled the Fraud Enforcement and Recovery Act of 2009 ("FERA"), enable prosecuting parties to circumvent the U.S. Supreme Court's unanimous decision in *Allison Engine v. United States ex rel. Sanders*.^[2] In that case, the Supreme Court limited the reach of FCA liability by holding that a defendant must have the specific intent "to get" a false claim "paid or approved by the government." FERA, however, eliminates the provision interpreted by the Supreme Court to require

specific intent and replaces it with the less demanding requirement that a false statement be “material” to a false claim. The term “material” is broadly defined to mean “having a material tendency to influence, or be capable of influencing, the payment or receipt of money or property.” A defendant may no longer be able to argue that it did not violate the FCA because it did not know that the Government provided funding to the defrauded entity. Further, this amendment is expressly made retroactive to all claims pending as of June 7, 2008 — the date of the *Allison Engine* decision.

FERA also broadens the scope of the FCA to capture fraud committed indirectly, as well as directly, on the Government. Numerous courts had held that presenting a false claim to a recipient of federal funds did not satisfy the FCA’s “presentment” requirement because the claim was not presented directly to the United States.^[3] The amendments, however, now reach such indirect false claims by redefining the term “claim” to include “any request or demand . . . for money or property” that 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.” These changes expand the reach of the FCA to entities that would not otherwise have been liable before. A person who submits a false claim to any entity receiving federal funds is now potentially subject to treble damages under the FCA. Will liability extend to false claims presented to the many companies that have recently received federal “bail-out” money? It remains to be seen. The Senate Judiciary Committee report accompanying the legislation makes it clear, however, that the amendments were necessary “in order to protect the Federal assistance and relief funds expended in response to our current economic crisis.”^[4]

The amendments also expand the scope of liability under the “reverse false claim” provision of the FCA. Specifically, liability is now imposed on anyone who “knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.” The term “obligation” is defined to include “the retention of an overpayment.” Although FERA does not expressly make this amendment retroactive, it arguably imposes instant liability on anyone who is “knowing and improperly” retaining an “overpayment” from the Government, even if that overpayment occurred years before FERA’s enactment. Notably, this new liability provision does not require any false statement or claim; liability is simply imposed on anyone who “knowing and improperly” retains an “overpayment.” FERA does not delineate the mechanics of how to return an overpayment to the Government.

Amendments to Procedural Provisions

In addition to the changes to the liability provisions, the new amendments also provide greater procedural mechanisms for the Government in prosecuting FCA claims. The amendments substantially enhance the ability of the Department of Justice (“DOJ”) to investigate alleged false claims, by authorizing the Attorney General to delegate to DOJ attorneys the power to issue civil investigative demands (“CIDs”) for testimony and documents. DOJ attorneys will no longer have to send every CID to the Attorney General for his or her personal approval. This change will likely result in the DOJ issuing far more CIDs than it has in the past.

FERA also expressly provides that when the Government intervenes in a whistleblower action, its complaint-in-intervention “relates back” to the filing date of the whistleblower’s complaint for purposes of the FCA’s statute of limitations. Historically, many FCA complaints remained under seal for years, without any notice of the claims or the action to the named defendants. This amendment overturns several court decisions that barred relation-back where defendants had no notice of the original complaint.^[5] Going forward, a Government complaint-in-intervention will relate back as long as it “arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint.” This provision was expressly made retroactive to all FCA actions pending on the date of enactment.

Conclusion

The FERA amendments to the FCA broaden the scope of conduct actionable under the Act, make it easier for prosecuting parties to prove their claims, and immediately impact any company doing business, directly or indirectly, with the Government. As was the case after the last substantial amendments to the FCA in 1986, there will likely be a surge of FCA filings in the near future. We may also see parallel changes to the state FCAs, on the books in 23 states and the District of Columbia, making those claims easier to prove as well. The stakes of doing business, even in an indirect way, with the Government or government-funded programs, have increased as a result of these new amendments.

Companies should beware.

[1] 31 U.S.C. § 3729 *et seq.*

[2] 128 S. Ct. 2123 (2008).

[3] See, e.g., *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004) (holding that the FCA's presentment requirement was not met because the allegedly false claim was presented to Amtrak, a federal grantee, not to the United States).

[4] S. Rep. No. 111-10, at 10 (2009).

[5] See, e.g., *United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263 (2d Cir. 2006).