

May 27, 2009

Fraud Enforcement and Recovery Act Expands Liability Under the False Claims Act and Criminal Fraud Provisions

On May 20, 2009, President Obama signed into law the Fraud Enforcement and Recovery Act ("FERA"). This comprehensive legislation expands the reach of federal law and increases funding for federal agencies to combat financial fraud. The most dramatic changes affecting government contractors and organizations participating in federally-funded programs are found in FERA's expansion of the False Claims Act ("FCA").

The FCA is a law that provides a cause of action to the United States and private whistleblowers for treble damages and civil penalties when false or fraudulent claims for payment are made to the federal government. FERA expands potential liability for false claims by applying the FCA to more entities and a broader range of transactions, reducing the proof required to establish liability, and expanding the pool of potential whistleblowers that may bring retaliation claims. Most notably, FERA amends the FCA in the following ways:

Extends the FCA to a wider range of transactions. Prior to the new legislation, the FCA required that allegedly false claims for payment must be presented directly to an officer or employee of the government. FERA eliminates this "presentment" requirement and extends liability to false claims for payment on government-funded projects, regardless of whether the claim is presented to or processed by a government official. In addition, the new legislation expands the definition of a "claim" under the FCA to include any request or demand for money or property, whether or not the government has title to the money or property, including requests for money to a contractor, grantee, or any other recipient of government funds used to advance a government program.

Reduces the intent required to establish liability. Prior to enactment of FERA, courts applying certain provisions of the FCA limited liability to circumstances in which a false claim was made for the purpose of getting a claim paid by the government. FERA, however, relaxes the necessary connection between a false statement and payment by requiring only that the false statement be "material" to a false or fraudulent claim. The term "material" is now defined as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."

Permits non-employees to bring retaliation claims. The FCA allows employees to sue their employer for damages and other relief if they are discriminated against as a result of their actions in connection with a false claims lawsuit or investigation. FERA now makes these retaliation claims available to contractors and agents who contend that they have been discriminated against.

Broadens the reverse false claims provision. Prior to FERA, the reverse false claims provision prohibited the use of a false statement or record to avoid or reduce an obligation to pay money to the government. FERA broadens this provision to apply to circumstances where an obligation to pay is not fixed, but contingent, and where an entity knowingly and improperly conceals, avoids or reduces an obligation to pay money to the government, even if no false statement is made.

Facilitates greater sharing of investigation materials by the Department of Justice. FERA permits the government to disclose to a qui tam whistleblower any information the government obtains through its investigation. It also allows the Department of Justice to share information with other government agencies more freely and eliminates the requirement that the Department first seek court approval for inter-agency disclosures.

In addition to amending the False Claims Act, FERA broadens federal statutes used to prosecute financial fraud, authorizes nearly \$500 million for the government's fraud enforcement efforts over the next two fiscal years, and creates a commission to assess the cause of the nation's current financial and economic conditions and the collapse of major financial institutions. The Act is intended to increase antifraud enforcement through the following notable changes:

Expands the definition of "financial institution." Mortgage lending institutions are now included within the definition of "financial institution" to enable certain criminal statutes to reach fraud against non-depository mortgage lenders (e.g., bank fraud, 18 U.S.C. § 1344).

Expands the reach of money laundering statutes. FERA addresses a recent Supreme Court ruling that determined that "proceeds" of criminal activity, as treated by federal money laundering statutes, were limited to profits of such activity. FERA broadens the term "proceeds" to capture gross receipts of criminal activity.

Expands securities fraud provisions to include fraud involving commodities. FERA adds fraud involving commodities futures and options to the criminal statute prohibiting securities fraud.

Broadens criminal antifraud statute to include fraud in connection with TARP funds. The Act includes fraud in connection with funds dispensed pursuant to the Troubled Asset Relief Program within the criminal statute proscribing fraud against the United States.

Increases funding for white collar fraud enforcement. FERA authorizes nearly \$500 million over the next two years for investigations, prosecutions and civil proceedings related to financial fraud. In a press release, co-sponsor Senator Leahy stated that the new legislation authorizes the hiring of "more than 300 Federal agents, more than 200 prosecutors, and another 200 forensic analysts and support staff to rebuild our nation's 'white collar' fraud enforcement efforts."

For more information about this statute, visit the firm's [White Collar Criminal Defense](#) practice, or contact one of the lawyers below.

[Stacy Brainin](#)

214.651.5584

stacy.brainin@haynesboone.com

[David Siegal](#)

212.659.4995

david.siegal@haynesboone.com

[Paul Searles](#)

214.651.5197

paul.searles@haynesboone.com

[Sarah Teachout](#)

214.651.5038

sarah.teachout@haynesboone.com