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FRAUD ENFORCEMENT RECOVERY ACT OF 2009 BECOMES LAW, EXPANDING EXPOSURE UNDER THE FALSE CLAIMS ACT AND FUNDING ANTI-FRAUD ENFORCEMENT

The Fraud Enforcement and Recovery Act ("FERA"), signed into law on May 20, 2009, threatens to expand exposure under the False Claims Act ("FCA") for a wide range of business transactions involving federal government funds. Before FERA, the FCA generally imposed liability and penalties for false statements or claims that were made directly to the government or that were made for the purpose of inducing the government to pay a false claim. Following FERA's amendments, the FCA purports to impose liability for false claims with more remote connections to the federal government. Plaintiffs are likely to argue that false claims made to private companies might now result in FCA liability to the extent that those claims were paid using government money. Under the old law, such private transactions were not subject to the FCA unless they resulted in false claims being submitted to the government and not merely to a recipient of federal funds.

FERA also purports to expand liability for the retention of money owed to the government. Under the old law, a person or entity was liable for retaining money owed to the government only if that person or entity (i) used a false record or statement to retain the government's money, and (ii) used the false record or statement *for the purpose of* concealing, avoiding, or decreasing an obligation to the government. Under FERA, plaintiffs can be expected to argue that the FCA now imposes liability on a person or entity for evading an obligation to pay the government, whether or not the person or entity used a false record or statement and without regard to whether the person or entity had the purpose of avoiding the obligation. For example, a Medicare provider might now be subject to suit under the FCA for knowingly avoiding an obligation to repay overpayments, even if the provider made no false representations to the government.

Before FERA, most courts held that false statements were actionable under the FCA only if they were "material" to the government's decision whether or not to pay for a claim. Thus, an inaccuracy on a

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claim did not give rise to FCA liability if it did not affect how much the government would pay for the claim. A few courts, however, declined to read materiality into the FCA, and even the courts that required materiality could not agree on the appropriate standard. Some courts held that an inaccuracy should be considered material only if it was an actual prerequisite to government payment such that the government would not have paid for the claim if it knew of the inaccuracy. Other courts held that an inaccuracy was material if it had a "natural tendency" to influence the government, whether or not it actually affected the payment decision. FERA resolves some of these disputes by adding a materiality requirement to two of the FCA's seven liability subsections. At least for actions under those subsections, FERA endorses the more liberal standard by defining "material" as anything "having a natural tendency to influence, or being capable of influencing, the payment or receipt of money or property."

FERA makes four other significant amendments to the FCA. First, it expands protection for "whistleblowers" who lawfully attempt to stop a violation of the FCA. Second, it permits whistleblower plaintiffs to access information gained from government subpoenas. Third, it authorizes the government to share information provided by whistleblowers with law enforcement authorities from state or local governments. And lastly, it effectively expands the statute of limitations for FCA actions, specifying that government complaints relate back to earlier whistleblower complaints for purposes of the statute of limitations.

This *Commentary* examines in detail each of these expansions to the FCA and considers the impact they may have on businesses that have not previously been forced to contemplate the potential for FCA liability, as well as those businesses that have for years navigated the murky waters of doing business with the government.[1]

BACKGROUND

The Fraud Enforcement and Recovery Act, signed by President Obama on May 20, 2009, expands the federal government's power to investigate and prosecute financial fraud, with a particular focus on any misuse of government stimulus and Troubled Asset Relief Program ("TARP") funds. The Act appropriates $532 million over the next two years for federal financial fraud enforcement and amends sections of the United States Criminal Code related to mortgage security, futures, and options commodities trading; fraud against the government; and money laundering. FERA also extends the reach of the FCA, the government's primary civil enforcement mechanism for combating fraud.

According to its sponsors, FERA's amendments to the FCA target recent decisions by the courts that clarified the scope of the FCA and the kinds of claims that give rise to FCA liability. Unhappy with these interpretations of the FCA, Congress amended the law in an attempt to vitiate those decisions, expanding both the types of relationships that give rise to FCA liability and the types of conduct that are considered false. Before FERA, liability under the FCA was generally dependant upon either the presentment of a false claim to the federal government or a false statement made with the intent of inducing the federal government to pay a claim. FERA does away with those limitations and extends the FCA to cover claims or statements made to government contractors, grantees, or other recipients of federal funds. In some circumstances, FERA imposes liability even in the absence of any false statement or claim.[2]

Buoyed by public concerns regarding the potential abuse of government stimulus funds, the legislation received strong bipartisan support in both Houses of Congress. Twenty-seven Senators ultimately signed on as co-sponsors of the

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1. A black line comparison of the significant FCA amendments is attached. The text of the entire bill as enacted is available at http://thomas.loc.gov/.

2. Two other bills currently pending in Congress propose additional amendments to the FCA. House of Representatives Bill 1788, like Senate Bill 458, its Senate companion, would make it easier for *qui tam* relators to proceed with cases in which the government declines to intervene. Both bills propose to eliminate the public disclosure bar and further extend the statute of limitations for all cases under the FCA. House Bill 1788 proposes two other amendments not included in Senate Bill 458: (i) lowering the standard qui tam relators must meet to survive dismissal under Federal Rule of Civil Procedure 9(b), and (ii) eliminating the element of materiality for claims under the FCA. House Bill 1788 was approved by the House Judiciary Committee in April and reported to the full House of Representatives. Senate Bill 458 was reported to the Senate Judiciary Committee, which, at the time of the publication of this *Commentary*, had taken no action.

bill before the Senate passed it by a vote of 92 to 4 on April 28, 2009. The House of Representatives passed its version of the Bill on May 6, 2009, incorporating all of the Senate's amendments and proposing additional amendments to the FCA. On May 14, 2009, the Senate accepted the additional amendments included in the House version by unanimous consent and added a minor amendment unrelated to the FCA. The House approved the Senate's amendment on May 18, 2009. Just two days later, on May 20, President Obama signed the bill into law.

FERA EXPANDS FALSE CLAIMS ACT LIABILITY TO INDIRECT RECIPIENTS OF FEDERAL FUNDS

Perhaps the most significant aspect of FERA is that it expands potential liability under the FCA to any person or entity that makes a false statement or claim to a recipient of federal funds. Similarly, FERA arguably extends FCA liability to any person or entity that knowingly retains an overpayment from the government, without regard to whether the recipient used a false statement or claim to do so. In combination, these changes promise to expand dramatically the number and type of private individuals who are potentially subject to FCA exposure. The changes are particularly troubling for those in the health care industry, who through their compliance efforts often identify potential overpayments without any corresponding fraudulent conduct.

The False Claims Act Prior to FERA. The best way to understand the practical impact of FERA's changes to the FCA is to examine the scope of the statute prior to the recently enacted amendments. Specifically, it is important to understand that before FERA, FCA liability was generally limited to individuals or entities that directly or indirectly induced payment *by the government*.

Anyone who violates the FCA is liable for up to $11,000 per false claim and three times the amount of damages sustained by the government as a result of such false claims. Most FCA actions are brought by whistleblowers, known as *qui tam* relators, on behalf of the federal government. As an incentive for providing information the government might not have uncovered, the FCA entitles successful *qui tam* relators to between 15 and 30 percent of the damage award or settlement recovered on behalf of the government.

Before FERA, the liability provisions of the FCA were codified at 31 U.S.C. § 3729 (a)(1) through (a)(7).[3] The majority of suits brought under the FCA, however, asserted a theory of liability under Section 3729 subsections (a)(1) and (a)(2).

Subsection (a)(1) attached liability for false claims presented to the federal government. Specifically, anyone who "knowingly present[ed], or cause[d] 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" violated subsection (a)(1). Courts uniformly interpreted the text of this provision as requiring "presentment" of a claim to the federal government. *See*, *e.g.*, *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 492 (D.C. Cir. 2004). Prior to the adoption of FERA, merely submitting a false claim to a recipient of federal funds, such as a federal contractor or grantee, did not violate subsection (a)(1), even if the contractor or grantee paid the claim using government funds. Instead, a violation of subsection (a)(1) occurred only if the defendant submitted or caused another to submit a false or fraudulent claim *to the federal government.*

Subsection (a)(2), in contrast, focused on the intended payment source. Anyone using "a false record or statement to get a false or fraudulent claim paid or approved *by the Government*," was in violation of subsection (a)(2). Although subsection (a)(2) did not contain a presentment requirement similar to (a)(1), liability did not attach without a finding that the false record or statement was meant to induce payment *by the government*, as recognized by the Supreme Court in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S.Ct. 2123, 2129-30 (2008). Mere payment by a federal grantee, absent some evidence of a claimant's intent to extract payment from the government, did not give rise to liability under

3. FERA recodifies those sections at 31 U.S.C. § 3729(a)(1)(A-G).

subsection (a)(2), regardless of whether the federal grantee used federal funds to pay the claim. *Id.* As Justice Alito explained in *Allison Engine*, where "a subcontractor makes a false statement to a private entity but does not intend for the Government to rely on the statement as a condition of payment, the direct link between the statement and the Government's decision to pay or approve a false claim is too attenuated to establish liability." *Id.* at 2130. Imposing liability without "this element of intent ... would expand the FCA well beyond its intended role of combating fraud against the *Government*." *Id.* at 2128 (internal quotations marks omitted, emphasis in original).

FERA Extends the FCA to Claims Submitted to a Recipient of Federal Funds With or Without an Intent to Get Money from the Government. FERA's changes appear to repudiate court decisions interpreting the FCA and purport to impose liability for a broader category of false claims paid using government funds. The changes attach liability without regard to whether the party making the allegedly false claim submitted it to the government or otherwise intended to defraud the government.

First, FERA's amendments remove the "presentment requirement" from subsection (a)(1) (now codified as 31 U.S.C. § 3729(a)(1)(A)), directly repudiating the interpretation of the United States Court of Appeals for the District of Columbia Circuit in *Totten*. *See United States ex rel. Totten*, 380 F.3d 488. Before the amendments, an FCA action was sustainable only if a claim was presented to a United States government officer, employee, or member of the armed forces. Merely submitting an allegedly false claim to a federal grantee or other recipient of federal funds was not enough; the claim must have been submitted to the federal government. *See id.* FERA eliminates the presentment prerequisite and subjects to potential liability anyone who makes claims for payment to any recipient of federal funds. Anyone who does business with a recipient of federal money now faces at least a risk of potential FCA exposure, even if the allegedly false claim is not intended to induce payment by the government.

Second, FERA removes the language "to get a false or fraudulent claim paid or approved by the Government" from subsection (a)(2) (now codified as 31 U.S.C. § 3729(a)(1)(B)), in an apparent attempt to abrogate the Supreme Court's unanimous decision in *Allison Engine*. This change represents as significant a departure from the existing legal regime as the elimination of the presentment requirement described above. In *Allison Engine*, the Supreme Court interpreted § 3729(a)(2)'s language "to get" and "paid or approved by the Government" as requiring a finding that the defendant intended *to get* the false or fraudulent claim *paid by the government*. 128 S.Ct. 2123, 2129-30 (2008). The Court held that because "getting a false claim paid by the Government was not the same as getting a false claim paid using 'government funds'… a defendant must intend that the Government itself pay the claim." *Id*. at 2128. FERA removes the language upon which the Court relied and appears to expand the scope of the FCA to cover false statements made to virtually any recipient of federal money regardless of whether the entity making the statement knew about the source of the funds or expected the government to pay the claim.[4]

In the March 23, 2009, Judiciary Committee Report on FERA, Senator Leahy blamed recent court interpretations of the presentment requirement for undermining the FCA's effectiveness. According to Senator Leahy, decisions such as *Totten* and *Allison Engine* allow "sub-contractors paid with government money to escape responsibility for proven frauds." "The False Claims Act," Senator Leahy said when he introduced Senate Bill 386, "must quickly be corrected and clarified in order to protect from fraud the Federal assistance and relief funds expended in response to our current economic crisis." Senator Leahy's comments, however,

4. FERA amends the definition of a "claim" under the FCA. Together with the amendments to the liability sections, the definition of "claim" clarifies that any demand made to contractors or grantees paid from government funds (including TARP funds and other federal assistance) constitutes a claim, without regard to whether the demand is ever presented to or otherwise paid by the *government*. The amended definition of claims expressly excludes requests for payment made to beneficiaries that receive government money with no restriction on the use of those funds, *i.e.*, employees, Social Security beneficiaries, pensioners, etc. This clarification ensures, for example, that a home improvement contractor renovating the home of a Social Security beneficiary will not face federal liability under the FCA simply because payment could be traced back to the federal government.

misconstrue the state of the law prior to FERA. Even before FERA, subcontractors faced liability for false claims submitted to prime contractors when those claims were passed on to the government or otherwise caused the prime contractor to submit a false claim to the government.[5] FERA does not change that. Instead, the amendments to subsections (a)(1) and (a)(2) appear to impose liability for false claims paid by recipients of government money, even if the government does not suffer any actual loss.[6]

FERA EXPANDS FCA EXPOSURE FOR THE RETENTION OF GOVERNMENT OVERPAYMENTS, EVEN WHERE NO FALSE STATEMENT OR CLAIM IS MADE

FERA makes two substantive changes to subsection (a)(7) (now codified as 31 U.S.C. § 3729(a)(1)(G)), the "reverse false claims" provision.[7] First, it amends subsection (a)(7) so that it conforms with the amended subsection (a)(2). Prior to FERA, subsection (a)(7) imposed liability on anyone who knowingly made a false record or statement "to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government."[8] Because subsection (a)(7), like (a)(2), based liability on false records or statements, courts applied the Supreme Court's reasoning in *Allison Engine* to require a finding that the defendant intended the false record or statement to defraud the government. *See United States v. Bourseau*, 531 F.3d 1159, 1168-69 (9th Cir. 2008). Under FERA, the FCA now purports to impose liability for false records or statements even if a business's allegedly false records or statements were never intended to result in the retention of a government payment.

Second, FERA expands liability for "reverse false claims," eliminating a perceived loophole in the old law, by imposing liability for the retention of government overpayments even in the absence of a false record or statement. Before FERA, liability under subsection (a)(7) was dependent on the submission of a false record or statement. The new law eliminates from subsection (a)(7) the requirement that the defendant make or use a false record or statement. Moreover, FERA specifies that the duty to repay the government need not be fixed for FCA liability to attach.[9] For example, under the new law, a plaintiff might argue that a Medicare provider who receives interim payments can be subject to FCA liability for the "knowing" retention of overpayments, even prior to reconciliation of the final amount owed (*i.e.*, cost report settlement). Of course, the FCA defines the term "knowingly" to include deliberate ignorance or reckless disregard. Thus, a plaintiff might argue that a Medicare provider is liable for failing to repay an overpayment even when the provider was not actually aware that it had been overpaid and never intended to keep the overpayment, provided the relator or government

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5. Indeed, the cases identified by Senator Leahy offer little support for his contention. *Totten* involved claims submitted to Amtrak, a recipient of numerous government subsidies, not a government contractor. *See* United States ex rel. *Totten v. Bombardier Corp.*, 380 F.3d 488, 492 (D.C. Cir. 2004). *Allison Engine* involved a contractor-subcontractor relationship but presented unique factual circumstances unlikely to be repeated. The relators in *Allison Engine* opted to assert claims under subsection (a)(2), *i.e.*, that the defendant, a subcontractor, made false statements to the prime contractor, in order to get a claim paid by the government. *Allison Engine*, 128 S.Ct. 2123, 2126 (2008). The *Allison Engine* relators could have alleged liability under subsection (a)(1) even if the defendant presented no false statements or claims directly to the government by alleging that the false statements that the defendant allegedly made to the prime contractor caused the prime contractor to submit false claims to the government. Accordingly, the subcontractor escaped liability because the relators did not put forth any evidence that any false claims were ever submitted to or paid by the government, not because of an existing loophole in the statute.

6. FERA authorizes the government to pursue and collect on false claims presented to private entities while the private entity that was actually harmed by the false claim has no recourse under the new law.

7. Subsection (a)(7) is frequently referred to as "reverse false claims" provision because it imposes liability for the fraudulent retention of government money, as opposed to the "direct" false claims provisions that impose liability for fraudulently inducing payment of government money.

8. Though claims under subsection (a)(7) are not as common as claims under subsection (a)(1) or (a)(2), subsection (a)(7) is particularly relevant to the health care industry. Medicare providers routinely receive government overpayments that have to be refunded at year's end, after a full accounting.

9. FERA defines obligation as "an 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."

can show that the provider acted recklessly when it failed to recognize a duty to repay the money.

In practical terms, the amendments to subsection (a)(7) will increase and complicate a recipient's responsibility for ensuring the accuracy of government payments. As Senator Leahy explained, "any knowing and improper retention of an overpayment beyond or following the final submission of payment as required ... would be actionable under" FERA.

FERA ADDS A MATERIALITY REQUIREMENT TO THE FCA BUT DEFINES MATERIALITY BROADLY

FERA purports to resolve a dispute between federal courts by codifying "materiality" into subsections (a)(2) and (a)(7) (now subsections (a)(1)(B) and (a)(1)(G)), but defining it broadly. Prior to the new amendments, most courts had held that liability under the FCA arose only when the alleged falsity was "material" to the government's payment decision. A minority of courts had refused to read a materiality requirement into the FCA. The more significant split among the circuit courts involves the application, or definition, of materiality. Courts initially defined "materiality" to be an actual prerequisite to payment such that an inaccuracy in a statement or claim would be considered "false" only if the government would not have paid the claim if it knew of the inaccuracy. More recently, the government has argued, sometimes successfully, that an inaccuracy is material and thus false if it has a "natural tendency" to influence the government. Under this standard, an inaccuracy could be considered material if it was deemed capable of influencing payment, even if the government would have paid the claim notwithstanding the alleged inaccuracy. FERA resolves this difference in interpretations of the materiality requirement for actions under subsections (a)(2) and (a)(7) by specifying that the alleged false statements must be "material to a false or fraudulent claim" and by defining "material" as something that may be regarded as "having a natural tendency to influence, or being capable of influencing, the payment or receipt of money or property."

In practice, FERA is likely to complicate rather than clarify the application of the materiality element. FERA codifies materiality only for subsections (a)(2) and (a)(7) claims, leaving unresolved whether the other liability sections also require a showing of a material falsity, and if so, which materiality standard applies.

OTHER FCA AMENDMENTS INCLUDED IN FERA

FERA Expands Protections for Whistleblowers. FERA also expands a whistleblower's ability to sue for retaliation under the FCA. Prior to FERA, the FCA protected employees from retaliation in response to steps they took in furtherance of an FCA action. The new law expands the right of action to government contractors or agents, in addition to employees, who make an effort to stop an FCA violation, regardless of whether the underlying efforts were made in furtherance of an FCA action. In practical terms, entities may now be forced to contend not just with the relator's suit on behalf of the government, but also with potential retaliation allegations from a wide range of contractors and agents that the entities have used.

FERA Creates an FCA-Specific Relation-Back Provision that Effectively Expands the Statute of Limitations Under the FCA. The new law expands the FCA's statute of limitations. Recent judicial decisions question whether common law relation-back principles are compatible with the *qui tam* provisions of the FCA. *See*, *e.g.*, *United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263 (2d Cir. 2006). Generally, the filing of a complaint "tolls" the statute of limitations—that is, the court will use the date the original complaint was filed for statue of limitations purposes, as long as the later-filed amended allegations "relate back" to the same subject or event as the original complaint. The touchstone of this relation-back doctrine has traditionally been notice: Where a defendant is on notice of the allegations filed against it, the court presumes it is fair to base the statute of limitations on the earliest-filed complaint because the defendant has had a chance to begin preparing its defense and thus was not prejudiced by the passage of time.

In *qui tam* actions, of course, the defendant does not get the benefit of notice when the whistleblower's complaint is filed in secret and is not served on the defendant immediately. Indeed, *qui tam* actions frequently remain under seal with no notice to the defendants for several years, while the government investigates and decides whether or not to intervene in the case. Because the defendant is not on notice of the allegations, some courts have held that the rationale of the

common law relation-back doctrine does not apply to *qui tam* complaints.[10]

FERA seems to ignore the issue of notice and codifies an exception that, for purposes of the statute of limitations, treats the government's later-filed allegations as if they were filed when the case was initiated. This has the effect of expanding liability for the defendant and limiting the defendant's ability to defend itself. For example, if a whistleblower case was filed in 2005 and not made known to the defendant until 2009, the defendant could have to defend allegations dating back to 1995, which is four years more than the 10-year statute of limitations would allow in most other federal lawsuits.

FERA does not resolve whether delay in unsealing by the government has violated any other rights of a defendant beyond the statute of limitations. Even under FERA, defendants may still argue that an extended seal period was inconsistent with due process or that the government failed to preserve evidence that was lost while the case remained under seal.

FERA Provides Relators With Access to Documents Obtained by the Government. Prior to FERA, relators were often denied access to documents and information that a defendant in an FCA case or a party under investigation produced to the government in response to a Civil Investigative Demand ("CID"). The new law explicitly allows whistleblowers and their counsel to have access to such documents and information. The government typically uses CIDs to obtain information when it is investigating FCA allegations and deciding whether it will join in a relator's case.

The access provided by FERA creates some potential problems. Obviously, recipients of CIDs will need to be cognizant that non-government personnel will have access to their information, raising numerous confidentiality issues. Depending on the identity of the relator, access to confidential information may even have legal implications. Additionally, allowing access to information produced in response to CIDs could enable relators who lack specific knowledge of violations to supplement speculative, generalized allegations with information obtained by the government, and thereby avoid dismissal of an otherwise legally insufficient complaint.

SOME OF FERA'S PROVISIONS PURPORT TO APPLY RETROACTIVELY

Most of the new amendments became effective when President Obama signed FERA on May 20, 2009, and will apply to suits based on conduct occurring on or after that date. The changes to subsection (a)(2), however, are intended to repudiate the Supreme Court's decision in *Allison Engine* from June 9, 2008. The legislation thus specifies that those changes apply retroactively to cases pending in the federal courts on June 7, 2008, two days before the Court announced its decision. The changes related to the new FCA-specific relation-back provisions also purport to apply retroactively to any cases pending on the date FERA was enacted. The substantial problems attendant to retroactive changes in the law are not covered here except to note that making these proposed retroactive changes appears aimed at reviving claims by the government or *qui tam* relators that had been previously dismissed. That retroactive application, standing alone, threatens to resurrect a significant number of previously determined lawsuits.

THE CONSEQUENCES OF FERA'S ENACTMENT

Although many additional proposed amendments to the FCA did not make their way into FERA, the amendments enacted, coupled with nearly half a billion dollars

10. At least one United States Court of Appeals recognized this inconsistency and held that the filing of a *qui tam* complaint does not toll the FCA's statute of limitations. In *United States v. Baylor University Medical Center*, the United States Court of Appeals for the Second Circuit held that the government's complaint-in-intervention, which was filed after the statute of limitations had run, did not relate back to the relator's earlier-filed complaint and was thus barred. 469 F.3d 263 (2d Cir. 2006) (explaining that the secrecy required by the FCA deprives a *qui tam* defendant of notice of the allegations against it and is thus incompatible with the relation-back doctrine).

appropriated for enforcement, underscore the government's intent to pursue any perceived fraud against the government. This has implications for both the health care industry and the myriad other entities now receiving federal funds, both directly and indirectly.

Nowhere is the government's intent to prioritize enforcement more apparent than in the health care industry. The Obama administration has made health care reform one of its priorities and has made clear that aggressively combating health care fraud is on the agenda. Even before FERA, the health care industry was the focus of more than half of the cases filed under the FCA and was responsible for more than 80 percent of the *qui tam* recoveries. While FERA's sponsors do not explicitly target health care companies, many of the amended provisions promise to have a disproportionate impact on that industry. In particular, the changes relating to the retention of government overpayments, as well as the application of the FCA's materiality requirement, are especially relevant to the health care industry.

In addition to enacting FERA, the administration recently announced the expansion of its Medicare Fraud Strike Force (the "Strike Force") and the creation of a new Health Care Fraud Prevention and Enforcement Action Team ("HEAT"). Specifically, the Strike Force, which had been active only in Southern California and South Florida, will be introduced in two new cities, Houston and Detroit. HEAT will meet biweekly to coordinate federal and state health care fraud enforcement and prevention efforts, and it will make health care fraud a Cabinet-level priority.

Liability under FERA will not be limited, however, to the health care industry. Indeed, FERA's amendments could have even greater impact on companies that do not deal directly with the government and have not previously considered their exposure to liability from the government. Under the new law, any person or entity that submits a claim to virtually any recipient of federal funds faces potential FCA lawsuits, just as if the claim had been submitted directly to the government. Likewise, anyone who makes a false statement to a recipient of federal money could be liable to the government for treble damages without regard to whether the false statement had any impact on the government fisc. Government funds are allocated to a vast array of public and private entities throughout the United States. Banks, credit unions, insurers, local and state governments, schools, health care providers, universities, law enforcement agencies, airport authorities, and a host of other grant recipients regularly receive payments from the federal government.

As stimulus funds reach more segments of the private sector, the number of transactions and circumstances covered by the FCA will continue to increase. Under FERA, many organizations that receive government funds only indirectly must consider for the first time obligations that previously applied only to those that deal directly with the government. Even organizations that have historically received government funds must now contend with broader applications of the FCA, fewer defenses, and longer limitations periods.

FERA will undoubtedly lead to increased litigation risk and attendant costs. When coupled with the government's investment in enforcement, it makes good business sense to review existing compliance programs as soon as possible.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

WASHINGTON
R. Christopher Cook
1.202.879.3734
christophercook@jonesday.com

Nolan S. Young
1.202.879.3728
nsyoung@jonesday.com

Lee Perla
1.202.879.3939
lperla@jonesday.com

CHICAGO
Heather M. O'Shea
1.312.269.4009
hoshea@jonesday.com

CLEVELAND
Stephen G. Sozio
1.216.586.7201
sgsozio@jonesday.com

DALLAS
Frank E. Sheeder III
1.214.969.2900
fesheeder@jonesday.com

LOS ANGELES
Suzanne C. Jones
1.213.243.2431
scjones@jonesday.com

SAN FRANCISCO
Martha Boersch
1.415.875.5811
mboersch@jonesday.com

BLACKLINE COMPARISON OF SIGNIFICANT AMENDMENTS TO THE FALSE CLAIMS ACT

§ 3729. False claims

(a) LIABILITY FOR CERTAIN ACTS.—

(1) IN GENERAL.—Subject to paragraph (2), ~~A~~any person who—

(~~1~~A) 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;

(~~2~~B) 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~~;

(~~3~~C) conspires to ~~defraud the Government by getting a false or fraudulent claim allowed or paid~~commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(~~4~~D) has possession, custody, or control of property or money used, or to be used, by the Government and~~, intending to defraud the Government or willfully to conceal the property,~~ knowingly delivers, or causes to be delivered, less ~~property than the amount for which the person receives a certificate or receipt~~than all of that money or property;

(~~5~~E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(~~6~~F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge ~~the~~ property; or

(~~7~~G) knowingly makes, uses, or causes to be made or used, a false record or statement material to ~~conceal, avoid, or decrease~~ an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410), plus 3 times the amount of damages which the Government sustains because of the act of that person~~, except that if~~ .

(2) REDUCED DAMAGES.—If the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation, the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of ~~the~~that person.

(3) COSTS OF CIVIL ACTIONS.—A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) ~~KNOWING AND KNOWINGLY DEFINED~~DEFINITIONS.—For purposes of this section~~,~~

(1) the terms "knowing" and "knowingly"—

(A) mean that a person, with respect to information—

(~~1~~i) has actual knowledge of the information;

(~~2~~ii) acts in deliberate ignorance of the truth or falsity of the information; or

(~~3~~iii) acts in reckless disregard of the truth or falsity of the information~~,~~; and

(B) require no proof of specific intent to defraud ~~is required.~~;

(c) CLAIM DEFINED.—For purposes of this section,(2) the term "claim" ~~includes~~—

(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;

(3) the term "obligation" means an 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; and (4) the term "material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(dc) EXEMPTION FROM DISCLOSURE.—Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

(ed) EXCLUSION.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

(h) Any employee whoRELIEF FROM RETALIATORY ACTIONS.—

(1) IN GENERAL.—Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee, contractor, or agent on behalf of the employee or, contractor, or agent or associated others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such reliefother efforts to stop 1 or more violations of this subchapter.

(2) RELIEF.—Relief under paragraph (1) shall include reinstatement with the same seniority status suchthat employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

§ 3731. False claims procedure

(a) A subpena [sic] requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(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.

(c)(d) In any action brought under section 3730, the United States shall be required to prove all essential elements of the

cause of action, including damages, by a preponderance of the evidence.

(de) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

EFFECTIVE DATE AND APPLICATION.—The amendments made by this section shall take effect on the date of enactment of the Act and shall apply to conduct on or after the date of enactment, except that—

(1) subparagraph (B) of section 3729(a)(1) of title 31, United States Code, as added by subsection (a)(1), shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after that date; and

(2) section 3731(b) of title 31, as amended by subsection (b); section 3733, of title 31, as amended by subsection (c); and section 3732 of title 31, as amended by subsection (e); shall apply to cases pending on the date of enactment.

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