

NEW FEDERAL FRAUD LAW IMPLEMENTS KEY CHANGES TO FALSE CLAIMS ACT

by
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The recently enacted Fraud Enforcement and Recovery Act of 2009 (“FERA”), extends the False Claims Act (“FCA”) to instances of misuse of federal funds even when no false claim is presented to the government.

The FCA amendment (retroactive to actions pending on June 7, 2008), overturns cases which held that a subcontractor’s false statement to a prime contractor would not be actionable unless the subcontractor intended its statement to be relied upon by the government in paying a claim. Now, no direct link between the false claim or statement and the government’s payment decision is required. For example, if the government funds a fixed-price contract in which the prime contractor has sole discretion to pay its subcontractor, any false claim submitted to the prime contractor will be actionable even if the claim never reached the government.

In order for a false statement or certification to be actionable, it must be “material,” which the new law defines as “having a natural tendency to influence, or be[ing] capable of influencing, the payment or receipt of money or property.” This broad, objective definition, no doubt, will be hotly contested in FCA litigation.

The FCA imposes liability on a defendant who makes a false statement to decrease a financial obligation to the government. The amendment overrules case law which held that such an obligation must be for a fixed sum of money, thereby broadening the kinds of cases that can be brought under the “reverse false claim” provision.

While whistleblowing employees of the defendant had previously been protected against retaliation, the amendment now also protects contractors or agents of the defendant. It is unclear, however, how a non-employer could be held liable for reinstatement and double back-pay, as the FCA provides.

The amendment gives the government some additional enforcement tools. The Attorney General is no longer required to sign civil investigative demands (“CIDs”), but may delegate that power to others in DOJ. This will increase the use of CIDs which enable the government to engage in unilateral discovery (including interrogatories and depositions of targets and witnesses) prior to the defendant being served with the complaint. Because CIDs can be issued after a *qui tam* complaint has already been filed but before it is served, this form of discovery may deprive defendants of many of the protections afforded by the Federal Rules of Civil Procedure. The new law also specifically allows DOJ to share the fruits of that discovery with the *qui tam* relator. Finally, when the government intervenes in a *qui tam*

action and adds its own claims, the new law permits the government's amended complaint to relate back, for purposes of calculating the statute of limitations, to the date the *qui tam* action was filed.

Notably, the new FCA provisions enacted through FERA do not include some of the other amendments that had been introduced earlier this year. Proposals to eliminate the public disclosure defense, to expand the statute of limitations, and to allow government employees to bring *qui tam* actions were not included.

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