



May 26, 2009

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FRAUD ENFORCEMENT AND RECOVERY ACT OF 2009 (“FERA”)

I. Introduction

On Wednesday, May 20, President Obama signed Public Law No. 111-21, the Fraud Enforcement and Recovery Act of 2009 (“FERA”). FERA provides the federal government with more tools to investigate and prosecute mortgage, corporate, and other financial frauds. The principal objective of FERA is to increase enforcement oversight over the types of financial frauds that contributed to the current subprime and economic crisis, and to recover taxpayers’ money lost to these frauds. Among other things, FERA:

- provides substantial funding and resources to the Justice Department, the Federal Bureau of Investigation, the U.S. Postal Inspection Service, the U.S. Secret Service, and the Inspector General for the Department of Housing and Urban Development for enforcement activity;
- strengthens current criminal and civil fraud statutes;
- very notably, strengthens the Civil False Claims Act (31 U.S.C. § 3729 et seq.) (“FCA”) to ensure that the government can recover taxpayer dollars purportedly lost to fraud and abuse; and
- establishes a Financial Crisis Inquiry Commission to examine the domestic, as well as global, causes of the current economic crisis.

It is important to note that the FCA amendments contained in FERA do not go as far as those reflected in other FCA legislation that recently passed the House or that remains pending in the Senate. These amendments, as discussed below, do expand dramatically the contours of liability under the FCA. Moreover, there is still some prospect that additional FCA legislation could be considered later this term.

II. The Act

Funding to Combat Fraud

FERA authorizes substantial funds for hiring fraud prosecutors and investigators at the Justice Department. With this funding, the FBI will almost double its mortgage-fraud task forces nationwide. Funds will be used by the U.S. Attorneys’ Offices to staff strike forces for the Criminal, Civil and Tax Divisions. Specifically, FERA authorizes \$165 million a year for hiring fraud prosecutors and investigators in the Justice Department in fiscal years 2010 and 2011, including an allocation of \$75 million and \$65 million to the FBI in 2010 and 2011, respectively, \$50 million each year for U.S. Attorneys’ Offices to staff their strike forces, and \$40 million for the Criminal, Civil and Tax Divisions. Furthermore, \$80 million will be allocated each year for hiring investigators and analysts at the U.S. Postal Inspection Service, the U.S. Secret Service, and the Office of Inspector General for the Department of Housing and Urban Development to combat fraud in federal assistance programs and financial institutions.

Lastly, \$20 million will be allocated each year to the SEC for investigations and enforcement proceedings involving financial institutions to which FERA and its amendments apply.

All funds appropriated under FERA will cover the costs of investigating and prosecuting criminal, civil, and administrative violations and for all proceedings involving financial crimes and crimes against federal assistance programs. The government has appropriated substantial funds through FERA, demonstrating a commitment to increased enforcement efforts against a wide range of financial frauds.

Improvements to Civil, Criminal, and Money Laundering Statutes

FERA makes a number of important improvements to fraud and money laundering statutes. The purpose of these improvements is to ensure that private mortgage brokers and companies are held fully accountable under federal fraud statutes. Most importantly, the Act amends the definition of “financial institution” in the criminal code (18 U.S.C. § 20) in order to extend federal fraud laws to mortgage-lending businesses not directly regulated or insured by the federal government, thereby applying the federal fraud laws to private mortgage businesses. The Act amends the false statement in mortgage applications statute (18 U.S.C. § 1014) making it a crime to make a materially false statement or to willfully overvalue a property in order to influence any action by a mortgage-lending business. FERA also amends the major fraud statute against the United States (18 U.S.C. § 1031), the federal securities statute (18 U.S.C. § 1348), and the federal money laundering statutes (18 U.S.C. §§ 1956 and 1957).

Amendments to the False Claims Act

FERA amends the FCA in several notable respects. In part, the FERA amendments to the FCA are a reaction to several recent court decisions (including the Supreme Court decision in *Allison Engine*, which we analyzed in an earlier alert, click [here](#), that limited the scope of the FCA. The FCA traditionally has provided the government with remedies (treble damages and penalties) against government contractors, grantees, subcontractors, subgrantees, health care providers and others that knowingly present false claims to the government or

knowingly make false claims or statements in order to receive government monies. Furthermore, the FCA allows “whistle blowers” – *qui tam* plaintiffs acting on behalf of the government – to file actions under the FCA.

The FCA amendments in FERA both expand FCA liability and the investigative tools available for FCA prosecution. Among the most notable amendments are the following:

- Intent and Materiality: The amendments overturn *Allison Engine* on the showing of intent necessary to prove certain FCA violations. Under the amended FCA, liability attaches if, among other things, a person “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval” or “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.” As amended, the FCA defines “claim” in part as any request for money or property that is presented to a representative of the United States or 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....” *Allison Engine* had provided that FCA liability did not attach to a subcontractor’s request for payment to a prime contractor unless it was shown that the subcontractor made a false statement with the intent to get a false claim to be paid by the government. In contrast, under the amended FCA, liability will attach if the false statement is “material” – i.e., merely capable of influencing a payment.
- Presentment: As indicated by the amended FCA language quoted above, it is no longer necessary (as some courts had held) that a claim for payment be presented to a representative of the United States government. Liability can attach to a claim presented to, for example, a prime contractor or grantee so long as the money claimed “is to be spent or used on the government’s behalf or to advance a Government program or interest.”

- Civil Investigative Demands: As a result of FERA, the Attorney General now for the first time may delegate authority to issue CIDs. CIDs are requests for documents, interrogatory responses and/or testimony to facilitate investigations of FCA violations. Moreover, the Attorney General or a designee may share the information obtained under a CID with any qui tam plaintiff if it is determined “necessary” as part of any FCA investigation. The potential for abuse of this power and testimony and documentation obtained through CIDs is enormous.

Much of the more than \$1 trillion in funds expended in an effort to stabilize our economy is dispensed through a variety of government contracts, subcontracts, grants and subgrants. FERA’s FCA amendments are directed in part at protecting these funds. Unfortunately, these amendments will create additional FCA investigatory and litigative activity in perhaps unintended ways. Now, virtually any request for a payment that somehow has a nexus – however tenuous – to federal funding, even if presented to a private party, creates the theoretical possibility for FCA liability. Indeed, the FCA now may be an “all-purpose anti-fraud statute,” contrary to the Supreme Court’s reading of the FCA just last year in *Allison Engine*.

Financial Crisis Inquiry Commission

Lastly, FERA establishes a Financial Crisis Inquiry Commission (the “Commission”) with broad powers to investigate both the domestic and the global causes of the current economic crisis in the United States. The Commission will be comprised of 10 members, all of whom must be private citizens with significant experience in such fields as banking, regulation of markets, taxation, finance, economics, consumer protection, and housing. The Commission will serve two main functions: to examine (1) the causes of the current financial and economic crisis in the United States; and (2) the causes of the collapse of each major financial institution that failed or was likely to fail if not for assistance provided by the government.

The Commission will have the power to hold hearings and compel production of testimony and documents. Furthermore, the Commission can obtain information directly from federal agencies, as well as from other organizations and private parties. The Commission will submit a report on December 15, 2010, containing its findings and conclusions regarding the causes of the current financial and economic crisis.

III. Implications of FERA

Congress has shown an undeniable commitment to reversing the effects of the current economic crisis and preventing a repeat of the crisis in the future. FERA is another example of Congress’ commitment. Although FERA had broad bipartisan support and moved through the legislative process to become law very quickly, it is not without its critics. FERA has been criticized as an attempt to criminalize our way out of the financial crisis. Is the answer to this crisis to create more and harsher criminal law? Critics say that FERA is based on a faulty premise – namely, that criminal activity caused the financial mess in America. Furthermore, critics argue that FERA’s provisions are unnecessary and redundant as federal agencies already possess the necessary tools to police the financial markets. Congress is being criticized as embracing unnecessary legislation simply to demonstrate that they are taking “some” action to solve the financial crisis.

Whether or not FERA is unnecessary or redundant, it demonstrates the simple fact that the federal government will enhance its efforts to investigate and prosecute financial frauds. Because the federal government believes the financial crisis is, at least in part, the result of criminal behavior, it will combat financial frauds with greater manpower, stricter penalties, and broader criminal statutes. In addition, although the FCA provisions in FERA do not go as far as some in Congress (and at the DOJ and in the plaintiffs’ FCA bar) had hoped, they do create the prospect for an increase in FCA investigations and litigation.

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