

The Fraud Enforcement and Recovery Act of 2009

On May 20, 2009, President Obama signed into law the Fraud Enforcement and Recovery Act of 2009 (“FERA”). FERA makes several important changes to the criminal and regulatory landscape facing corporations and businesspersons. While these changes are explained in greater detail below, the bottom line is that the business community can expect greater scrutiny from government regulators and enforcement agencies, and a greater likelihood of civil suits initiated by “whistleblowers” and other private actors.

First, FERA authorizes over \$500 million in Fiscal Years 2010 and 2011 for additional government enforcement activity. Specifically, FERA authorizes the Department of Justice to appropriate \$165 million in each of Fiscal Years 2010 and 2011 for investigating and prosecuting alleged fraud involving financial institutions as well as federal assistance programs. FERA also authorizes additional appropriations for other enforcement entities, including the Securities and Exchange Commission (\$20 million each year), the Postal Inspection Service (\$30 million each year), and the United States Secret Service (\$20 million each year). These entities investigate and assist in civil and criminal actions involving financial institutions and federal assistance programs, as well as alleged securities fraud, insider trading, health care fraud, credit fraud, and mail and wire fraud.

Second, FERA creates the Financial Crisis Inquiry Commission, an entity that will be comprised of ten members, six of whom are to be chosen by the majority in both Houses of Congress and the remaining four by the minority. The Commission is charged with examining the causes of present financial crises and referring to the Attorney General (and appropriate state authorities) anyone the Commission finds may have violated the law in relation to the crises. To this end, the Commission has subpoena power and may hold hearings. This Commission can reasonably be expected to look at both alleged “retail” level causes of present financial crises (such as corrupt real estate appraisers), as well as alleged “wholesale” causes of present financial crises (such as unethical or fraudulent practices of large financial institutions or actors in the mortgage finance or securities industries).

Third, FERA amends the False Claims Act in several important ways, expanding its reach substantially. This Act is often invoked to file suits against companies or individuals who do business with the federal Government. Over the years, federal courts have interpreted the False Claims Act—in their view, consistent with its plain text—to impose certain limitations on putative plaintiffs. Most notably, in *Allison Engine Co. v. United States ex rel. Sanders*, the Supreme Court in 2008 unanimously held that a plaintiff under the False Claims Act must show that the defendant made a false statement for the purpose causing the Government to pay a claim. Put differently, the Supreme Court held that it was not enough that the false statement resulted in the use of government funds to pay a claim; rather the defendant must have had an intent to defraud the Government itself. FERA amends the relevant section of the False Claims Act to overturn the holding in *Allison*, substantially expanding the potential reach of the Act and situations in which companies can be sued under it. FERA also relaxes the requirement in the False Claims Act that the defendant must present or cause to be presented the false claim to a federal officer or employee. This overturns circuit court precedent that also previously limited the applicability of the False Claims Act. In addition, FERA changes the definition of

“claim” in a potentially ambiguous way, expressly not requiring that the Government “ha[ve] title to the money or property” requested and including requests to any “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” as long as the Government has “provided any portion of the money or property [or] will reimburse” the entity to which the request was made “for any portion of the money or property.” All of these changes expand the potential for liability under the False Claims Act.

Relatedly, FERA overturns other precedents holding that the Government’s complaint, where the Government chooses to intervene, does not necessarily relate back to the original plaintiff’s complaint for purposes of the statute of limitations. This too substantially affects and expands corporate liability, as government suits can now potentially reach back further in time. FERA also enhances the Government’s ability to use “civil investigative demands” by allowing the Attorney General to delegate the authority and by broadly defining the “official uses” for documents and other materials produced. This effectively expands the availability of government discovery into putative defendants’ business records and expressly allows sharing information with civil plaintiffs. FERA makes other changes to the False Claims Act, including making whistleblower protections more widely available. This likely will increase the number of “whistleblower” suits, in which private plaintiffs and their counsel file suit and thereafter typically seek to have federal authorities pursue the case.

These changes mean that plaintiffs generally no longer need to show intent to defraud the Government itself. The request for money or property need not be presented to a government official or employee and can be for money or property that does not belong to the Government, when, for example, a government interest is implicated and the Government has provided or will reimburse for “any

portion” of the money or property. The fact that the Government now provides funds to virtually every major sector of the economy effectively expands the scope of the Act further.

Fourth, FERA terms these amendments “clarifications” and declares June 7, 2008, to be the effective date for the provision that overrules *Allison*. (The Court handed down *Allison* on June 9 of that year.) FERA therefore purports to allow certain cases, based on past conduct, to go forward absent intent to defraud the Government. Because there is an argument that Congress may not readily change the law retroactively, additional uncertainty and litigation will likely ensue from the “clarification.” The possibility of treble damages against defendants, corporate or individual, obviously amplifies all of these concerns.

Fifth, FERA expands the scope of several fraud provisions in the federal criminal code. For example, FERA broadens the definition of “financial institutions” by including “mortgage lending business[es],” a term defined by FERA. It thereby expands the coverage of various provisions of Chapter 47 of Title 18, United States Code (“Fraud and False Statements”). In addition, it amends section 1031(a) of Title 18, which covers certain frauds involving the Government, to make clear that the provision applies to federal assistance through the Troubled Asset Relief Program (also known as TARP), among other recent economic bailout legislation.

Taken together, the provisions and funding mechanisms in FERA signal that businesses will face heightened criminal scrutiny by the Department of Justice, the Securities and Exchange Commission, and potentially, through the Financial Crisis Inquiry Commission, by Capitol Hill. The amendments to the False Claims Act also increase the potential exposure to false claims actions, the effect of which is heightened by the treble damages and penalty provisions of False Claims Act.

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