

The Fraud Enforcement and Recovery Act of 2009: Significant Amendments made to the False Claims Act

On May 20, 2009, President Obama signed into law the Fraud Enforcement and Recovery Act of 2009 ("FERA"). FERA amends the False Claims Act ("FCA") in a number of important ways. While many provisions of FERA include measures for increased enforcement oversight over the types of financial frauds that helped lead to the subprime mortgage crisis, FERA also includes amendments that are intended to address certain recent court decisions that Congress believed misinterpreted the FCA. These amendments affect not only the financial industry; they have a significant impact on all private contractors who do business with the federal government.

One way in which FERA amends the FCA is by eliminating the "presentment requirement". The presentment requirement required that a false claim be presented to "an officer or employee of the United States Government or a member of the Armed Forces." This amendment addresses the D.C. Circuit Court's decision in 2004 in *United States ex. rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir 2004), which held that a claim presented to a federal grantee, as opposed to an officer or employee of the federal government, did not satisfy the FCA's presentment requirement. FERA intends to clarify that liability for a false claim can now attach to a claim presented to a contractor, grantee or other recipient so long as the money claimed is to be spent on the Federal Government's behalf or to advance a Federal Government program or interest.

Also under FERA, a defendant in an FCA case may now be found liable if it "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Federal Government", whether or not there was intent by the defendant for the Federal Government to pay a false claim. FERA removes a former provision of the FCA stating that liability is imposed when it can be proved that a defendant has made, used or has caused to be made or used a "false record or statement to get a false or fraudulent claim paid or approved by the Government." Thus, FERA establishes a requirement that a federal contractor's false claim simply be "material" to the decision to pay the claim, which means that the false statement must merely "have a tendency to influence" or be "capable of influencing" the payment decision by the Federal Government. FERA overturns the Supreme Court's ruling in *Allison Engine Co. v. United States ex. rel. Sanders*, 128 S. Ct. 2123 (2008), which held that it must be shown in a Federal false claims action that the defendant intended that the Federal Government itself pay the claim rather than just show that a false statement by the defendant resulted in the use of federal funds to pay a false claim.¹ This amendment was made retroactive to June 7, 2008, the date of the *Allison Engine* decision. Therefore, Federal Government contractors are potentially liable for actions taken between June 2008 and May 2009 (as well as after May 2009) which may have been permissible under the *Allison Engine* ruling.

The amendments to the FCA under FERA also permit the Attorney General to delegate authority to his designees to issue civil investigative demands which are used to obtain documents, testimony, and interrogatory responses relevant to an FCA investigation. FERA also amends the FCA in this respect to allow the Attorney General or his designee to share information obtained under a civil investigative demand with a relator if it is deemed necessary under an FCA investigation.

The FCA imposes liability in situations where a person submits a false record or statement that conceals, avoids or decreases an "obligation to pay or transmit money or property to the Federal Government", i.e.

¹ The Supreme Court's *Allison Engine* ruling overturned a Sixth Circuit ruling, which held that in order for a defendant to be liable under the False Claims Act, it is sufficient to show merely that government money was used to pay a false claim. See 471 F.3d 610, 621 (C.A.6 2006).

a “reverse false claim.” FERA amends the FCA to expand the definition of “obligation” to include “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.” The Senate Judiciary Committee’s report regarding FERA explains that this amendment is intended to address certain court decisions that Congress believed were too limited in their interpretation of the definition of “obligation.” For example, the court in *American Textile Manufacturers Institute, Inc. v. The Limited, Inc.* narrowly held that a reverse false claim does not arise from a contingent, as opposed to fixed, obligation that will only occur after the exercise of discretion by government actors; pursuant to the court’s ruling, an overpayment kept by a party would not be considered a reverse false claim unless such party had a present duty to pay money or property created by a statute, regulation, contract, judgment or acknowledgment of indebtedness. 190 F.3d 729 (1999). By expanding the definition to include “the retention of an overpayment,” the Senate Report indicates that Congress intended “to prevent Government contractors and others who receive money from the Government incrementally based upon cost estimates from retaining any Government money that is overpaid during the estimate process.” The violation for receiving the overpayment may occur once an overpayment is “knowingly and improperly retained,” without notice to the Government about the overpayment, thus invalidating the proposition that a party must have a “present duty to pay money or property.” The Senate Report however, stated that this provision is not intended to create liability for a simple retention of an overpayment that is permitted by a statutory or regulatory process for the reconciliation of cost reports that may permit “an unknowing, unintentional retention of overpayment.”

Entities that do business with the Federal Government should take note of these new clarifications to the FCA. They should review their policies and procedures for complying with the FCA and with respect to government contracts in general and revise them to reflect the increased stringency of the FERA amendments. Staff training may also be appropriate to reinforce expectations of how to avoid triggering a false claims action under the new amendments. Specifically, such entities also need to evaluate their electronic billing systems to ensure that notifications are set up to alert for overpayments or duplicate payments, where possible. These entities also need to make sure that their agreements with all vendors which are contracted to submit claims to the Federal Government on behalf of such entities contain adequate representations and warranties reflecting these changes in the law.

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