

## FRAUD ENFORCEMENT AND RECOVERY ACT INCREASES THE SCOPE OF FALSE CLAIMS ACT LIABILITY

President Obama recently signed into law the Fraud Enforcement and Recovery Act of 2009 (FERA). Among other significant changes, FERA ushers in expansive modifications to the False Claims Act (FCA or Act)<sup>1</sup> that increase the potential for liability under the Act. With the increased number of contracts currently and potentially funded in whole or in part by the recently-passed American Recovery and Reinvestment Act of 2009,<sup>2</sup> FERA stands to significantly increase potential FCA exposure for government contractors at the federal, state, and local level, or companies who are otherwise reimbursed by third parties with US government funds.

### THE EXPANDED SCOPE OF FCA LIABILITY UNDER FERA

Section 4 of FERA is entitled “Clarifications to the False Claims Act to Reflect the Original Intent of the Law.” In an effort to bring harmony to the law in the face of recent cases that introduced uncertainty as to the Act’s scope,<sup>3</sup> Section 4 of FERA enacts several changes that expand FCA liability by relaxing the Act’s presentment requirement, broadening the range of property covered by the Act, and removing the element of intent formerly required for a finding of liability under the Act. Specifically, FERA “clarifies” that the FCA extends to false claims for government money or property without regard to (a) whether the claim was presented to a government employee or official, (b) whether the government has custody or control of the money or property, or (c) whether the claimant specifically intended to defraud the government.

FERA accomplishes these expansions by altering the grounds for liability and definitions of key terms in the FCA. As revised by FERA, the FCA may be enforced against any entity that “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval.”<sup>4</sup> This language amends former FCA § 3729(a)(1) by eliminating the requirement that a claim must be presented to an officer or employee of the government or a member of the US military to ground liability.<sup>5</sup> In addition, FERA prescribes FCA liability where a person “knowingly makes, uses,

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<sup>1</sup> 31 U.S.C. §§3729–3733.

<sup>2</sup> Pub. L. No. 111-5, 123 Stat.115 (Recovery Act).

<sup>3</sup> See, e.g., *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008); *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004); *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 562 F.3d 295 (4th Cir. 2009).

<sup>4</sup> 31 U.S.C. §3729(a)(1)(A). Unless otherwise noted, citations to the US Code include revisions as enacted by FERA.

<sup>5</sup> Former §3729(a)(1) provided: “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[.]”

or causes to be made or used, a false record or statement material to a false or fraudulent claim[.]”<sup>6</sup> This language amends former § 3729(a)(2) by eliminating the “to get” and “by the Government” language previously cited in *Allison Engine* as connoting an intent requirement,<sup>7</sup> and adding a materiality requirement to that section. The same materiality language was also added to former § 3729(a)(7).<sup>8</sup> FERA also eliminates the intent requirement of former § 3729(a)(4).<sup>9</sup> Materiality will be found wherever a contractor’s statement “ha[s] a natural tendency to influence, or [is] capable of influencing, the payment or receipt of money or property.”<sup>10</sup> Going forward, FCA liability can be predicated on any statement made by a contractor that is known to be false, regardless of whether the contractor intended that the government rely on the statement in payment of its claim.

As part of its expansion of FCA liability, FERA expands the concept of “reverse false claims.” A reverse false claim was previously typified by the situation where an entity used a false statement or record to avoid or decrease an obligation to pay money to the government in order to retain the funds. Under the new law, liability for a reverse false claim will exist wherever one “knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.”<sup>11</sup> In other words, a false statement or record is no longer required for liability to attach. In addition, FERA expands the definition of “obligation” giving rise to liability for reverse false claims to include duties arising from the retention of overpayment.<sup>12</sup> Thus, contractors and other recipients of

government funds must be alert to these obligations if the government makes an overpayment even in the absence of fraud to obtain the money.

FERA also amends the definition of “claim” to include “any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property...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” where “the United States Government provides or has provided any portion of the money or property [or] will reimburse such contractor, grantee, or other recipient for any portion of the money or property[.]”<sup>13</sup> Notably, the phrase “to advance a Government program or interest” is not defined in the law. The effect of this revision is to affirm *Allison Engine*’s overruling of *Totten* by establishing that the FCA does not require that a claim be “presented to an officer or employee of the government before liability can attach.”<sup>14</sup> FERA’s revised definition of “claim” also gives legislative effect to the Fourth Circuit Court of Appeals’ *Custer Battles* decision, which held that “[s]o long as ‘any portion’ of the claim is or will be funded by US money given to the grantee, the full claim satisfies the definition of claim as used in” the FCA.<sup>15</sup> FERA expands this definition even further by stating explicitly that liability under the FCA reaches claims for payment of funds over which the United States has neither title nor control as long as the funds are “to be spent or used on the Government’s behalf or to advance a Government program or interest.”<sup>16</sup> Unfortunately, FERA provides no definition for what it means “to advance a Government program or interest.”

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FERA stands as the culmination of effort by certain legislators, including Republican Senator Charles Grassley, to overturn certain court decisions that were seen as impairing the ability of qui tam relators and the federal

6 *Id.* §3729(a)(1)(B).

7 *Allison Engine*, 128 S. Ct. at 2128.

8 31 U.S.C. §§3729(a)(1)(B) and 3729(a)(1)(G). Former §3729(a)(2) read, “knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government[.]” Similarly, former §3729(a)(7) read, “knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government[.]”

9 *Id.* § 3729(a)(1)(D). Previously, §3729(a)(4) contained the following qualification: “intending to defraud the Government or willfully to conceal the property[.]”

10 *Id.* §3729(b)(4).

11 *Id.* §3729(a)(1)(G).

12 *See id.* §3729(b)(3).

13 *Id.* §3729(b)(2).

14 S. Rep. No. 111-10, at 10 (2009).

15 562 F.3d at 303.

16 31 U.S.C. § 3729(b)(2)(A)(ii).

government to bring cases under the FCA. While some comfort may be obtained from FERA's provision of a new level of certainty regarding the scope of FCA, contractors should also be wary of the increased possibilities of a FCA violation. The increased spending and contracting activity fostered by the Recovery Act, and the broader scope of FCA liability resulting from FERA's enactment and the possibility of even more expansion in the future<sup>17</sup> will only increase the potential FCA exposure for government contractors at all levels. Accordingly, federal, state, and local contractors should ensure that they have appropriate compliance systems in place to deal with the enhanced risks associated with a stepped up level of FCA enforcement.

*We hope that you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:*

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<sup>17</sup> See, e.g., False Claims Clarification Act, S. 458, 111th Cong. (2009); False Claims Act Corrections Act, H.R. 1788, 111th Cong (2009).