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Revamping The False Claims Act

Law360, New York (August 05, 2009) -- The new amendments to the federal False Claims Act [1] broaden the scope of parties potentially liable for treble damages, narrow available defenses and otherwise strengthen one of the government's most successful civil weapons in its fight against suspected fraud on the United States.

The amendments went into effect on May 20, 2009, when President Obama signed the Fraud Enforcement and Recovery Act of 2009 ("FERA").

Although Congress's stated goal in enacting FERA was to protect federal bailout money from fraud, the impact of the new amendments will be felt by every company doing business, either directly or indirectly, with the federal government.

History of the FCA from the Civil War to Allison Engine

The original FCA was enacted in 1863 during the Civil War as the Informer's Act (or Lincoln Law). President Lincoln convinced Congress to pass the law after numerous military suppliers were caught selling the Union Army sawdust instead of gunpowder and otherwise providing worthless military supplies.

The law, to this day, imposes liability on persons or entities that present false claims (i.e., demands for money) to the government. It also permits whistleblowers to file qui tam actions on behalf of the government in exchange for a bounty in the event of a monetary recovery.

During World War II, Congress grew tired of private parties racing to file qui tam actions after learning from public news sources that yet another military supplier had been criminally indicted for fraud. The FCA was thus amended in 1943 to restrict the role of whistleblowers to cases where the government was otherwise unaware of the fraudulent conduct precipitating the action.

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The government was also given the right to intervene in qui tam actions and the whistleblower's share of a monetary recovery was reduced. As a result of the 1943 amendments, qui tam litigation quieted down until the next significant amendments 40 years later.

The need for whistleblowers became apparent again by 1986, when the majority of the government's largest military contractors were again defending criminal charges of fraud. Congress thus attempted to resurrect the FCA by amending several of its provisions.

The statutory definition of the requisite intent, for instance, was expanded to reach defendants who submitted a false claim resulting from deliberate ignorance or recklessness as to the falsity of the claim.

In addition, the statute of limitations was lengthened to 10 years in the event of fraudulent concealment, the double damages provision was replaced with a treble damages provision, a provision prohibiting retaliation against whistleblowers was added and the bounty available to whistleblowers was increased.

FCA litigation flourished after the 1986 amendments, exceeding even Congress's expectations. The government has recovered more than $21 billion from FCA actions since 1986. Over two-thirds of those recoveries are from the health care industry alone, even though the original Lincoln Law and the amendments in 1943 and 1986 were reactions to dishonest military suppliers.

Despite its success in combating fraud in any industry where the government spends money, the sponsors of the FERA legislation believed that the "effectiveness of the FCA ha[d] recently been undermined by court decisions limiting the scope of the law."

One such judicial decision held that the FCA only reached false claims presented directly to the government. In the context of Medicaid fraud, for instance, courts had held that there could be no FCA liability because Medicaid providers submit claims to state Medicaid agencies, not to the federal government.[2]

Likewise, in United States ex rel. Totten v. Bombardier Corp., a case involving an alleged fraud committed against Amtrak, the D.C. Circuit held that there was no FCA liability because the claim was presented to Amtrak, a federal grantee, not to the federal government.[3]

The tide of case law limiting the reach of the FCA to claims presented directly to the government culminated with the Supreme Court's 2008 decision in Allison Engine v. United States ex rel. Sanders.[4]

In that case, the Supreme Court held that a defendant to an FCA action must have the specific intent to defraud the government.

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After Allison Engine, a subcontractor that knowingly submitted a false claim to a general contractor of the government could not be liable under the FCA absent a specific intent to defraud the government.

Underlying the Supreme Court's unanimous decision was a concern that "[r]ecognizing a cause of action under the FCA for fraud directed at private entities would threaten to transform the FCA into an all-purpose antifraud statute."

Allison Engine, among other things, insulated from liability defendants that did not know that the government provided funding to the entity allegedly defrauded.

FERA amended the FCA's seven distinct liability provisions in an effort to overturn Allison Engine, Totten and other judicial decisions that reined in the scope of the FCA. The new amendments also provide greater procedural tools for the government in prosecuting FCA claims and narrower procedural defenses.

FERA Amendments to Liability Provisions

The two most significant amendments to the FCA's liability provisions broaden its scope to capture fraud committed indirectly, as well as directly, on the government.

First, FERA replaces the statutory language interpreted by the Supreme Court in Allison Engine as requiring a specific intent to defraud with the less demanding requirement that a false statement be "material" to a false claim.

Congress also added a definition of "material," for the first time, enacting the lesser of the two materiality standards previously applied by the courts. "The term 'material' [now] means having a natural tendency to influence, or being capable of influencing, the payment or receipt of money or property."

These changes are expressly made retroactive to all FCA claims pending as of June 7, 2008 — the date of the Allison Engine decision. Defendants are likely to challenge the retroactivity of these amendments in the courts.

Second, the amendments eliminated the "presentment requirement," which provided that a false claim must be presented to "an officer or employee of the government."

The new definition of the term "claim" now imposes liability on any person that presents to any person or entity an allegedly false claim, i.e. a demand for money or property "spent or used on the government's behalf or to advance a Government program or interest."

Since the key phrase "to advance a Government program or interest" is undefined, courts will have to decide its meaning and scope. Moreover, liability likely exists irrespective of the defendant's awareness of the government's "interest" in the claim getting paid.

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It is now, however, more difficult than ever to know, given the government's recent outlay of federal bailout money into the private sector, when the government has an "interest" in a transaction, and thus when one has treble damages exposure.

Will liability extend to the many companies that have recently received federal bail-out money or to false claims presented to the recipients of such funds? It remains to be seen.

The Senate Judiciary Committee report accompanying the legislation makes it clear, however, that the amendments were necessary "to protect the Federal assistance and relief funds expended in response to our current economic crisis."[5]

In addition, the federal agency responsible for overseeing TARP funds, the Office of the Special Inspector General for the Troubled Assets Relief Program ("SIGTARP"), has promised to partner with other relevant law enforcement agencies, including the U.S. Department of Justice, to prevent, detect, and investigate cases of fraud involving TARP funds.[6]

SIGTARP's plan to have TARP recipients sign certifications regarding how TARP funds are spent is a likely source of potential FCA liability given the various certifications that have formed the basis of FCA liability in the healthcare industry.

Another important amendment expands the scope of liability under the "reverse false claim" provision of the FCA. Specifically, liability is now imposed on anyone who "knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the government."

The term "obligation" is defined for the first time, and expressly includes "the retention of an overpayment."

Although FERA does not expressly make this amendment retroactive, whistleblowers will likely argue that it imposes instant liability on anyone who is "knowing and improperly" retaining an "overpayment" from the government, even if that overpayment occurred years before FERA's enactment.

Notably, this liability provision does not require any false statement or claim; liability is simply imposed on anyone who "knowing and improperly" retains an "overpayment" or otherwise avoids an "obligation" to pay the government.

FERA Amendments to Procedural Provisions

The new amendments also provide greater procedural mechanisms for the government in prosecuting FCA claims. The amendments substantially enhance the ability of the DOJ to investigate alleged false claims by authorizing the Attorney General to delegate to DOJ attorneys the power to issue civil investigative demands ("CIDs") for testimony and documents.

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DOJ attorneys will no longer have to send every CID to the Attorney General for his or her personal approval. This change is expected to result in the DOJ issuing far more CIDs than it has in the past.

In addition, the amendments expressly permit the DOJ to share with whistleblowers documents received in response to a CID, obviating the DOJ's prior practice of seeking permission from a court before sharing such information.

FERA also expressly provides that when the government intervenes in a whistleblower action, its complaint-in-intervention "relates back" to the filing date of the whistleblower's complaint for purposes of the FCA's statute of limitations.

Historically, many FCA complaints remained under seal for years, without any notice of the claims or the action to the named defendants. This amendment overturns several court decisions that barred relation-back where defendants had no notice of the original complaint.[7]

Going forward, a government complaint-in-intervention will relate back as long as it "arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint."

This relation-back provision applies to both the original FCA claim filed under seal, as well as "any additional claims," such as common law claims, that the government asserts in its complaint-in-intervention. This amendment was expressly made retroactive to all FCA actions pending on the date of enactment, including actions pending under seal.

The prohibition against retaliation was also extended to protect whistleblowers that are "contractors" or "agents." Previously, the prohibition against retaliatory action was limited to "employees."

Finally, the amendments clarify that the FCA provision requiring whistleblowers to file their complaints under seal does not preclude the government or whistleblower from providing to any state or local government named as a co-plaintiff a copy of the complaint, any other pleading or the whistleblower's mandatory written disclosure of material evidence concerning the allegations in the complaint.

The treble damages provision and the whistleblower's share of a monetary recovery remain unchanged after the amendments.

Conclusion

The FERA amendments broaden the scope of conduct actionable under the FCA, make it easier for prosecuting parties to prove their claims, and immediately impact any company doing business, directly or indirectly, with the government.

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As was the case after the last substantial amendments to the FCA in 1986, there will likely be a surge of FCA filings in the near future. We may also see parallel changes to the state FCAs, on the books in 23 states and the District of Columbia, making those claims easier to prove as well.

The stakes of doing business, even in an indirect way, with the government or government-funded programs or “interests” have increased as a result of these new amendments. Companies should beware.

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The opinions expressed are those of the author and do not necessarily reflect the views of Portfolio Media, publisher of Law360.

[1] 31 U.S.C. § 3729 et seq.

[2] United States ex rel. Crews & Ill. v. NCS Healthcare of Ill. Inc., 460 F.3d 853, 856 n.1 (6th Cir. 2006).

[3] 380 F.3d 488 (D.C. Cir. 2004).

[4] 128 S. Ct. 2123 (2008).

[5] S. Rep. No. 111-10, at 10 (2009).

[6] SIGTARP, Initial Report to Congress (Feb. 6, 2009).

[7] See, e.g., United States v. Baylor Univ. Med. Ctr., 469 F.3d 263 (2d Cir. 2006).

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