New Federal Initiatives Project

FERA – 2009
Brings U.S. Broad New Government Enforcement Powers

By

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FERA – 2009 – BRINGS U.S. BROAD NEW GOVERNMENT ENFORCEMENT POWERS

As the economic meltdown of 2008 wound down, 2009 brought a rapid legislative response in the enforcement arena. Rocketing its way through Congress, the Fraud Enforcement and Recovery Act of 2009[1] (dubbed "FERA") authorizes substantial new funding to the Department of Justice and other federal enforcement agencies for investigating and prosecuting offenses. In so doing, FERA makes significant substantive and procedural changes to existing federal fraud laws. As discussed below, these changes broaden the scope of various enforcement statutes, while attempting to ease the Government's investigative and prosecution burdens in the litigation of such cases.

While it will take quite a while for these new powers to play out and be tested through the crucible of our criminal justice system, one thing is for sure: FERA represents a heightened exposure to potential criminal liability for many businesses and individuals. We outline the new statute in the categories set out below.

I. FERA reclassifies private mortgage lenders as "financial institutions" for the purposes of federal fraud laws.

Prior to FERA, private mortgage lenders operated largely outside the scope of federal fraud statutes, but Section 2 of FERA redefines the term "financial institution" to include independent mortgage lending businesses. This subjects these entities to liability under criminal statutes, such as the federal bank fraud statute.[2] The new definition permits harsher penalties and lengthens the statute of limitations for charges under criminal statutes, such as the federal wire fraud statute.[3]

II. FERA expands the federal fraud statute to include frauds involving federal economic stimulus funds and the government's purchase of troubled assets.

FERA amends Section 1031(a) of the U.S. Code, title 18, by explicitly extending its protections to federally-granted stimulus funds, making it a federal crime for government contractors to defraud the government of funds allocated by stimulus plans.[4] It also applies Section 10319(a) to the government's purchases of troubled assets. Penalties under this statute are severe and may include millions of dollars in fines and up to ten years imprisonment.[5] Thus, white collar criminal defendants now face an enhanced penalty scheme for frauds involving federal assistance programs.

III. FERA makes it a violation of the securities fraud law to engage in frauds of options and commodities.

FERA expands the law governing fraud in connection with securities[6] to cover frauds relating to options and futures in commodities.[7] A securities fraud conviction carries more severe penalties than other fraud laws, and may include unspecified fines, up to twenty-five years imprisonment, or both.[8] FERA exposes those who engage in frauds involving options and futures to prosecution under the securities fraud statute.

IV. FERA clarifies that the "proceeds" of unlawful activity include the gross receipts of the activity and not just its profits.

Prior to FERA, the Supreme Court interpreted the criminal money laundering statute, which prohibits transactions that involve "proceeds" of unlawful activities, as applicable only to the net income of such activities.[9] This made prosecutions impossible if the unlawful acts were not profitable.[10] FERA changes the landscape by defining "proceeds" as "property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity," and strips money laundering defendants of a potential defense.[11]

V. Section 4 of FERA extends the reach of the False Claims Act and relaxes the burdens borne by the government in pursuing false claims.

FERA substantially amends the False Claims Act (FCA),[12] a powerful piece of anti-fraud legislation that allows private citizens to sue parties for defrauding the government and receive a percentage of the damages awarded.[13] These revisions increase the risk of liability for businesses and individuals that engage in transactions with the government or receive federal funds.[14]

Before FERA was enacted, a party only faced liability for making a false statement if it intended to defraud the government itself, not another entity, such as a prime contractor.[15] Now, FERA imposes liability on those who submit false claims for federal dollars, without regard to they are made.[16] FERA also expands the definition of a "claim" to include requests and demands for money to any recipient of federal funds so long as the money is "to be spent or used on the Government's behalf or to advance a Government program or interest."[17] As a result, FERA's lack of clarity as to what constitutes advancement of the government's interest[18] may allow prosecutors to charge FCA violations where only a minimal nexus to the government exists.[19]

FERA broadens the FCA to encompass not only affirmative fraudulent acts, such as making false statements,[20] but also passive acts, such as the knowing retention of overpayments.[21]

FERA relaxes the government's investigatory and prosecutorial burdens in FCA cases by modifying the procedure for obtaining civil investigative demands (CIDs)[22] As amended, the FCA permits the Attorney General to delegate authorization of a prosecutor's CID request to lower level officials in the Department of Justice, without specifying how far down the ladder he or she may go.[23] FERA further facilitates FCA prosecutions by relaxing prohibitions against the sharing of the information gathered through CIDs.[24] The Attorney General may now share information with state governments, agencies, and *qui tam* relators where doing so is "necessary" to the investigation.[25] In sum, FERA's changes in the FCA expose potential defendants to heightened potential liability.

Conclusion

The white collar criminal defense bar will soon feel FERA's impact. It amends key definitions and federal criminal laws by broadening their scope. This exposes parties engaged in business with the government to new risks of federal criminal liability. In light of the new risks of liability imposed by FERA, companies and individuals would be well served by being on heightened alert as to exactly how their business is being carried out.[26]

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[1]Pub. 2. 111-21, 123 Stat 1617 (2009) ("FERA").
[2]FERA § 2(a); 18 U.S.C. § 1344 (2008).
[3]18 U.S.C. § 1343 (2008).
[4]FERA § 2(d).
[5]18 U.S.C. 1031(a) (2008).
[6]18 U.S.C. 1031(a), 1348 (2008).

[7] FERA § 2(e).
[8]18 U.S.C. § 1348.
[9]*United States v. Santos*, 128 S.Ct. 2020, 2039-44 (2008).
[10]Howard Goldstein, *Fraud Enforcement And Recovery Act Of 2009: Congress Amends Money Laundering and Criminal Fraud Statutes to Expand Their Scope and Penalties* (May 28, 2009), http://www.mondaq.com/article.asp?articleid=80372.
[11]FERA § 2(f)(1).
[12]31 U.S.C. §§ 3729–33. For a redline version showing FERA's amendments to the FCA, see http://www.friedfrank.com/files/QTam/S.%20386%20Redline.pdf.
[13]Marcia Coyle, *Fears Rise Over New Fraud Law*, NAT'L L. J. (May 25, 2009), *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202430941952.
[14]*Id*.
[15]*Allison Engine Co., Inc. v. United States ex rel. Sanders*, 128 S.Ct. 2123, 2129-31 (2008).
[16]*President Obama Signs Legislation Significantly Expanding the Scope of the False Claims Act* (May 26, 2009), http://www.gibsondunn.com/Publications/Pages/PresidentObamaLegislationExpandsScope-FalseClaimsAct.aspx.
[17]FERA § 4(b)(2)(A)(ii).
[18]*President Obama Signs Legislation Significantly Expanding the Scope of the False Claims Act* (May 26, 2009), http://www.gibsondunn.com/Publications/Pages/PresidentObamaLegislationExpandsScope-FalseClaimsAct.aspx.
[19]Additionally, the government no longer must prove it actually had title to or possession of the money or property fraudulently claimed. FERA § 4(b)(2)(A).
[20]*President Obama Signs Legislation Significantly Expanding the Scope of the False Claims Act* (May 26, 2009), http://www.gibsondunn.com/Publications/Pages/PresidentObamaLegislationExpandsScope-FalseClaimsAct.aspx.
[21]FERA also expands the risk of an employer's liability by extending whistleblower protections. *See* FERA § 4(d); Marcia Coyle, *Fears Rise Over New Fraud Law*, NAT'L L. J. (May 25, 2009), *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202430941952.
[22]CIDs can include the issuance of subpoenas and compel deposition testimony and other materials pertaining to an investigation. *Id*.
[23]FERA § 4(c). Previously, a CID request could only be granted with personal approval from the Attorney General. Marcia Coyle, *Fears Rise Over New Fraud Law*, NAT'L L. J. (May 25, 2009), *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202430941952.
[24]*Id*.
[25]Moreover, FERA allows the government to tack on claims to FCA suits after the applicable statute of limitations has expired by providing that the additional claims relate back to the initial filing of the suit. FERA § 4(b).
[26]Richard O. Duval et al., *President Obama Signs Landmark Anti-Fraud Bill Into Law* (June 3, 2009), http://www.hklaw.com/id24660/PublicationId2664/ReturnId31/contentid54180/.

Related Links:

"The Need for Increased Fraud Enforcement in the Wake of the Economic Downturn"
Senate Judiciary Committee Hearing, February 11, 2009:
http://judiciary.senate.gov/hearings/hearing.cfm?id=3651

"New Federal Fraud Law Implements Key Changes to False Claims Act," by Mark R. Troy, Counsel's Advisory, Washington Legal Foundation: http://www.wlf.org/Upload/legalstudies/counselsadvisory/060509Troy_CA.pdf

"The Fraud Enforcement and Recovery Act (S. 386): Criminalizing Our Way out of the Financial Crisis," By Brian W. Walsh and Tiffany M. Joslyn: http://www.heritage.org/Research/LegalIssues/wm2322.cfm

"Congress' Hammer: Another Criminal Law," By Brian W. Walsh and Tiffany M. Joslyn, RealClearPolitics: http://www.heritage.org/Press/Commentary/ed030409c.cfm

"Correcting False Claims about the New False Claims Act Legislation," By Hans von Spakovsky and Brian Walsh: http://www.heritage.org/Research/LegalIssues/lm0042.cfm