

To: Our Clients and Friends

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Federal False Claims Act Amended to Significantly Expand Liability

On May 20, 2009, President Obama signed legislation containing a number of significant amendments to the federal False Claims Act ("FCA"), the statute which permits private citizens to bring lawsuits on behalf of the United States against persons or entities accused of defrauding the government and keep a portion of any recovery. These amendments, which are part of the Fraud Enforcement and Recovery Act of 2009 ("FERA"), substantially expand the range of conduct subject to liability under the FCA, provide greater protection for "whistleblowers," and remove certain procedural hurdles that the government and whistleblowers have faced in pursuing FCA investigations and actions, as discussed further below.

Expanded Liability for Potential Defendants

The amendments expand the scope of FCA liability for potential defendants in several key respects:

Parties that indirectly receive government funds may now be liable for FCA violations, even if they never directly present a claim to the government. Prior to FERA, only parties who directly presented a claim for payment to an officer or employee of the federal government could be liable for violating the FCA. Under the amended statute's expanded definition of "claim," however, even claims that are not presented directly to the government—such as those made to a federal contractor or to a third-party disbursing money on the government's behalf—may subject a party to FCA liability.

A party may now be liable under the FCA for knowingly retaining an overpayment, even if the overpayment was innocently received. Under FERA, a party now violates the FCA if it "knowingly conceals, or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government." The term "obligation" is now defined to specifically include "retention from overpayment." This means that a company faces

potential FCA liability if it unintentionally receives overpayments, yet knowingly fails to return them to the government.

Prohibited false statements now include any false statement that is “material to” an obligation to pay the government, and no intent to defraud is required. FERA amends the FCA to prohibit making or using a false statement or record that is “material to” an obligation to pay or transmit money to the government—it is no longer required that the record or statement be used to conceal or decrease an obligation. Moreover, the amendments reverse the Supreme Court’s decision in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S.Ct. 2123 (2008), holding that proof of intent to defraud is an element of a false statement claim. Rather, liability now attaches merely so long as a false statement is “material to a false or fraudulent claim.”

Conspiracy liability now includes conspiring to violate any prohibition under the FCA. Under the former version of the FCA, conspiracy liability was limited to conspiring to submit false claims. FERA amends the FCA to extend liability to include any conspiracies to violate any of the other prohibitions under the FCA, such as making false statements or reverse false claims (*i.e.*, knowingly retaining an overpayment).

Expanded Protection for “Whistleblowers”

Although the FCA currently protects “whistleblowers”—employees of the company alleged to have defrauded the government who initiate or otherwise participate in an FCA investigation or action—FERA expands who qualifies for protection and also increases the scope of that protection, as follows:

Protection extended to contractors and agents. Whistleblowers have traditionally received protection from retaliatory actions such as demotion or firing taken by their employers as a result of reporting or participating in an FCA investigation or action. However, under the prior version of the FCA, only actual employees of the company alleged to have defrauded the government were protected. Now, under FERA, the FCA’s anti-retaliation provisions extend to contractors and agents of the company as well.

Protection extended to efforts to stop FCA violations. Formerly, only actions taken in connection with an FCA investigation or action were protected, such as initiating, assisting with, or testifying in an FCA case. The recent amendments, however, provide that any lawful effort to stop one or more violations of the FCA is also protected from retaliation.

Amendments to Litigation Procedure

Finally, the amendments include several procedural revisions to the FCA, including:

Relation back of government’s complaint. If the government intervenes in an FCA action and files its own complaint, or amends a relator’s complaint, for statute of limitation purposes, the government’s complaint will now relate back to the date of the original complaint. This amendment provides the government with greater leeway in filing its own

complaint or amending a relator's complaint, but could also dramatically undermine a defendant's ability to defend itself. However, to relate back to the earlier filing date, the government's claims must arise out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the relator's prior complaint.

Expansion of civil investigative demand authority. Prior to FERA, FCA investigations were often hampered because only the Attorney General of the United States had authority to issue civil investigative demands to investigate potential FCA violations. The amendments remove this problem by allowing the Attorney General to delegate his authority to lower level Justice Department officials.

Expansion of government disclosure rights. The FCA will now permit materials obtained by the Attorney General during an FCA investigation to be disclosed to third-parties such as the relator and his or her counsel as well as "consultants and experts." It also permits the government to serve sealed *qui tam* complaints and other information on state and local law enforcement authorities so that they can also investigate the case.

Conclusion

Last week's amendments represent the most sweeping expansion of the FCA in over 20 years. They stand to impact not only those companies traditionally susceptible to FCA claims (*e.g.*, participants in federal health care programs, defense contractors, etc.) by substantially increasing the range of conduct subject to liability, but also subcontractors and other entities who indirectly receive government funds which have not previously been in the government's (or plaintiff's attorneys) crosshairs. The amendments thus provide a good opportunity for companies to reassess their potential FCA liability, as well as their current compliance policies and procedures to ensure they are taking appropriate steps to prevent or detect conduct that might subject them to liability, such as their handling of overpayments. With the amendments effective immediately from the date of FERA's enactment on May 20, 2009, and some provisions retroactive to cases pending on that date, companies are encouraged to undertake such self-evaluations sooner rather than later.

For more information about this topic, please speak to your Bryan Cave contact or call:

R. Joseph Burby
Atlanta, Georgia
(404) 572-6815
joey.burby@bryancave.com

Edwin M. Cook
Atlanta, Georgia
(404) 572-4535
edwin.cook@bryancave.com