Criminal Defense and Investigations

Fraud Enforcement and Recovery Act of 2009

SUMMARY
On May 20, 2009, President Obama signed into law the Fraud Enforcement and Recovery Act of 2009 ("FERA"), a statute intended to strengthen the federal government’s ability to investigate and prosecute mortgage and financial fraud and money laundering. FERA, a multi-faceted bill, among other things:

- amends the federal money laundering statutes to clarify that money laundering applies to “gross receipts” of criminal activity, not just the “profits” of crimes;
- significantly expands the scope of the False Claims Act ("FCA") by (a) eliminating the requirement that the plaintiff prove that the defendant intended to defraud the federal government and instead providing that liability extends to a false claim presented to any party, as long as defendant’s false statement was “material” to the payment of government funds; (b) extending liability to false claims made against money or property held or administered by the United States but to which it does not hold legal title; and (c) extending liability to “reverse” false claims, where the defendant knowingly conceals or fails to return overpayments to the government.
- extends the reach of several federal bank fraud statutes to cover “mortgage lending businesses”;
- amends the major fraud statute to provide further protection for funds expended under the Troubled Asset Relief Program ("TARP") and the economic stimulus package;
- amends the federal securities statute to cover fraud schemes involving commodities futures and options;
- authorizes the provision of $266 million per year over the next two fiscal years to various federal agencies to investigate and prosecute mortgage fraud, securities and commodities fraud and other frauds involving federal economic assistance; and
- creates an independent commission to examine the causes of the financial crisis.

This legislation reflects a more aggressive approach by the U.S. Congress and the Obama administration with respect to white-collar crime and securities enforcement.
OVERVIEW

Money Laundering Statutes Are Not Limited to Criminal “Profits”
FERA amends the federal money laundering statutes (18 U.S.C. §§ 1956, 1957) to overrule legislatively the decision of the Supreme Court in *United States v. Santos*, 128 S. Ct. 2020 (2008). In that decision, the Supreme Court held that the term “proceeds” in 18 U.S.C. § 1956 was limited to cover only the “profits” of crimes. To eliminate the ability of a defendant to escape liability by showing that no profits were earned from the alleged crime, “proceeds” is now defined to mean “any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.”

In enacting this amendment, Congress set forth a specific approval process to address its concern that prosecutors could “merge” or transform one crime into two by simply adding money laundering charges (and corresponding penalties) for financial transactions that constitute an essential part of the predicate offense:

> It is the sense of the Congress that no prosecution [under the federal money laundering statutes] should be undertaken in combination with the prosecution of any other offense, without prior approval of the Attorney General, the Deputy Attorney General, the Assistant Attorney General in charge of the Criminal Division, a Deputy Assistant Attorney General in the Criminal Division, or the relevant United States Attorney, if the conduct to be charged as “specified unlawful activity” in connection with the [money laundering] offense . . . is so closely connected with the conduct to be charged as the other offense that there is no clear delineation between the two offenses.

FERA requires the Attorney General to report to the House and Senate Committees on the Judiciary annually for the next five years on the Department of Justice’s (“DOJ”) efforts “to ensure that the review and approval process [set forth above] takes place in all appropriate cases.”

Amendments to the False Claims Act
Many of FERA’s amendments to the FCA (18 U.S.C. § 1329 et seq.) were similarly enacted to overturn federal court decisions that had significantly limited the scope of the FCA. The key FCA amendments in FERA include:

Elimination of the Intent Requirement. FERA amends the FCA to eliminate the requirement that the plaintiff prove that the defendant intended to defraud the federal government, and to expressly cover any person who knowingly makes a false claim to “a contractor, grantee, or other recipient,” if the money or property sought by the claim is intended “to be spent or used on the Government’s behalf or to advance a Government program or interest.” This provision permits the prosecution of false claims submitted to a private entity, as long as any part of the false claim is paid by the government.

This amendment was enacted in direct response to the Supreme Court’s unanimous decision in *Allison Engine Co. v. U.S. ex rel. Sanders*, 128 S. Ct. 2123 (2008), in which the Supreme Court held that the

Criminal Defense and Investigations
June 1, 2009
FCA required proof that the false claim was designed “to get” funds or property “paid or approved by the Government.” In *Allison Engine*, the Supreme Court held that a subcontractor that built ships for the Navy could not be liable under the FCA where the intent was to defraud the prime subcontractor with no evidence of a specific intent to defraud the federal government.

FERA provides that this particular amendment applies retroactively to pending FCA claims made on or after June 7, 2008—two days prior to the *Allison Engine* decision.

**Materiality Requirement.** The FCA now also requires plaintiffs to show that the defendant’s false statement was “material” to the payment of government funds. “Material” is defined as “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.”

**Liability Extended to Funds Held In Trust by Government.** Liability under the FCA now extends to false claims made against money or property that the United States administers or holds in trust but does not legally hold title to. This amendment overrules *United States ex rel. DRC, Inc. v. Custer Battles*, 376 F. Supp. 2d 617 (E.D. Va. 2005), in which the Court found that a defendant was not liable for false claims submitted to United States officials administering the assets of an Iraqi fund.

**Liability for Overpayments.** FCA liability now applies to “reverse” false claims—where the defendant “knowingly and improperly” conceals or fails to return overpayments by the government.

**Other FCA Amendments.** The FCA is otherwise amended, in part: (a) to extend conspiracy liability under the FCA to include any conspiracy to commit a violation of any substantive section of the statute; (b) to provide that the government’s complaint or amendment to a relator’s complaint relates back to the filing date of the original complaint for statute of limitations purposes to the extent it arises out of the same conduct, transactions or occurrences alleged in the prior complaint; (c) to provide that information obtained by the government through civil investigative demands may be shared with a *qui tam* relator to the extent “it is necessary as part of any false claims act investigation,” as well as other interested federal agencies; and (d) to increase the FCA anti-retaliation protections afforded to false claim whistleblowers and expand those protections to cover a “contractor, or agent” in addition to an employee.

**Federal Bank Fraud Crimes Are Amended To Cover “Mortgage Lending Businesses”**
FERA expands the definition of “financial institution” in the criminal code (18 U.S.C. § 20) to include “a mortgage lending business” as one type of financial institution. “Mortgage lending business” is defined as “an organization which finances or refinances any debt secured by an interest in real estate, including private mortgage companies and any subsidiaries of such organizations, and whose activities affect interstate or foreign commerce.” This expanded definition permits the federal government to prosecute mortgage fraud involving private mortgage institutions under the criminal statutes affecting “financial institutions.” See 18 U.S.C. § 3293(1)-(3) (listing of financial institution offenses). Those statutes can
provide for stronger penalties (up to 30 years) and a ten-year statute of limitations rather than the five-year statute of limitations applicable to mail and wire fraud statutes.

FERA also amends the false loan application statute (18 U.S.C. § 1014) to make it a crime to make a materially false statement or to willfully overvalue a property in order to influence any action by a mortgage lending business. Previously, the statute only covered federally-regulated institutions.

Amendment of Major Fraud Statute to Protect “Bailout” Funds
The major fraud statute (18 U.S.C. § 1031) is amended to include fraud associated with TARP funds or “an economic stimulus, recovery or rescue plan provided by the Government, or the Government’s purchase of any troubled asset as defined in the Emergency Economic Stabilization Act of 2008.” This type of fraud also could be prosecuted under the mail and fraud statutes. (18 U.S.C. §§ 1341, 1343.)

Inclusion of Commodity Futures and Options in Anti-Fraud Statutes
The federal securities fraud statute (18 U.S.C. § 1348) is amended to cover fraud schemes involving options and futures trading in commodities.

Funding of Financial Investigations by Federal Agencies
FERA authorizes the provision of $266 million in funding for each of the next two fiscal years for investigations, prosecutions and civil and administrative proceedings for various federal agencies. Specifically, FERA allocates $165 million to the Attorney General (including the Federal Bureau of Investigation, the U.S. Attorney’s Offices, and the Criminal, Civil and Tax Divisions of the DOJ); $30 million to the Postal Inspection Service of the U.S. Postal Service; $30 million to the Inspector General of the Department of Housing and Urban Development; $20 million to the Secret Service; and $21 million to the U.S. Securities and Exchange Commission.

Creation of Financial Crisis Inquiry Commission
FERA establishes a Financial Crisis Inquiry Commission to examine (a) “the causes of the current financial and economic crisis in the United States”; and (b) “the causes of the collapse of each major financial institution that failed” or would have failed but for the receipt of federal assistance during the period of August 2007 to April 2009.

The Commission will consist of ten members, six appointed by Congressional Democrats and four by Congressional Republicans. No person who is a government official or employee can serve as a member.

The Commission will have the authority to subpoena witnesses and documents, hold hearings and take testimony. The Commission is authorized to obtain from any federal agency information related to its inquiry. FERA specifically provides that “[i]t is the sense of the Congress that the Commission should seek testimony or information from principals and other representatives of government agencies and
private entities that were significant participants in the domestic and global financial and housing markets during the time period examined by the Commission.

The Commission is required to submit a report to Congress and the President by December 15, 2010 containing the findings and conclusions of its investigation, and must refer any violations of the law to the appropriate federal or state authorities.

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