Converging Events Signal a Changing Landscape in False Claims Act and Whistle-blower Litigation and Investigations

In the last year, several developments have converged to create a more aggressive fraud enforcement environment for government contractors and other recipients of federal and state funds. Against the backdrop of dramatically increased government spending designed to address the country's financial crisis, Congress has made amendments to the federal False Claims Act that lower the barriers to successful FCA claims by whistle-blowers and the government. Moreover, Congress and the executive branch have heightened their focus on government oversight and enforcement relating to fraud and abuse in government funded contracts and programs.

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Companies that are awarded government contracts or receive other funding from federal and state agencies are facing a more aggressive fraud enforcement environment as a result of a number of converging events. This is particularly true in several areas: the provision of health care products and services, defense and homeland security contracts, exploration and development of energy and other natural resources, and the financial services industries. Over the last year, Congress has made it easier for a growing whistle-blowers' bar to successfully sue recipients of federal funds, and regulators simultaneously are increasing their enforcement efforts. Important developments in this arena include the following:

- amendments to the federal False Claims Act (FCA), 31 U.S.C. 3729 et seq., which make it easier for whistle-blowers and the government to bring successful FCA claims (these amendments may be supplemented by further proposed legislative changes currently pending before Congress);
- dramatic increases in government funds flowing to corporate organizations via both the American Recovery and Reinvestment Act of 2009 (the economic stimulus package) and the Emergency Economic Stabilization Act of 2008 (the "bailout" of the financial services industry);
- a major increase in the emphasis on the part of both the executive branch and Congress on government oversight and enforcement relating to fraud and abuse in government funded contracts and programs; and
- additional legislative protection provided to whistle-blowers from the government as well as the private sector.

Amendments to the False Claims Act

The FCA provides the Department of Justice (DOJ) and whistle-blowers the right to bring suit in response to "false or fraudulent claims" to the government.[1] 31 U.S.C. § 3729 et seq. The statute was originally enacted in 1863 to target war profiteers who defrauded the Union Army during the Civil War. Concerned that the statute had fallen into disuse, in 1986 Congress amended the statute to increase damages from double to treble and to make the FCA more hospitable to whistle-blowers' claims. Since 1986, the federal

government has embraced the FCA as its weapon of choice in combating fraud and recovered more than $22 billion, including a total of at least $1 billion per year recovered in eight of the last nine years. The pace of recoveries under the FCA has continued to increase over time, with 2009 seeing significant amounts.

For example, on Sept. 2, 2009, DOJ announced that it had reached a global settlement of $2.3 billion with Pfizer Inc. over allegations of off-label marketing of various drugs. Of that total, $1 billion was allocated for settling numerous lawsuits brought by whistle-blowers under the FCA—the largest civil fraud settlement against a pharmaceutical company to date. Moreover, in January 2009, Eli Lilly and Company settled several FCA lawsuits for a total of $800 million. Such large FCA enforcement recoveries are not limited to the health care industry. In 2009, for example, DOJ entered into settlements with NetApp Inc. and NetApp U.S. Public Sector Inc., and the Boeing Company of $128 million and $25 million, respectively.[2]

Although the FCA has proven a potent weapon in fighting fraud, certain members of Congress believed that courts had improperly constrained the FCA in a manner inconsistent with the 1986 amendments. For instance, Sen. Charles Grassley (R-Iowa) argued that these decisions improperly "limited the applicability and the reach of the [FCA], cutting off many worthy cases from ever going forward." 155 CONG. REC. 32 (daily ed. Feb. 24, 2009). In response to these concerns, Congress moved to strengthen the False Claims Act by adding § 4 to the Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, 123 Stat. 1617, which became law on May 20, 2009. Among other changes, FERA seeks to:

- establish clear liability for fraudulent claims submitted to government contractors and grantees;
- create liability for certain attempts to avoid repayment of overpayments, including improper retention of Medicare and Medicaid funds; and
- make certain procedural changes, including expansion of the government's ability to use the Civil Investigative Demand process to gather evidence.

Clarification that the FCA Covers Claims Made to Government Contractors and Grantees

As outlined in the Senate Judiciary Committee's report accompanying S. 386, FERA aims to overturn the Supreme Court's interpretation of the FCA in *Allison Engine Co. Inc. v. United States ex rel. Sanders*, 128 S. Ct. 2123, 2128–31 (2008), that the FCA did not establish liability for certain false or fraudulent claims made to government contractors and grantees, as opposed to claims made directly to the government. S. Rep. No. 111-10, at 10–12 (2009). FERA seeks to establish clear liability for false or fraudulent claims submitted to government contractors and grantees "if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest." FERA § 4(a)(2). In making these changes, Congress also sought to overturn the D.C. Circuit's ruling in *United States ex rel. Totten v. Bombardier Corporation*, 380 F.3d 488, 490–92 (D.C. Cir. 2004), that 31 U.S.C. § 3729(a)(1) requires that a false claim be presented directly to the federal government, as opposed to a government grantee such as Amtrak (in that case) or, in a different context, a state's Medicaid programs. S. Rep. No. 111-10, at 10–12.[3]

FERA further clarifies that conspiracy liability under 31 U.S.C. § 3729(a)(3) may be premised on any of the FCA's substantive provisions in § 3729(a). Before FERA was passed, the text of 31 U.S.C. § 3729(a)(3) did not explicitly cover all of the FCA's substantive liability provisions. This change overturns decisions in cases such as *United States ex rel. Huangyan Import & Export Corp. v. Nature's Farm Products Inc.*, 370 F. Supp. 2d 993, 1004–05 (N.D. Cal. 2005), which found that § 3729(a)(3) did not reach conspiracies to violate § 3729(a)(7). S. Rep. No. 111-10, at 13.

In order to effectuate these changes, § 4(a)(1) of FERA revises the substantive liability provisions of 31 U.S.C. §§ 3729(a)(1)–(3) as follows:

> (~~1~~**A**) 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;
>
> (~~2~~**B**) knowingly makes, uses, or causes to be made or used, a false record or statement **material** to ~~get~~ a false or fraudulent claim ~~paid or approved by the Government~~;
>
> (~~3~~**C**) conspires to **commit a violation of subparagraph (A), (B), (D), (E), (F), or (G)** ~~defraud the Government by getting a false or fraudulent claim allowed or paid~~;[4]

The exact reach of these changes will depend on the outcome of future litigation, but it appears clear that the amendments will greatly expand the reach of the False Claims Act into areas once thought outside its purview.

Expansion of the Definition of "Claim"

The statute also expands the definition of a "claim," reversing a district court's ruling in *United States ex rel. DRC Inc. v. Custer Battles LLC*, 376 F. Supp. 2d 617, 646 (E.D. Va. 2005).[5] In that case, the district court held that a defense contractor who had defrauded the government in connection with work in Iraq fell outside of the FCA's scope, because the money lost was Iraqi money that was under the control of the U.S. government. The amendments would allow FCA suits on claims made to the federal government for money or property to which the United States does not have title but to which the U.S. government does have control, again expanding the reach of the FCA into largely new territory.[6]

Expansion of "Reverse False Claims" Liability to Include Retention of Overpayments

In addition to prohibiting the submission of false claims to trigger payment by the government, the FCA includes

a "reverse false claims" provision, 31 U.S.C. § 3729(a)(7), *recodified at* 31 U.S.C. § 3729(a)(1)(G)—that focuses on fraud in reducing liability to pay money to the government. Before FERA was enacted, the reverse false claims provision provided liability for using a *false record* to decrease an obligation owed to the government. FERA broadened § 3729(a)(7) to cover not only the use of false records to decrease an obligation to pay the government but also the actions of a party who "*knowingly conceals* or *knowingly and improperly avoids* or *decreases* an obligation to pay" the government. With the passage of FERA, use of a false record is not required to show liability: a "knowing" and "improper" retention of government funds will also trigger liability. FERA also added a definition of "obligation" to the FCA for the first time; the new definition includes, among other things, duties arising from contractual, grantor-grantee, or licensor-licensee relationships as well as duties arising from *the retention of overpayments*. *See* FERA § 4(a)(2). These revisions to the reverse false claims provision create the prospect of significant new liability, but Congress added a potential defense: the requirement that the avoidance of the obligation must be "improper," which is not defined in the statute and will require judicial interpretation.

Addition of Lower Applicable Materiality Requirement

Prior to the enactment of FERA, there had been debate in the case law regarding whether the FCA included an implicit materiality requirement and, if so, what the standard for determining materiality should be. The broader materiality standard employed by most courts asked whether the claim was "capable of influencing" or had "a natural tendency to influence" the government's decision about payment, as opposed to the "outcome materiality" test that asked whether the government *actually* relied on the information. FERA's revised language adds an explicit materiality requirement to 31 U.S.C. §§ 3729(a)(2) and (a)(7) and defines "materiality" as "having a natural tendency to influence, or be capable of influencing, the receipt of money or property." FERA § 4(a)(2). This change codifies the broader materiality standard that asks whether the claim "could have influenced" the government's decision with respect to payment.

Procedural Amendments

In addition to making substantive changes to the liability sections of the False Claims Act, FERA includes a number of procedural revisions to the statute:

- expanded use of Civil Investigative Demands (CIDs);
- relation back to the date of a relator's complaint for a government complaint in intervention; and
- permission for federal prosecutors and relators to serve the sealed complaint on state and local authorities.

FERA §§ 4(b), (c), & (e). The most significant of these procedural amendments is the provision that permits the U.S. attorney general to delegate authority to other agencies to issue CIDs, which previously had been vested in the attorney general's office. FERA § 4(c). This change is likely to expand the use of CIDs to gather not only documents but also testimony under oath during pre-intervention investigations. FERA also permits the government to share information gained from a CID with relators if doing so is "necessary as part of any False Claims Act investigation," and to share information with federal, state, and local agencies in the course of an investigation. *Id*.

In addition, FERA permits the government to intervene in a case and to file its own complaint or amend a relator's complaint, with the pleading deemed to relate back to the filing date of the original complaint if it arises from the same "conduct, transactions, or occurrences set forth, or attempted to be set forth... ." FERA § 4(b). This revision obviously will limit the viability of certain arguments involving the statute of limitations when the government intervenes. Finally, FERA provides that the standard seal imposed on FCA cases does not preclude the federal government or relator from sharing the complaint, any other pleadings, or the written disclosure with any state or local government entity named as a co-plaintiff. FERA § 4(e).

Effective Date

FERA applies the new procedural sections—relation back to the date of complaints in intervention, modification of CID procedures, and service on state or local authorities—to all cases pending on the date the statute was enacted. FERA § 4(f)(2). The application of FERA's revisions to the FCA's substantive liability provisions is more complex. The statute applies prospectively to "conduct on or after the date of enactment [May 20, 2009]," with the exception of the amendment to 31 U.S.C. § 3729(a)(2), which applies "as if enacted on June 7, 2008," two days before *Allison Engine* was decided. The legislation provides that the retroactive revision to § 3729(a)(2) shall apply to all "claims under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after that date." FERA § 4(f)(1). Confusion already has arisen as to how courts should interpret this provision.[7]

Congress clearly intended to eliminate defenses based on the ruling in *Allison Engine* to some extent, but the precise application of the retroactive effective date is not clear. Relators and the government are likely to argue that all conduct prior to the May 20, 2009, date of FERA's enactment would be excluded from an *Allison Engine* defense. Given the arguably punitive nature of the FCA, constitutional challenges to retroactive application based on the *Ex Post Facto* and Due Process clauses of the U.S. Constitution have already begun. *See, e.g., United States v. Science Applications Int'l Corp.*, No. 04-1543(RWR), 2009 WL 2929250, at *14 n.10 (D.D.C. Sept. 14, 2009) (noting defendant's argument that retroactive application of FERA would violate *Ex Post Facto* and Due Process clauses). Further complicating matters is the fact that the revision to remove the requirement of presentment to "an officer or employee of the United States Government" previously found in § 3729(a)(1) is not applied retroactively; therefore, the type of defense raised by *Allison Engine* would appear to remain in place for conduct prior to May 20, 2009, in cases involving claims under § 3729(a)(1).

Regardless of whether FERA may be applied retroactively, the amendments have already begun to have an impact on the resolution of FCA cases. Courts have looked to FERA to assist them in interpreting congressional intent regarding pre-FERA language of the FCA. For example, in *United States ex rel. Longhi v. Lithium Power Technologies Inc.*, 575 F.3d 458, 470 (5th Cir. 2009), the court declined "to rule on whether [FERA] applies retroactively or prospectively," but it found FERA "to be relevant as to Congress's intent when it enacted the FCA." *Id. See also* 155 Cong. Rec. E1295, 1300 (May 18, 2009) (statement of Rep. Berman) (noting that FERA amendments to liability provisions other than § 3729(a)(2) "are not retroactive. … [The amendments clarify existing law, and] courts should rely on these amendments to clarify the existing scope of False Claims Act liability, even if the alleged violations occurred before the enactment of these amendments.").

Pending Legislation

Additional bills that would implement more expansive changes to the False Claims Act—such as the False Claims Act Clarification Act (S. 458) and the False Claims Act Correction Act of 2009 (H.R. 1788)—remain in various stages of the legislative process. These bills, as well as earlier versions of S. 386, have proposed a number of other revisions to the FCA. Significant proposed changes include provisions to—

- exempt qui tam relators from the requirement to plead fraud with specificity under Rule 9(b);
- abolish defendants' ability to rely on the public disclosure bar to dismiss a qui tam action in response to *Rockwell International Corp. v. United States*, 549 U.S. 457 (2007), which limited recovery for a relator because he was not an "original source" of the allegations that led to the judgment;
- expand the statute of limitations for all claims, including retaliation, to either eight or ten years; and
- resolve a current split among circuit courts in favor of allowing government employees to bring qui tam cases as relators in certain circumstances after exhausting administrative procedures.

Health care reform legislation currently pending in Congress could also strengthen the FCA. On July 13, 2009, the Senate Committee on Health, Education, Labor and Pensions voted unanimously to add an amendment to its health care reform bill that would double the current penalties under the False Claims Act for certain types of health care fraud related to the bill. Under the proposed amendment, convicted companies would face fines of up to six times the amount of the fraud for fraudulently billing new health exchanges created by the bill.[8]

Dramatic Increase in Federal Spending and Greater Government Oversight and Enforcement

Throughout 2008 and 2009, the executive branch and Congress have taken a number of steps to address the financial crises threatening the U.S. economy. These efforts have included two major legislative actions that dramatically increased the amount of federal funds flowing to entities transacting business with the government. First, the Emergency Economic Stabilization Act of 2008 (the bailout of the financial services industry), Pub. L. No. 110-343, 122 Stat. 3765, which was signed into law on Oct. 3, 2008, authorized the secretary of the treasury to use up to $700 billion in taxpayers' funds to purchase troubled assets from financial institutions. Henry Paulson, the secretary of the treasury under President George W. Bush, made available $350 billion of this capital to financial institutions and other entities, and on Jan. 16, 2009, the Senate voted to release the remaining $350 billion in authorized bailout funds. Second, on Feb. 17, 2009, President Barack Obama signed into law a $787 billion economic stimulus package—the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115—which included more than $460 billion in federal spending for health care, education, transportation and infrastructure, and energy. Such massive federal spending presents significant business opportunities for companies involved in these areas, but receipt of these funds is likely to result in increased government oversight and an enhanced potential for scrutiny under the False Claims Act.

Within the last few years, there also has been a major increase in the emphasis placed on government oversight and enforcement of fraud and abuse allegedly tied to government funded contracts and programs. This increase has stemmed from concerns—raised by the public, Congress, and the executive branch—regarding allegations of serious fraud and abuse found in numerous federally funded programs, including the government bailout of financial institutions and the stimulus package discussed above, government funding for health care programs such as Medicare and Medicaid, and the use of government funds to wage the wars in Iraq and Afghanistan. Accordingly, efforts to significantly increase scrutiny of federally funded contracts and programs and the companies involved with them are now officially under way on several fronts, including the five areas discussed below.

Expanded Enforcement Activities to Reduce Health Care Fraud

According to White House budget documents, President Obama's proposed budget for fiscal year 2010 includes proposals to increase program integrity activities at the Department of Health and Human Services (HHS) to reduce health care fraud, waste, and abuse. Along the same lines, in May 2009, HHS and DOJ announced the creation of a new interagency effort—the Health Care Fraud Prevention and Enforcement Action Team (HEAT)—to help prevent and identify fraud and abuse in government health care programs. At the same time, HHS and DOJ also announced the expansion of Medicare strike forces already in operation in southern Florida and in Los Angeles to include operations in Detroit and Houston; in June, the activities of these strike forces in Detroit led to charges against 53 doctors, health care executives, and beneficiaries.[9] These announcements came in the midst of the health care in-

dustry's preparation for a significant increase in auditing and investigative activities carried out by an evolving universe of government contractors, including recovery audit contractors, program safeguard contractors, zone program integrity contractors, Medicaid integrity contractors, and Medicare drug integrity contractors. Although the responsibilities and jurisdiction of each contractor differ, such activities are collectively designed to identify abusive or problematic activity, recover overpayments, and spark additional scrutiny by appropriate law enforcement agencies as these government contractors deem appropriate.

Aggressive Oversight of Funding Used for the Bailout and Stimulus Package

On Nov. 17, 2008, Sen. Grassley wrote a letter to the Treasury and Justice Departments emphasizing the role of whistle-blower litigation in prosecuting fraud by recipients of federal bailout funds. Arguing that the False Claims Act and its qui tam whistle-blower provisions "can and will play an important role in preventing, deterring, and prosecuting fraud against the [bailout programs]," Sen. Grassley urged both departments to "ensure that whistleblowers are treated seriously, their concerns are reviewed in an expeditious manner, and that any legitimate claims of fraud, waste, or abuse are aggressively investigated and prosecuted to the fullest extent of the law, including seeking recovery of all funds lost via the FCA."[10] Even though Sen. Grassley and others can be expected to maintain congressional oversight of the private-sector entities that receive federal funds under the bailout program, corresponding oversight is also being provided by the Office of the Special Inspector General for the Troubled Asset Relief Program (SIGTARP). *See* Emergency Economic Stabilization Act § 120. That office, which is responsible for conducting, supervising, and coordinating audits and investigations of the use of funds under the bailout programs, has made it clear that it intends to establish transparency in the use of bailout funds and to ensure compliance with all applicable legal and contractual requirements. As of its third quarterly report to Congress on Oct. 21, 2009, SIGTARP had launched 61 criminal and civil investigations (54 are still ongoing), created a task force to get out in front of certain criminal efforts to profit from the stimulus funds, and completed five audits on the use of funds provided by the Troubled Asset Relief Program.[11]

As with the Emergency Economic Stabilization Act, congressional leaders also have made it clear that they intend to provide rigorous oversight of the use of stimulus funds that are provided by the American Recovery and Reinvestment Act. In discussing the need for such oversight, the chairman of the House Oversight and Government Reform Committee, Rep. Edolphus Towns (D-N.Y.), noted that the stimulus package provides an important "opportunity to heal our ailing economy" and also creates "the monumental challenge of ensuring that American taxpayers' dollars are used wisely and not squandered."[12]

Consistent with this assessment, Congress has put in place significant oversight structures for the funds authorized in the stimulus bill. First, the American Recovery and Reinvestment Act established and provided $84 million in funding to the Recovery Accountability and Transparency Board to coordinate and oversee the use of covered funds in order to "prevent fraud, waste, and abuse." This board is carrying out its mandate by performing numerous functions, including auditing or reviewing the use of covered funds to determine whether wasteful spending, poor contract or grant management, or other abuses are occurring. American Recovery and Reinvestment Act §§ 1521, 1523. The act also provides more than $416 million in funding for offices of inspectors general in various agencies—including the Departments of Defense, Education, Energy, Health and Human Services, and Homeland Security as well as the General Services Administration and NASA—to allow them to provide oversight of programs, grants, and activities funded by the act. *Id.* § 5, div. A, tits. I–XII; Tit. V, § 5007.

Finally, FERA addresses fraud and misuse of government funds related to "Federal assistance and relief" programs, *see* FERA pmbl., which would include funds appropriated through the Emergency Economic Stabilization Act and the American Recovery and Reinvestment Act. Among other changes, FERA expands federal criminal liability for major fraud against the United States by specifically prohibiting fraudulent activities involving bailout funds. FERA § 2(d) (amending 18 U.S.C. § 1031(a)). FERA also provides for significantly increased funding for federal antifraud enforcement. FERA authorizes the appropriation of $165 million for each of the fiscal years 2010 and 2011 to the attorney general for "investigations and prosecutions and civil and administrative proceedings involving Federal assistance programs and financial institutions," which is to be allocated to the FBI ($75 million for FY 2010, and $65 million for FY 2011); the offices of the U.S. attorneys ($50 million for each year); and the civil, criminal, and tax divisions of the DOJ ($40 million for each year). FERA also authorizes the appropriation of funds to the Postal Inspection Service ($30 million for each year); the inspector general for the Department of Housing and Urban Development ($30 million for each year); the Department of Homeland Security ($20 million for each year); and the Securities and Exchange Commission ($20 million for each year). FERA §§ 3(a)–(f).

Establishment of a Commission on Wartime Contracting

In January 2008, with the passage of the National Defense Authorization Act, Congress created an independent, bipartisan Commission on Wartime Contracting to study federal contracting in Iraq and Afghanistan. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181 § 841, 122 Stat. 3, 231–32. Congress gave the commission broad authority and duties to study and assess all federal contracts relating to reconstruction, logistical support for coalition forces, and security operations in Iraq and Afghanistan. As the commission works to complete its final report, which is currently scheduled for release in August 2010, any number of government contractors in Iraq and Afghanistan may come under close scrutiny as the commission reviews allegations pertaining to contract performance, waste, fraud, abuse, and mismanagement in wartime contracting.

The commission held its first public hearings in February and May 2009, and on June 10, 2009, it released an interim report entitled "At What Cost? Contingency Contracting in Iraq and Afghanistan."[13] The report included the commission's preliminary findings and a summary of its work to date. The commission also urged prompt corrective action on a number of "issues of immediate concern" that, according to the commission, "require prompt action to avoid further undermining U.S. objectives and wasting more taxpayer money." These issues include, among other things, the risk of "enormous waste" created by the drawdown of U.S. forces in Iraq, the need for greater accountability in the use of subcontractors, and the need to establish an in-country command to oversee contracting in Afghanistan.

In the report, the commission also set forth plans to further scrutinize contractors' management and accountability generally as well as the use of contractors in the specific areas of logistics, security, and reconstruction. To complete these agenda items, the commission has a wide range of powers and authorities at its disposal, allowing it to secure needed information from both government agencies and private parties. The commission has the power to seek documents and information, secure testimony under oath, hold hearings that are similar to congressional investigative hearings, and issue reports on findings of fact and recommendations. The commission also may refer targeted companies to DOJ for investigation of potential violations of the laws of war, federal law, or other applicable legal standards.

Indeed, in its interim report, the Commission on Wartime Contracting announced that its plans for the coming months include, among other things, holding additional meetings with contractors and nongovernmental organizations and conducting additional hearings. The commission also promised to "make additional referrals to law-enforcement officials" regarding possible violations of the law or government regulations. Consistent with these plans, in summer and fall 2009, the commission held several hearings, including one on Sept. 14, 2009, that focused on the U.S. State Department's selection, management, and oversight of security contractors and other contractors in support of the U.S. embassy in Kabul, Afghanistan. Additionally, taking into account the findings from these hearings, the commission issued special reports on contractor oversight and procurement. Until the commission releases its final report next summer, companies contracting with the federal government to perform security and other functions in Iraq and Afghanistan should prepare for the possibility of investigations, high-profile public hearings, extensive press coverage, and potential criminal and/or civil referrals.

Establishment of an Ad Hoc Subcommittee on Contracting Oversight

On Jan. 29, 2009, Sen. Joseph Lieberman (I-Conn.), chairman of the Senate Committee on Homeland Security and Governmental Affairs, announced that he was creating an Ad Hoc Subcommittee on Contracting Oversight.[14] In contrast to the Commission on Wartime Contracting, which focuses on contracts related solely to the operations in Iraq and Afghanistan, this subcommittee has jurisdiction over all types of federal contracting. Sen. Claire McCaskill (D-Mo.), a former prosecutor and state auditor and a vocal advocate of more aggressive oversight of contractors, is chairing the subcommittee. Upon announcing the formation of the subcommittee, Sen. Lieberman noted that annual spending on federal contracts has now reached $532 billion and that the Government Accountability Office has determined that government contracting is "at high risk of waste, fraud, abuse, mismanagement, or in need of comprehensive reform." He predicted that the new subcommittee will use its investigative authority to "improve the value of taxpayer dollars devoted to federal contracting." In an "Open Letter to the Acquisition Community," dated March 19, 2009, Sen. McCaskill reinforced these expectations and added that, over the next two years, she plans to encourage a "vigorous public debate about the important issues in government contracting." She also stated that the subcommittee "will conduct investigations and hold regular hearings to examine past failures, current policies, and how to bring more efficiency, transparency, and accountability to the contracting process." Indeed, since its creation, the subcommittee has held several hearings on contracts awarded by the Department of Defense and other government agencies and has launched investigations into a wide range of issues related to government contracts.

New Federal Contracting Guidelines

On March 4, 2009, President Obama ordered a review of government contracting practices that he declared were "too often" "plagued by massive cost overruns and outright fraud."[15] Citing the dramatic increase in the amounts spent on government contracts since 2000, he directed his administration to create new guidelines to combat waste, abuse, poor performance, and inadequate accountability in federal contracting. In response to this directive, on July 29, 2009, the Office of Management and Budget (OMB) released a set of contracting and workforce reforms. Among other things, the new guidelines require agencies to reduce contracts by at least seven percent and to track contractor performance through a unified database. The OMB announced that additional guidelines are due this fall.[16] According to the White House Web site, one of the goals of President Obama's administration is to "[r]eform federal contracting and acquisition" to "make sure that taxpayers get the best deal possible for Government expenditures."[17] This goal follows on Obama's stated agenda as president-elect, when he promised to "make government spending more accountable and efficient" and to "restore honesty, openness, and common-sense to [military] contracting."[18]

Enhanced Protection for Whistle-blowers

Enhanced protection for whistle-blowers who are employed by the government as well as the private sector also has become a key element in the push for greater oversight of federally funded programs. As Rep. Towns has stated, "[W]histleblower protection is a critical component of government accountability. At a time when America needs the

best value for every dollar spent, we need those protections now more than ever—and particularly now that billions of stimulus dollars, and bills more aimed at stabilizing the financial system, are at stake."[19]

Such an understanding led to the inclusion of new provisions to protect whistle-blowers in the 2009 stimulus bill. Specifically, the American Recovery and Reinvestment Act of 2009 contains provisions designed to protect certain employees who report waste, fraud, and abuse of stimulus funds. The provisions cover private employers; state and local governments; and federal, state, and local government contractors and subcontractors. [20] (The Senate removed provisions designed to protect federal employees from the bill prior to passage.) The whistle-blower protection provisions prohibit nonfederal employers who receive stimulus funds under the act from firing, demoting, or otherwise discriminating against an employee who discloses information the employee

> reasonably believes is evidence of—(1) gross mismanagement of an agency contract or grant relating to covered funds; (2) a gross waste of covered funds; (3) a substantial and specific danger to public health or safety related to the implementation or use of covered funds; (4) an abuse of authority related to the implementation or use of covered funds; or (5) a violation of law, rule, or regulations related to an agency contract (including the competition for or negotiation of a contract) or grant, awarded or issued related to covered funds.

American Recovery and Reinvestment Act § 1553.

Congress also included provisions in FERA that enhance federal whistle-blower protections found in the False Claims Act. The anti-retaliation provision of the FCA is codified in § 3730(h), which, until the amendments, prohibited discrimination against an employee "in the terms and conditions of employment by his or her employer because of lawful acts … in furtherance of an action under [the FCA]." Various courts had interpreted the definition of "employee" as excluding both contractors and agents from the section's ambit. In 2009, Congress addressed these decisions when it passed FERA and expanded the language of § 3730(h) of the FCA to explicitly include retaliation against "contractors" and "agents." FERA § 4(d). **TFL**

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Endnotes

[1]Whistle-blowers who bring FCA actions are known as qui tam relators. The term "qui tam" is short for *qui tam pro domino rege quam pro se ipso in hac parte sequitur* ("who brings the action for the King as well as for himself"). *United States ex rel. Eunice Matthews v. Bank of Farmington*, 166 F.3d 853, 857 (7th Cir. 1999), *overruled on other grounds by Glaser v. Wound Care Consultants Inc.*, 570 F.3d 907, 919–20 (7th Cir. 2009). The FCA provides the relator a significant incentive to bring a successful case: the relator may share in as much as 30 percent of the "proceeds of the action or settlement of the claim." 31 U.S.C. § 3730(d).

[2]Letter from M. Faith Burton, Acting Assistant Attorney General of the United States, to Hon. Patrick J. Leahy, Chairman, Senate Committee on the Judiciary 2 (Apr. 1, 2009), www.usdoj.gov/ola/views-letters/111-1/040109-s386-fraud-enforcement-recovery-act.pdf; Press Release, U.S. Department of Justice, *Justice Department Announces Largest Health Care Fraud Settlement in Its History* (Sept. 2, 2009), www.usdoj.gov/opa/pr/2009/September/09-aag-900.html; Press Release, U.S. Department of Justice, *Eli Lilly and Company Agrees to Pay $1.415 Billion to Resolve Allegations of Off-Label Promotion of Zyprexa* (Jan. 15, 2009), www.usdoj.gov/opa/pr/2009/January/09-civ-038.html; Press Release, U.S. Department of Justice, *GSA Contractor NetApp Agrees to Pay U.S. $128 Million to Resolve Contract Fraud Allegations* (Apr. 15, 2009), www.usdoj.gov/opa/pr/2009/ April/09-civ-353.html; Press Release, U.S. Department of Justice, *Boeing Company to Pay U.S. $25 Million to Resolve Allegations Related to Defective Work on KC-10 Aerial Refueling Aircraft* (Aug. 13, 2009), www.usdoj.gov/opa/pr/2009/August/09-civ-798.html.

[3]The statute also removes the language "by the Government," "to get," and "getting" from 31 U.S.C. §§ 3729(a)(2), (3), and (7) in response to *Allison Engine*'s reading of an intent requirement into 31 U.S.C. §§ 3729(a)(2) and (3). *Allison Engine* held that, if a "defendant makes a false statement to a private entity and does not intend the government to rely on that false statement as a condition of payment, the statement is not made with the purpose of inducing payment of a false claim 'by the Government.'" 128 S. Ct. at 2130.

[4]The reference to "subparagraph (A), (B), (D), (E), (F), or (G)" is to the recodified substantive liability provisions previously found at 31 U.S.C. §§ 3729(a)(1)–(7), and recodified as §§ 3729(a)(1)(A)-(G).

[5]In fact, on April 10, 2009, the Fourth Circuit reversed the ruling and remanded the holdings in the district court's decision in *Custer Battles* regarding the definition of a "claim." *See* 562 F.3d 295, 305 (4th Cir. 2009).

[6]FERA revises the definition of "claim" to expand the definition of the term:

(2) the term "claim"—

(A) means 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, that—

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is 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, and if the United States Government—

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property.

FERA § 4(a) (emphasis added).

[7]*Compare United States v. Science Applications Int'l Corp.*, No. 04-1543(RWR), 2009 WL 2929250, at *13–14 (D.D.C. Sept. 14, 2009) (rejecting government's contention that revision to § 3729(a)(1) applies to all *cases* pending on June 7, 2008, and finding that the statute refers to *claims* (i.e., demands for money or property) pending on June 7, 2008), *with United States ex rel. Carter v. Halliburton Co.*, No. 1:08cv1162(JCC), 2009 WL 2240331, at *5 n.3 (E.D. Va. July 23, 2009) (defining "claim" differently and stating, "Because this case was pending on June 7, 2008, the Court has applied the amendment in § 3729(a)(1)(B) (2009) to count 4, a claim originally brought under § 3729(a)(2) (1994)."). Moreover, in *United States v. Aguillon*, 628 F. Supp. 2d 542, 550–51 (D. Del. 2009), the court addressed the issue of FERA's retroactivity sua sponte and appeared to misinterpret the revision to § 3729(a)(2) not to apply retrospectively. The government has filed a motion to reconsider this ruling.

[8]Press Release, Sen. Bernie Sanders, *Senate Committee Adds Sanders' Fraud Crackdown to Health Reform Bill* (July 13, 2009), sanders.senate.gov/newsroom/news/?id=7199664a-d616-4dcb-a5ba-206f28c59e7f.

[9]Carrie Johnson, *Health-Care Fraud to Be Targeted, New Task Force Will Focus on Costly Waste and Abuse*, Wash. Post, May 21, 2009, at A04; News Release, U.S. Department of Heath and Human Services, *Medicare Fraud Strike Force Operations Lead to Charges Against 53 Doctors, Health Care Executives and Beneficiaries for More Than $50 Million in Alleged False Billing in Detroit* (June 24, 2009), www.hhs.gov/news/press/2009pres/06/20090624a.html.

[10]Press Release, Sen. Charles Grassley, *Grassley Urges Federal Government to Utilize "Lincoln's Law" to Help Protect and Recover Taxpayer Dollars Lost to Fraud in Economic Stabilization Programs* (Nov. 17, 2008), grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=18128.

[11]*See* Letter from Neil Barofsky to Hon. Charles Grassley, Ranking Member of the Senate Committee on Finance (Jan. 22, 2009), grassley.senate.gov/private/upload/Letter-from-Special-IG-Neil-M-Barofsky-to-Senator-Chuck-Grassley.pdf; Office of the Special Inspector General for the Troubled Asset Relief Program, *Quarterly Report to Congress*, June 21, 2009, at 5–7; office of the special inspector general for the Troubled Asset Relief Program, *Quarterly Report to Congress*, Oct. 21, 2009, at 6-8.

[12]Rep. Edolphus Towns, *Chairman's Opening Statement and Witness Testimony from Hearing on "Preventing Stimulus Waste and Fraud: Who are the Watchdogs?"* (Mar. 19, 2009), available at oversight.house.gov/story.asp?ID=2348.

[13]Commission on Wartime Contracting in Iraq and Afghanistan, *At What Cost? Contingency Contracting in Iraq and Afghanistan* (2009), www.wartimecontracting.gov/download/documents/reports/CWC_Interim_Report_At_What_Cost_06-10-09.pdf.

[14]Press Release, Senate Committee on Homeland Security and Governmental Affairs, *Lieberman Announces New HSGAC Subcommittee, McCaskill to Get Contracting Gavel* (Jan. 29, 2009), lieberman.senate.gov/newsroom/release.cfm?id=307502.

[15]Ross Colvin, *Obama Takes Aim at Costly U.S. Defense Contracts*, Reuters, Mar. 4, 2009.

[16]Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 9755 (Mar. 4, 2009); Press Release, Office of Management and Budget, *White House to Save $40 Million Annually Through Contracting Reforms* (July 29, 2009), www.whitehouse.gov/omb/news_072909_reform; *see also* John M. Donnelly, *Obama Pursues Crackdown on Procurement Abuses*, CQ Today Online News, Mar. 4, 2009.

[17]Executive Office of the President, Fiscal Responsibility, www.whitehouse.gov/issues/fiscal/.

[18]Office of the President-Elect, *Agenda: Fiscal*, change.gov/agenda/fiscal_agenda/; Office of the President-Elect, *Agenda: Defense*, change.gov/agenda/defense_agenda/.

[19]Press Release, House Committee on Oversight and Government Reform, *Chairman Towns' Statement on the Whistleblower Protection Enhancement Act of 2009* (Mar. 12, 2009), oversight.house.gov/story.asp?ID-2340.

[20]*See* H.R. Rep. No. 111-16, at 511 (2009) (Conf. Rep.). On March 12, Rep. Chris Van Hollen (D-Md.) announced the introduction of the Whistleblower Protection Enhancement Act of 2009. This legislation—co-sponsored by Rep. Ed Towns (D-N.Y.), Rep. Todd Platts (R-Pa.), and Rep. Bruce Braley (D-Iowa)—seeks to strengthen whistle-blower protections for federal employees reporting fraud, waste, and abuse. *See* Press Release, Rep. Chris Van Hollen, *Van Hollen Announces Whistleblower Protection Enhancement Act of 2009* (Mar. 12, 2009), vanhollen.house.gov/HoR/MD08/Newsroom/Press+Release+by+Date/2009/3-12-09+Van+Hollen+Announces+Whistleblower+Protection+Enhancement+Act+of+2009.htm.