

Morgan Lewis

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The Fraud Enforcement and Recovery
Act of 2009: A New Day Has Dawned
for the False Claims Act

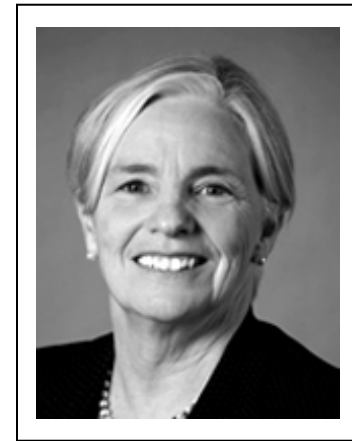
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Topics of Discussion

- **Overview – FCA Substantive Amendments**
 - Definition of Claim and Materiality
 - Reverse False Claims
 - New Overpayment Liability
 - Expanded Definition of Obligation
 - Conspiracy
 - Relation Back on Government Intervention
 - Retaliation
- **FCA Procedural Amendments**
 - Use of CIDs: Approval and Information Sharing
 - Retroactivity – Two Provisions
 - Qui Tam Service by States
 - Procedural Costs
- **Questions**

Overview – FCA Amendments

- Substantial legislative history and disputed interpretations regarding FCA amendments
 - Game changer for both compliance and investigations
- Congressional desire to reverse judicial decisions affecting substantive and procedural interpretations of statute
 - *Allison Engine, Baylor, Custer Battles, Totten, American Textiles*
- Amendments generally clarify that FCA covers government contractor and grantees – broadens nexus of federal money

Current Liability (a)(1)(A) to (C)

- Applies to any person who
 - knowingly presents or causes to be presented a false or fraudulent claim for payment or approval
 - knowingly makes or uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim
 - conspires to commit a violation of subparagraph (A), (B), (C), (D), (E), (F) or (G)

New Definition of a Claim

- Claim no longer needs direct nexus to the government
- Clearly covers claims to contractors, grantees and other recipients
- Government does not have to have title to the money or property
- Redefines obligation
- Defines materiality

New Definition of Obligation

- Expanded definition of obligation
- Reverses *American Textiles* – **must have fixed duty**
- Now covers regulatory violations
- The term “obligation” means:
 - **an established duty, whether or not fixed, arising from an expressed or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of an overpayment**

Express Materiality Provision

- At long last, a materiality standard, but weak one
- Liability now depends on whether a false record or statement was material to a false claim
- Materiality defined as **“having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property”**

Reverse False Claims – New Liability

- New Provision –3729(G):
 - “knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to the Government, or knowingly conceals or **knowingly and improperly** avoids or decreases an obligation to pay or transmit money or property to the Government”
- Expanded to include any retention of an overpayment
- No affirmative fraudulent act required for liability
- Litigation battleground
 - knowingly and improperly avoiding an obligation

Conspiracy

- Expands (a)(3) Conspiracy Liability Provisions to cover all elements of (a)(1) liability, new (A) to (G)
- Potential to increase pool of potential responsible entities and individuals for damages
 - Joint and several liability

Government Intervention – Relation Back

- Allows government to file own complaint at time of intervention that relates back to original filing of *qui tam* by relator, often years later
 - Reverses *Baylor*
- Effectively extends statute of limitations
- Government can delay intervention and add new claims
- Undercuts ability to defend stale claims and undermines judicial administration
 - Court reluctance to extend intervention time may increase
- **When Is It Time to Call Time?**
 - Significant preintervention issue

Civil Investigative Demands

- Authorizes information sharing between government and relator prior to government intervention decision
 - Most important amendment to relators' bar
- Potential for abuse:
 - Relators could use it to support or expand claims
 - Competitors gain sensitive information
- Authorizes use of CIDs based on approval from DOJ official other than Attorney General in hope of expanding use in *qui tam* cases
- One-sided litigation *Baker Taylor* issues ripe for challenge

New “Official Use” Provision

(8) the term “official use” means any use that is consistent with the law, and the regulations and policies of the Department of Justice, including use in connection with internal Department of Justice memoranda and reports; communications between the Department of Justice and a Federal, State, or local government agency, or a contractor of a Federal, State, or local government agency, undertaken in furtherance of a Department of Justice investigation or prosecution of a case; interviews of any qui tam relator or other witness; oral examinations; depositions; preparation for and response to civil discovery requests; introduction into the record of a case or proceeding; applications, motions, memoranda and briefs submitted to a court or other tribunal; and communications with Government investigators, auditors, consultants and experts, the counsel of other parties, arbitrators and mediators, concerning an investigation, case or proceeding.

Effective Date of Amendments

- Provides for retroactive effective date for 3729(a)(1) expanded claim liability back to June 7, 2008, date of *Allison Engine* decision
 - Substantive change and ripe for constitutional and other challenges
- All other changes effective May 20, 2009

Qui Tam Service By States

- Authorizes state *qui tam* service in federal cases
 - Encourages parallel proceedings and collaboration with law enforcement
- Seal provisions and responsibilities remain the same
- Provides opportunity for states to act apart from DOJ and go it alone

Service on *Qui Tam* States

- Confirms DOJ may coordinate and share information in sealed FCA cases with states players
- Bring states into FCA investigations more quickly and allows states to determine independent role in multidistrict investigations
- Potential for chaotic handling and opportunity for greater defense strategies

FCA Amendments – What Does It Mean to Your Company?

- FCA amendments substantially affect all industries
- Pending health reform, defense contracting, and financial sector proposals have additional fraud and abuse provisions
- Forecast is for enhanced and new anti-fraud measures to evaluate and implement
- Impact on compliance workplans and business operations
- Impact on government, relator and defense strategies

Compliance and Risk Management

- Extension of retaliation provisions to contractors and agents affects many industry sectors and requires focus on current process for handling whistleblower and other complaints
- Overpayment liability compels process check-up and disclosure strategies, particularly in health sector

FCA Defense Strategies

- FCA Amendments confirm that proactive defense strategies are necessary preintervention
 - Routine processing is not a defense advantage
- Government litigation holds – When and how to assert?
- Rethinking global approaches – Should states be dealt with first in multidistrict matters?
 - Medco
- CIDs and information sharing preintervention will require defense interaction with Court – How to position company?
- Cost Sharing

Contact Information



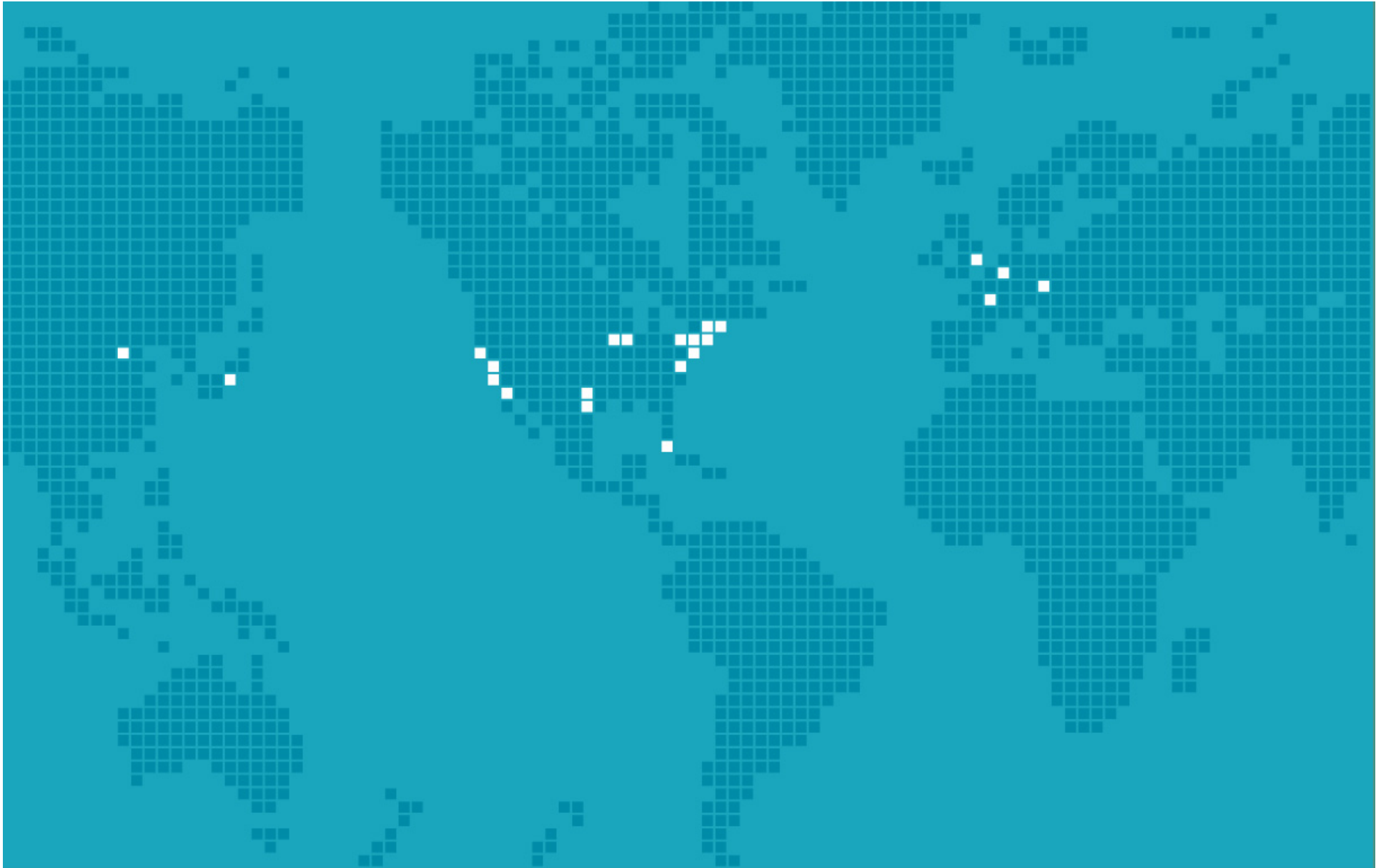
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