

Senate Passes Bill to Protect the Economic Recovery from the “Scourge of Fraud”

April 30, 2009

On April 28, the Senate overwhelmingly passed (by a vote of 92 to 4) the Fraud Enforcement and Recovery Act of 2009 (FERA) (S. 386). While FERA has yet to pass in the House of Representatives and be signed into law by President Obama, the House Judiciary Committee has approved a similar measure and the Obama administration has voiced strong support for FERA. Once enacted, FERA will strengthen and enhance the arsenal of criminal enforcement mechanisms available to federal prosecutors for combating financial fraud in the mortgage industry, and will provide additional funds for federal agencies and prosecutors to hire additional personnel—all of which is designed to safeguard the nearly \$3 trillion of federal “bailout” funds that may be at risk. Sen. Patrick Leahy (D-Vt.), who authored the bill, described FERA as “a step toward holding accountable those who have caused so much damage to our economy” by protecting federal stimulus efforts from the “scourge of fraud.”

FERA will authorize the provision of a total of \$245 million per year over the next two years for the Department of Justice (DOJ) to hire prosecutors, and for the DOJ, FBI, and other law enforcement agencies to hire investigators, forensic analysts, and support staff to “rebuild [the] nation’s ‘white collar’ fraud enforcement efforts.” The Senate expects that additional personnel are necessary to respond to the 5,000-plus fraud allegations the Department of Treasury receives each month.

FERA also will institute several significant changes to existing laws. Most notably, FERA will amend the False Claims Act (FCA), 31 U.S.C. § 3729, to extend the FCA’s coverage to any false or fraudulent claim for government money or property, irrespective of whether the claim is presented to a government official or employee, whether the government holds title or has physical custody of the money, or whether the defendant specifically intended to defraud the government.

This amendment will effectively reverse the decisions of the Supreme Court in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008) (holding that Section 3729(a)(2) of the FCA requires the government to prove that a defendant intended for the government itself, rather than a government contractor, to pay the claim to establish a violation), and the U.S. Circuit Court for the District of Columbia in *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004) (holding that to establish liability under Section 3729(a)(1) the government must prove that the claim was presented to an officer or employee of the United States government, not just a government grantee).

Since the expansion of the FCA’s scope through amendments in 1986, the FCA has been the government’s chief weapon in combating fraud in the procurement of federal contracts and funds. The

FCA provides for treble damages and civil monetary penalties of \$5,500 to \$11,000 per claim, and authorizes whistleblowers, known as *qui tam* relators, to file suit on behalf of the United States against those who fraudulently claim funds from the federal government. A successful *qui tam* relator can share in as much as 30% of the government's recovery under the FCA.

In addition, FERA will expand the reach of numerous federal fraud statutes. In particular, FERA will amend the following:

- The criminal code, to include “mortgage lending business” within the definition of “financial institution.” FERA would hold accountable private mortgage brokers and mortgage lending businesses that are not directly regulated or insured by the federal government under federal fraud laws, including those governing bank fraud, 18 U.S.C. § 1344; financial institution bribery, 18 U.S.C. § 215; continuing financial crimes enterprise, 18 U.S.C. § 225; and false statements for financial institution, 18 U.S.C. § 1005. It would also provide enhanced penalties for mail and wire fraud offenses under 18 U.S.C. §§ 1341 and 1343 affecting a financial institution.
- The false statement in mortgage application statute, 18 U.S.C. § 1014, to make it a crime for any individual or entity to make a materially false statement or to willfully overvalue a property for purposes of influencing any action by a mortgage lending business. Currently, Section 1014 only applies to federal agencies, banks, and credit associations and does not extend to mortgage lending businesses even if such businesses manage federally regulated or federally insured mortgages.
- The major fraud statute, 18 U.S.C. § 1031, to include funds distributed under the Troubled Asset Relief Program (TARP) and the economic stimulus package.
- The federal securities fraud statute, 18 U.S.C. § 1348, to cover fraud schemes involving commodities futures and options, which include some of the derivatives and financial products that may have contributed to the financial collapse.
- The criminal money laundering statutes, 18 U.S.C. § 1956–57, to make clear that the “proceeds” of the crime include the gross receipts of illegal activity, not just the “profits” of such activity, effectively reversing the Supreme Court’s decision in *United States v. Santos*, 128 S. Ct. 2020 (2008) (construing the term “proceeds” narrowly to mean “profits” of a criminal money laundering scheme). FERA also amends the international money laundering statute to include tax evasion.

While FERA is projected to cost \$490 million over the next five years, proponents of the act, including the president, assert that this legislation will more than pay for itself via increased use of the FCA and robust enforcement of FERA’s financial fraud provisions. Senator Leahy has noted that the government recovers more than \$20 for every dollar spent on criminal fraud litigation. The government has recovered more than \$21 billion under the FCA since 1986, including more than \$1 billion in fiscal year 2008 alone. With potentially \$300 billion of federal “bailout” funds in play, recipients of TARP and other economic stimulus funds should be on notice of these significant new enforcement mechanisms potentially available to federal prosecutors and the expanded scope of the FCA.

The Fraud Recovery and Enforcement Act of 2009 (S. 386) can be read in full at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s386rs.txt.pdf.

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