

## Congress Expands Reach of Major Anti-Fraud Statutes and Authorizes \$500 Million to Combat Financial Fraud

On May 20, 2009, President Obama signed the [Fraud Enforcement and Recovery Act of 2009](#) (FERA) into law, significantly expanding the scope of the federal False Claims Act (FCA) for the first time in over 20 years. The new law increases the risks already faced by participants in TARP programs and other institutions that have received federal stimulus funds.

FERA also authorizes the appropriation of over \$500 million for the Department of Justice and other federal law enforcement agencies, and amends a number of federal criminal statutes to expand the government's ability to prosecute financial fraud. In this rapidly changing legal and enforcement environment, it is critical for members of the banking and financial services industries to be aware of whether their current compliance controls are adequate in light of these new risks.

### The FCA Amendments

For more than 20 years, the FCA has been one of the federal government's most powerful enforcement tools. Its broad prohibitions and strong whistleblower protections have helped to secure billions of dollars in government recoveries in the health care and government contracting industries. With the recent extension of federal money and other assistance into banking and financial services, the reach of the FCA has expanded. Now members of these industries may face FCA exposure if they participate in the federal economic stabilization or stimulus programs.

**Simplified and Expanded Prohibitions.** The principal liability provisions have been simplified and expanded. For example, the FCA now prohibits:

- Knowingly presenting a false claim for payment or approval. This section no longer requires that the claim be presented to the government.
- Knowingly making or using a false record or statement that is material to a false claim. This section no longer requires that such a record be used "to get" such a claim "paid or approved."
- Knowingly making or using a false record or statement that is material to an obligation to pay the government. This section no longer requires that the record or statement be used to conceal or decrease an obligation—it is enough that it was made or used and is material to an obligation to pay.

**New Definition of "Claim."** Under the amended FCA, a "claim" is not restricted to demands for money directly from the United States. It includes a request or demand presented to any recipient, as long as the money or property at issue will be used on the government's behalf or to advance a government interest, and the government has either provided or will be reimbursed for part of the money.

**Expanded Whistleblower Protections.** The anti-retaliation provisions of the FCA have been expanded in two significant ways:

- *Protection extended to contractors and agents.* The FCA's anti-retaliation provision now applies to contractors and

agents in addition to employees.

- *Protection triggered by effort to stop a violation of the FCA.* The protection afforded by this provision is now triggered by a lawful effort to stop one or more violations of the FCA; the effort no longer needs to be in furtherance of an action under the FCA.

The article "[Firms Receiving Stimulus Funds May Also Receive False Claims Scrutiny](#)" by Ropes & Gray's Kirsten Mayer and Michael Wong discusses potential FCA risk faced by participants in the new federal economic stabilization programs, and what program participants can do now to mitigate that risk.

## Amendments to Federal Criminal Anti-Fraud Laws

FERA 2009 amends key anti-fraud provisions in the federal criminal code to expand liability and specifically to address financial fraud involving the TARP programs.

- *Statute Prohibiting Major Fraud Against the United States Expanded to Include TARP Programs.* 18 U.S.C. § 1031 no longer focuses principally on contractor procurement fraud. FERA expanded it specifically to include schemes involving TARP or the Government's purchases of troubled assets.
- *"Financial Institution" Redefined to Include Mortgage Lending Business.* The federal criminal code has been amended to make explicit that a "mortgage lending business" is a "financial institution." A "mortgage lending business" is now defined as any organization which finances or refinances debt secured by an interest in real estate, including private mortgage companies and their subsidiaries.
- *Securities Fraud Statute Amended to Include Commodities and Options Fraud.* 18 U.S.C. § 1348 now prohibits schemes to defraud involving commodities for future delivery or options for such commodities, not just schemes to defraud involving securities.
- *Money Laundering "Proceeds" Defined to Include Gross Receipts.* FERA defined "proceeds" in the federal money laundering statutes to include the gross value of money or property indirectly derived from some form of unlawful activity.

## Appropriations for Law Enforcement

Finally, FERA authorizes the appropriation of over \$500 million for federal law enforcement to combat financial fraud in fiscal years 2010 and 2011. This includes \$140 million for the Federal Bureau of Investigation, \$180 million for the U.S. Attorney's Offices and Main Justice, \$42 million for the Securities and Exchange Commission, and \$160 million for other investigative agencies. This money is for the investigation and prosecution specifically of fraud involving federal assistance programs and financial institutions, including mortgage lending businesses.

## Contact Information

If you would like to learn more about these recent legal developments, please contact your legal advisor at Ropes & Gray or one of the attorneys listed below who are with Ropes & Gray's Government Enforcement practice.

[Christopher Coniff](#)

[Kirsten Mayer](#)

[Michael Li-Ming Wong](#)

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