

IF YOU THINK YOU KNOW THE RAMIFICATIONS UNDER THE FALSE CLAIMS ACT, THINK AGAIN!

PART I: A SUMMARY OF THE LIABILITY PROVISIONS

INTRODUCTION

The foundation of the False Claims Act (FCA) was initiated during the Civil War to create a governmental obligation to take action against those persons working for or with the Government, such as suppliers and contractors, seeking to present a false claim against, or conceal overpayments due for reimbursement to the Government.

Investigations into alleged false claims under various Federal programs such as supply contracts, vendor agreements, and service arrangements have brought to light fraudulent acts that have been committed against the Government. Additionally, changes have been made to the FCA which allow for recovery of damages and civil fines. Recent developments have also enlarged the scope of the FCA to include administrative agencies that deal in Federal monies and that has resulted in an increased level of pursuit of such claims.

In this first of three articles, we discuss the nature of the FCA and the amendments made in 1986 which aid in the clarification and proper definition of the FCA and the liabilities that exist therein.

LIABILITY

The FCA provides that: “(a) any person who:

- *(1) 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) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;*
- *(3) conspires to defraud the Government by getting a false or fraudulent claim paid or approved by the Government...;*
- *or (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus three times the amount of damages which the Government sustains because of the act of that person.” 31 U.S.C. § 3729(a).*

Amendments to the FCA in 1986 set forth the imposition of: (1) treble damages and civil fines of \$5,000 to \$10,000 per false claim; and (2) defendant liability for "deliberate ignorance" and "reckless disregard" for the truth. (www.justice.gov/jmd/ls/legislative_histories/pl99-562/act-pl99-562.pdf).

In 1990, the Federal Civil Penalties Inflation Adjustment Act (FCPIAA) adjusted federal fines and penalties to match the rate of inflation. Pub.L.No. 101-410, 104 Stat 890 (Jan. 23, 1990). The FCPIAA also permitted inflation adjustments to be made every five years to sustain the value of civil fines and penalties in relation to cost of living increases. (<http://www.gpo.gov/fdsys/pkg/STATUTE-104/pdf/STATUTE-104-Pg890.pdf>).

In 1999, the Department of Justice increased the range of penalties for FCA violations from \$5,500 to \$11,000. 28 C.F.R. § 85.3(a) (9). Much like the trebling feature, the penalties authorized under the FCA then became mandatory **and not subject to a court's discretion**. 31 U.S.C. §§ 3729(a).

The most noteworthy changes since the amendments to the FCA in 1986 were made and incorporated into the Fraud Enforcement and Recovery Act of 2009 (FERA) signed by President Obama on May 20, 2009. FERA changed the FCA by eliminating the "**presentment requirement**" which means that liability exists with regards to claims whether or not they were presented directly to the government and liability is applicable "...*whenever the government provides "any portion" of the money or property for which a claim has been made.*" (http://apps.americanbar.org/litigation/litigationnews/practice_areas/construction-false-claims-act.html). Also included in the FERA changes are "reverse claims" which essentially covers the intent to conceal an obligation to reimburse monies owed to the Government, such as in cases of overpayment. 31 U.S.C. § 3729(a).

CONCLUSION

The FCA has expanded into a significant and powerful tool to regulate wrongdoing and abuse when dealing with the Federal Government. There has also been an increase in the amount of damages recoverable, and the fines which can be assessed.

Consequently, venturing into the FCA realm without some expert guidance can prove very complex and daunting to a layperson.

Consultative assistance should be explored to properly and thoroughly protect a contractor's interests in a given case when the contractor is faced with allegations of fraud under the FCA. The experts at Excell Consulting International, Inc. can assist and evaluate your company's position and provide valuable and cost-effective protection for your business. With empowerment through partnership, **you can rest assured that you will be protected.**

In the end, you will be glad you made the call.

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Author's note: The information contained in this article is for general informational purposes only. This information does not constitute legal advice, is not intended to constitute legal advice, nor should it be relied upon as legal advice for your specific factual pattern or situation. – *John G. Balch, CEO CPCMC*