
J E N N E R & B L O C K

**Hot Topics in Compliance:
Recent Developments in Federal Law**

**Defense Industry Initiative Webinar
December 8, 2010**

Iris E. Bennett
Jessie K. Liu
Cynthia J. Robertson

Agenda

- Dodd-Frank Act (2010) Whistleblower Provisions
 - Bounty Program & Anti-Retaliation Provisions
- Federal Sentencing Guidelines Amendments (November 2010) for Corporate Entities
 - Compliance-related Sentencing Guidelines amendments
- Fraud Enforcement and Recovery Act of 2009
 - Significant amendments to False Claims Act: Intent and materiality, presentment, investigative tools
 - Application by law enforcement and the courts: Case examples
- FCPA Proposed Legislation
 - Overseas Contractor Reform Act

Dodd-Frank Act (2010) Whistleblower Bounty Provisions

- Purpose:
 - Financial reward (a portion of recovery) for individuals who report alleged securities laws violations to SEC or CFTC

- Bounty Provisions Apply To:
 - An action brought by the SEC “under the securities laws,” including FCPA anti-bribery and books & records violations, and any “related action”

 - An action brought by the Commodity Futures Trading Commission (CFTC) under the Commodity Exchange Act

Dodd-Frank Act (2010) Whistleblower Bounty Provisions

- Applies to *public* companies
- “Related Action” recovery –
 - Dodd-Frank defines “related action” to mean any judicial or administrative action brought by an entity described in subclauses (I) through (IV) of subsection (h)(2)(D)(i) based on the original information provided by a whistleblower that led to the **successful enforcement** of the Commission action
 - Eligible entities under the statute are DOJ, appropriate regulatory authorities, self-regulatory organizations, and state attorney generals
 - Thus, “related action” not limited to securities law actions

Dodd-Frank Act (2010) Whistleblower Bounty Provisions

- Whistleblower must submit “original information”
 - Original information is:
 - Based on whistleblower’s own “independent” knowledge or analysis
 - Unknown to the SEC at time of submission (unless whistleblower is original source of information)
 - Not exclusively from a public allegation
 - Submitted after effective date of Act

Dodd-Frank Act (2010) Whistleblower Bounty Provisions

- “Independent knowledge” generally means only that information not obtained from publicly available source
- Whistleblower who provides non-public, second-hand information may qualify for award
- Several categories of individuals expressly excluded:
 - Those who conduct audits required for SEC filings
 - Employees of DOJ, law enforcement, regulatory agencies
 - Those **convicted** of crimes in connection with activity in question
 - BUT: those merely implicated in the conduct are not excluded

Dodd-Frank Act (2010) Whistleblower Bounty Provisions

- Reward Amount:
 - Between 10 percent and 30 percent of any monetary recovery by the government in excess of \$1M
 - Applies to all “monetary sanctions,” meaning “any monies, including penalties, disgorgement, and interest”
 - Factors in determining percentage of award:
 - Significance of the information
 - Degree of assistance provided by the whistleblower
 - Government’s interest in deterring such violations

Whistleblower Provisions – SEC Proposed Rule

- Proposed Rule (Regulation 21F) published in November 2010
- Expands categories of those ineligible for bounty for lack of “independent knowledge,” including:
 - Attorneys, their agents, independent accountants
 - Pre-existing legal or contractual duty to report the information
 - Gain the information through their role in company’s internal compliance program
 - BUT this exclusion inapplicable if the company does not disclose to the Commission within a reasonable time or acts in bad faith
 - Those who learned the information illegally

Whistleblower Provisions – SEC Proposed Rule (cont.)

- Permits *anonymous* whistleblowers if represented by an attorney
 - Disclosure of identity permissible when required by law or to other government agencies
- SEC will not award whistleblowers payment based upon:
 - Any monetary sanctions the whistleblower pays in the resulting SEC action, or
 - Sanctions paid by entities whose liability is based substantially on conduct *that the whistleblower directed, planned, or initiated.*
- Rule provides that the \$1M threshold for eligibility must be met based on the SEC action, not any “related action”

Whistleblower Provisions – SEC Proposed Rule (cont.)

- SEC asserts that rule intended to discourage employees from bypassing their company's internal compliance programs
 - Would treat employee as a whistleblower under the SEC program as of the date that employee reports the information ***internally*** — ***if*** employee provides the same information to the SEC within 90 days
- Query whether the rule's carve-outs for those eligible to claim a bounty would pass muster to the extent they extend beyond the statutory eligibility limitations
- Comments to the SEC's proposed rules must be submitted on or before December 17, 2010
- Final rule to be implemented by April 2011

Comparison to FCA Whistleblower Limitations

- Whistleblowers under the FCA may not base allegations on “public disclosures” unless an “original source”
- In March 2010, healthcare legislation amended FCA and weakened public disclosure bar
 - Bars only actions based on disclosures from **federal** sources or the news media
 - Allows lawsuits based on publicly disclosed information available from state and local sources to proceed
 - Abrogated the Supreme Court's recent decision in *Graham County Soil and Water District v. U.S. ex rel. Wilson*
 - Expanded scope of the “original source” exception by eliminating the “direct knowledge” requirement
 - A *qui tam* relator can now maintain a claim based on publicly disclosed information, even if knowledge is merely indirect, so long as the relator has “independent knowledge that materially adds to the publicly disclosed allegations”

Comparison to FCA Whistleblower Limitations

- Recent amendments to FCA under healthcare law also grants federal prosecutors veto power over a court's decision to dismiss based on public disclosure bar
- Previously the government had to intervene in the action because the public disclosure provision applies only to actions brought by private individuals
- The government may now oppose dismissal without intervening and permit private actions to go forward in the hopes of a recovery

Dodd-Frank Act (2010)

Whistleblower Anti-Retaliation Provisions

- Purpose:
 - Provides protections against retaliation for individuals who report alleged violations to the government

- Coverage:
 - Whistleblowers who offer information under:
 - Dodd-Frank Act, Sarbanes-Oxley Act, the Exchange Act, or
 - 18 U.S.C. § 1513(e), which broadly applies to providing truthful information relating to the commission or possible commission of any Federal offense (e.g., FCPA, antitrust)

 - Applies to discharge and lesser harassment and discrimination

 - Protections apply to any “employer” (public and private)

Dodd-Frank Act (2010) Whistleblower Anti-Retaliation Provisions

- Remedies and Statute of Limitations:
 - Provides a private right of action in federal district court for whistleblowers subject to retaliation
 - Relief “shall” include reinstatement, double back pay with interest, and litigation costs including attorney’s fees
 - Statute of limitations varies from 3-10 years depending on the circumstances

Dodd-Frank Act (2010)

Whistleblower Anti-Retaliation Provisions

- Comparison to Sarbanes-Oxley:
 - SOX does not entitle an employee to double back pay
 - Dodd-Frank includes this provision and thereby offers a punitive/deterrent element
 - Under SOX, whistleblower required to bring claim to the Department of Labor (OSHA) and could only bring a lawsuit after the Department of Labor declined to intervene
 - Under Dodd-Frank, a whistleblower may proceed directly to federal court with their retaliation claim

Dodd-Frank Act (2010) Implications

- Review and bolster existing policy and training regarding company whistleblower policy, if needed
 - Encourage and facilitate internal complaints
 - Include anonymous reporting
 - Ensure internal whistleblower is taken seriously and that he/she knows it
 - Investigate credible allegations
- Ensure that confidentiality policies do not conflict with employees' right under federal law to report potentially illegal activity
- Ensure executive management and other managers are aware of the key provisions of Dodd-Frank

Federal Sentencing Guidelines: Amendments for Corporate Entities

Federal Sentencing Guidelines - Background

- Adequacy of a corporate compliance program is relevant to:
 - A decision to charge
 - How harshly to sanction
 - See Principles of Federal Prosecution of Business Organizations (Title 9, Chapter 9-28.00)

- Federal Sentencing Guidelines give credit in corporate sentencing where offense committed despite existence of an adequate corporate compliance program
 - Company must:
 - Exercise due diligence to prevent and detect criminal conduct, and
 - Promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law

Federal Sentencing Guidelines - Factors

- Factors under current Sentencing Guidelines at Section 8B2.1:
 - Standards and procedures to prevent and detect criminal conduct
 - Governing authority knowledgeable about the content and operation of the compliance program and exercises reasonable oversight
 - Specific high-level personnel have overall responsibility for the compliance program
 - Specific individuals have day-to-day operational responsibility for the compliance program and report to high-level personnel and to the governing authority where appropriate
 - Reasonable efforts to exclude from substantial authority those whom the organization knew, or should have known, have engaged in conduct inconsistent with the compliance program

Federal Sentencing Guidelines – Factors (cont.)

- Factors, cont'd
 - Effective training programs
 - Monitoring and auditing to detect criminal conduct
 - Evaluate periodically the effectiveness of the compliance program
 - Create and publicize a system for reporting potential or actual criminal conduct by employees and agents, without fear of retaliation
 - Promote and enforce the program consistently through incentives and through discipline
 - Where criminal conduct detected, take reasonable steps to respond appropriately – modify compliance and ethics program if necessary
 - Periodically assess the risk of criminal conduct – take steps to design, implement, or modify the program if necessary

Federal Sentencing Guidelines – Case Examples

- DOJ considered compliance programs in:
U.S. v. Universal Leaf Tabacos Ltd. (E.D. Va. Aug. 6, 2010)
 - Sentencing memo in FCPA case stated, “The agreed upon disposition partly reflects credit given for Universal’s pre-existing compliance program”
 - BUT: No express deduction in the Guidelines calculation for the compliance program

Noble Corporation (S.D. Tex. Nov. 4, 2010)

- “Noble's pre-existing compliance program and steps taken by Noble's Audit Committee to detect and prevent improper conduct from occurring” were a factor in entering FCPA non-prosecution agreement

Federal Sentencing Guidelines – November 2010 Amendments

- The Sentencing Guidelines were amended effective November 2, 2010
- Modified some specific factors under the Guidelines for determining if a corporate entity deserves credit for having an effective program:
 1. Encourage direct reporting by the company's chief compliance officer (CCO) to the Board of Directors (or committee thereof) – company may receive Guidelines credit for effective compliance program even where a high-level company officer ***was involved*** in the offense so long as certain elements are met:

Federal Sentencing Guidelines – November 2010 Amendments

- 1(a). Compliance program gives CCO with day-to-day responsibility for the program the ability to communicate directly with the Board or equivalent, or appropriate sub-group, ***promptly*** on any matter involving criminal conduct or potential criminal conduct, ***and at least annually*** on the implementation and effectiveness of the compliance program;
- 1(b). The compliance program detected the violation or potential violation prior to discovery or reasonable likelihood of discovery from outside the organization;
- 1(c). The organization promptly disclosed the matter to the appropriate authorities; and
- 1(d). No one with day-to-day operational responsibility for the compliance program was involved in the offense.

Federal Sentencing Guidelines – November 2010 Amendments

- Other notable Amendment changes:
 - Expressly encourages remediation by aiding victims
 - Remediation of violation “may include, where appropriate, providing restitution to identifiable victims”; and
 - Expressly encourages (but does not require) use of outside compliance advisors
 - Preventing future criminal conduct “may include the use of an outside professional advisor to ensure adequate assessment and implementation of any modifications” to the company’s compliance program

Guidelines Amendments - Implications

- Review whether your existing program comports with factors set forth under the Guidelines, as amended
- Consider adjustments if not in line with amendments
 - According to an April 2010 survey, only 41% of publicly traded companies have their CCO report directly to the Board of Directors
 - Source: “The Relationship between the Board of Directors and the Compliance and Ethics Officer,” Society of Corporate Compliance and Ethics, April, 2010

Fraud Enforcement and Recovery Act of 2009 and Recent Developments

FERA - Background

- Fraud Enforcement and Recovery Act (FERA) enacted May 2009
- FERA provides the federal government with enhanced tools to fight financial fraud
- But FERA also amended the False Claims Act (FCA) in several significant ways

FERA – Significant Amendments

1. Intent and Materiality

- In 2008, the Supreme Court held in *Allison Engine*
 - No FCA liability where a subcontractor submitted a false claim to a prime contractor unless shown that the subcontractor did so *with intent to get the government to pay out a false claim*
- FERA legislatively overruled *Allison Engine*
- Under FERA, False Claims Act liability attaches when a false statement is material (defined as capable of influencing a government decision to pay a claim) even if it was not made for the purpose of getting the government to pay out a claim

FERA – Significant Amendments

2. Presentment

- Before FERA, the FCA only applied where a claim was presented “to an officer or employee of the United States Government or a member of the Armed Forces”
- Under FERA, the FCA applies to claims presented to a prime contractor or grantee so long as the money involved is to be spent on the government’s behalf or to advance a government program or interest

FERA – Significant Amendments

3. Investigative Tools

- FERA expands FCA investigative tools, including by:
 - Permitting the federal government and relators to share information with state and local governments during the period when a *qui tam* complaint is sealed
 - Authorizing the Attorney General to share information obtained through Civil Investigative Demands (CIDs) with *qui tam* relators if the disclosure is “necessary as part of any false claims act investigation” (no showing of “substantial need” or court approval required)
 - Authorizing the Attorney General to delegate the authority to approve CIDs to lower level DOJ officials (no delegation previously was allowed)

Cases: FERA's Relation Back

- *United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.* (D.C. Cir. June 22, 2010)
 - Holds FERA's relation back provision allows government intervention after the limitations period has run
 - Original *qui tam* complaint timely filed, but the government waited to intervene until several years after the statute of limitations had run
- Pre-FERA, FCA did not expressly allow untimely claims to “relate back” to original *qui tam* complaint for statute of limitations purposes
- FERA amended FCA: “A Government pleading shall relate back to the filing date of [qui tam complaint], to the extent that [Government claim] arises out of the conduct, transactions, or occurrences set forth . . . in the prior complaint.” 31 U.S.C. § 3731(c)

Cases: FERA's Retroactive Application

- FERA's § 4(f)(1) retroactivity clause:
 - The amendment "shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act
- Majority view:
 - Applies only to instances **where *claims for government payment*** were pending on June 7, 2008
 - Adopted by Eleventh Circuit, D.D.C., S.D. Ohio, N.D. Illinois, among many others
 - Some courts have even found retroactive application unconstitutional
- Minority view:
 - Applies to all FCA **cases** pending on June 7, 2008.
 - *United States ex rel. Kirk v. Schindler Elevator Corp.*, 601 F.3d 94, 113 (2d Cir. 2010)

FERA Amendments - Implications

- Review whether your existing program comports with broadened scope of FCA under FERA Amendments
 - Establish means to ensure accuracy and legitimacy of claims not only to the government, but to any contractor/grantee who is working on government's behalf
 - Perform internal audits
 - Encourage internal reporting of potential wrongdoing
 - Prepare for increased investigative tools by creating protocols for storing data and handling investigations

FCPA Proposed Legislation

The Overseas Contractor Reform Act (H.R. 5366)

Overseas Contractor Reform Act Basic Provisions

- Requires “any person found to be in violation of the FCPA” to be “proposed for debarment” within 30 days “after a final judgment of such violation”
- Permits waiver by head of a Federal Agency but must be reported to Congress
- Extremely broad policy statement that “no Government contracts or grants should be awarded to individuals or companies who violate the FCPA”

Why Proposed?

- Congress frustrated that agencies either not willing or uninterested in debarring contractors who are FCPA violators
- Rep. Welch (sponsor of House bill)
 - Cites allegations against Xe (formerly Blackwater), where Iraqi officials purportedly bribed by Xe employees to diminish impact of 17 civilians shot in Iraq

Timeline of Act

- Introduced May 20, 2010
- Passed unanimously in House on Sept. 15, 2010
- Referred to Senate Committee on Homeland Security and Government Affairs
- Industry groups have urged Senate staffers to rethink proposed legislation

Why Industry Is Concerned

- A mandatory “proposed debarment” causes immediate suspension
- The Act eliminates agency discretion regarding whether to pursue debarment
 - May force debarment proceedings where contractor is presently responsible
- The broad policy statement contained in the proposed legislation eviscerates the waiver provision
- Impermissibly targets FCPA violators

Suggestions for Clarification

- Change requirement from “propose for debarment” to “refer for debarment”
 - Would eliminate language that triggers FAR requirement to suspend FCPA violator
 - Would maintain agency discretion
- Clarify that “any person found to be in violation of the FCPA” must entail a judicial finding of guilt
- Eliminate or amend the policy statement to one where agency SDOs shall consider for debarment individuals or companies convicted under the FCPA

Implications

- Voice concerns to your industry association representatives
- Educate your government relations team if they are not already aware of concerns regarding the proposed legislation
- Remain updated on legislative developments

Speaker Biographies



Iris E. Bennett

Ms. Bennett is Of Counsel to Jenner & Block and a member of the Firm's Litigation Department. She is a member of its White Collar Defense and Investigations and Antitrust Litigation Practices. Ms. Bennett conducts internal investigations for companies concerned about potential violations of criminal law, provides counseling with respect to resolution strategies and remediation, and represents companies in government investigations. Ms. Bennett has significant experience representing companies that operate internationally and that are subject to the Foreign Corrupt Practices Act (FCPA).

Washington, DC Office

Office: (202) 639-6008

Email: ibennett@jenner.com



Jessie K. Liu

Ms. Liu is a partner in the Jenner & Block's Litigation Department. She is a member of the White Collar Defense and Investigations Practice. Ms. Liu's practice focuses in particular on advising and defending government contractors facing investigations or enforcement actions. She counsels clients from the moment they learn of a potential compliance issue, through a subsequent internal investigation, to the final resolution of the matter. She also represents clients in grand jury, congressional, and inspector general investigations. She has substantial experience in the False Claims Act and Foreign Corrupt Practices Act.

Washington, DC Office

Office: (202) 639-6017

Email: jliu@jenner.com

Speaker Biographies



Cynthia J. Robertson

Ms. Robertson is a Government Contracts Emerging Issues Attorney in Jenner & Block's Washington DC office. She is a member of the Firm's Government Contracts and White Collar Defense and Investigations Practices and Litigation Department. Ms. Robertson's current role for the firm involves understanding and advising clients about the emerging issues stemming from legislation and regulation affecting government contractors and other industries. Ms. Robertson researches and analyzes changes to regulations like the FAR and DFAR and, where appropriate, works with industry associations and clients to offer public comment on rulemaking proceedings. Ms. Robertson monitors Department of Defense policies and defense acquisition reform proposals and ensures clients are kept abreast of important changes.

Washington, DC Office

Office: (202) 639-6021

Email: crobertson@jenner.com