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Hidden in the NDAA: The Expanded Reach of the Program Fraud Civil Remedies Act

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Federal government contractors and many others have been closely watching the drafting, introduction, consideration, debate, amendment, and passage of the annual National Defense Authorization Act ("NDAA"). Since 1961, the NDAA has authorized appropriations and established policy for the Department of Defense, nuclear weapons programs at the Department of Energy, defense intelligence programs, and other defense activities of the federal government (e.g., military construction projects and homeland security programs). The NDAA for Fiscal Year 2025 was signed into law by President Biden on December 23, 2024, and entitled "Servicemember Quality of Life Improvement and National Defense Authorization Act for Fiscal Year 2025," H.R. 5009, 118th Congress, 2nd Session). The NDAA is primarily a policy bill, not the final funding bill for the military.

A new training program with Taiwan, policy related to diversity training and extension of the FISA surveillance program are in the headlines. But hidden in the depths of the 2025 NDAA is the Administrative False Claims Act ("AFCA"), which authorizes significant changes to federal law to further empower the U.S. Department of Justice ("DOJ") and various federal administrative agencies to pursue parties for alleged civil fraud. The AFCA renames and revitalizes the Program Fraud Civil Remedies Act of 1986 ("PFCRA"). Administrative agencies have expanded powers to pursue and settle up to $1 million in fraud claims and other allegations of false statements that were made to the United States government, using administrative proceedings in which the agency serves as the investigator, prosecutor, and judge. Moreover, the threat of suspension and debarment give the agency even further leverage.

The PFCRA has long provided an administrative remedy to Executive Branch agencies related to false, fictitious, or fraudulent claims and statements where an alleged liability is less than $150,000. It has been a formidable weapon in the government's arsenal as it provides for penalties up to $5,000 per claim, and an additional assessment of up to two times the amount of the fraudulent claim. But given the $150,000 cap, it has often been passed over in favor of other statutes. The new AFCA raises the maximum amount of a fraud claim that may be handled administratively to $1 million and allows the government to recoup costs for investigating and prosecuting these frauds.

Given the inherent risks with administrative proceedings, this expanded front poses greater risks. Add

to the home field advantage the threat of debarment or permissive exclusion, and the home field advantage is even greater.

How the PFCRA Meshes with the False Claims Act

The federal civil False Claims Act ("FCA"), codified as amended at 31 U.S.C. § 3729, et seq., is the most important tool in the government's arsenal for combating alleged program fraud. It allows whistleblowers who have original source knowledge to sue in the name of the United States for alleged damages resulting from fraud that caused federal agencies to spend monies they would not otherwise have spent or damages resulting from the federal agencies not receiving funds that they were otherwise entitled to receive from private parties who misled the agencies about what should have been paid to the government under contracts.

To entice the whistleblowers to bring these cases, the statute authorizes the award of a bounty that ranges from 10 to 30 percent of the damages, along with attorney's fees, depending on whether the "DOJ" intervenes or not in the lawsuit. When whistleblowers file these cases in federal district court, they remain sealed so that the DOJ and federal agencies involved have adequate time to investigate the whistleblower's allegations and determine whether the DOJ will intervene as to some, or all the theories alleged. The intervention decision is a critical phase in FCA litigation as most intervened cases settle. Publicly traded companies must consider a variety of dangers when faced with a threatened intervention, including:

1. Trebled statutory penalties that can quickly reach into seven figures;
2. Program suspension or debarment;
3. Exclusion from Medicare;
4. Adverse publicity that impacts lenders and creditors, along with employee morale; and
5. Shareholders' derivative actions.

While these threats are significant, the heightened pleading rules required under FED. R. CIV. P. 9(b) for fraud allows defense counsel to craft significant challenges to the adequacy of the allegations under Rule 12(b)(6) when the complaint fails to adequately plead the required elements, supported by facts and their plausible inferences. Defense counsel can also seek to stay discovery until a court determines if their challenges merit relief. In addition, since the FCA is a fraud statute, a defendant has the right to a jury trial.

Key Protections are Unavailable in Administrative Proceedings

These important protections, however, are not available if an administrative agency pursues its claims before an Administrative Law Judge ("ALJ"). Moreover, the Federal Rules of Evidence are often relaxed in such proceedings. In the rare case that a defendant can convince an ALJ to rule in its favor, the agency can appeal – to itself – to review the ALJ's decision. But if the accused loses in the administrative hearing, its appellate rights are extremely limited. It can only seek review from a federal court after exhausting its administrative remedies, and the review is very deferential to the ALJ's findings on factual issues in the record. Against this background, the enactment of the Administrative False Claims Act heightens the risks to companies and individuals who contract with the government since now federal agencies have expanded authority to pursue smaller False Claims Act cases through their administrative powers – and defendants do not have the safeguards otherwise available to them if they were charged in federal court with violating the False Claims Act. Given their new authority from Congress, the agencies that contract with private parties will be implementing regulations in short order. Generally, such legislative regulations are binding and

entitled to full deference by courts, notwithstanding the abrogation of the “Chevron deference” doctrine announced in *Loper Bright Enterprises v. Raimondo*, 44 S.Ct. 2244 (2024).

The Right to a Jury Trial may Remain under Jarkesy

The holding from *SEC v. Jarkesy*, 603 U.S. 1 (2024), suggests a way to attack a threatened administrative proceeding under the Administrative False Claims Act. *Jarkesy* involved the U.S. Securities and Exchange Commission’s (“SEC”) exercise of new powers under the Dodd-Frank Act’s reform measures to seek penalties through its administrative authorities for alleged fraud against registrants (where previously it was limited to filing suit in federal district court). Mr. Jarkesy had argued the administrative proceeding violated his right to a jury trial guaranteed by the Seventh Amendment to the U.S. Constitution but was initially unsuccessful in challenging the SEC’s action before the ALJ under its new powers. Only after predictably losing at trial before the SEC’s ALJ and having significant penalties imposed was Jarkesy able to pursue an appeal on the grounds he had preserved. The Fifth Circuit ruled for Jarkesy and vacated the SEC’s judgment for three reasons, most notably finding that his right to a jury trial had been violated even though in the Dodd Frank Act Congress had granted the SEC the option to pursue such claims administratively.

The SEC improvidently sought certiorari in the *Jarkesy* case, which resulted in the U.S. Supreme Court’s determination that, under the facts presented, the agency’s use of its administrative procedures had violated Jarkesy’s right to a jury trial. Notably, the majority’s opinion was not limited to the SEC. Thus, its rationale offers a way to challenge an agency’s administrative pursuit of an entity or individuals under its expanded authority conferred by Congress in the Administrative False Claims Act, which is part of the 2025 NDAA. As ably summarized by the Congressional Research Service:

> To determine whether a suit is “legal in nature,” the Court had to “consider both the cause of action and the remedy it provides.” Pursuant to precedent, the Court stated the type of remedy is the “more important” factor when evaluating the nature of the suit. The Court provided that, although monetary relief is a remedy available in both legal and equitable suits, the nature of the monetary relief will reflect the type of suit at issue. Monetary relief designed to restore the status quo between the parties, such as disgorgement or restitution, is an equitable form of relief, while monetary relief designed to punish or deter wrongdoing, such as a civil monetary penalty, is legal in nature.
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> *SEC v. Jarkesy*: Constitutionality of Administrative Enforcement Actions, CRS LSB11229 (September 16, 2024), at 2.

Given the punitive nature of the False Claims Act’s statutory penalties, which now range from $13,946 to $27,894 per false claim (and can be trebled), it is clear that such penalties are meant to punish or deter wrongdoing. As such, a colorable argument can be made, using the reasoning expressed by the *Jarkesy* Court, that a federal agency’s pursuit of a defendant for alleged False Claims Act violations under the newly expanded authority conferred by Congress in the Administrative False Claims Act violates the right to a jury trial as guaranteed by the Seventh Amendment.

Practical Considerations

Whether to pursue such an approach will depend on various considerations. If a litigant succeeds in such an argument, the danger of piling on must be considered. An agency may convince the DOJ to expand its theory and pursue much higher damages. Another practical consideration is the cost of litigation. False Claims Act cases are time consuming and expensive. Getting some level of closure rather than a protracted litigation allows a company to limit the collateral damages that commonly accompany such cases and turn a new page.

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