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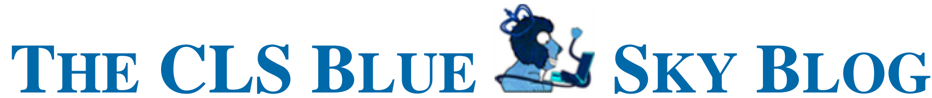

THE CLS BLUE SKY BLOG

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Skadden Discusses DOJ's Use of FIRREA as Enforcement Tool

By Boris Bershteyn, Andrew M. Good, Ryan D. Junck and Caroline Ferris White April 22, 2021

Comment

The Department of Justice (DOJ) under President Joe Biden is widely expected to increase its focus on white collar enforcement actions against individuals and financial institutions. We anticipate that we will see, as we did in the Obama years, an uptick in actions relying on the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA). It has already been employed to address misconduct in connection with the government's Paycheck Protection Program (PPP): In January 2021, the DOJ announced a civil settlement with the borrower of a PPP loan for violations of FIRREA and the False Claims Act based on false statements made on loan applications.

Although it is a civil statute, FIRREA became a powerful enforcement tool to prosecute wrongdoing following the 2008 subprime mortgage crisis, when its civil money penalty provision was used to secure historic, billion-dollar settlements. This was a novel use for a statute that had been on the books for over 20 years.

Enacted in 1989 in response to the savings and loan crisis of the late 1980s, FIRREA's primary function was to improve regulation of and protect U.S. financial institutions. Focused on protection, Congress included a provision authorizing civil actions seeking penalties for violations of certain criminal statutes that affected financial institutions. Under Section 951 of FIRREA, the DOJ may seek civil penalties for violations of any of 14 predicate criminal statutes. Nine of these involve harm to a financial institution by their very terms — for example, bank fraud. For the other five, which include wire and mail fraud, Congress specified that the violation must "affect[] a federally insured financial institution."

This provision is an attractive tool for the government for a number of reasons:

- First, a civil violation need only be established by a "preponderance of the evidence," a lower burden than the "beyond a reasonable doubt" required in a criminal case. Thus, FIRREA lets the DOJ seek substantial sums of money for violations of, say, the bank fraud statute, where it might be hard to meet the reasonable doubt standard.
- Second, the civil penalties provision has a generous 10-year statute of limitations. This is far longer than most civil statutes of limitations, which are often three to five years.
- Third, the civil penalties provision affords the DOJ significant investigative powers before it files a complaint.

Finally, the fines available under the civil penalties provision can be staggering. The maximum penalty for a single violation of the statute, depending on when it occurred and when it is assessed, is currently between $1.1 million and $2 million. Where the DOJ is able to show a "continuing violation," the statue permits fines of $1.1 million to $2 million per day or $5.5 million to $10.2 million per violation, whichever is less. If the violation results in a gain or loss, the DOJ can seek to increase the penalty up to the amount of that gain or loss. And because it is not possible to imprison a company, the penalties imposed under FIRREA are not materially different from what the DOJ can impose in a criminal action against a corporate defendant.

The potential scope of FIRREA has become clearer since the Obama administration first began relying on it. Before the financial crisis, the civil penalties provision had largely lain dormant, and there was little case law interpreting it. Court decisions since that time have made clear that FIRREA can be used to target both misconduct by third parties that harms financial institutions and, perhaps more significantly, conduct by financial institutions that affects the institutions themselves. While the latter theory would seem to permit penalties against the very institutions FIRREA was enacted to protect, courts that have addressed this issue have generally agreed with the government that such actions are contemplated by the statute.

In particular, several rulings in the U.S. District Court for the Southern District of New York have concluded that the statute permits actions based on this "self-affecting" theory. The first case to interpret the phrase "affecting a federally insured financial institution" was United States v. Bank of New York

Mellon in 2013. That court found that a bank need not be the victim of the alleged crime to be “affected,” thus bringing institutions that were in fact perpetrators of wrongdoing within the scope of the statute.

That interpretation has since been adopted in at least three other Southern District of New York cases. The self-affecting theory has not yet been squarely addressed by any court of appeals. But in 2015, the U.S. Court of Appeals for the Second Circuit endorsed a broad reading of similar language in another provision of FIRREA extending a 10-year statute of limitations to mail and wire fraud “if the offense affects a financial institution.” In United States v. Heinz, the court found that an offense affects a financial institution where there is a direct effect on the institution, regardless of whether that financial institution is a co-conspirator.

Given its lower burden of proof, long statute of limitations, subpoena power and potential for substantial penalties, we expect the DOJ under President Biden to employ FIRREA as an enforcement tool, particularly against corporate defendants.

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This post comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the firm’s memorandum, “Biden DOJ Likely to Employ FIRREA as an Enforcement Tool,” dated April 5, 2021, and available here.

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