THE NATIONAL LAW JOURNAL

DECEMBER 2, 2013

An ALM Publication

THE PRACTICE | Commentary and advice on developments in the law

DOJ Using Old Law in New—and Worrisome—Way

Government has more ammunition with its recent reliance on a financial reform act passed in the 80s.

BY DAN WEBB AND ROBB C. ADKINS

(B) take evidence; and

(C) by subpoena, summon witnesses ... require ... produ

(2) PROCEDURES APPLICABLE

The same procedures and limitations as ... provided with

(3) LIMITATION--

In the case of a subpoena for which ... return date is

(h) STATUTE OF LIMITATIONS--

A civil action under this section may not be commenced

[Codified to 12 U.S.C. § 1833a]

[Source: Section 951 of title IX of the Act of August

TITLE XI–REAL ESTATE APPRAISAL REFORM AMENDMENTS

THE NATIONAL LAW JOURNAL

The Financial Institutions Reform, Recovery, and Enforcement Act has seen a resurgence lately, as financial institutions find themselves targeted by the Department of Justice based on conduct that occurred during the recent financial crisis. Indeed, the DOJ has filed more FIRREA actions in the past few years than it did in the first 20 years of the statute's existence.

The law was originally passed in 1989 to protect financial institutions against fraud in the context of the savings and loan crisis. Now, FIRREA is being used in ways not contemplated more than two decades ago and has become a powerful tool for the DOJ—raising troubling questions about its recent application.

To understand the genesis of FIRREA, one must go back to the savings and loan crisis of the 1980s. At that time, financial institutions were collapsing at a rapid rate. By the end of 1987, some 505 savings and loan institutions were reported insolvent. In response to this crisis, and its many perceived root causes, Congress enacted FIRREA in 1989 as part of a comprehensive legislative plan to reform and strengthen the banking and federal deposit insurance systems. The statute also sought to protect banks by providing enforcement authority to combat the perceived fraudulent conduct of individuals and third parties against financial institutions. Accordingly, Section 951 of the statute, codified at 12 U.S.C. 1833a, permits the U.S. attorney general to bring a civil action against anyone who violates 14 enumerated criminal statutes affecting a financial institution.

Some of these criminal statutes, such as bank fraud, clearly affect a financial institution. Other enumerated criminal statutes, such as mail and wire fraud, do not expressly concern financial institutions; therefore, for those offenses, the government must additionally prove that the fraud is one "affecting a federally insured financial institution."

A brief examination of FIRREA provisions makes clear why it has become a weapon of choice for the DOJ in financial crisis cases. FIRREA provides powerful enforcement tools, including the following:

Lower burden of proof. Because an action under FIRREA is civil, the burden of proof is the lower preponderance of the evidence. 12 U.S.C. 1833a(f). This allows the DOJ to bring actions under a broad range of criminal statutes, without having to meet the heightened criminal burden of beyond a reasonable doubt. This advantage appears to be particularly at play in financial crisis cases that have proven difficult from a criminal enforcement perspective.

Administrative subpoenas. FIRREA provides a mechanism for DOJ attorneys to conduct discovery prior to filing a civil complaint. The statute authorizes issuance of administrative subpoenas for documents or testimony as long as it is "in contemplation of a civil proceeding under FIRREA." 12 U.S.C. 1833a(g). In a typical civil suit, one must first file a complaint based on the information at hand, sur-

vive motions to dismiss and only then gain access to formal discovery from the opposing party or others. FIRREA allows the government to obtain all of this evidence prior to filing suit, thus avoiding the "ready, fire, aim" difficulties associated with typical civil actions. Under the broad investigatory powers of FIRREA, the DOJ can engage in extensive investigations, compel disclosure of voluminous documents and depose key witnesses to build its case.

The 10-year statute of limitations period. A third tool in FIRREA's arsenal is its 10-year statute of limitations period. 12 U.S.C. 1833a(h). This is much longer than the typical three- to five-year statute of limitations in civil cases. For events that took place during the recent financial crisis, some potential criminal and civil actions are already running up against their five-year limit. FIRREA allows the DOJ another five years to put a case together, which, combined with the broad investigatory powers discussed above, provides enormous enforcement and negotiating power against financial institutions.

Large penalties. FIRREA permits a government attorney to seek up to $1.1 million in civil money penalties per violation and for continuing violations up to $1.1 million per day or $5.5 million in total. 12 U.S.C. 1833a(b)(1) & (2). Significantly, the statute also authorizes fines up to the amount of pecuniary gain or loss from the violation. 12 U.S.C. 1833a(b)(3). These "gain or loss" recoveries can be staggering, totaling in the multi-millions or multi-billions.

Much like the Foreign Corrupt Practices Act of 1977, FIRREA has been on the books for decades but had seen relatively little enforcement until recently. In the wake of the recent financial crisis, the DOJ has revived FIRREA and pursued a number of high-profile actions. As Stuart Delery, assistant attorney general for the DOJ's Civil Division, stated at a press conference in February, "FIRREA is a powerful weapon for combatting financial fraud, and it will continue to play a key role in the department's efforts to hold accountable those who violated the law."

ASSERTING UNTESTED THEORIES

As an older statute is repurposed for new application, the DOJ finds itself asserting untested theories in an attempt to conform the law to the facts. Perhaps nowhere is this more starkly demonstrated than in a series of recent cases in which the DOJ brought action against financial institutions under FIRREA, putting at issue the statute provision "affecting a federally insured financial institution." The "affecting" provision is not defined in the statute and, due to limited litigation in its first 20 years, no court cases had addressed the provision until recently.

In support of its recent FIRREA actions in financial crisis cases, the DOJ has asked the courts to interpret the "affecting" requirement as permitting an action against the financial institution for allegedly engaging in fraud that affected itself. See, for example, *United States v. Bank of New York Mellon*, 2013 WL 1749418 (S.D.N.Y. 2013). Defendants have argued, among other things, that "affecting" a financial institution under FIRREA means harming or victimizing the financial institution, and that the financial institution itself cannot have "affected" itself where the government's theory is that it is the perpetrator, rather than the victim, of the alleged fraud. Thus far, the DOJ has been successful at the district court level, but appellate courts have yet to weigh in on this legal theory.

FIRREA has proven to be a favorite weapon of the DOJ in financial fraud enforcement. Armed with a lower burden of proof, broad investigative powers, a lengthy statute of limitations period and severe civil money penalties, the DOJ's aggressive FIRREA enforcement effort focused on financial-crisis cases shows no signs of abating. As a result, practitioners—especially those in-house or representing financial-sector clients—should monitor closely how the DOJ fashions its theories of liability and how FIRREA is interpreted by the courts. Of particular interest will be the interpretation of "affecting a federally insured financial institution" as that issue works through the appellate court.

Increased FIRREA enforcement also raises practical concerns, particularly with respect to the broad investigatory powers that can be brought to bear on financial institutions in a climate of aggressive enforcement against those same financial institutions.

How might responses to a FIRREA administrative subpoena affect potential parallel investigations or exposure? To what extent may Civil Division attorneys share the information obtained through the broad investigatory authority under FIRREA?

Unlike parallel criminal investigations, in which documents and compelled testimony may be subject to grand jury secrecy rules under Rule 6(e) of the Federal Rules of Criminal Procedure, information gathered through a FIRREA administrative subpoena are not subject to that rule. And given that FIRREA is no longer being viewed by the DOJ as a statute designed to protect financial institutions from fraud, but rather to file actions against them for fraud, practitioners must proceed cautiously in responding to administrative subpoenas and assume that the financial institution may be a target of the investigation.

As financial institutions increasingly find themselves receiving FIRREA administrative subpoenas, they and their counsel would be well advised to familiarize themselves with the statute, review the recent cases interpreting it and to respond to those subpoenas with an understanding of the current enforcement climate and potential impact.

DAN WEBB AND ROBB C. ADKINS *are partners at Winston & Strawn. Webb, the firm's chairman, previously served as the U.S. attorney for the Northern District of Illinois. Adkins, the chairman of the firm's white-collar, regulatory defense and investigations practice, was the top fraud official at the Department of Justice.*

Reprinted with permission from the December 2, 2013 edition of THE NATIONAL LAW JOURNAL © 2013 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382, reprints@alm.com or visit www.almreprints.com. #005-12-13-02