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## CIVIL FALSE CLAIMS ACT: House Passes Revisions to False Claims Act Liability in S. 386 with Four Additional Amendments that Must Win Senate Approval

This afternoon, the House of Representatives passed amendments to the civil False Claims Act ("FCA") in approving [S. 386](#), the Fraud Enforcement and Recovery Act of 2009 ("FERA"). The amendments to the liability provisions of the FCA contained in the House bill are identical to those passed by the Senate last week in S. 386. See [FraudMail Alert No. 09-04-30](#). Added onto the bill that the House passed, however, are four other amendments that involve non-liability issues: relation back of the government's complaints in *qui tam* proceedings, expansion of the Department of Justice's civil investigative demand authority, expansion of the retaliation cause of action, and an exception to the seal provision to allow sharing of evidence with state and local government law enforcement authorities. Although the Senate and House versions of S. 386 must be reconciled, it is now more likely that the revisions to the FCA's liability provisions in S. 386 will become law.

Fortunately, many other amendments that have been under consideration before were not included in S. 386. The public disclosure jurisdictional bar, Rule 9(b)'s specificity requirements, the FCA's statute of limitations provisions, and other important longstanding defenses to FCA liability all remain intact in S. 386 as passed by both the Senate and the House. Prior versions of FCA amendments reported by the House and Senate Judiciary Committees had virtually eliminated these important defenses to meritless *qui tam* suits. See FraudMail Alert Nos. [08-06-20](#), [08-02-27](#), and [07-12-21](#). Thus, S. 386 comes closer than the other bills to preserving the FCA's original, historic balance of interests—encouraging whistleblowers with important information about fraud to disclose it to the government, while preventing meritless or parasitic suits—and to maintaining the key role that these defenses play in that balance.

### Amendments to Liability Provisions of the FCA

As discussed in our previous FraudMail Alert, the version of S. 386 passed by the Senate effectively overturns parts of the Supreme Court's unanimous decision last year in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008), by removing the "to get" and "by the Government" language in section 3729(a)(2) that the Court applied in order to limit liability and keep the FCA from becoming an all-purpose fraud statute. It also includes a materiality

requirement in the provisions that correspond to subsections (a)(2) and (a)(7), and defines "material" as having a natural tendency to influence payment or approval of the claim, the "weaker" materiality standard. See John T. Boese, *Civil False Claims and Qui Tam Actions* §2.04 (Aspen Publishers) (3d ed. & Supp. 2009-1). In addition, S. 386 expands the definition of "obligation" that triggers reverse false claims liability. All these revisions apply prospectively, except for the amendment to subsection (a)(2), which would take effect on the date that *Allison Engine* was decided, June 7, 2008, and is therefore retroactive. (Whether that provision is constitutional is, of course, to be decided).

### The Four House Amendments

The bill passed by the House today adopts the liability revisions in S. 386 as passed by the Senate. The additional House amendments are as follows:

- **Relation Back of Government's Pleading.** Under the House amendment, when the government files a complaint or amends the relator's complaint to clarify or add claims, the government's pleading now relates back to the date of the original complaint. Under this amendment, the government could delay its intervention in ways that could dramatically undermine a defendant's ability to defend itself. See, e.g., *United States v. Baylor University Medical Center*, 469 F.3d 263 (2d Cir. 2006); *United States ex rel. Health Outcomes Technologies v. Hallmark Health System, Inc.*, 409 F. Supp. 2d 43 (D. Mass. 2006).
- **Civil Investigative Demands.** Under current law, only the Attorney General is authorized to approve a Civil Investigative Demand ("CID") under the FCA, and the information received in response to the CID cannot normally be shared with relators and their counsel. The House amendment expands this provision by authorizing the Attorney General to appoint a designee to approve a CID, and it allows the information obtained to be shared with "any qui tam relator if the Attorney General or designee determine it is necessary as part of any false claims act investigation." Also, there is a broad definition of "official use" in the amendment, under which the Justice Department is allowed to use the information in communications with government personnel, consultants, and counsel for other parties in matters concerning an investigation, case, or proceeding. The expanded use and sharing of CID responses with any *qui tam* relator, consultant and counsel is potentially harmful to businesses and individuals, and in recognition of this, it should be narrowly and carefully circumscribed by the Justice Department to curb abuses. One area of potential abuse is that relators who have no specific knowledge of the alleged fraudulent conduct will use CID material shared with them to satisfy the requirements of Rule 9(b) or to expand a complaint. Hopefully, DOJ will keep such potential for abuse in mind in sharing CID material.
- **Retaliation.** The House amendment expands the prohibition against discrimination "in the terms and conditions of employment" to a "contractor, or agent," in addition to an employee, without requiring the prohibited retaliatory acts to be taken by an "employer." Under the amendment, liability could potentially extend to many different types of relationships that do not involve an employment contract. This broad provision could

have unintended consequences because it is open-ended and somewhat confusingly worded.

- **Service on State or Local Authorities.** The House amendment allows the government or relator to serve a *qui tam* complaint, other pleadings, or the written disclosure on state and local law enforcement authorities that investigate the cases on behalf of the government, and provides that the seal does not preclude this particular sharing of information.

While several of the House amendments are carelessly worded, overbroad, and potentially harmful to defendants, the fact that they leave traditional defenses to liability untouched is important to preserve the historical roots of this unique statute, and serves the interests of maintaining balance and reasonable limits under it as well.

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