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CIVIL FALSE CLAIMS ACT: The Senate Passes S. 386 Amending Major Liability Provisions in the FCA; House Judiciary Passes More Sweeping FCA Revisions in H.R. 1788

On Tuesday, the Senate passed S. 386, the Fraud Enforcement and Recovery Act of 2009 ("FERA"), to address concerns about the potential for fraud by mortgage handling companies, financial institutions, and other recipients of TARP and economic stimulus funds. Most importantly, S. 386 also revises the liability provisions of the civil False Claims Act ("FCA") to make recoveries under the statute easier--not only against recipients of stimulus funds, but also against all other individuals, companies, and institutions that may be sued under the FCA. Although the FCA revisions in the bill are not absolutely necessary to cover TARP and stimulus funds, the sponsors' excuse was to close a perceived "loophole" in the law that a unanimous Supreme Court found was necessary to avoid injustice and unreasonable government recoveries in *Allison Engine Co. v. United States ex rel. Sanders,* 123 S. Ct. 2128 (2008). That decision properly limited liability only to fraudulent statements that were specifically connected to government funds and designed "to get" false claims paid or approved by the government. *See* FraudMail Alert No. 08-06-09. *See also* John. T. Boese, Civil False Claims and Qui Tam Actions §2.06[G] (3d ed. 2006 & Supp. 2009-1). S. 386 specifically reverses *Allison Engine* and also revises many other liability provisions found in 31 U.S.C. § 3729(a).

Two other bills introduced in the 111th Congress, S. 458 and H.R. 1788, reiterate the blunderbuss revisions to the FCA that were introduced but not enacted in the 110th Congress in S. 2041 and H.R. 4854. *See* FraudMail Alert Nos. 08-06-20 and 08-02-27. *See also* John. T. Boese, Civil False Claims and Qui Tam Actions §1.08 (3d ed. 2006 & Supp. 2009-1). These sweeping revisions are even more dangerous than S. 386. H.R. 1788 was reported to the House by the House Judiciary Committee without amendment on Tuesday. S. 458 is still pending before the Senate Judiciary Committee.

S. 386 Revises the Liability Provisions of the FCA

Section 4 of S. 386 revises the FCA to remove both the "by the Government" limitation and the "to get" language in section 3729(a)(2), and comparable language in sections 3729(a)(3) and (a)(7) of the current law. This language was the basis for the intent requirement that the unanimous Supreme Court applied in *Allison Engine Co. v. United States ex rel. Sanders,* 128 S. Ct. 2123

(2008) that limits FCA liability to false statements "to get" false claims paid by the government under subsection (a)(2), and to conspiracy to defraud the government by getting false claims allowed or paid under subsection (a)(3). Without requiring this link between a false claim and payment or approval by the government, the Court noted, the FCA would be "boundless" and become an "all-purpose" fraud statute. 128 S. Ct. at 2128, 2130.

In its comments on S. 386, the Department of Justice recommended that this language be deleted, and that a materiality requirement be inserted in the liability provisions that correspond to sections 3729(a)(2) and (a)(7) instead. *See* Letter from Dept. of Justice Acting Assistant Attorney Gen. Burton to Sen. Leahy expressing the Department's views on FCA amendments in Section 4 of S. 386 (Feb. 24, 2009). DOJ recognized, however, that the definition of "claim" needed to be limited "to ensure that the FCA does not encompass fraud having no nexus to the Government." The Senate Judiciary Committee incorporated DOJ's suggestions in S. 386 during markup, and as a result, the bill passed by the Senate limits the funds that are subject to liability in two significant ways. First, it adopts the Justice Department's proposal for providing the required nexus to the federal government, limiting liability to the funds provided by the government "to be spent or used on the Government's behalf or to advance a Government program or interest." Second, it incorporates DOJ's materiality requirement, but defines "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."

These revisions raise a number of questions and concerns. A "capable of influencing" definition of materiality is susceptible to overbroad interpretations by the government and relators, and even by courts. This "weak" materiality standard has been used to dismiss many FCA cases, but it has also been used to allow many FCA cases to proceed to trial. More importantly, since it is not clear exactly what is meant by the requirement that the funds are "to be spent . . . on the Government's behalf or to advance a Government program or interest," questions will surely arise as to whether the government's interest extends to the funds requested, and if so, whether its interest is sufficient to trigger liability. These questions will be particularly difficult to answer even where a government agency is intimately involved, but the government's heavy funding of private enterprises such as Fannie Mae and General Motors will undoubtedly entice many relators to try to expand this concept far beyond any rational limits to purely commercial enterprises. Senator Kyl recognized the difficulty, but noted that "previous understanding, as well as common sense, dictate that a particular transaction does not 'advance a Government program or interest' unless it is *predominantly federal in character*—something that at least would require . . . that the claim ultimately results in a *loss to the government*," rather than "any garden-variety dispute between a general contractor and a subcontractor simply because the general receives some federal money." 155 Cong. Rec. S4540 (daily ed. Apr. 22, 2009) (statement of Sen. Kyl) (emphasis added).

S. 386 would also extend liability to a conspiracy to submit reverse false claims, and defines the "obligation" that triggers reverse false claims liability to encompass "an established duty, whether or not fixed" that arises from a contractual, grantee, licensee, or fee-based relationship, from a statute or regulation, or from the retention of any overpayment. As a result of the Senate's passage of an amendment offered by Senator Kyl, this definition is more limited and thoughtful than the definition in the original bill, which included a "contingent duty" that could have covered conduct subject to a fine as soon as the conduct occurred, before the duty to pay the fine actually arose. The Kyl amendment also removed "quasi-contractual" relationships from the list of duties covered by the definition of "obligation" because it is a term that describes a remedy rather than a duty. Senator Kyl criticized the bill's use of the loose term "relationships" to describe legal duties such as those arising under contracts, and he noted that this language was somewhat "Oprahfied," but, unfortunately, this terminology remains in the bill.

As passed by the Senate, S. 386 would generally apply prospectively to conduct that occurs on or after its date of enactment, with one major and controversial exception. The amendment to the provision in the bill that corresponds to section 3729(a)(2) would specifically apply retroactively to all claims pending as of June 7, 2008, which is the date that *Allison Engine* became law. The retroactive application of this amendment is almost certainly unconstitutional—and will raise a host of practical problems in pending cases that courts will spend years trying to resolve.

H.R. 1788 Reverses 20 Years of *Qui Tam* Litigation

As reported to the House on Tuesday, H.R. 1788, the False Claims Correction Act of 2009, proposes sweeping amendments to the False Claims Act that are similar to H.R. 4854, which was passed by the House Judiciary Committee but never passed by the full House in the 110th Congress. Like its predecessor, H.R. 1788 would rewrite virtually every significant provision of the FCA. *See* FraudMail Alert Nos. 08-06-20 and 07-12-21. For example, liability under H.R. 1788 extends to claims for "Government money or property," including money held in trust for an "administrative beneficiary" of the United States, an entity that is so broadly defined under the bill that FCA liability could cover false claims to Social Security recipients or government employees. The bill is seriously flawed because there is no nexus to the government requirement under it to keep the FCA from becoming the all-purpose fraud statute that the Justice Department warned against in its comments on S. 386, and that the Supreme Court found it necessary to prevent in *Allison Engine.*

In addition, H.R. 1788 would:

- Essentially eliminate the public disclosure bar, the jurisdictional bar under which an important historic balance between encouraging whistleblowers to bring new information on fraud to the government's attention and preventing parasitic whistleblower suits has been maintained since this law was originally enacted. H.R. 1788 makes it harder to prove public disclosure and allows only the DOJ to move to dismiss on this ground.

- Allow *qui tam* suits by government employees--a clear conflict of interest that the government itself has opposed.

- Remove or substantially weaken the requirement that relators must identify specific false claims in order to comply with Rule 9(b) of the Federal Rules. By exempting relators—but not the government—from the requirement in Rule 9(b) that fraud claims must be pled with specificity, the bill invites baseless private whistleblower suits.

- Expand "protected acts" under Section 3730(h) beyond those in furtherance of a *qui tam* suit to "efforts to stop" a violation of the FCA, and expand acts of retaliation beyond those by an employer to include actions "by any other person."

- Extend the statute of limitations to an unprecedented length of 8 years for all *qui tam* and retaliation actions.

- Retroactively apply most of the amendments to pending cases.

In short, the revisions in H.R. 1788 would drastically expand FCA liability, eliminate legitimate and long-standing defenses used by courts to weed out frivolous and meritless cases, and overturn FCA decisions that have been adverse to *qui tam* relators—even exempting them from compliance with a Federal Rule of Civil Procedure that applies to all parties in civil litigation. The revisions are careless and extreme in content, and poorly drafted as well.

The pending Senate counterpart to H.R. 1788, S. 458, the False Claims Act Clarification Act of 2009, is almost identical to S. 2041, its predecessor in the 110th Congress that was not enacted. Among other things, S. 458 defines the "obligation" that triggers reverse false claims liability in S. 458 to include a "contingent duty" and "quasi-contractual" relationships, terms that were specifically rejected by the Senate under the Kyl amendment to S. 386. One hopes the Senate's passage of S. 386 will allow for some rational thought before S. 458 is taken up, and make further consideration of S. 458 unnecessary. (The reader should note that the author testified before the Senate Judiciary Committee in February of 2008 in opposition to S. 2041).

Despite the troubling issues that remain, the FCA revisions in S. 386 reflect what the Department of Justice always wanted: a free reign to pursue under the FCA virtually any type of misconduct that is remotely connected to a Federal program regardless of whether the Treasury suffers any real financial loss. Perhaps this is why the Office of Management and Budget last week issued a statement giving the Administration's strong support to enactment of S. 386. *See* Office of Mgmt. & Budget, Exec. Office of the President, Statement of Admin Policy on S. 386 (Apr. 20, 2009). While clearly more thoughtful than the amendments currently pending in the 111th Congress in H.R. 1788 and S. 458, the FCA amendments in S. 386 do nothing to clarify existing law and reverse 20 years of carefully crafted FCA case law. Not much is clear except for one thing: the False Claims Act is poised to become a much more dangerous weapon for all those who deal with the Federal government.

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