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FALSE CLAIMS ACT: Senator Grassley Proposes Sweeping Amendments to the False Claims Act Favorable to Plaintiffs' Bar

Today on the Senate floor, Senator Grassley introduced sweeping amendments to the civil False Claims Act ("FCA") which will significantly increase liability under the FCA by eliminating long-standing defenses. The bill, S. 2041, also guarantees increased payments to private *qui tam* relators and their attorneys. The proposed amendments, entitled the "False Claims Act Corrections Act of 2007," are co-sponsored by Senators Durbin, Leahy, Specter, and Whitehouse. Senator Grassley explained that the proposed amendments are designed to "correct" judicial decisions—one by the Supreme Court and one by Chief Judge John Roberts when he sat on the D.C. Circuit Court of Appeals—and to bring the FCA in line with "congressional intent" from 1986. That is both an understatement and a misstatement. The actual language of the bill submitted to the Senate is a virtual rewrite of the False Claims Act that significantly changes both the substantive and the procedural provisions of the statute and would greatly expand liability for large and small businesses, not-for-profit institutions and individuals. The proposed amendments would also significantly increase the amounts paid to whistleblowers and the plaintiffs' bar whether or not they bring new information regarding fraud to the government.

Major Revisions in the Bill

In the process of "overturning" these court decisions, the proposed amendments amend the FCA in the following ways. The bill:

- Greatly expands the sources of money that can be the subject of FCA claims which (if read literally) would apply the Act to fraud committed against Social Security recipients or Federal employees;
- Virtually and practically eliminates the jurisdictional defense of "public disclosure/original source" which was adopted by Congress in 1986 to reward true whistleblowers and avoid parasitic *qui tam* lawsuits;

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- Increases the statue of limitations in most cases from six (6) to ten (10) years, nearly doubling the liability period;
- Extends the statute of limitations further by reversing a recent Second Circuit decision to allow stale government claims to "relate back" to the date a *qui tam* case is originally filed under seal;
- Expands the conspiracy section to apply to "reverse" false claims;
- Adds an almost incomprehensible provision prohibiting "waiver or release" of an FCA claim;
- Expands the "wrongful discharge" provision now found in 31 USC § 3730(h) to virtually any person or government contractor who claims adverse action because they attempted to stop a "fraud" whether or not related to a *qui tam* case;
- Allows *qui tam* relators, and their counsel, to obtain access to documents, deposition transcripts and other information obtained under a DOJ Civil Investigative Demand, which no court has allowed;
- Forces over 20 states that have passed or amended state false claims laws to rewrite their laws if they wish to come into compliance with the Deficit Reduction Act.

Expansion of FCA Liability

The proposed definition of "Government money or property," would, if read literally, expand the scope of the FCA well beyond what Congress ever intended in 1986 or any court has held since. This would include any money the government touches in any way, including money held by a bankruptcy trustee or Federal employees' money collected in the United Way campaign. It may, in fact, even apply to fraud on individual Social Security beneficiaries or government employees who pay with their Federal benefits or salaries. Allowing the government to recover treble damages and penalties for such private wrongs is far beyond the proper scope of the Act.

This provision, if enacted, is likely to face a serious constitutional challenge. The Supreme Court has explained, in a series of decisions, that False Claims Act damages and penalties which exceed a reasonable multiple of the actual loss to the government are unconstitutional under both the Due Process and Excessive Fines clauses. *See United States v. Halper,* 490 U.S. 435 (1989); *Hudson v. United States*, 522 U.S. 93 (1997); *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257 (1989). By definition, the government suffers no economic loss when non-government funds are at stake. There is, therefore, serious question as to whether such a provision, if passed, would survive constitutional challenge.

Enrichment of Government Employees

The proposal to "clarify" a circuit split on the issue of whether government employees may act as relators refers to a recent District of Colorado decision, where the court dismissed a qui tam case brought by a government auditor whose case was based on information obtained in his government audit. The court held that the auditor did not "voluntarily" provide the information to the government prior to filing his suit (as is required under current Section 3730(e)(4)) because his job as a government auditor mandated him to provide that information in his role as a government auditor.

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Instead of barring suits by Federal employees, which enrich government employees at the expense of both the Treasury and program integrity, these amendments for the first time explicitly allow such suits under certain circumstances. The amendment would allow government employees to act as relators when they have reported the information about the fraud to the Inspector General of the agency and to the Attorney General, and no action has been taken by the government within 12 months.

For the reasons we have stated in numerous prior Alerts, allowing any government employees to enrich themselves in any way based on information learned on the job is bad public policy and will subject auditors and their agencies to criticism that the audit is intended only for personal enrichment.

Click here for the bill containing the proposed amendments discussed in this Alert. For copies of the bill and the decisions discussed in the Alert, please contact us at fraudmail@friedfrank.com or (202) 639-7220.

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Authors and Contributors:

Washington, DC
John T. Boese
Beth C. McClain

Fried, Frank, Harris, Shriver & Jacobson LLP

New York
One New York Plaza
New York, NY 10004-1980
Tel: 212.859.8000
Fax: 212.859.4000

Washington, DC
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2505
Tel: 202.639.7000
Fax: 202.639.7003

Frankfurt
Taunusanlage 18
60325 Frankfurt am Main
Germany
Tel: 49.69.870030.00
Fax: 49.69.870030.555

Hong Kong
In association with Huen Wong & Co.
11th Floor, Gloucester Tower
The Landmark
15 Queen's Road Central
Hong Kong
Tel: 852.3760.3600
Fax: 852.3760.3611

Fried, Frank, Harris, Shriver & Jacobson (London) LLP
99 City Road
London EC1Y 1AX
England
Tel: 44.20.7972.9600
Fax: 44.20.7972.9602

Fried, Frank, Harris, Shriver & Jacobson (Europe)
65-67, avenue des Champs Elysées
75008 Paris
France
Tel: 33.140.62.22.00
Fax: 33.140.62.22.29

Website
www.friedfrank.com

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