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CIVIL FALSE CLAIMS ACT: Senator Grassley Urges DOJ, Treasury, and Qui Tam Lawyers to Use the FCA against Financial Institutions under Troubled Assets Relief Program

In early October 2008, Congress authorized $700 billion in government funds for the purchase of distressed assets from financial institutions through the Emergency Economic Stabilization Act of 2008. This massive aid package is intended to stabilize the economy and financial systems through the distribution of government funds under the Troubled Assets Recovery Program ("TARP") and the Capital Purchase Program ("CPP"). Most of these funds are sought by banks, insurance companies, savings institutions, and other financial institutions that are not familiar with the unique liability provisions and severe damages and penalties imposed under the civil False Claims Act ("FCA"), which authorizes treble damages and mandatory penalties of up to $11,000 for every "knowing" false claim submitted for Federal funds.

Although the FCA was originally passed in 1863 in reaction to perceived fraud on the Union Army during the Civil War, the Act has become a major weapon of the Justice Department against "fraud" on federal programs since far-reaching amendments were passed in 1986. Just last week, DOJ announced that recoveries under the FCA since 1986 total more than $21 billion, and DOJ's FCA statistics show that almost $11 billion was recovered in the last six years alone. *See* Press Release, Department of Justice, More than $1 Billion Recovered by Justice Department in Fraud and False Claims in Fiscal Year 2008 (Nov. 10, 2008) (attaching Fraud Statistics 1986 - 2008). In addition to its onerous treble damages and penalties, liability under the FCA can be based on "reckless disregard" rather than intentional fraud. Importantly, the FCA may be enforced both by the Department of Justice and by private parties, referred to as "*qui tam* relators," who act as whistleblowers and can recover up to 30 percent of any settlement or judgment. (For a more detailed analysis of these issues, see John T. Boese, *Civil False Claims and Qui Tam Actions* (Aspen Publishers, 3d ed. 2006 & Supp.2008-2)).

On Monday, November 17, 2008, Senator Grassley sent a letter to Treasury Secretary Paulson and Attorney General Mukasey, urging them to use the FCA against claimants under TARP and CPP who intentionally or recklessly submit false claims for TARP or CPP funds. Senator Grassley also encouraged private whistleblowers and their counsel to bring FCA suits against these claimants. For the past two decades, FCA suits have focused mainly on government

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programs in the areas of healthcare, government contracts, and oil and gas, leaving the regulation of financial institutions largely to the Federal bank regulatory agencies, the SEC and other expert agencies. However, except for tax claims, liability under the FCA applies to all entities that (1) submit a false claim to the federal government, (2) make or cause a false record or statement to be used to get a false claim paid or approved by the government, (3) conspire to get a false claim allowed or paid, or (4) make a false record or statement to conceal or avoid an obligation to pay money to the government. *See* 31 U.S.C. § 3729(a). Thus, the FCA can apply to financial institutions and others that falsely seek funds from the government under TARP and CPP. Potential defendants should also note that the Judiciary Committees of both the Senate and House recently reported out bills containing proposed amendments that would greatly expand liability under the FCA. *See* FraudMail Alert Nos. 07-09-12, 07-12-21, 08-02-27, and 08-06-20.

Senator Grassley stressed in his letter to DOJ the role that he believes will be played by the DOJ and private *qui tam* relators in enforcing the FCA under these financial programs, but he incorrectly overstated the reach of the FCA in an important respect. He stated that the federal courts have recognized that, under the FCA, an actionable fraud has occurred when an entity "submit[s] a claim that falsely certifies that the defendant has complied with a law, contract term, or regulation." This misstates the law on false certification under the FCA. Federal courts have long recognized the clear requirement of materiality for liability based on false certification under the FCA, which requires a false certification to be "material" to the government's decision to pay or approve the claim. The Supreme Court recently emphasized the importance of this materiality requirement in its decision in *Allison Engine Co. v. United States ex rel. Sanders,* 128 S. Ct. 2123, 2126 (2008). Without such a materiality requirement, every violation of a statutory provision, contract term, or regulation, no matter how inconsequential, can result in an FCA violation. Many *qui tam* relators' counsel (and even, occasionally, the DOJ) have argued that materiality is not a required element of FCA liability, but no court has so held.

Institutions which seek TARP and CPP funding should now be on notice that such funds do not come without the potential for False Claims Act litigation brought by DOJ, disgruntled employees, or other whistleblowers seeking a large reward. Financial institutions will soon join healthcare providers, pharmaceutical companies and government contractors as likely defendants in such cases. It is essential that any claimants for TARP or CPP funds carefully review their applications and claims, and fully vent any potential problems, before submission of a claim for TARP or CPP funds to the government.

Senator Grassley's press release and letter are available at:
http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=18128

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