FraudMail Alert®

http://www.friedfrank.com/practice_groups/quitam.htm

FCA Legislative Update:

(1) False Claims Bills Introduced in Nineteen States;
(2) A Tax Proposal to Benefit *Qui Tam* Relators; and
(3) Internal Report Concludes That New York City's FCA Yields Nothing So Far

State FCA Legislation

Nineteen states have introduced false claims legislation patterned after the federal False Claims Act within the last year—the vast majority in 2007.[1] Although this is normally a busy time for new legislative proposals, the rapid rate at which state legislatures are introducing these bills indicates that most of them have been prompted by the ten percent financial incentive promised under the Deficit Reduction Act ("DRA") that took effect on January 1, 2007. *See* FraudMail Alert Nos. 06-02-08 and 05-10-28. Others are designed to respond to the recent HHS OIG Report finding that a number of state false claims laws, while very effective in recovering money for the state, nevertheless are not sufficiently similar to the federal law to get whatever benefits may arise from the DRA. *See* FraudMail Alert Nos. 06-12-29 and 06-08-18.

If all of these bills are enacted, they would add to the false claims laws already on the books in sixteen states plus the District of Columbia, with the result that 33 state jurisdictions would have false claims laws modeled on the federal statute. These state laws are likely to be essentially identical to the federal FCA due to the HHS OIG's requirement that the state provisions must match the federal law in order to qualify for the DRA's incentive. In that event, the sphere of influence governed by the federal FCA will continue its expansion.

The nineteen states that have recently introduced new false claims act legislation, or amendments to existing FCA laws, are: Arkansas, Colorado, Connecticut, Florida, Georgia, Kansas, Minnesota, Mississippi, Missouri, New Jersey, New Mexico, New

continued on page 2

[1] Seventeen states already have some form of false claims law. Eleven states, plus the District of Columbia, have "general" laws applicable to all types of alleged fraud against the state. These are: D.C., California, Delaware, Florida, Hawaii, Illinois, Indiana, Massachusetts, Montana, Nevada, Virginia, and Tennessee. Five other states--Louisiana, Michigan, New Hampshire, New Mexico, and Texas--have false claims laws directed solely at health care fraud.

Copyright © 2007. Fried, Frank, Harris, Shriver & Jacobson LLP. All rights reserved.

York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina and Texas.[2] One of these, New Mexico, recently passed its bill, which awaits Governor Richardson's signature. Most of these bills are virtually identical to the federal FCA.[3]

The proposed changes to Florida's false claims law illustrate the trend toward a close identity between state and federal false claims laws. Recently, Florida's false claims law was rejected for the DRA's incentive by the HHS OIG as insufficiently identical to the federal FCA. *See* FraudMail Alert No. 06-12-29. The OIG based its rejection on two particular deviations from the federal law. In the bills subsequently introduced in Florida, these deviations are amended, first, by inserting "fraudulent" in the definition of "claims" under the statute, and second, by changing the length of the statute of limitations to conform to the six-year period and the three-year tolling provision contained in the federal law.

There are noteworthy differences between the state proposals and the federal statute, however. For example, Iowa's proposal specifies that it applies to actions based on "activity prior to January 1, 2007" that are within a proposed ten-year statute of limitations, thus specifically overruling the presumption against retroactivity and applying a ten-year limitations period to all actions, whether brought by the state or a relator. Whether that amendment is constitutional, considering the punitive nature of the new law, remains to be litigated. In addition, the Iowa bill explicitly applies the preponderance of the evidence burden of proof to *qui tam* plaintiffs. These are expansions beyond the federal law. Even more bizarre is the statement in the Iowa proposal that

[t]his chapter shall . . . be construed and applied in a manner that reflects the congressional intent behind the federal False Claims Act, . . . including the legislative history underlying the 1986 amendments to the federal False Claims Act.

Other unique provisions contained in the New York proposals specify that no action may be filed against the state or a local government. The New York bills also provide a process by which the state attorney general may grant permission to a local government to file an action, and would prevent the state from being bound by a local government's actions involving damages to the state. These provisions apparently reflect a compromise

---

[2] *See* H.B. 2600, 86th Gen. Assem., Reg. Sess. (Ark. 2007); H.B. 1144, 66th Gen. Assem., 1st Reg. Sess. (Colo. 2007); S.B. 1128, Gen. Assem., Jan. Sess. (Conn. 2007); S.B. 1428, Gen. Assem., Jan. Sess. (Conn. 2007); S.B. 2312, 109th Reg. Sess. (Fla. 2007); H.B. 1595, 109th Reg. Sess. (Fla. 2007); H.B. 551, 149th Gen. Assem. (Ga. 2007); H.B. 631, 82nd Gen. Assem., 1st Sess. (Iowa 2007); H.B. 483, 85th Legis. Sess. (Minn. 2007); S.B. 2279, 2007 Reg. Sess. (Miss. 2007); S.B. 1244, 93rd Gen. Assem., 2d Reg. Sess. (Mo. 2006); H.B. 770, 48th Legis., Reg. Sess. (N.M. 2007); A.B. 4308, 230th Legis. Sess. (N.Y. 2007); S.B. 2108, 230th Legis. Sess. (N.Y. 2007); S.B. 179, 2007 Gen. Assem. (N.C. 2007); S.B. 2126, 60th Legis. Assem. (N.D. 2007); S.B. 589, 51st Legis., 1st Sess. (Okla. 2007); S.B. 889, 51st Legis., 1st. Sess. (Okla. 2007); H.B. 329, 190th Gen. Assem., Reg. Sess. (Pa. 2007); H.B. 5582, Gen. Assem., Jan. Sess. (R.I. 2007); S.B. 82, 117th Gen. Assem., 1st Reg. Sess. (S.C. 2006); S.B. 1309, 80th Legis. (Tex. 2007); H.B. 2690, 80th Legis. (Tex. 2007); H.B. 2925, 80th Legis. (Tex. 2007).

[3] Most of the bills provide for a penalty range of between five and ten thousand dollars. Some depart from the federal law on the relator's share percentage. The Colorado bill, for example, allows not less than 20 percent nor more than 30 percent if the state does not proceed with an action. The Colorado bill also adds an eighth area of liability for failure to disclose a false claim for an inadvertent submission of a false claim that is subsequently discovered, a provision found in several existing state false claims laws. Some of the bills enlarge upon the federal statute of limitations. The Colorado and Iowa bills, for example, would both allow all actions to be commenced up to ten years after the violation..

based on the potential for conflict between the state law and New York City's municipal false claims ordinance. *See* FraudMail Alert Nos. 05-04-07 and 04-06-29.

Tax Code Amendment Proposal

In addition to the expanded potential for state enforcement actions under state false claims laws, a new amendment to the Internal Revenue Code was proposed in early March that would provide additional benefit to relators. *See* H. R. 1274, 110th Cong. 1st Sess. (March 1, 2007). Under this bill, the Internal Revenue Code would be amended to exclude amounts recovered by *qui tam* relators from gross income—a questionable result that favors relators at the public's expense.

Relators already receive favorable tax treatment for attorney's contingency fees under a federal law enacted in 2004 in reaction to a circuit split over whether these fees were to be treated as income and therefore taxable to the recipient of an award under a settlement or judgment. *See* American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 703, 118 Stat. 1418 (2004). Under this law, attorney's fees and court costs paid in connection with *qui tam* or retaliation actions under the FCA may be deducted from adjusted gross income.

In view of the highly favorable tax treatment under the 2004 Act of the very significant monetary rewards that relators receive for FCA settlements, additional favorable tax treatment under the proposed amendment to the Code is unnecessary and excessive. In light of the recent bounties received by Ven-A-Care relators ($40 million from the National Medical Care settlement alone, in addition to settlements with other pharmaceutical companies) and the relators in the Serono settlement ($51.8 million), removing these huge amounts from taxation would result in excessive give-aways to relators at taxpayers' expense.

A Slow Start in New York City

According to an annual report summarizing the results of actions taken under New York City's relatively new false claims ordinance passed in 2005, only four proposed civil complaints were received in 2006 and one in 2005. *See* Letter from Corporation Counsel M. Cardozo to Mayor Bloomberg and City Council, New York City False Claims Act, at 2-3 (Feb. 28, 2007). No enforcement actions were commenced by the Corporation Counsel or by *qui tam* plaintiffs, although two cases were still under investigation. This is remarkably little activity under a law that was touted at its passage by the City Council as addressing false claims that have "considerable impact upon the city's treasury through the loss of untold amounts of public dollars," and by a council member's estimate that it could bring in more than $30 million for the city. *See* New York City False Claims Act, Intro. No. 630 §1 (May 11, 2005) (Legislative Findings and Intent of City Council), *reprinted in* N.Y.C. Admin. Code § 7-801 (2005); S. Gaskell, Bill Would Let You Sue For The City, The New York Post, at 12 (Feb. 16, 2005).

Two cases were declined for very good reasons. These cases involved Medicaid allegations, and, under state law, any recoveries would be paid to the state, but relators' awards would be paid out of the city's treasury. Allowing *qui tam* suits to be brought in these cases would have saddled the city with both the awards and litigation costs without any gain. Moreover, actions had already been filed by the state and federal governments under the federal FCA.

Authors and Contributors:

Washington, DC
John T. Boese

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

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

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

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

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

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

A Delaware Limited Liability Partnership

FraudMail Alert® is published by the Qui Tam Practice Group of, and is a registered trademark and servicemark of Fried, Frank, Harris, Shriver & Jacobson LLP.

FraudMail Alert® is provided free of charge to subscribers. If you would like to subscribe to this E-mail service, please send an E-mail message to mailto:FraudMail@friedfrank.com and include your name, title, organization or company, mail address, telephone and fax numbers, and E-mail address.

To view copies of previous FraudMail Alerts, please visit our FraudMail Alert® archives at http://www.friedfrank.com/wcc/fmamain.php3
To view copies of previous Qui Tam To Our Client Memoranda, please visit our archives at http://www.friedfrank.com/firmpubs.php?topic=Qui+Tam