
False Claims Act Developments

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On February 24, 2009, Senator Grassley (R-IA) introduced S. 458 (co-sponsored by Senators Durbin (D-IL), Leahy (D-VT), Specter (R-PA), and Whitehouse (D-RI)) to make a number of pro-plaintiff amendments to the False Claims Act (FCA). Similar to the False Claims Act Correction Act that was introduced in the last Congress, the new bill also addresses some subsequent judicial and policy developments, including the massive government spending that will result from the TARP legislation and economic stimulus package. The bill would reverse a number of judicial decisions that have limited the reach of the FCA and would make the following significant changes:

- Eliminate any requirement that claims be presented directly to the government as long as the money to pay a claim submitted to a contractor, grantee, or other recipient comes from or will be reimbursed by the government (reversing in part *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008), and thus permitting suits against subcontractors and third-party brokers that purchase distressed assets with TARP money);
- Allow FCA suits on claims made to the federal government for money or property to which the United States does not have title (reversing *United States ex rel. DRC v. Custer Battles, LLC*, 376 F. Supp. 2d 617 (E.D. Va. 2005), which held FCA claims for losses of Iraqi money under U.S. government control were not cognizable);
- Reduce the extent to which prior disclosure of facts relevant to an FCA claim in investigations, news media reports, or congressional proceedings will bar recovery by a relator raising those same claims, including permitting partial recovery by a relator who merely provides a new basis for recovery not encompassed by an existing proceeding or investigation (substantially narrowing the applicability of *Rockwell International Corp. v. United States*, 549 U.S. 457 (2007));
- Permit only the United States to file a motion to dismiss against a relator who is not an original source of information and require that such a motion be filed prior to or concurrent with serving the complaint upon the defendant, rather than allowing defendants to file such a motion at any time during the proceeding;
- Allow government employees to bring FCA claims as long as they (1) first notify the proper authorities, including their supervisor, inspector general, and the Attorney General, of the

wrongdoing; (2) wait 18 months (which the agency may extend once by 12 months), during which time no government action is taken on the fraud; and (3) do not hold an investigative or auditing position related to the alleged fraud or did not learn of the fraud through a filed indictment/information or open investigation or audit;

- Protect from public disclosure and discovery all filings and evidence related to motions to dismiss government employee plaintiffs who do not meet the above three requirements;
- Increase the statute of limitations from six to ten years and allow the government to file substantially related claims beyond the ten-year limit if the relator's claim was brought within that period;
- Bar relators from waiving or releasing qui tam claims outside of court-approved settlements in cases where the government does not intervene (reversing *United States ex rel. Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230 (9th Cir. 1997) (holding that a relator's release of claims, entered into without the knowledge or consent of the government, may be enforced where the government had knowledge of the underlying claims and had investigated them before the relator settled with the defendant);
- Explicitly include government contractors and agents in the class of individuals protected from retaliation for bringing an FCA claim;
- Permit the government to share with the relator information discovered through pre-intervention civil investigation; and
- Require the Department of Justice to submit an annual report to Congress on the nature, size, and litigation history of claims settled by the government and on the outcome of motions to dismiss cases that had been initiated by government employee relators.

These changes would be applied retroactively, with the exceptions of the new statute of limitations and the allowance of actions for claims not presented to the government or involving money or property to which the United States does not hold title.

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