

FALSE CLAIMS ACT ALERT

BIPARTISAN BILL INTRODUCED IN SENATE TO EXPAND SCOPE OF FALSE CLAIMS ACT LIABILITY AND EVISCERATE DEFENSES



Sweeping legislative amendments to the False Claims Act (FCA) were introduced in the Senate on September 11, 2007, by Democrat Patrick Leahy and Republican Chuck Grassley. Disguised as an effort to “clarify” the statute and overturn the *Totten* and *Rockwell* decisions, the bill goes much further, and if enacted would dramatically expand the scope of potential liability and limit the defenses available under the statute.

The most important features of the proposed legislation include the following:

- The legislation would effectively abolish the “public disclosure” jurisdictional bar of the statute. The new legislation would provide that only the Department of Justice, not defendants, may seek to dismiss relator claims on public disclosure grounds. As a practical matter, this would leave defendants with no avenue to seek dismissal of parasitic *qui tam* lawsuits, eviscerating one of the most important defenses available in *qui tam* matters.
- The legislation would remove the current “presentment” requirement in the FCA, effectively overturning the D.C. Circuit’s decision in *U.S. ex rel. Totten v. Bombardier Corp.* This new legislation would enlarge the potential scope of liability so that any grantee or other recipient of federal funds could be held liable under the statute, even if no claims are presented to the government or its agents. The legislation includes new definitions of “government money or property” and “claim” that could lead to dramatic expansions of the scope of FCA liability.
- The legislation would provide that the FCA encompasses claims made for non-U.S. funds that are in the possession of the U.S. government, overturning the decision in *U.S. ex rel. DRC, Inc. v. Custer Battles*. This would mean, for example, that all Iraqi funds, FMS funds and other foreign government funds held by the United States fall within the ambit of the FCA.

- The legislation would provide for liability where a person intends to “retain overpayment” of government money or “convert” government money to an “unauthorized use,” and fails to return the amount due or returns less than the amount due. This new provision is a wholesale revision of a currently unused section of the statute.
- The legislation would allow government employees to act as *qui tam* relators if they can establish that: (1) they disclosed in writing substantially all material evidence and information of a suspected violation to the inspector general of their agency, (2) they notified their supervisor and the attorney general of this disclosure and (3) the attorney general has not filed an action based on the information within 12 months of the disclosure. This legislation would effectively overrule several decisions that have restricted the ability of government employees to personally profit from their government work as relators.
- The legislation would lengthen the statute of limitations from six to 10 years.
- The legislation would breathe new life into the Department of Justice’s ability to issue Civil Investigative Demands (CIDs) to investigate potential FCA violations by permitting the attorney general to delegate authority for issuance of such CIDs.

This bipartisan legislation (entitled “False Claims Act Correction Act of 2007,” S. 2041) was introduced not only by Sen. Grassley, the co-sponsor of the 1986 amendments to the FCA, but also by Democrats Patrick Leahy (Judiciary Committee chairman) and Richard Durbin, and Republican Arlen Specter. Moreover, companion legislation apparently has been introduced in the U.S. House of Representatives by Rep. Howard Berman, the co-sponsor with Grassley of the 1986 amendments.

Akin Gump lawyers will be following this bill closely, as it is the most sweeping effort to amend the FCA since the 1986 amendments. We will provide a more thorough analysis of the bill’s provisions within the next few weeks. We welcome your questions. Stay tuned.

CONTACT INFORMATION

If you have any questions about this client alert, please contact:

Robert Huffman..... 202.887.4530rhuffman@akingump.com Washington, D.C.
 Peter Hutt..... 202.887.4294phutt@akingump.com Washington, D.C.
 Robert Salcido 202.887.4095rsalcido@akingump.com..... Washington, D.C.
 Sabrina Yohai..... 202.887.4187syohai@akingump.com..... Washington, D.C.

Austin Beijing Dallas Dubai Houston London Los Angeles Moscow
 New York Philadelphia San Antonio San Francisco Silicon Valley Taipei Washington, D.C.