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SPECIAL ALERT

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Major Amendments Proposed to the Federal False Claims Act to Strengthen The Rights and Expand the Potential Recoveries for Private Parties ("Whistleblowers") and the Federal Government

On September 12, 2007, Senators Charles Grassley (R-IA) and Dick Durbin (D-IL) introduced a bill which offers major changes to the Federal False Claims Act ("FCA"). Entitled "The False Claims Act Corrections Act of 2007," and co-sponsored by Senators Specter (R-PA), Leahy (D-VT), and Whitehouse (D-R.I.), the amendments are much broader than the sponsors suggest, and include expanding the sources of money which may be subject to the FCA, increasing the FCA's statute of limitations, significantly narrowing the "Public Disclosure" bar as a defense to FCA claims, and allowing government employees (in certain circumstances) to serve as *qui tam* relators ("whisteblowers"). This bill, if enacted, would expose individuals and health care companies to increased liability under the FCA.

By way of background, the FCA allows private parties ("whistleblowers") to obtain financial recoveries when they bring a lawsuit which results in recovery of Government funds. The Government can also bring an action under the FCA without a whistleblower. Such actions are not unique to the healthcare industry, although a disproportionate number of FCA cases are brought against healthcare companies.

Eliminating the Public Disclosure Bar Defense

In direct response to the Supreme Court's recent decision in *Rockwell International Corp. v. United States*, 127 S. Ct. 1397 (2007), the bill contains amendments that would substantially weaken the FCA's existing public disclosure jurisdictional bar. While the FCA now provides that jurisdiction for whistleblowers does not exist for actions based upon publicly disclosed information, the bill would bar whistleblower actions under a public disclosure theory ***only*** when the relator derived knowledge of "*all* essential elements" of the action from a public disclosure. The bill would further narrow the public disclosure bar by specifically excluding from its definition information obtained from a Freedom of Information Act request and from exchanges of information with government employees (if such information does not otherwise qualify as publicly disclosed). Moreover, the bill provides that the right to dismiss claims based on public disclosure grounds would rest with the Department of Justice. Defendants could not raise the disclosure bar as a jurisdictional defense.

Unquestionably, these proposed amendments would make it easier for *qui tam* relators to maintain whistleblower actions under the FCA and would thus limit a contractor's existing defense under 31 U.S.C. 3730(e)(4).

Increasing the Statute of Limitations

In most instances, the FCA's statute of limitations is 6 years. The bill would increase the limitations period to 10 years for all cases. Additionally, the bill provides for a further extension of the statute of limitations where the government, in intervening in a *qui tam* action, files its own complaint or amends a previously-filed complaint by a whistleblower to add claims or add detail to existing claims. In that event, the new or amended pleading would relate back to the filing date of the original action so long as the government claims arise out of the conduct or occurrences set forth or attempted to be set forth in the initial complaint. These amendments would increase the likelihood of stale cases being filed and compound the existing challenges of lengthy litigation and unavailability of documents and witnesses to defend these matters.

Expanding the Money Sources Subject to the FCA

The bill seeks to expand the types of funds subject to the FCA. To this end, the bill proposes that funds under the control of the United Sates Government, but which are not Government funds, would now be subject to recovery under the FCA. The sponsors state that this amendment is purportedly in response to the Court's decision in *United States ex. rel. DRC, Inc. v Custer Battles LLC,* 2006 WL 2388790 (E.D. Va. August 16, 2006) in which a jury verdict in favor of the whistleblower was overturned because the monies at issue were not taxpayer dollars, but were Iraqi monies under the control of the United States Government. This proposed amendment would plainly expand the purpose of the FCA, which was to protect government money. Indeed, this proposed amendment would allow recovery where there has been no actual monetary loss suffered by the Government.

Expanding the Pool of Potential Whistleblowers

In a stated effort to resolve a split among the Circuit Courts of Appeal, the proposed legislation would now permit a government employee to act as a whistleblower when that employee has learned of the fraudulent conduct within the course and scope of his employment. In order to qualify, the government employee would have to have reported the activity up the chain of command, to the Inspector General of the applicable agency, and to the Attorney General, with no action being taken after twelve months. Putting government employees in the position of being able to directly profit from their job related activities is likely to result in challenges over whether such activities are being undertaken simply for personal gain, rather than as a legitimate business function.

Other Issues

The bill proposes that the FCA's retaliation provision be expanded to provide not only employees, but also "government contractors" and "agents," with the right to sue for retaliatory conduct resulting from defined actions taken under the FCA. In what is an attempt to broaden the right to bring a retaliation claim, the bill would amend the actions required to be taken by the employee, government contractor or agent in order to pursue a retaliation action from lawful acts done..." in furtherance of an action under this section" to "in furtherance of other efforts to stop 1 or more violations of this subchapter." The other

notable change involves removal of the requirement of 31 U.S.C. 3729 (a)(1) that false claims be presented to a government employee. Instead, the bill would provide for liability directly for any false claim regarding government money or property regardless of whether that claim was presented to a government employee.

Finally, it is unclear what impact the bill, if enacted, would have on existing state false claims act laws. Pursuant to the requirements of the Deficit Reduction Act ("DRA"), in order to qualify for certain federal funds, a number of states already have amended, or are in the process of amending, their state false claims act statutes to more closely mirror the FCA. It is not clear whether these amendments, if adopted, would require states to amend their own statutes similarly in order to comply with the DRA.

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There needs to be a balancing of interests between the desire to pursue fraudulent recoveries (which the government has the right to do without a whistleblower) and the need to avoid unnecessary litigation brought by private whistleblowers pursuing a bounty.

If you would like additional information regarding this topic, please contact George B. Breen at 202/861-1823 or gbreen@ebglaw.com or Stuart Gerson at 202/861-4180 or sgerson@ebglaw.com in the firm's Washington office or Kerry Parker at 973/639-8259 or kparker@ebglaw.com in the firm's Newark office or the Epstein Becker & Green attorney who regularly handles your legal matters. For further information about Epstein Becker & Green's Health Care and Life Sciences Practice, or to see back issues of Special Alerts, please visit our website at www.ebglaw.com.

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