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COMMENTARY

COMPLIANCE

GRASSLEY PROPOSES SIGNIFICANT CHANGES TO THE FALSE CLAIMS ACT

On September 12, 2007, Senator Chuck Grassley introduced Senate Bill 2041, "The False Claims Correction Act of 2007." The legislation seeks to amend the False Claims Act ("FCA") in light of recent case rulings that its sponsors (Senators Grassley, Durbin, Leahy, Lott, Specter, and Whitehouse) believe have led to a narrowed interpretation of the existing FCA. Senate Bill 2041, if enacted as is, would greatly expand potential liability under the FCA and could effectively eliminate several longstanding defenses intended to protect against speculative and parasitic lawsuits.

The FCA prohibits the knowing submission of false claims to the government. Persons who knowingly submit false claims for payment to the government are liable under the FCA for up to $10,000 per false claim[1] and three times the amount of damages sustained by the government as a result of such false claims. FCA actions may be brought by the government or by whistleblowers, known as *qui tam* relators, in the name of and on behalf of the federal government. *Qui tam* relators must file their complaint under seal, meaning that it is not provided to the defendant or otherwise available to the public, and must provide to the government a written disclosure of substantially all material information they possess regarding the allegations.

In 1986, Congress made major revisions to the FCA in order to make it a more effective tool to combat fraud against the government ("1986 Amendments"). Among other things, the 1986 Amendments made it easier to prove an FCA violation, increased damages for violation of the Act, and added provisions intended to encourage *qui tam* relators to bring cases on behalf of the government. Following the 1986 Amendments,

1. This amount has been increased by the Department of Justice to a maximum of $11,000 per claim. 28 C.F.R. 85.3(9) (2007).

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successful *qui tam* relators are entitled to an award of between 15 percent and 30 percent of the proceeds of the action or settlement of claims. The award is intended to be a bounty paid by the government for information that it otherwise would not possess.

Since the passage of the 1986 Amendments, FCA recoveries have been an ever-growing source of revenue for the government. In 1987, the government saw $86.5 million in recoveries under the FCA. In 2006, that number had grown to $3.2 billion, most of which was recovered from health care entities including hospitals, pharmaceutical companies, physicians, and other providers and suppliers of health care products and services.

In recent years, several decisions by the courts have clarified the scope of the FCA and, in particular, have better defined the circumstances under which a *qui tam* relator can bring an action. Concerned that the recent decisions by several courts might result in a significant decrease in the government's recoveries under the FCA, the sponsors of this legislation seek to rewrite the FCA to eliminate many of the statutory defenses successfully employed by defendants in those cases. In particular, Senate Bill 2041, among other changes, eliminates the "public disclosure bar" as a jurisdictional defense to *qui tam* suits, extends the statute of limitations to 10 years in all cases, and generally expands liability for false claims.

SENATE BILL 2041 WOULD ELIMINATE THE PUBLIC DISCLOSURE BAR

Prior to the 1986 Amendments, *qui tam* relators were barred from bringing FCA actions where the information underlying their claims was already available to the government. The 1986 Amendments removed this limitation in order to encourage private individuals who possessed first-hand knowledge of FCA violations to come forward. In its place, Congress added the "public disclosure bar," which generally bars relators from bringing *qui tam* complaints that are based upon information that is already available to the public. Under the public disclosure bar, the courts do not have jurisdiction over FCA allegations that are based upon information that has been publicly disclosed unless the action is brought by the government or by a relator who is an "original source" of the information. "Original source" is defined as an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the government before filing an action. The public disclosure bar and its original-source exception were intended to prevent parasitic actions based upon information already available to the public while still encouraging actions by individuals with first-hand knowledge of fraud against the government.

Senate Bill 2041 would virtually eliminate the public disclosure bar and effectively nullify a recent Supreme Court decision clarifying who can qualify as an original source. In *Rockwell International Corp. v. United States*, 127 S. Ct. 1397 (2007), the relator filed a *qui tam* suit based in part on publicly disclosed information, alleging that the defendant, a government contractor, violated the FCA by submitting claims in violation of environmental laws and regulations. Based in part on the information learned from the relator, the government conducted an independent investigation of the defendant's activities. The Supreme Court found that the relator was not the original source of the allegations on which the government ultimately prevailed because the relator merely predicted the alleged violations, which occurred after he was no longer employed by the defendant. The Court held that predictions are not "direct and independent knowledge," and therefore, the relator did not qualify as an original source. Thus, under the current law as interpreted by the Supreme Court in *Rockwell*, *qui tam* allegations that are based upon publicly disclosed information are jurisdictionally barred unless the relator is an original source of the information underlying the specific allegations on which the government prevails. This is the case even if the relator's allegations caused the government to investigate and uncover information that ultimately led to the prevailing allegations.

The proposed legislation eliminates the public disclosure bar as a jurisdictional defense to *qui tam* actions. In its place, Senate Bill 2041 empowers the government, which is generally allied with the *qui tam* relators, to decide whether to move the court to dismiss *qui tam* allegations that are based upon public information. Contrary to the intent of the 1986 Amendments, defendants would not have the ability to seek relief from *qui tam* actions that are based upon public information.

Senate Bill 2041 also seeks to narrow the definition of "public disclosure." Several recent cases interpreting the FCA have held that *qui tam* allegations that are based *in part* on publicly disclosed information are precluded under the public disclosure bar unless the relator is an original source of the information underlying those allegations. *See United States ex rel. Boothe v. Sun Healthcare Group, Inc.*, Civ. 06-2156, 2007 WL 2247666, *4 (Aug. 7, 2007); *see also Battle v. Bd. of Regents for Ga.*, 468 F.3d 755, 762 (11th Cir. 2006). By contrast, under the proposed legislation, a putative relator would be subject to dismissal by the government only if he or she derived his or her knowledge of *all essential elements of liability* from the public disclosure.

By removing the public disclosure bar as a jurisdictional defense, Senate Bill 2041 encourages suits brought by private citizens with little or no independent information to support their allegations. Anyone who is able to piece together fraud allegations from information available to the public will be able to bring an FCA action, subject only to the government's right to file a motion to dismiss. However, in all practicality, the government has little incentive to dismiss a *qui tam* action, particularly where it opts not to intervene. In such cases, if the *qui tam* relator pursues the action and recovers money, either in court or through settlement, the government receives money that it would not have received if it had successfully moved to dismiss the action. Indeed, it would likely be more burdensome for the government to invest resources in filing a motion to dismiss a case that it deems not worthy of intervention than to simply allow the relator to proceed with the action. By eliminating the public disclosure bar as a jurisdictional defense, Senate Bill 2041 subjects defendants to precisely the type of speculative, unsubstantiated, or parasitic claims the 1986 Amendments sought to preclude.

The increased number of potentially qualified relators will also present new challenges to the government and to the courts in determining issues of priority. For example, if two individuals separately file cases making similar allegations of fraud, which one qualifies as a relator entitled to proceed with the action? Under the existing law, the "first to file" bar precludes *qui tam* relators from pursuing allegations when a similar case is pending. When considered in conjunction with the public disclosure bar, the first-to-file bar seeks to ensure that the first person who genuinely possesses information of fraud will have priority. Absent the public disclosure bar, however, Senate Bill 2041 would apparently reward the first person to file, at the expense of all others, without regard to whether he or she possesses unique information not available to the public.

SENATE BILL 2041 EXTENDS THE STATUTE OF LIMITATIONS IN ALL FCA CASES

In an attempt to address a recent Second Circuit case, the proposed legislation rewrites the statute of limitations for bringing an action under the FCA. In *United States v. Baylor University Medical Center*, 469 F.3d 263 (2d Cir. 2006), the relator filed his *qui tam* complaint under seal and served it on the government, as required by the FCA. The case remained under seal for more than eight years until the government decided to intervene and proceed with the case. By the time the government intervened, the statute of limitations had expired. The government argued that its complaint was not barred by the statute of limitations because it "related back" to the date the relator filed his original *qui tam* complaint. The court rejected the government's relation-back theory and dismissed the claims. The court reasoned that the secrecy required by the FCA is incompatible with the relation-back doctrine because the touchstone of the relation-back doctrine is notice to the defendant. When the defendant is on notice of the pending allegations, it is not prejudiced by the passage of time. Where the relator's complaint is filed under seal, however, defendants are deprived of that notice. Thus, a government complaint does not relate back to an earlier filed *qui tam* complaint when the *qui tam* complaint is under seal.

Senate Bill 2041 seeks to nullify the Second Circuit's decision in *Baylor* by creating its own relation-back doctrine within the FCA statute-of-limitations provisions. The proposed legislation specifies that any government pleading shall relate back to the filing date of the relator's complaint, despite the fact that the relator's complaint is filed under seal. This change, if adopted, will deprive the defendant of notice of the existence of the action.

Senate Bill 2041 also extends the statute of limitations in all cases. Under existing law, the statute of limitations is six years from the date of the alleged FCA violation or three years from the date the government reasonably learns of the material facts, but in no event more than 10 years after the date on

which the violation is committed. This latter provision has generally been applied to actions brought by the government and not to actions brought by relators. The proposed law would extend the statute of limitations to 10 years for *all* cases.

When the extended statute-of-limitations period and the new relation-back provision are considered in tandem, the potential limitations period is virtually indefinite. Under Senate Bill 2041, relators will be able to bring an action up to 10 years after the alleged fraudulent claims are submitted and the government will then be able to take its time investigating the claims, knowing that its case will relate back to the relators' filing. Thus, if the government's investigation takes eight years, as it did in *Baylor*, defendants could be faced with the difficult task of defending allegations that are up to 18 years old.

The proposed extension of the limitations period poses particular challenges for the health care industry. The health care industry is traditionally faced with high turnover among employees. Even under the current statute of limitations, many defendants encounter situations where employees with knowledge of pertinent events have moved on. The employees who remain, or can be tracked down, often find it difficult to recall the details of the events in question. Those challenges will become much more daunting under the proposed legislation, where the relevant events may have occurred 10, 15, or even 20 years ago. Additionally, health care entities will essentially have to decide whether to expand their existing document-retention practices, beyond state-law requirements, to maintain documents for decades or risk facing litigation without potentially exonerative documents remaining accessible.

SENATE BILL 2041 EXPANDS LIABILITY FOR FALSE AND FRAUDULENT CLAIMS

Under current law, a claim is actionable under the FCA only if it is presented to a federal officer or employee of the United States government. In *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), a federal appeals court held that a false claim submitted to a federal grantee, including any recipient of federal funds, is not equivalent to a false claim being submitted to the United States government under the FCA. The court reasoned that a federal grantee is not considered a department, agency, or instrumentality of the United States government, even if the federal grantee receives federal funds, which it uses to pay claims from contractors. According to the court, the presentment of a claim to a federal grantee cannot satisfy the clear textual requirement of the FCA that a claim be presented to the United States government.

Senate Bill 2041 expands the scope of the FCA by imposing liability on a person who submits a claim to any recipient of federal funds (*i.e.*, a federal grantee) and would treat that situation the same as if he or she presented a claim directly to the government. The proposed legislation collapses the distinction between the government and its federal grantees. Senate Bill 2041 does not contain any threshold requirements for the amount of federal funds an entity must receive to be considered a federal grantee. Nor does it limit liability to only those claims paid by a grantee using federal funds. Under Senate Bill 2041, any person or entity who receives *any* money from the government could be considered a grantee, and any false statements or claims submitted to such grantee would be subject to FCA enforcement. Given the number of individuals and entities that receive some amount of federal funds, the proposed legislation would make the potential reach of the FCA virtually boundless.

OTHER REVISIONS

Senate Bill 2041 proposes other revisions, which would effectively nullify a number of key rulings for defendants. These revisions expand liability under the FCA and, in conjunction with the changes discussed above, compromise defendants' ability to defend themselves.

- Senate Bill 2041 would prohibit waivers of FCA liability. A number of courts have recently considered the validity of severance agreements where employees agree to release their employers from all claims, including FCA claims. Under Senate Bill 2041, waivers of FCA liability would be unenforceable.

- Under current law, relators do not have access to documents and information provided to the government in response to a civil investigative demand. The proposed legislation explicitly provides relators and their coun-

sel access to such documents and information. Allowing access to this information will enable relators who lack specific knowledge of violations to supplement speculative, generalized allegations with information obtained by the government. A similar revision was proposed in 2001 but failed to pass.

- Senate Bill 2041 would expand the right of action for retaliation under the FCA. The FCA currently provides a right of action to employees who are retaliated against because of conduct taken in furtherance of an FCA action. The proposed legislation expands the right of action to employees, government contractors, or agents who take efforts to stop an FCA violation regardless of whether the person's efforts were made in furtherance of an FCA action.

- Under current law, most courts have held that government employees, having an existing duty to report fraud, cannot serve as *qui tam* relators. The proposed legislation explicitly permits federal employees to pursue *qui tam* allegations under specified circumstances. Specifically, a government employee may serve as a *qui tam* relator where he or she has reported the information underlying his or her allegations to a specified government official and no action is taken within 12 months.

- Under existing law, most courts hold that information obtained under a Freedom of Information Act ("FOIA") request is a public disclosure. Senate Bill 2041 specifies that a *qui tam* relator would not create a public disclosure by obtaining information from a FOIA request or from information exchanges with law enforcement and other government employees.

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The express purpose of Senate Bill 2041 is to repudiate recent judicial interpretations of the existing FCA and to aid and encourage *qui tam* relators in bringing FCA allegations. The sponsors contend that the FCA has been weakened by recent judicial decisions and, absent the proposed revisions, will not continue to generate as much revenue as it has over the past two decades. Specifically, Senator Grassley questions "how anybody can hold up legislation that has brought $20 billion that would have otherwise been lost due to fraud back to the Federal Treasury." Senator Grassley's sentiments, however, do not take into account the impact this legislation would have on the health care industry, which has become the primary target for *qui tam* relators and the government. FCA actions, even ones that lack merit, are very expensive to defend. This expense is borne not just by those found to have committed fraud against the government, but also by the innocent unjustifiably accused. Many FCA defendants find litigation to be prohibitively expensive and settle allegations against themselves rather than bear the expense and risk the uncertainty of litigation. Indeed, even those who successfully defend themselves against nonmeritorious FCA allegations pay heavily to defeat those allegations. By eliminating many of the FCA's protections against nonmeritorious allegations, Senate Bill 2041 will encourage *qui tam* actions from individuals who lack direct knowledge of fraud and will severely compromise an FCA defendant's ability to respond to allegations once they are filed. The 1986 Amendments were intended to weed out nonmeritorious and parasitic relator claims early in judicial proceedings. Senator Grassley's 2007 amendments would preserve such claims, however specious, from early dismissal.

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