Congress is currently considering False Claims Act (FCA) legislation that could drastically impact the scope of the FCA and the nature of FCA litigation. The FCA allows individual plaintiffs to bring suits on behalf of the government, either on their own or in coordination with the Department of Justice, alleging that fraud has been committed against the government by government contractors or participants in federal programs. Individuals who bring these suits are known as “qui tam” relators, from the Latin phrase, “qui tam pro domino quam pro se ipso,” meaning, roughly, “he who brings an action for the king as well as for himself.” The FCA has been used to recover more than $20 billion of federal funds lost to fraud since the passage of 1986 Amendments to strengthen the Civil War-era law.

Activity on the Hill

Both the House and Senate have passed versions of the False Claims Act Correction Act out of committee. S. 2041 was introduced by Senators Chuck Grassley (R-IA), Dick Durbin (D-IL), Patrick Leahy (D-VT), Arlen Specter (R-PA) and Sheldon Whitehouse (D-RI) on September 12, 2007; Representatives Howard Berman (D-CA) and James Sensenbrenner (R-WI) introduced H.R. 4854 on December 19, 2007, and Linda Sanchez (D-CA) signed on as a co-sponsor after markup.

The Senate Committee on the Judiciary held a hearing on the legislation at the end of February1 and approved revised legislation out of committee on April 3, 2008. The House Judiciary Subcommittees on Courts, the Internet, and Intellectual Property and on Commercial and Administrative Law held a joint hearing on the legislation on June 19,2 and the full Judiciary Committee approved the bill at the conclusion of a July 16, 2008 markup.3 Both the House and Senate received “views letters” from the Department of Justice (DOJ), scrutinizing the bills as introduced.

Although S. 2041 has been placed on the Senate calendar and, consequently, could be taken up at any time when Congress returns in September, a report on it from the Judiciary Committee has yet to be filed, and the legislation is likely to attract “holds” from individual Senators that would slow its consideration. If the Senate and House each pass their bills, a Conference Committee would have to be appointed and convened, and a compromise would have to be achieved, an outcome we see as unlikely given the abbreviated legislative work period left this year. Still, the likelihood of final passage is very high, especially in 2009, if expected increases in Democratic majorities materialize. Reforms to the FCA will

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1  http://judiciary.senate.gov/hearing.cfm?id=3161
3  http://judiciary.house.gov/hearings/calendar.html
remain a high priority for key Congressional leaders, including Senators Leahy, Grassley and Specter and Representatives Conyers and Berman.

Both bills would expand the reach of the FCA significantly beyond the scope of its current interpretation. According to the bills’ sponsors, the legislation would strengthen and modernize the FCA, and clarify its original intent where it has been misinterpreted by the courts. Nonetheless, critics feel that the legislation goes well beyond making technical changes; notably, the original versions of both bills would have allowed federal government employees to act as *qui tam* relators, and would extend FCA liability to explicitly reach overpayments retained by entities such as health care providers. These and other provisions have been scaled back in the Senate version of the bill, largely in response to DOJ criticism. Fewer of DOJ’s suggested changes were made in the House, but the section of the House bill allowing federal government employees to bring suits has been eliminated entirely.

DOJ support may be a touchstone for the viability of the legislation. Committee members were generally not sympathetic to concerns raised by the defense bar, but DOJ was persuasive in limiting the scope of at least the Senate bill. DOJ indicated that it could not support either bill as introduced. Now that the Senate bill has been revised to largely reflect DOJ’s suggested changes, it is unclear whether DOJ will continue its opposition. Notably, the Senate bill retains a provision allowing federal government employees to act as *qui tam* relators, at least in certain circumstances. Very few changes were made to the House bill at markup, leaving most of the concerns raised in DOJ’s 18 page letter unresolved.

**Key Provisions**

Both bills would respond to a number of recent court decisions interpreting the FCA in ways that the bills’ sponsors perceive as limiting the FCA’s scope. Key provisions relating to the FCA’s “presentment” clause, the ability of federal government employees to act as *qui tam* relators, the public disclosure bar, the civil investigatory demand provisions, pleading requirements and the statue of limitations are discussed below.

**Requirement that Claims be “Presented” to the Government**

The FCA’s “presentment” clause provides that liability under the FCA attaches only if claims are “presented to an officer or employee of the United States Government.” Courts in recent years interpreted this to mean that the FCA does not apply to false claims submitted to a mere “grantee” of federal funds. Both bills would amend liability under the FCA to remove the presentment requirement. This change was drafted partly in response to *Totten v. Bombardier Corp.*, 380 F.3d 488 (2004), where the court found that fraud committed on a government grantee, Amtrak, was outside of the scope of the FCA because claims were presented to the grantee as opposed to the government directly.

On June 9, 2008, in *Allison Engine Co. Inc. v. U.S. ex rel. Sanders*, the U.S. Supreme Court unanimously held that “presentment” is not required for FCA liability under certain sections of the current law, resolving the circuit split that existed on the question when this legislation was drafted, but that FCA liability cannot attach if the allegedly false information is not “material” to the government’s decision to pay the claim. Senator Grassley saw this decision, which limited exposure under the FCA only to those claims where there is a direct link between the alleged fraud and the government’s decision to pay the claim, as further evidence that the FCA requires legislative clarification. Members of the House Judiciary Committee noted at the markup that following this decision, “loopholes” remain in the FCA that need to be closed through this legislative fix.
To accomplish the sponsors’ goals, the Senate bill originally added a new definition of “Government money or property,” extended liability to retention of overpayments and otherwise altered the language of the Act. The amended version of the bill passed by the Committee reflects suggestions made by the DOJ in a views letter released February 21, 2008; the suggested amendments retain much of the FCA’s current language but would still remove the presentment requirement through a new definition of “claim.”

The House bill would also eliminate the presentment requirement. The current House bill contains a provision, similar to one removed from the Senate bill at the markup, which would expand the scope of the FCA by applying liability to all claims for “Government money or property.” This would allow FCA claims to be brought even when government money was no longer held by the government, as long as it was to be spent on the government’s behalf.

**Liability for Retention of Overpayments**

Consistent with the DOJ recommendations, the Senate bill defines the term “obligation,” as used by the statute to attach liability where there is an obligation to pay or transmit money or property to the Government, to explicitly include “retention of an overpayment.” This subtle change could alter current interpretations of the FCA.

The House bill would also explicitly expand liability to the retention of a known overpayment. Liability would attach in instances of failure to disclose an overpayment about which the person is on actual notice. Amendments made to this provision of the House bill at markup were intended to prevent liability from attaching when overpayments are the result of mere technical errors that would be resolved through normal billing procedures, as is often the case for health care providers.

**Right of Government Employees to Bring a Claim for Recovery**

The circuit courts are currently split on the issue of whether a federal government employee who learns of information underlying an alleged violation in the course of his or her employment may act as a *qui tam* relator under the FCA. The Senate bill provides an explicit procedure whereby a government employee may act as a *qui tam* relator in certain circumstances, after making appropriate disclosures and notifications, if the government fails to act on information provided by that employee within 18 months. The legislation provides that the government may move to dismiss a government employee relator’s case if “all the necessary and specific material allegations contained in such action were derived from a filed criminal indictment or information or an open and active criminal, civil, or administrative investigation or audit by the Government,” or if the employee’s position specifically includes “uncovering and reporting the particular type of fraud that is alleged in the action.” Nonetheless, it would open the door to suits brought on the basis of information federal government employees uncover in the course of conducting their jobs. These limitations, added during the markup, narrow the reach of the Senate bill from its original form.

DOJ has indicated, in its views letter on the original Senate bill, that it supports a “complete bar on *qui tam* suits filed by current and former Government employees that utilize information acquired during the course of Government employment,” and, in testimony, that allowing federal government employees to bring these suits is “unsound public policy.” It is unclear whether the revisions go far enough to secure DOJ support for the current Senate bill.
The original version of the House bill would also have permitted government employees to act as *qui tam* relators in certain cases. However, an amendment offered by Rep. Sensenbrenner (R-WI) at the bill’s markup eliminated the section of the bill containing these provisions.

**Public Disclosure Bar**

Under current law, the FCA’s so-called “public disclosure bar” prohibits jurisdiction over actions based on the public disclosure of allegations or transactions in court hearings, government reports or investigations, or the news media, unless the person bringing the action is the original source of the information. Courts have interpreted this provision as barring actions that the legislation’s sponsors believe should be allowed to go forward. For example, in *Rockwell Int’l Corp. et al v. U.S.* (2007), the Supreme Court held that this provision bars relators from recovery unless they are an “original source” of information for all claims ultimately settled, or upon which a verdict is rendered.

The committee-approved version of the Senate bill incorporates comments made by DOJ on this issue. The legislation would enable the Attorney General to file a motion to dismiss based on the public-disclosure bar, unless the relator provides new information that adds substantial grounds for additional recovery or the Government’s investigation resulted from information voluntarily provided by the relator.

The House bill would also limit use of the public disclosure bar for reducing awards to relators, but in a way that DOJ opposes. It would dictate that the Attorney General could make a motion to dismiss based on public disclosures only in cases where allegations are based exclusively on the public disclosure. Therefore, DOJ argues it would allow recovery by relators with no firsthand knowledge and no information to add beyond what is already public. By restricting use of the public disclosure bar to the government and prohibiting defendants from using the provision to move to dismiss cases, the bill would take away a tool on which the defense bar has come to rely to stop lawsuits filed by so-called “parasitic” relators who simply file claims on the basis of information that is already in the public domain. The July 15, 2008 views letter from DOJ to the House Judiciary Committee Chairman outlines strong opposition to this section and recommends changes which were not addressed by the Committee at the markup.

**Expanded Civil Investigative Demand Authority**

The FCA’s Civil Investigative Demand (CID) provisions allow the AG to issue a demand for material and relevant information when there is reason to believe that a person may be in possession, custody or control of documents in question. In response to narrow interpretations limiting the usefulness of this authority, the Senate bill would allow the AG to delegate the power to issue a CID and would allow information to be shared with *qui tam* relators if deemed necessary. This section reflects DOJ suggestions. The House bill would also allow the AG to delegate CID authority and allow the government to share CID information with relators.

**Reduction in Specificity Required to Initiate Action**

The House bill includes a provision not included in the Senate’s bill that would allow plaintiffs to bring claims even in cases where they cannot identify the specific claims that resulted in the alleged misconduct. Under the language of the bill, *qui tam* relators would be able to proceed with an FCA action without having specific claims, if (1) the facts alleged show a reasonable indication that false claims are likely to have occurred; and (2) the pleading provides adequate notice of the specific nature of the alleged misconduct.
to allow the government to investigate and the defendants to prepare their case. This section substantially lowers the burden for pleading a claim “with particularity” as is currently required by Federal Rule of Civil Procedure 9(b) for fraud claims.

**Whistleblower Protections**

The Senate bill strengthens whistleblower protections by broadening the definition “employee” to protect both direct and indirect employees of the entity being charged with fraud under the FCA. The House bill also expands relief for retaliatory actions taken against relators.

**Extended Statute of Limitations**

The statute of limitations under the FCA is currently six years, generally, or three years from the date the government reasonably learns of the material facts, up to 10 years after the date of the alleged fraud. The Senate bill would extend the statute of limitations to 10 years for all cases, regardless of government knowledge. The House bill, as amended at markup, would extend the statute of limitations to 8 years for all cases.

**Effective Date**

The effective date for the legislation in the current version of the Senate bill would be the date of enactment for all actions filed before, on or after that date, except the provisions which broaden the scope of FCA liability in Section 2 of the bill and changes to the statute of limitations, which would apply only in cases filed after the date of enactment. Most provisions of the House bill would be effective on the date of enactment for any case pending or filed on or after that date; provisions relating to overpayments, retaliation and statute of limitations would apply only in cases filed on or after that date.

* * *

While this summary provides an overview of key provisions in the House and Senate versions of the False Claims Act Corrections Act, it is not intended to be a comprehensive review of either bill. Alston & Bird’s health law and policy practice, which consists of recent former lawyers from the Department of Justice, the HHS Office of Inspector General and Senator Grassley’s own committee staff, is tracking developments on this legislation closely and is available to provide strategic advice and counseling on issues important to health care providers and suppliers, which face new and expansive exposure under both bills. Please contact us if you have questions about this proposed legislation.
## Side-by-Side Comparison of Senate and House Bills

We hope that this summary will provide a helpful guide to key provisions in the House and Senate versions of the False Claims Act Corrections Act.

<table>
<thead>
<tr>
<th>Subject</th>
<th>S. 2041</th>
<th>H.R. 4854</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Overpayments</strong></td>
<td>Sec. 2(b)(3) defines obligation to explicitly include “the retention of any overpayment.” (reflects DOJ suggestion to make the FCA’s applicability to overpayments explicit)</td>
<td>Sec. 2(a)(1)(C) would attach liability in case of failure to disclose an overpayment about which the person is on actual notice.</td>
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<tr>
<td><strong>Damages</strong></td>
<td>Sec. 2(a)(1) imposes liability of $5,000 to $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act, “plus 3 times the amount of money or property paid or approved because of the act of that person.” Sec. 2(a)(2) describes reduced damages (double instead of triple) if defendant cooperates.</td>
<td>Sec. 2(a)(1) imposes liability of $5,000 to $10,000, “plus 3 times the amount of damages which the Government or its administrative beneficiary sustains because of the act of that person.” Sec. 2(a)(2) describes reduced damages (double instead of triple) if defendant cooperates.</td>
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<td><strong>Presentment</strong></td>
<td>Sec. 2(b)(2) defines claim to include both a request or demand that “(i) is presented to an officer, employee, or agent of the United States; or (ii) is made to a contractor, grantee, or other recipient if the United States Government – (I) provides or has provided any portion of the money or property requested or demanded; or (II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.” Claim “does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restriction on that individual’s use of the money or property.”</td>
<td>Sec. 2(a)(1)(A)-(B) would attach liability for false claims for “Government money or property.” Sec. 2(b)(2) defines Government money or property to include “funds the United States Government provides or has provided to a contractor, grantee, agent, or other recipient, or for which the United States Government will reimburse a contractor, grantee, agent, or other recipient,” and funds “to be spent or used on the Government’s behalf or to advance a Government program,” and “money or property that the United States holds in trust or administers for any administrative beneficiary.” Claim and administrative beneficiary are also broadly defined.</td>
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<tr>
<td><strong>Federal Government Employees as qui tam relators</strong></td>
<td>Sec. 3 allows federal Government employees to file qui tam suits in narrow circumstances. The section provides that the Government may move to dismiss an action brought by a Federal Government employee if (i) the allegations were derived from an open or active investigation or audit; (ii) the employee’s duties include uncovering and reporting “the particular type of fraud that is alleged in the action, and the employee, as part of the duties of that employee’s position, is participating in or has knowledge of an open and active . . . investigation or audit by the Government of the alleged fraud;” (iii) the employee failed to make disclosures and notifications to superiors; or (iv) made the required disclosures and notifications less than 18 months prior to bringing suit, or longer if extended by the Attorney General. Dismissed cases would remain sealed and DOJ would report to the Judiciary Committees on results of motions made under this provision.</td>
<td>Sec. 7 of the original House bill, which would have allowed Federal Government employees to bring qui tam suits, was stricken at markup.</td>
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<tr>
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<tr>
<td>Disclosure Statements, sealing and service of complaints, first</td>
<td>No similar provision</td>
<td>Sec. 3(a) makes changes related to protecting information relators bring to the Government from discovery and the sealing and service of complaints in declined cases.</td>
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<tr>
<td>Alternative Remedy provision</td>
<td>No similar provision</td>
<td>Sec. 3(b) would expand the scope of the alternative remedy provision, which allows relators to recover where the Government pursues a case administratively as opposed to through the FCA.</td>
</tr>
<tr>
<td>Amount of qui tam award</td>
<td>Sec. 4(c) limits relator awards to a “share only of the proceeds of the action or settlement that are attributable to the new basis for recovery that is stated in the action brought by that person,” and otherwise allows the court to reduce the relator’s share in certain circumstances.</td>
<td>Sec. 3(c) would allow the court to reduce a relator’s share in certain circumstances and would eliminate the 10 percent cap in the existing FCA; also provides that payments to relators accrue interest.</td>
</tr>
<tr>
<td>Public Disclosure Bar</td>
<td>Sec. 4(b) would narrow the public disclosure bar. The section permits dismissal of a case upon a motion brought by the Government if (1) “on the date the action or claim was filed, substantially the same matters, involving the same wrongdoer, as alleged in the action or claim were contained in, or the subject of,” a variety of types of open investigations or media reports; (2) “any new information provided by the person does not add substantial grounds for additional recovery beyond those encompassed within the Government’s knowledge; and the public sources were “not initiated or published after the Government’s receipt of information about substantially the same matters voluntarily brought by the person to the Government.”</td>
<td>Sec. 3(d) would narrow the public disclosure bar. The section permits dismissal of cases based on a motion brought by the Attorney General only if allegations are “based exclusively on the public disclosure,” where “a ‘public disclosure’ includes only disclosures that are made on the public record or have otherwise been disseminated broadly to the general public. An action or claim is ‘based on’ a public disclosure only if the person bringing the action derived the person’s knowledge of all essential elements of liability of the action or claim alleged in the complaint from the public disclosure. . . .” (DOJ strongly opposes this provision.)</td>
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<tr>
<td>Relief from retaliatory actions/whistleblower protection</td>
<td>Sec. 5 strengthens whistleblower protections by extending them to employees, government contractors or agents. They are entitled to all relief necessary to make them whole. The section also describes available types of relief.</td>
<td>Sec. 3(e) strengthens whistleblower protections against retaliatory action and entitles persons who have been discriminated against to “all relief necessary to make the person whole.”</td>
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<tr>
<td>Statute of Limitations</td>
<td>Sec. 6 expands the statute of limitations to 10 years across the board.</td>
<td>Sec. 4(a) extends the statute of limitations to 8 years across the board.</td>
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<tr>
<td>Civil Investigative Demands (CIDs)</td>
<td>Sec. 7 expands current CID provisions by allowing the Attorney General to 1) delegate currently held authority to issue a CID and 2) share information with relators if deemed necessary. The section also includes a definition of “official use.”</td>
<td>Sec. 6 expands current CID provisions by allowing the Attorney General to 1) delegate currently held authority to issue a CID and 2) share information with relators if deemed necessary.</td>
</tr>
<tr>
<td>Standard of Proof/ Pleading Standard affecting requirement that fraud must be pled with particularity</td>
<td>No similar provision</td>
<td>Sec. 4(c) states that in pleading a case, a relator “shall not be required to identify specific claims that result from an alleged course of misconduct if the facts alleged in the complaint, if ultimately proven true, would provide a reasonable indication that one or more violations of section 3729 are likely to have occurred, and if the allegations in the pleading provide adequate notice of the specific nature of the alleged misconduct to permit the Government effectively to investigate and defendant to fairly defend the allegations.”</td>
</tr>
<tr>
<td>Service on State or Local Authorities</td>
<td>No similar provision</td>
<td>Sec. 5 allows sealed qui tam complaints to be served on appropriate state or local law enforcement authorities named as a co-plaintiff with the United States.</td>
</tr>
<tr>
<td>Severability</td>
<td>Sec. 9 provides for severability.</td>
<td>No similar provision</td>
</tr>
<tr>
<td>Effective date</td>
<td>Sec. 7 (formerly Sec. 8) provides that most provisions are effective on the date of enactment for actions filed before, on or after that date; provisions relating to overpayments, retaliation, and statute of limitations apply only in cases filed on or after that date.</td>
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