

CLIENT ALERT

Latest False Claims Act Developments Further Erode Safeguards Against Parasitic Whistleblower Suits

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The Fraud Enforcement and Recovery Act of 2009 was just the beginning of dramatic changes to the False Claims Act (FCA). Two recent developments significantly erode the FCA's protections against *qui tam* actions that are parasitic or mere fishing expeditions. In particular, they may make it more difficult for defendants to dispose of such cases at the motion to dismiss stage, thereby increasing the costs of defending such suits.

Delegation of Authority To Issue Civil Investigative Demands

When Congress enacted the Fraud Enforcement and Recovery Act of 2009 ("FERA"), it gave the Attorney General the authority to delegate to the "designee" of his choosing the right to issue Civil Investigative Demands (CIDs). By a Final Rule published on March 24, 2010, all U.S. Attorneys were delegated the authority to issue CIDs. The Attorney General had already previously delegated to the Assistant Attorney General for the Civil Division the Attorney General's authority to issue CIDs.

At first blush, one might conclude that these changes merely make the approval process for CIDs easier, with little impact on defendants, especially since the government has had access to documents through use of Inspector General subpoenas. However, these changes have far more wide-reaching implications. First, pursuant to FERA, information obtained through CIDs may now be shared with "any *qui tam* relator if the Attorney General or designee determine it is necessary as part of any false claims act investigation." 31 U.S.C. § 3733(a)(1)(D) (as amended by FERA). Armed with such information, a relator can now more easily satisfy the requirements of Fed. R. Civ. Pro. 9(b). Second, in situations in which there are parallel criminal and civil investigations, the government can use CIDs to compel testimony that previously could be obtained only through use of a grand jury subpoena. By using a CID, rather than a grand jury subpoena, criminal prosecutors may be able to freely share information with civil side government attorneys without being subject to grand jury secrecy rules.

The Final Rule is available here: <http://edocket.access.gpo.gov/2010/pdf/2010-5816.pdf>

Amendments to the Public Disclosure Bar to *Qui Tam* Suits and the Supreme Court's Decision in *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*

Just a day earlier, on March 23, 2010, Congress passed the Patient Protection and Affordable Care Act (PPACA), and in the process amended the FCA yet again, this time by tipping the balance in favor of allowing civilians to claim the fruits of so-called "whistleblower" status though they may be proceeding based on public information.

The "public disclosure bar" to *qui tam* suits is meant to strike a balance between encouraging true whistleblowers to alert the government of fraud on the public fisc of which the government might be unaware (by allowing such civilians to file suits in the government's name, and to share in any recovery) while discouraging civilians from piggy-backing on "publicly disclosed" fraud with their own suits. Thus, generally, courts do not have jurisdiction over suits brought by relators who seek to bring civil FCA

cases on the basis of "publicly disclosed" information, unless they are "original sources." The new law rewrites the public disclosure bar to limit the types of public information that may bar a suit, altering the law so that most public *state* proceedings will not bar a *qui tam* suit, nor will state reports, audits or investigations. Moreover, even with respect to federal hearings, they will not bar such suits unless the government or its agent was a party to the hearing. Perhaps most importantly, where a *qui tam* complaint would otherwise be jurisdictionally barred under even the amended standard for what constitutes a public disclosure, the government can unilaterally re-establish the court's jurisdiction over the matter by opposing the dismissal of the case.

On a related note, on March 30, 2010, the Supreme Court decided *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, No. 08-304 (Mar. 30, 2010), holding that the public disclosure provision's reference to administrative reports, audits and investigations include state and local sources, not just federal sources. The Court noted that while the PPACA replaces the version of the public disclosure provision that the Court was interpreting, the PPACA "makes no mention of retroactivity, which would be necessary for its application to pending cases." As such, the PPACA's amendments to the public disclosure provision of the FCA will not apply retroactively to pending cases.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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