CLIENT ALERT

Senator Grassley Introduces Long-Promised Proposed Amendments to the False Claims Act

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On Monday, July 26, 2021, a bipartisan group of senators, led by Sen. Chuck Grassley (R-Iowa), introduced a bill titled "False Claims Amendments Act of 2021" aimed at "beef[ing[up the government's most potent tool to fight fraud."

The new bill has been long-promised by Grassley over the past year, as we have previously covered.

The bill would make the following amendments to the False Claims Act (31 U.S.C. § 3729 *et seq.*):

- **Materiality** – A new paragraph (e) would be added to Section 3729 titled "Proving Materiality" (1) specifying that the Government or a relator may establish materiality by a preponderance of the evidence and (2) adding that a defendant may only rebut an "argument of materiality" by "clear and convincing evidence";
- **Discovery Upon the Government in Declined Cases** – A new paragraph (f) would be added to Section 3731 to apply to non-intervened qui tam cases and would direct that "the court shall, upon a motion by the Government, order the requesting party to pay the Government's expenses, including costs and attorney's fees, for responding to a party's discovery requests, unless the party can demonstrate that the information sought is relevant, proportionate to the needs of the case, and not unduly burdensome on the Government."
- **Government Dismissal Authority (§ 3730(c)(2)(A))** – With respect to so-called "Granston" motions to dismiss filed by the Department of Justice, new language would be added to Section 3730(c)(2)(A) concerning the hearing to be afforded to a relator facing such a motion, specifying that "at [the hearing] the Government shall have the burden of demonstrating reasons for dismissal, and the relator shall have the opportunity to show that the reasons are fraudulent, arbitrary and capricious, or contrary to law."
- **FCA Retaliation (§ 3730(h)(1))** – The words "current or former" would be added to Section 3730(h)(1) to make the FCA's anti-retaliation provision applicable to acts taken against "[a]ny *current or former* employee, contractor, or agent . . . ."
- **Retroactivity** – The proposed amendments above would apply prospectively to any case filed on or after the date of enactment as well as retroactively to any case "pending on the date of enactment of this Act."

In addition, the bill calls for the Comptroller General to submit a report to Congress on the "effectiveness" of the FCA over the first 18 months after the bill becomes law, with effectiveness measured in part by the amounts recovered by the Government during that period.

The most significant piece of the bill, without a doubt, is the burden-shifting provision that would require a defendant to rebut a showing of materiality with clear and convincing evidence. Notably, the bill does not seek to change the definition of materiality, in spite of Sen. Grassley's repeated criticisms of the Supreme Court's decision in *Universal Health Services v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), which interpreted the meaning of that term and, among other things, held that continued payment by the Government in the face of noncompliance by a defendant was "strong evidence" of a lack of

materiality. Even so, such a provision would undoubtedly spark increased litigation over this element, for starters with respect to the meaning of the term "argument of materiality" and how to apply these competing standards.

Add to this the new provision that would allow the Government to move for costs in qui tam actions that the Government has declined – namely, the cases most often subject to materiality questions – if the Government believes that a defendant's requests are irrelevant, unduly burdensome or not proportionate to the needs of the case. While this provision does not appear on its face all that different from the remedies already available to the Government under the Federal Rules of Civil Procedure in responding to improper discovery requests, it may well invite disputes rather than help avoid them in the first place.

The proposed additions to Section 3730(c)(2)(A) concerning the Government's dismissal authority would likely override the "unfettered discretion" to dismiss standard set forth by the D.C. Circuit in *Swift v. U.S.*, 318 F.3d 250 (D.C. Cir. 2003), but would not seemingly change the more widely adopted "rational relation to a valid government purpose" test set forth in *U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp*., 151 F.3d 1139 (9th Cir. 1998), which itself permits the relator an opportunity to demonstrate that the Government's stated reasons are fraudulent, arbitrary and capricious, or illegal. As this is effectively the process employed by most courts across the country already, this amendment, if adopted, may not result in any significant practical changes to how Government motions to dismiss are briefed or resolved.

The fourth proposal would amend the anti-retaliation provision of the FCA to expressly apply to "former" employees, contractors, and agents, and appears to have sprung from a recent Sixth Circuit decision, *U.S. ex rel. Felten v. William Beaumont Hosp*., 993 F.3d 428 (6th Cir. 2021), a split decision holding that the FCA's anti-retaliation provision extends to actions taken after employment. The proposed language would seemingly head off the development of a split among the circuits but will undoubtedly encourage more suits and litigation.

Finally, the bill states that the above amendments would be retroactive to any cases pending on the date of enactment. In effect, this means that the above amendments will apply to all FCA cases still before the district court when the bill becomes law. It goes without saying that this will only increase the potential for disputes, many of which will emerge the day the bill is enacted.

C&M will continue to monitor the development of the bill, its proposed amendments, and their impact upon companies and individuals subject to FCA enforcement.For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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