

# **The Future of the False Claims Act: Recent Judicial and Legislative Highlights**

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**Highlights Of H.R. 4854 “The False Claims Act  
Correction Act of 2007” and DOJ’s Views**

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# Presentment

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- The requirement for the false claim to be presented to an officer or employee of the United States is gone
- Now the false claim can be for “Government money or property”
- Government money or property can be money that the US provides to anyone if it is to spent on the Government’s behalf or *to advance a Government program* OR money or property that the US holds in trust or administers for any *administrative beneficiary*
- *Administrative beneficiary* is any entity on whose behalf the US serves as custodian or trustee for money or property owned by the entity

## DOJ's Concerns With The New "Government money or property" Language

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- The change could cause an increase in frivolous suits and a significant increase in litigation
- The language could be read to mean that the FCA now covers frauds on anybody that is a paid a federal salary or receives a government subsidy or health care benefits
- The FCA might apply to fraudulent invoices submitted to a contractor on a private project if that contractor also has government work
- The litigation costs will be charged back to the Government

# Retention Of Overpayments Is Included In The Act

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- “Any person who
- Has possession, custody, or control of Government money or property and, intending to
- Retain a *known* overpayment, or
- *Knowingly* convert the money or property [even temporarily] to an unauthorized use
- Fails to return it would be liable under the new Act

# Whistleblower's Disclosure Statement

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- New Act exempts from discovery “in the absence of a showing of extraordinary need, the written disclosure of any material evidence and information, *and any other attorney work product*, that the person bringing the action provides to the Government”
- DOJ believes this provision goes well beyond the judicial opinions that have held the written disclosure and other communications are protected by the work product doctrine
- Internal corporate records provided by the whistleblower might now be considered work product
- The Government might not be able to disclose the information to the defendant

# First To File

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- **Currently, the FCA states that no person “may intervene or bring a related action based on the facts underlying” a pending qui tam action**
- **The new Act would permit a third party to join a pending qui tam if the person that brought the action consented**
- **DOJ is concerned that this would enable a relator that failed to satisfy the requirements to bring a qui tam to get around those requirements by adding another relator**
- **DOJ is also concerned that this provision will encourage putative whistleblowers that would otherwise be barred by someone else’s filing to delay reporting fraud so that the damages will increase**

# Expansion Of Alternate Remedy

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- Currently, the FCA provides that if the Government elects to pursue its claim through an alternate remedy the whistleblower will have the same rights in that proceeding as he or she would have if the FCA case had proceeded
- The new Act defines “alternate remedy” as anything of value, including in-kind goods or services, that the Government receives from the defendant in return for releasing FCA claims, or declining to intervene or investigate them, AND anything of value received by the Government based on the claims alleged by the whistleblower if the whistleblower subsequently prevails on them

# DOJ's Concerns

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- Under the new alternate remedy definition, if the Government declines to intervene but settles with the defendant on a non-fraud basis the whistleblower might assert entitlement to a share in that settlement
- The definition could include criminal proceedings that arise out of a qui tam action and might authorize the whistleblower to participate in them
- In FCA cases involving Medicare and Medicaid, the definition might allow whistleblowers to seek a recovery based on a defendant's entry into a Corporate Integrity Agreement as means of settling with the HHS OIG

# Elimination Of The Ten Percent Cap For Certain Whistleblowers

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- Currently, whistleblowers who planned or initiated the fraud or whose suit is based on certain types of public disclosures cannot receive more than ten percent of any recovery
- Under the new Act, the court may reduce the share that the type of whistleblowers described above may receive but the ten per cent cap is gone. The court has complete discretion.
- DOJ objects and notes that the new public disclosure bar permits whistleblowers to bring claims based entirely on information provided to them by the Government

# Public Disclosure

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- The new Act substantially narrows the public disclosure bar
- It permits dismissal only if “all the essential elements” of the whistleblower’s allegations are “based exclusively on the public disclosure”.
- Public disclosures are defined to be only disclosures “on the public record” or that have been “disseminated broadly to the general public”
- The public disclosure is *no longer jurisdictional* and the defendant cannot move to dismiss it on this basis; only the Government can, even if it did not intervene

# DOJ's Concerns

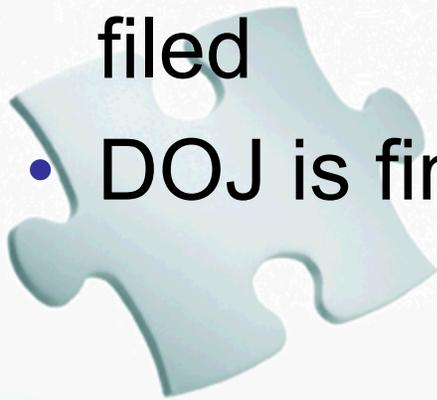
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- **Government wants more time to investigate whether it has grounds to move to dismiss on public disclosure grounds**
- **Whistleblowers will now be able to file suits based entirely on information that they learn from Government auditors or investigators since that information is not in the public record**
- **Whistleblowers will be able to obtain a share of the taxpayers' recovery even if most of the essential elements of their claims are based on the Government's investigation; they just need to add one element from another source**
- **DOJ wants the whistleblower's recovery to be based only on the value of the new information he or she contributes**

# Statute Of Limitations

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- The new Act provides for a single ten-year statute of limitations and clarifies that the Government's intervention relates back to when the whistleblower's complaint was filed
- DOJ is fine with this



# Pleading Standard

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- The new Act states that a whistleblower is not required to identify specific claims arising from a course of misconduct as long as the complaint provides a reasonable indication that FCA violations likely occurred, and provides notice sufficient to permit the Government to investigate and the defendant to defend
- DOJ relies on cases that have held that detailed qui tam complaints may satisfy Rule 9(b)'s particularity requirement even though they do not identify specific false claims; DOJ opposes exempting qui tam complaints from Rule 9(b)
- DOJ objects to the application of the relaxed standard to only to whistleblowers, and not to the Government

# Severance Agreement Waiver Of Claims

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- The new Act prohibits any agreement from “limiting or circumventing” the rights of persons bringing qui tam actions
- There is a carve out for agreements between the U.S. and the person bringing the qui tam suit who could be affected in settling his claims and those of the U.S. by that agreement
- DOJ believes the carve out might mean that it can only settle FCA claims with the consent of the whistleblower
- DOJ also thinks that severance agreements that require departing employees to inform their employers of any misconduct might limit or circumvent that employee’s ability to bring a qui tam suit since it would allow the employer to become compliant and self-disclose

# Government Employees As Whistleblowers

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- The new Act permits Government employees to bring qui tam suits in certain circumstances
- DOJ strongly opposes this
- It will invite interference with federal investigations
- Conflicts of duty will arise because of the federal employees' personal financial incentive
- Federal employees already are required to report fraud
- Federal employees may focus on matters that will lead to lucrative recoveries for themselves to the detriment of their other official and more important duties

# Specific DOJ Concerns

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- The new Act permits Government employees to base qui tam suits on information learned during the course of their duties *unless* “all the necessary and specific material allegations . . . were derived from an *open and active fraud investigation*”; OR the employee failed to disclose “substantially all material evidence” to certain federal officials before filing suit; OR the disclosure was made AND the Government filed suit within 12 months thereafter
- DOJ wants dismissal because of the above to apply to people who learn the information from the Government

# Specific DOJ Concerns

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- **Not clear that the Government will be able to dismiss suits brought by its employees unrelated to that status based on, for example, first to file or public disclosure provisions**
- **The standard for dismissal based on employee's derivation of his allegations is too narrow; the Government may not be able to prove this**
- **The employee just needs to throw in one additional allegation to escape dismissal**
- **There are questions about what is an "active fraud" investigation and audits should be off limits too**
- **In its motion to dismiss its employee's qui tam suit, the Government must set forth its supporting "documentation of the allegations, evidence and information"; DOJ objects to this and to the Government having the burden and notes that there is no protection for the information that it would have to introduce and it could be disclosed to the defendant**
- **Government employees bringing qui tam suits should not be according the whistleblower protections of the Act**

# Retroactivity

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- The new Act provides that it applies retroactively; DOJ recommends the Act be clarified to state that the amendments apply prospectively to conduct occurring after their enactment, that the amendments only apply to cases filed after the date of their enactment and that they shall not revive claims that are time barred as of that date

# Questions?

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