

ALERT

Key Senator Looks to Make Changes to the False Claims Act

August 5, 2020

WHAT: Amid a “massive increase in government funding to address the COVID-19 crisis,” prominent U.S. Senator Chuck Grassley (R-IA) announced he would introduce legislation to make changes to the False Claims Act (FCA) to grant whistleblowers more protections.

WHEN: Senator Grassley, who previously co-authored amendments to the False Claims Act in 1986 and 2009, said he is working on legislative changes to the False Claims Act but has not formally introduced his legislation.

WHAT DOES IT MEAN FOR INDUSTRY: The False Claims Act was last amended in 2009, after the 2008 financial crisis. Senator Grassley, a prominent advocate for the False Claims Act, announced that he plans to provide more whistleblower protections to the statute for instances where DOJ seeks unilateral dismissal authority of *qui tam* whistleblower lawsuits. Senator Grassley argued the legislation is necessary following the significant COVID-19 federal stimulus dollars that Congress has injected into the economy.

Senior Senator Chuck Grassley (R-IA) took to the Senate Floor on Thursday, July 30, 2020 (National Whistleblowers Day) to announce that he would introduce legislation to strengthen the False Claims Act.

Grassley, who has long prioritized whistleblower protection, made a strong call to strengthen whistleblower protections under the False Claims Act and tied doing so to the COVID-19 pandemic, because the government has now pumped trillions of taxpayer dollars into the economy, and this “massive increase in government funding to

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address the Covid-19 crisis has created new opportunities for fraudsters trying to cheat the government and steal hard-earned taxpayer dollars.”

Senator Grassley’s floor speech echoed themes from the last time the False Claims Act was updated – in 2009 through the Fraud Enforcement and Recovery Act of 2009 (FERA). FERA, which was coauthored by Senator Grassley, reformed the False Claims Act as a response to the 2008 financial crisis after Congress approved over \$1 trillion that went into the economy following two major stimulus bills (the Troubled Asset Relief Program (TARP) under the Emergency Economic Stabilization Act and the American Recovery and Reinvestment Act). The massive expenditures of federal dollars into the economy resulted in an uptick of False Claims Act Enforcement.

Grassley’s Proposed Legislation

While Senator Grassley has not formally introduced the legislation, he laid down a marker for his bill, specifying that one of the main reforms he is focused on is limiting the Justice Department’s authority to seek dismissals of whistleblower *qui tam* FCA cases under 31 U.S.C. 3730 (c)(2)(A). Much has been written about these kinds of dismissals, particularly since the Justice Department issued the “Granston Memo” in January 2018.

That memo outlined circumstances in which such dismissal authority was warranted (including, e.g., meritless cases or cases that increased the government’s litigation burden). Recently, Principal Deputy Assistant Attorney General Ethan Davis stated in a June 2020 address that the authority has been used 50 times. Significantly, that number is more than the total number of times the dismissal authority has been exercised in the 30 years preceding the Granston memo. Several courts have indeed affirmed the Justice Department’s ability to dismiss such cases at its discretion. *See, e.g., Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003) (government has an “unfettered right” to dismiss a *qui tam* action).

Senator Grassley’s floor speech indicated that Congress should rein in this DOJ authority under the statute: “If there are serious allegations of fraud against the government, the attorney general should have to state the legitimate reasons for deciding not to pursue them in court. That’s just common sense.”

He further stated that his proposed bill would allow relator whistleblowers in False Claims Act *qui tam* cases with an opportunity to be heard if the government sought dismissal.

Now that Senator Grassley has specifically laid out plans to introduce legislation to amend the False Claims Act, there are several key questions regarding what will occur next in the legislative process.

Will the Justice Department Take a Position on the Grassley Legislation?

One major question regarding next steps is whether the Justice Department will formally support or oppose Senator Grassley’s proposal, or whether it will take any position at all. Senator Grassley has likely shared the proposal with the Justice Department for “technical assistance” in the drafting of the bill – and is soliciting support the same way he has sought and highlighted the support of the SEC for his SEC whistleblower

legislation (the Whistleblower Programs Improvement Act).

Senator Grassley recently sent a letter to the U.S. Attorney General William Barr in September 2019 regarding the Justice Department's broad exercise of its dismissal authority.

Furthermore, Grassley has prioritized asking Attorney General nominees during confirmation hearings about their views on the False Claims Act, often urging them to commit to vigorously enforce the statute. Whether the Justice Department will commit to supporting or opposing Senator Grassley's legislation will be an open question going forward, particularly in light of Mr. Davis' recent speech where he touted the Justice Department's exercise of dismissal authority under the Granston Memo, and broader debates within the current Administration regarding COVID-19-related liability issues.

Will the Bill be Bipartisan?

Another key question is whether the bill will have bipartisan support. In 2009, the FERA amendments were coauthored by then-Chairman Patrick Leahy (D-VT) and Senator Ted Kaufman (D-DE; retired) along with Senator Grassley. Likewise, in 1986, the reforms to the False Claims Act were introduced by Senator Grassley and Senators Carl Levin (D-MI) and Dennis DeConcini (D-AZ), both of whom are now retired.

Bipartisan support for legislation is often necessary to move in the Senate and receive any real consideration for final passage. Senator Grassley is likely looking for a bipartisan cosponsor to demonstrate bipartisan support for his proposal prior to introduction of the bill.

Other Reform Proposals?

Whether the bill will include reforms other than simply a limit on the Government's dismissal authority remains to be seen. There are stakeholders who have called for legislative reform on various procedural questions in FCA *qui tam* cases and other more substantive issues.

Given the pandemic and the expected uptick in cases – in addition to new case law likely flowing from *qui tam* cases related to COVID-19 related funds – Congress may see the current time period as being the appropriate time to seek changes to the statute that has been used with great success by the Justice Department and investigative agencies in recent years.

Will the Senate Judiciary Committee Take Up the Bill Anytime Soon?

A final key factor in determining if the legislation will move through Congress is whether the Chairperson of the Senate Judiciary Committee will seek to prioritize moving False Claims Act legislation and giving it committee consideration. Indeed, the Senate Judiciary Committee has jurisdiction over legislation to amend the False Claims Act.

While Senator Grassley currently chairs the Senate Finance Committee, he took over that committee after a tenure as the Chairman of the Senate Judiciary Committee due to Republican caucus rules. Senator Lindsay Graham (R-SC) currently chairs the Senate Judiciary Committee, but various reports indicate that in 2021

Senator Grassley will return to be the top Republican on the Senate Judiciary Committee.

If Republicans maintain the majority in the Senate following the 2020 election, this would mean that Senator Grassley would set the Judiciary Committee's legislative agenda for the next Congress. This would be a strong sign that he would likely use his perch to advance his priorities, including with respect to False Claims Act legislation.

Wiley's White Collar Defense & Government Investigations Practice is a national leader in False Claims Act (FCA) investigations and litigation, including with respect to representing clients in *qui tam* whistleblower actions under the FCA. The practice further works closely with Wiley's Government Contracts Group and other regulatory practice groups to provide counseling to minimize the risk of False Claims Act investigations and litigation.

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