

Amendments to the False Claims Act Pending in the U.S. Senate

Related Services
Government Contracts

March 19, 2009

This is the first of several updates that the McGlinchey Stafford law firm will generate concerning new federal legislation proposed to amend the False Claims Act (FCA). Congress is considering legislation to broaden the scope of existing law that prohibits "false" or "fraudulent" statements made in connection with government contracts. The changes would allow actions against subcontractors in the government procurement chain. **If you do business with the government or with government contractors, you need to be aware of this legislation. These rules will apply to stimulus money, without regard to the nature or size of your business.**

Recently, two bills have been introduced in the Senate.

The False Claims Clarification Act of 2009 (S. 458) has been proposed to clarify the original intent of the 1986 amendments to the FCA. The Fraud Enforcement and Recovery Act (S. 386) has a more general aim to improve the enforcement of fraud related to federal assistance and relief programs, including the FCA. The provisions in S. 386 pertaining to the FCA are identical to provisions contained in S. 458, but S. 458 contains further amendments to the FCA.

The Acts are part of the Congressional response to recent cases interpreting the FCA, such as *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008), as well as a response to recent legislation, such as the economic stimulus package, that has granted an unprecedented amount of federal assistance and relief to numerous entities and individuals.

To provide some background, the FCA imposes civil liability on "any person who knowingly uses a false record or statement to get a false or fraudulent claim paid or approved by the Government" and on "any person who conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123, 2126 (2008) (citing 31 U.S.C. § 3729(a)(2), (a)(3)). The Supreme Court held in *Allison Engine* that when a subcontractor makes a false statement to a private entity and does not intend for the Government to rely on that false statement as a condition of payment, the subcontractor is not liable under the FCA. *Id.* at 2130. The Court found that such an interpretation of the FCA protected the Government from loss due to fraud but also ensured that a defendant would not be liable for anything beyond the ordinary and reasonable consequences of its conduct. *Id.*

S. 458 and S. 386 have been proposed to reverse the decision in *Allison Engine* and other cases that have interpreted the FCA narrowly when imposing liability on government contractors and subcontractors. Both acts propose to amend the FCA to make liable subcontractors in a government contract who submit false claims, regardless of whether they had specific intent to defraud the Government. If either act becomes law, the decision of *Allison Engine* will be reversed.

Currently, S. 458 has been introduced in the Senate by Sen. Chuck Grassley (R-Iowa) and assigned to the Senate Judiciary Committee. S. 386 has been placed on the legislative calendar without a written Committee Report. Previously, S. 386 was introduced in the Senate by Sens. Leahy (D-Vt.), Grassley, and Kaufman (D-Del.) and assigned to the Senate Judiciary Committee.

Given the President's recent memorandum on procurement reform, we expect Congress to devote serious attention to this legislation and ultimately to come up with changes to the FCA that expand the scope of government enforcement.

For more information, please contact a [McGlinchey Stafford government-contracts attorney](#).