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CBO issues long-awaited analysis of proposed FCA amendments

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At long last, the Congressional Budget Office (CBO) issued[1] its cost estimates regarding Senator Chuck Grassley's (R-IA) False Claims Amendments Act of 2021.[2]

The CBO's analysis may have been slightly disappointing for Grassley and other proponents of the proposed legislation; although the CBO found that the amendments could result in a few successful verdicts for the plaintiffs each year, the estimated two to three additional successes per year is not exactly a ringing endorsement for the legislation, particularly in light of the CBO's determination that heightened (c)(2)(A) requirements would simultaneously prolong litigation and increase litigation costs.

CBO cautioned that although its estimate was "subject to significant uncertainty," success in three additional cases each year would average out to increased collections of about $145 million from 2022-2032.

We have previously written about both the original version[3] of the bill and the most current iteration[4] of the proposed FCA amendments, which was the subject of the CBO's analysis. The FCA amendments would make two significant changes to the FCA.

First, they would amend the materiality requirement to provide that "[i]n determining materiality, the decision of the Government to forgo a refund or pay a claim despite actual knowledge of fraud or falsity shall not be considered dispositive *if other reasons exist* for the decision of the Government with respect to such refund or repayment" (emphasis added).

Second, the proposed legislation would resolve the circuit split regarding the proper standard of review for evaluating government (c)(2)(A) dismissal motions by adopting the least deferential of the various standards of review.

More specifically, it would require a district court to hold a hearing at which the government bears the burden of "demonstrating reasons for dismissal," and provide relators the opportunity "to show that the reasons are fraudulent, arbitrary and capricious, or contrary to law."

Less controversially, the proposed legislation would also clarify that the FCA's whistleblower protections extend to post-employment retaliation.

With respect to the materiality provision, the CBO used information about "recent unsuccessful or dismissed cases" to estimate that the new materiality requirement would result in DOJ "succeed[ing] in about three FCA cases each year that would not otherwise have been won." Notably, this analysis appears to have been performed without substantive input from DOJ, which "could not provide an estimate of the number of cases that would be affected by this provision."

CBO cautioned that although its estimate was "subject to significant uncertainty," success in three additional cases each year would average out to increased collections of about $145 million from 2022-2032. Based upon the portion of this sum arising from the collection of damages ($35 million), CBO estimated that over the next decade, the Treasury would receive a total of approximately $17 million to reduce the budget deficit.

Based on the limited information provided by the CBO, it does not appear that CBO's estimates considered potential costs to DOJ arising from increased discovery expenses and prolonged litigation (including the burden of near-inevitable appeals) as parties and the courts grapple with what is required to prove that "other reasons exist" for a government's decision to continue paying a claim despite knowledge of fraud.

The CBO's estimate of three additional victories per year could be considered somewhat underwhelming, particularly in light of Grassley's prior complaints[5] that Escobar "gut[ted]" the FCA and was a "disjustice" [sic] to Congress's anti-fraud efforts.

Any increased collections must also be considered in tandem with the CBO's estimates regarding the costs of implementing the legislation's proposed changes to (c)(2)(A) dismissal authority. CBO noted that requiring the government to "identify the purpose for dismissing an FCA case" and providing relators an opportunity for rebuttal would "prolong litigation and increase the workload" on DOJ's Civil Division.

Assuming a somewhat modest "additional month of work" for each case as a result of the new requirements, CBO estimated that it would cost $15 million to implement that change over the next five years. The report does not indicate that CBO factored in any costs associated with increased appeals, and did not provide an estimate of the total increased spending over the 2022-2032 period CBO used for its materiality analysis.

To be sure, the CBO's report is an important step in moving the proposed legislation forward, and its estimates will certainly be part of the conversation when the legislation is considered by the full Senate.

Senator Grassley, who at 88 is running for his eighth term in the Senate, has yet to forecast the next steps for the proposed legislation (despite a recent floor speech[6] for "National Whistleblower Appreciation Day").

Given the limited number of legislative session days left this fiscal year, it is unclear if the False Claims Amendments Act of 2021 will be up for debate, let alone for a vote, anytime in Fiscal Year 2022. We at Qui Notes will be tracking closely.

Notes

[1] https://bit.ly/3dr3z1T

[2] S. 2428.

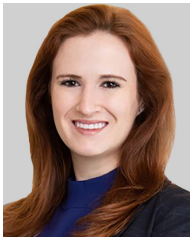
[3] https://bit.ly/3BMNfly

[4] https://bit.ly/3eLkXyl

[5] https://bit.ly/3qIjoEm

[6] https://bit.ly/3divMrU

About the author



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