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PRACTICE FOCUS / FRAUD

Bills grant attorney general expansive investigative power

Commentary by
Timothy M. Moore

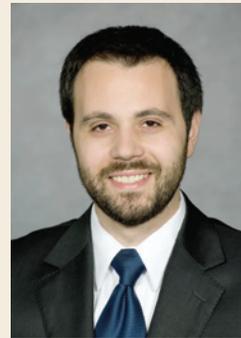
Pending in the Florida Legislature are twin bills that, if passed, will be the greatest revision and expansion of the Florida False Claims Act since the law's enactment nearly two decades ago.

These bills, House Bill 935 and Senate Bill 1494, were filed shortly before the current legislative session began on March 5. They already enjoy enthusiastic support from Florida's Attorney General Pam Bondi, who has deemed their passage one of her top legislative priorities. According to the Bondi, the bills will enable her office to investigate the growing number of reports of fraud involving state money.

Furthermore, HB 935, touted by its sponsor as sending the message that Florida is serious

about protecting taxpayer money, received the Florida House Civil Justice Subcommittee's unanimous approval. HB 935's smooth sailing thus far suggests that both bills may breeze through the Legislature, and breathe new life into Florida's False Claims Act.

Based on the federal False Claims Act, Florida's False Claims Act is a whistleblower statute designed to protect public funds from fraud. The act enables a relator, a private person who claims to know of fraud involving public funds, to bring a case on the state's behalf against the person or company who allegedly committed the fraud. The Attorney General can either intervene in and proceed with the relator's case, or, if nobody has filed a case, bring its own.



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As incentive to bring the case, the act enables the relator to receive attorney fees and up to 30 percent of any recovery.

Among the many changes proposed in the bills are some that bring Florida's False Claims Act in line with the federal False Claims Act. For example, under the bills, only false records or statements that are material to a false or fraudulent claim or obligation would trig-

ger liability for making, using, or causing to be made or used a false record or statement. This is a change from current law, where materiality is not an element. Additionally, the bills define "material" and "obligation" identically with federal law; presently, the Florida False Claims act defines neither.

Yet, two changes proposed in HB 935 and SB 1494 figure importantly.

First, the bills expand the Florida False Claims Act to encompass false claims made to the entire state government, not just the executive branch.

Currently, the Florida False Claims Act prohibits only false claims made to a state "agency," that is, "any official, officer, commission, board, authority, council, committee, or department of the executive branch of state

government.” For instance, the Florida False Claims Act forbids making a false claim to the Agency for Healthcare Administration, an executive-branch agency, but it does not prohibit making a false claim to a municipality. By deleting the word “agency,” but retaining an expansive definition of “state,” the bills thereby expand the Florida False Claims Act’s reach to claims made to all of Florida state government.

Second, the bills also give teeth to the Attorney General’s ability to investigate alleged violations of the Florida False Claims Act.

Although the Florida False Claims Act gives the Attorney General statutory authority to investigate alleged violations of the act, it provides the Attorney General no tools for

carrying out that task. Thus unequipped, the Attorney General has had to look elsewhere for statutory authority to issue subpoenas for its Florida False Claims Act investigations. For example, when investigating false claims involving Medicaid, the Attorney General uses the state Medicaid fraud statutes as a basis for its subpoena power. HB 935 and SB 1494 change that by empowering the Attorney General to issue subpoenas compelling document production, interrogatory answers, and sworn testimony in a Florida False Claims Act investigation. Moreover, the bills allow the Attorney General to seek a court order compelling someone to respond to a subpoena even if that person invokes the Fifth Amendment’s protec-

tion against self-incrimination. The bills temper that power by exempting the subpoenaed person from “criminal proceeding[s] with respect to the transaction” for which the Attorney General subpoenaed him or her.

If these bills pass, there will be broad consequences for those who regularly do business with Florida government. The Attorney General’s strong endorsement of the bills foreshadows that her office would quickly start using these new investigative tools. Additionally, the pool of potential investigative targets would be much larger because the Florida False Claims Act would cover claims made to all parts of state government.

Accordingly, more businesses are likely to

find themselves within the cross-hairs of a Florida False Claims Act investigation. Increased enforcement efforts by the Attorney General will also place a new importance on effective compliance programs, often the centerpiece of defenses in False Claims Act cases.

Businesses in Florida, especially those that regularly receive contracts from the State of Florida, would do well to analyze and update their compliance plans upon the passage of HB 935 and SB 1494.

Timothy M. Moore is an attorney at Shook, Hardy & Bacon, where his practice focuses on complex civil litigation and the defense of companies and executives facing government enforcement actions.

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