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New Criminal Liability Law for Government Contractors Nearer to Enactment

INTRODUCTION AND BACKGROUND

On October 9, 2007, the House of Representatives overwhelmingly passed legislation with broad ramifications for companies with government contracts relating to U.S. military, relief, and reconstruction operations overseas. H.R. 400, "The War Profiteering Prevention Act of 2007" ("the Act"), creates new criminal offenses for fraudulent acts involving the provision of goods or services in connection with U.S. Government operations overseas. Identical legislation was approved by the Senate Committee on the Judiciary in May 2007 and is a priority of the Senate Democratic leadership to bring to a floor vote this fall.

The Act comes in response to publicity about certain government contracts concerning U.S. operations in Iraq and Afghanistan, and it augments existing federal enforcement authority under the False Claims Act (18 U.S.C. § 287). It establishes a new criminal fraud offense in title 18 of the United States Code aimed at contracting operations that occur during times of "war, military action, or relief or reconstruction activities." The Act makes it a crime, punishable by up to 20 years of imprisonment and a fine of up to \$1 million, to engage in either of two acts: (1) executing or attempting to execute a scheme or artifice to defraud the United States or a provisional authority; or (2) "materially" overvaluing any good or service with the intent to defraud the United States or a provisional authority, such as the former Coalition Provisional Authority in Iraq. In its report, the House Committee on the Judiciary Committee

indicated that the Act is particularly aimed at "efforts to exploit 'cost plus' or 'no bid' contracts."

Contractors may be found criminally liable of materially overvaluing goods and services only if the government proves they had the intent to defraud. As the report of the House Committee on the Judiciary states, no contractor "may be prosecuted... based on the contractor's *merely negligent or innocently mistaken conduct*" (emphasis added). Contractors may still be subject to civil actions, however, under the False Claims Act.

A separate offense would occur under the Act if a contractor (1) "falsifies, conceals, or covers up" a material fact "by any trick, scheme, or device;" (2) "makes any materially false, fictitious, or fraudulent statements or representations;" or (3) "makes or uses any materially false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry." In addition to a fine of up to \$1 million, a contractor convicted of any of those offenses faces up to 10 years of imprisonment — double the penalty for false statements under 18 U.S.C. § 1001.

The legislation is also noteworthy in two additional respects. First, it explicitly establishes extraterritorial jurisdiction for prosecution of any offenses under the proposed new statute. Thus, contractor activities occurring exclusively outside the United States would come within the government's enforcement jurisdiction. Correspondingly, the legislation creates

venue for prosecution “in any district where any act in furtherance of the offense took place,” or “in any district where any party to the contract or provider of services is located.”

Second, the proposed new offense would constitute a “predicate crime” for prosecution of money laundering under 18 U.S.C. § 1956(c)(7) or racketeering under 18 U.S.C. § 1961(1). That means that an alleged fraud offense under the proposed legislation would be a statutory basis for charging violations of federal money laundering and racketeering laws. In addition, unlawful proceeds from contractor violations under the proposed law would be subject to criminal forfeiture under 18 U.S.C. § 982(a)(2)(B).

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Select areas of representation include False Claims Act enforcement actions; securities fraud and insider trading; health care fraud; criminal antitrust; economic crimes; banking and financial institutions fraud; environmental crimes; RICO prosecutions; and customs cases. We also have a breadth of experience in internal compliance investigations and in representing companies and individuals in Congressional oversight investigations.

FOR MORE INFORMATION

For further information on this pending legislation or any other enforcement or investigative matter of concern, including the development of an effective compliance program to help prevent violations of law, please contact:

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