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**THE FALSE CLAIMS ACT CORRECTION ACT OF 2008**

SEPTEMBER 25 (legislative day, SEPTEMBER 17), 2008.—Ordered to be printed

Mr. LEAHY, from the Committee on the Judiciary,  
submitted the following

**R E P O R T**

[To accompany S. 2041]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to which was referred the bill (S. 2041), to amend the False Claims Act, having considered the same, reports favorably thereon, with amendment, and recommends that the bill, do pass.

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**I. BACKGROUND AND PURPOSE OF THE FALSE CLAIMS ACT  
CORRECTION ACT OF 2008**

**A. BACKGROUND**

In 1863, President Abraham Lincoln proposed legislation designed to protect the United States Treasury from fraud and abuse in Civil War defense contracts. This legislation, the False Claims Act (FCA), was adopted by Congress late that year and signed into law by President Lincoln. The FCA that was originally enacted provided both civil and criminal penalties against individuals who were found to “knowingly have submitted a false claim to the Gov-

ernment.”<sup>1</sup> These penalties included double damages for “any false claims for money or property upon the United States”<sup>2</sup> or for any individual “who submit[s] false information in support of claims.”<sup>3</sup> On top of double damages, the FCA passed in 1863 also imposed a \$2,000 civil penalty per false claim.

The heart of the 1863 Act was an authorization for private individuals, known as *qui tam*<sup>4</sup> relators, to file FCA cases on behalf of the Federal Government. If an individual private relator successfully prosecuted a case to final judgment under the FCA, they were awarded one-half of the damages recovered. The FCA also awarded a successful relator with reimbursement for all costs to prosecute the case.<sup>5</sup>

The 1863 Act did not authorize the Government to intervene once a suit was commenced under the FCA by a private relator. In fact, as this Committee previously noted, “[a] relator’s interest in the action was viewed, at least in one instance, as a property right which could not be divested by the United States if it attempted to settle the dispute with the defendant.”<sup>6</sup> Further, under the 1863 Act, nothing precluded *qui tam* actions from being pursued by a relator regardless of the source of the relator’s information. The 1863 Act remained on the books virtually unchanged until World War II.

In the early 1940s, a number of *qui tam* cases were filed in response to the increased Government procurement during World War II. One case, *United States ex rel Marcus v. Hess*, 317 U.S. 537 (1943), raised the question of whether *qui tam* relators were filing FCA cases based solely upon information obtained in the criminal indictments brought by the Government. In *Marcus*, the Government argued that a civil action filed by an informant with knowledge of the criminal complaint created a situation where a relator was filing a *qui tam* action without any new information. The Court found that such suits could proceed and accomplish the goals of the Act recovering more money than is allowed under criminal penalties.<sup>7</sup> This decision prompted then-Attorney General Francis Biddle to request<sup>8</sup> a repeal of the *qui tam* provisions. This repeal passed in the House, but when amended in the Senate, the *qui tam* provisions were reinstated with modifications.<sup>9</sup>

The Senate legislation limited jurisdiction of the courts by barring *qui tam* suits based upon information that was in possession of the Government unless the relator was an original source of that information.<sup>10</sup> However, the final conference report adopted a modified version of this jurisdictional bar and did so without explanation. The final language “dropped the clause regarding original sources of allegations” and left a jurisdictional bar if the Govern-

<sup>1</sup> S. Rep. No. 99-345, 99th Cong., 2d Sess. (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5273 (hereinafter “S. Rep. No. 99-345”).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> The term *qui tam* is shorthand for *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means “who pursues this action on our Lord the King’s behalf as well as his own.” See *Rockwell Int’l Corp., v. United States*, 549 U.S. \_\_\_\_\_, 127 S.Ct. 1397, 1403 n.2 (2007).

<sup>5</sup> See S. Rep. No. 99-345, *supra* note 1, at 5275.

<sup>6</sup> *Id.* at 5275 (citing *United States v. Griswold*, 30 Fed. Rep. 762 (Cir. Ct., D. Ore. 1887)).

<sup>7</sup> See *Marcus*, 317 U.S. at 545.

<sup>8</sup> See S. Rep. No. 1708, 77th Cong., 2d Sess. (1942) (reprinting Attorney General Biddle’s letter to Congress requesting modifications to the FCA).

<sup>9</sup> For further background see S. Rep. No. 99-345, *supra* note 1, at 5276.

<sup>10</sup> See False Claims Amendments Act of 1986, P.L. 99-562, 100 Stat. 3154, 3157 (codified as amended at 31 U.S.C. § 3730(e)(4)(b) (2000)).

ment had prior knowledge.<sup>11</sup> This “government knowledge bar” deprived courts of jurisdiction over qui tam actions “based upon evidence or information in the possession of the United States, or any agency or officer or employee thereof, at the time such suit was brought.”<sup>12</sup>

The conference report also had other amendments to the FCA. The 1943 amendments authorized the Department of Justice to take over cases initiated by relators and required relators to submit all of their supporting evidence to the Department of Justice at the time they filed a complaint. The Department of Justice was then given 60 days to decide if they would intervene in the suit and take control of the case. If the Department took control, the relator had no say in the final disposition of the case. Further, the 1943 amendments limited the relator’s portion of proceeds to “fair and reasonable compensation” not to exceed 10 percent of the proceeds if the Government prosecuted the suit.<sup>13</sup> In the event the Government did not intervene, a relator could receive up to, but not to exceed, 25 percent of the recovery.<sup>14</sup>

These changes—the “government knowledge bar” in particular—significantly limited the number of FCA cases that were filed. By the 1980s, the FCA was no longer a viable tool for combating fraud against the Government. Courts had interpreted the “Government knowledge bar” narrowly and found that there was a complete bar for qui tam relators even if the Government made “no effort to investigate or take action after the original allegations were received.”<sup>15</sup> Some courts went further, finding that the bar precluded all qui tam cases when the information was already known, or should have been known by the Government, even if the source of the information to the Government was the qui tam relator.<sup>16</sup> As a result, FCA filings plummeted from 1943 through 1986 with only about six to ten FCA cases filed per year.<sup>17</sup>

In the early 1980s, Congress began to take note of the increased evidence of fraud against the Government. A three-volume report issued by the General Accounting Office (now known as the Government Accountability Office or GAO) concluded that fraud against the Government was “widespread.”<sup>18</sup> The report also noted that undetected fraud was probably much higher than expected because “weak internal controls allow fraud to flourish.”<sup>19</sup> Further, this Committee observed that “the cost of fraud cannot always be measured in dollars and cents”<sup>20</sup> and the GAO report discussed how fraud erodes the public confidence and ability to manage programs.<sup>21</sup> In addition, one Senate hearing included testimony that “45 of the 100 largest defense contractors—including 9 of the top

<sup>11</sup> See S. Rep. No. 99–345, supra note 1, at 5277.

<sup>12</sup> 57 Stat. 608, codified as amended at 31 U.S.C. § 232–235 (1976). See also *United States v. Pittman*, 151 F.2d 851, 853–54 (5th Cir. 1945) (discussing 1943 amendments to the FCA).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See S. Rep. No. 99–345, supra note 1, at 5277 (citing *United States ex rel Lapin v. Int'l Bus. Machs. Corp.*, 490 F.Supp 244 (D. Hi. 1980)).

<sup>16</sup> See *United States ex rel., Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984).

<sup>17</sup> Elleta Sangrey Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 Vill. L. Rev. 273, 318 (1992).

<sup>18</sup> General Accounting Office, *Fraud in Gov't Programs: How Extensive is It?—How Can it Be Controlled* ii (1981) (hereinafter “GAO Report”).

<sup>19</sup> S. Rep. No. 99–345, supra note 1, at 5268 (1986) (citing GAO Report).

<sup>20</sup> *Id.* at 5268.

<sup>21</sup> *Id.*

10—were under investigation for multiple fraud offenses.”<sup>22</sup> Scholars similarly expressed concern about serious fraud against the Government and began to discuss the past successes of the FCA.<sup>23</sup>

In response, Senators Charles E. Grassley, Carl Levin, and Dennis DeConcini introduced S. 1562, the False Claims Amendments Act, in 1985.<sup>24</sup> This bill, along with similar legislation introduced by Senator Strom Thurmond, was referred to the Senate Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure. The House of Representatives also considered a bill to amend the FCA, H.R. 3317, which was referred to the House Committee on the Judiciary, Subcommittee on Administrative Law and Governmental Relations. Both the House and Senate Subcommittees held hearings to review this legislation.<sup>25</sup>

The House and Senate bills amending the FCA in 1985 shared the similar goal of returning the qui tam provisions to the FCA in order to empower private citizens to work with the Government in rooting out fraud. More specifically, the Senate Committee on the Judiciary noted that “perhaps the most serious problem plaguing effective enforcement [of fraud] is a lack of resources on the part of Federal enforcement agencies.”<sup>26</sup> The Committee continued, “allegations that perhaps could develop into very significant cases are often left unaddressed at the outset due to a judgment that devoting scarce resources to a questionable case may not be efficient.”<sup>27</sup> This Committee concluded that it “believes that the amendments [to the FCA] which allow and encourage assistance from the private citizenry can make a significant impact on bolstering the Government’s fraud enforcement efforts.”<sup>28</sup>

Ultimately, the House and the Senate passed the False Claims Amendments Act of 1986 (the 1986 Amendments) and President Reagan signed it into law on November 23, 1986.<sup>29</sup> The final legislation made a number of reforms to the 1943 version of the FCA. Chief among them was a change to increase the penalty provision from the double damages to treble damages. The 1986 Amendments also provided the qui tam cases filed by private relators must be filed under seal for sixty days and served to the United States, but not the defendant.<sup>30</sup> The purpose of this provision was two-fold: to provide the Department of Justice an opportunity to decide if the case was meritorious and worthy of the Department taking over the case, and to protect the defendant from unfounded accusations. The 1986 amendments also created a new mechanism that allowed the Department of Justice the option of intervening in a FCA case that it initially declined to take over, provided the De-

<sup>22</sup> S. Rep. No. 99-345, *supra* note 1, at 5267 (citing testimony of Dep’t of Defense Inspector Gen., Joseph Sherick).

<sup>23</sup> See, e.g., Erwin Chemerinsky, *Controlling Fraud Against the Government: The Need for Decentralized Enforcement*, 58 *Notre Dame L. Rev.* 995 (1983) (arguing that the FCA should be amended).

<sup>24</sup> False Claims Amendments Act of 1986, S. 1562, 99th Cong. (1985).

<sup>25</sup> False Claims Reform Act: Hearing Bef. the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. (Sept. 17, 1985); Hearings Bef. the Subcomm. on Admin. Law and Govern. Rel. of the House Comm. on the Judiciary, 99th Cong., 2d Sess. (Feb. 5, 1986).

<sup>26</sup> S. Rep. No. 99-345 *supra* note 1, at 5272.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (codified as amended at 31 U.S.C. §§ 3729-3733) (1994); 22 *Weekly Comp. Pres. Doc.* 1499 (Nov. 3, 1986).

<sup>30</sup> 31 U.S.C. § 3730(b)(2)-(3) (2000).

partment had “good cause.”<sup>31</sup> Further, the amendments included a provision that provided qui tam relators the ability to continue to participate in a FCA case working side-by-side with the Government, subject to a court’s ability to limit the relator’s role in certain instances.

The 1986 amendments also sought to incentivize further qui tam relators by lifting the uncertainty of relators’ monetary rewards for coming forward and reporting fraud. Specifically, the amendments removed the discretionary award structure for qui tam relators and, in most cases, provided that a relator could be awarded 15 percent of the recovery for coming forward and their hard work.<sup>32</sup> Further, the amendments provided whistleblower protections in recognition of the risk that qui tam relators take in reporting fraud against the Government. This provision provided qui tam relators the ability to seek reinstatement, back pay with interest, as well as special damages that includes attorney’s fees and litigation costs in courts if they were retaliated against.<sup>33</sup>

Most importantly, the 1986 Amendments specifically overturned the Government knowledge bar that was created in the 1943 amendments and replaced it with a new mechanism referred to as a “public disclosure bar.”<sup>34</sup> This new, public disclosure bar was designed to bar only truly parasitic cases filed by relators whose complaints were “based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media.”<sup>35</sup> However, this jurisdictional limitation included an important exception that allowed cases to go forward in two instances: first, if it was brought by the Attorney General;<sup>36</sup> and second, if “the person bringing the action is an original source of the information.”<sup>37</sup> The 1986 Amendments defined “original source” as “an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.”<sup>38</sup> The goal of this provision was to ensure that any individual qui tam relator who came forward with legitimate information that started the Government looking into an area it would otherwise not have looked, could proceed with an FCA case.

Finally, the 1986 Amendments authorized an award of attorneys’ fees to any defendant that prevailed in a suit where the “court finds \* \* \* [the litigation] was clearly frivolous, clearly vexatious, or brought primarily for the purposes of harassment.”<sup>39</sup>

<sup>31</sup> 31 U.S.C. § 3730(c)(3) (2000).

<sup>32</sup> 31 U.S.C. § 3730(d)(1)–(2) (2000).

<sup>33</sup> 31 U.S.C. § 3730(h) (2000).

<sup>34</sup> 31 U.S.C. § 3730(e) (2000); see also *United States ex rel. LeBlanc v. Raytheon Co.*, 874 F. Supp. 35, 38 (D. Mass. 1995), *aff’d* 62 F.3d 1411 (1st Cir. 1995), *cert. denied*, 516 U.S. 1140 (1996).

<sup>35</sup> 31 U.S.C. § 3730(e)(4)(A) (2000).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> 31 U.S.C. § 3730(e)(4)(B) (2000).

<sup>39</sup> 31 U.S.C. § 3730(d)(4) (2000).

## B. IMPORTANCE OF THE FALSE CLAIMS ACT

The need for a robust FCA cannot be understated. For example, the year prior to the 1986 Amendments, the Department of Justice recovered only \$54 million using the FCA. After the 1986 Amendments, recoveries have increased incrementally each year with over \$5 billion from settlements and judgments recovered in the past two years alone. All told, the 1986 Amendments have led the Government to recover over \$20 billion since 1986, of which \$12.6 billion has been the result of qui tam actions. However, more work remains to be done. For instance, the Administrator of the Centers for Medicare and Medicaid Services testified in 2006 that fraud—excluding errors—in the Federal/State Medicaid program could be as high as 8 percent.<sup>40</sup> Based on 2008 estimates, the fraud losses could be as high as \$16.25 billion<sup>41</sup> this year for the Federal Government alone—not including the State share of funds required by the Medicaid program. With such a great potential for fraud against the Government, it is important that the Committee revisit the FCA and correct erroneous court interpretations that have limited the scope and application of the FCA in contravention of Congress’s intent in passing the 1986 Amendments.

In the 110th Congress, the Judiciary Committee heard testimony highlighting the critical role that qui tam relators play in uncovering and prosecuting violations of the FCA.<sup>42</sup> Pamela Bucy, Bainbridge Professor of Law at the University of Alabama School of Law, noted that a great deal of fraud would go unnoticed absent the assistance of qui tam relators. Professor Bucy testified:

Complex economic wrongdoing cannot be detected or deterred effectively without the help of those who are intimately familiar with it. Law enforcement will always be outsiders to organizations where fraud is occurring. They will not find out about such fraud until it is too late, if at all. When law enforcement does find out about such fraud, it is very labor intensive to investigate.

Fraud is usually buried in mountains of paper or digital documents. It is hidden within an organization. Many different people within an organization, in multiple offices, divisions, and corporate capacities, may have participated in the illegality. Because of the complex nature of economic crime and the diffuse nature of business environments, it may not be apparent, perhaps for years, that malfeasance is afoot. By then, victims will have been hurt, records and witnesses will have disappeared, and memories will have faded.

Given these facts, insiders who are willing to blow the whistle are the only effective way to learn that wrongdoing has occurred. Information from insiders is the only way to effectively and efficiently piece together what happened

<sup>40</sup> S. Hrg. 109–905, Physician-Owned Specialty Hospitals: Profits Before Patients? Hearing Before the Senate Comm. on Finance, 109th Cong. 141–142 (2006) (responses to questions for the record from Mark McClellan, Administrator, Centers for Medicare and Medicaid Services).

<sup>41</sup> United States Dep’t of Health and Human Servs., Budget in Brief Fiscal Year 2009 61 (2008) available at <http://www.hhs.gov/budget/09budget/2009BudgetInBrief.pdf> (last visited Aug. 13, 2008).

<sup>42</sup> See S. Hrg. 110–412, The False Claims Act Correction Act (S. 2041): Strengthening the Gov’t’s Most Effective Tool Against Fraud for the 21st Century, Hearing before Committee on the Judiciary, 110th Cong., 2d Sess. (February 27, 2008).

and who is responsible. Insiders can provide invaluable assistance during an investigation by identifying key records and witnesses, interpreting technical or industry information, providing expertise, and explaining the customs and habits of the business or industry. Help from an insider can save time and expense for both law enforcement and putative defendants by focusing the investigation on relevant areas. Because of the valuable information brought by insiders, it is no surprise that Government officials state: *‘Whistleblowers are essential to our operation. Without them, we wouldn’t have cases.’* (Emphasis added).<sup>43</sup>

Michael Hertz, Deputy Assistant Attorney General, Civil Division, of the Department of Justice concurred with Professor Bucy, testifying:

[T]he 1986 qui tam amendments to the Act that strengthened whistleblower provisions have allowed us to recover losses to the Federal fisc that we might not have otherwise been able to identify.<sup>44</sup>

The cases filed by qui tam relators following the 1986 Amendments have proven that fraud is pervasive and that it permeates Government programs from welfare and food stamp benefits to multibillion dollar defense contracts; from crop subsidies to disaster relief; and from Government-backed loan programs to health care benefits issued by Medicare and Medicaid. Resourceful qui tam relators have uncovered these often-complex frauds and have tipped off the Government to fraudulent activity. Mr. Hertz elaborated on this point:

[T]here are no government programs that are immune from possible fraud, as reflected by our caseload. Cases brought by the Department under the Act, including those initiated by whistleblowers, have recovered significant funds on behalf of the Department of Interior, the General Services Administration, the Department of Housing and Urban Development, the Department of Agriculture, the Department of Education, the Department of State, the Department of Energy, NASA, and more recently, the Department of Homeland Security, to name but a few.<sup>45</sup>

Mr. Hertz’s testimony highlights the depth and breadth of frauds perpetrated against the Government. Yet it is important to note that some areas of fraud are more pervasive than others and none more so than healthcare benefits paid by the Government under the Medicare and Medicaid programs. FCA cases have touched virtually every area of the healthcare community, including hospitals, doctors, pharmaceutical companies, nursing homes, durable medical equipment retailers and manufacturers, and renal care facilities, among others. Healthcare cases have constituted a significant portion of FCA recoveries, with hospital cases recovering over \$3.4 billion and pharmaceutical manufacturer cases recovering over \$4.6 billion. That is about 40 percent of \$20 billion that the Government has recovered using the FCA over the past 20 years.

<sup>43</sup> Id. at 120–21.

<sup>44</sup> Id. at 192.

<sup>45</sup> Id. at 189.

Qui tam relators have been particularly instrumental in unearthing healthcare frauds given the complexity of Federal healthcare programs. Prescription drug pricing cases and Medicare billing frauds are often sophisticated and, are often compartmentalized within a corporation so that only a very few individuals may actually understand the fraudulent scheme. Complexity of subject matter should never preclude the Government from uncovering fraud, but, unfortunately, it is impossible to determine how much fraud goes undetected.

Of the over 5,800 qui tam FCA cases filed since 1986, more than half (roughly 3,117) have focused on fraud against Government health care programs. These cases have recovered over \$9 billion of the \$12.6 billion recovered through qui tam cases since 1986 (nearly 72 percent). Frauds against the Department of Defense ranked second with over \$1.6 billion of qui tam recoveries (nearly 13 percent). While these recoveries represent a victory for American taxpayers, they are only one measure of the fraud against the Government. As the GAO pointed out,<sup>46</sup> fraud erodes public confidence in the Government's ability to efficiently and effectively manage its programs. This is why the FCA is so important to not just the Government, but to American taxpayers. It offers an opportunity for the Government to win back the hearts and minds of taxpayers who believe the Government does not care how taxpayer dollars are spent.

In addition, the presence of effective qui tam provisions in the FCA has a deterrent effect on those who seek to defraud the Government. Mr. Hertz testified:

In the wake of well-publicized recoveries attributable to the qui tam cases, those who might otherwise submit false claims to the Federal Government are more aware than ever of the 'watchdog' effect of the qui tam statute. We have no doubt that the Act has had the salutary effect of deterring fraudulent conduct.<sup>47</sup>

Despite these important successes, the FCA continues to face challenge after challenge in courts across the country, and recent court interpretations now undermine its potential effectiveness.

#### C. PURPOSE OF THE BILL

The original FCA was written to assist the Government in combating fraud against the U.S. Treasury by incentivizing private individuals to act as private attorneys general. By multiplying the number of individuals looking for fraud, the FCA was designed to bolster the resources of the Government to protect the Federal fisc and uncover frauds that otherwise would never have come to light. The FCA was crafted to enable private individuals to not only report fraudulent conduct, but also to move forward with lawsuits and to participate in the recovery. Allowing individual relators to proceed with lawsuits also provided a check on the Government bureaucracy that may lack the resources or the incentive to pursue complex or potentially embarrassing fraud cases. Despite these noble goals, the FCA has been subjected to substantial legal chal-

<sup>46</sup> See S. Rep. No. 99-345, supra note 1, at 5268 (citing GAO Report).

<sup>47</sup> S. Hrg. 110-412, supra note 42, at 192.



lenges that have led to conflicting interpretations from courts across the country. These conflicts make the outcomes of FCA cases unclear—not based upon facts, but based upon where the case is filed—and significantly undermine the effectiveness of the FCA.

The Committee has closely watched various interpretations of the FCA that have been appealed all the way to the Supreme Court. Despite the Supreme Court’s holdings in these cases, the interpretation of the FCA widely varies from court to court. Earlier this year, a court summarized the current state of law interpreting the FCA stating: “The Court sympathizes with anyone litigating under the False Claims Act. Perhaps Congress will elect at some point to give legislative attention to the FCA to resolve some of the still unresolved questions about the Act’s application.”<sup>48</sup> In addition to conflicting interpretations of the FCA, a number of courts—including the Supreme Court—have interpreted provisions of the FCA contrary to Congress’s intent in passing the 1986 Amendments.

The False Claims Act Corrections Act, S. 2041, seeks to clarify conflicting interpretations of the FCA, to provide an affirmative answer to unresolved questions created over the years by litigation, and to bring the FCA back into line with congressional intent. Among other things, this legislation makes clear that the FCA protects all Federal funds, including circumstances in which a person discovers an overpayment by the Government and decides to retain those funds. The legislation also defines recoverable damages; clarifies that Government employees may act as qui tam relators in limited, defined circumstances; prevents dismissal of qui tam allegations that assist Government investigations; strengthens anti-retaliation protections for qui tam whistleblowers; clarifies the statute of limitations period for all portions of the FCA; and provides technical amendments to the Civil Investigative Demands (CIDs) the Department of Justice is authorized to issue under the FCA. These provisions will assist practitioners, judges, and businesses across the country by providing clarity and certainty to the FCA. A more detailed section by section analysis of these provisions is provided below.

## II. HISTORY OF THE BILL AND COMMITTEE CONSIDERATION

### A. INTRODUCTION OF THE BILL

Senator Grassley introduced S. 2041, the False Claims Act Correction Act of 2007, on September 12, 2007, joined by Senators Durbin, Leahy, Specter, and Whitehouse as original cosponsors. The bill was referred to the Committee on the Judiciary.

### B. COMMITTEE CONSIDERATION

#### 1. Committee hearing

The Committee held a hearing on S. 2041 entitled, “The False Claims Act Correction Act (S. 2041): Strengthening the Government’s Most Effective Tool Against Fraud for the 21st Century” on February 27, 2008. Testimony was received from: Michael F. Hertz, Deputy Assistant Attorney General, Civil Division, Department of

<sup>48</sup>*United States ex rel. Montgomery v. St. Edward Mercy Medical Center*, 2008 WL 110858 (E.D. Ark. Jan. 8, 2008).

Justice; Tina M. Gonter of Jacksonville, Florida; The Honorable John E. Clark, Of Counsel, Goode, Casseb, Jones, Riklin, Choate, & Watson P.C., San Antonio, Texas; John T. Boese, Partner, Fried, Frank, Harris, Shriver, & Jacobson LLP, Washington, D.C.; and Pamela M. Bucy, Professor of Law, University of Alabama Law School, Tuscaloosa, Alabama.

Mr. Hertz testified that while the Department of Justice was in agreement with many individual components contained in the legislation, it could not support the bill as drafted. In particular, the Department is concerned with section 3 of the legislation which expressly states that Government employees may act as qui tam relators in limited defined circumstances. Mr. Hertz also testified about the Department's concerns regarding the revisions to the public disclosure bar contained in the legislation. Mr. Hertz discussed the position articulated by the Department in a formal views letter and corresponding appendix which was submitted to the Committee prior to the hearing. Mr. Hertz also discussed other subjects where the Department supported provisions in the bill that clarify the FCA. Mr. Hertz stated that the Department believed some cases had been wrongly decided by the courts, including the Supreme Court, and that the Department had submitted briefs consistent with provisions contained in S. 2041. Specifically, Mr. Hertz discussed how the Department disagreed with holdings in *United States, ex rel., Totten v. Bombardier Corp.*, 286 F.3d 542 (D.C. Cir. 2004) (hereinafter "Totten"), *Allison Engine Co. v. United States, ex rel., Sanders*, 471 F.3d 610 (6th Cir. 2006), *cert granted*, 128 S. Ct. 491 (2007), *rev'd on other grounds*, 553 U.S. \_\_\_\_, 128 S.Ct. 2123 (2008), and *United States ex rel. DRC, Inc., v. Custer Battles, LLC*, 376 F. Supp. 2d 617 (E.D. Va 2005) (hereinafter "Custer Battles"). Mr. Hertz concluded by stating that the Department of Justice was supportive of the qui tam provisions of the FCA and provided their views to ensure that corrections to the FCA do not "create additional obstacles to government enforcement efforts."<sup>49</sup>

Ms. Gonter, Judge Clark, and Professor Bucy each provided testimony recognizing the need to clarify the FCA and to strengthen the partnership between relators and the Federal Government.<sup>50</sup> Ms. Gonter shared her first hand experience as a qui tam relator. She worked as a quality assurance inspector for a Navy subcontractor and how she uncovered a scheme where the subcontractor, with tacit approval from the prime contractor, supplied defective valves for use in United States Navy submarines. Ms. Gonter told the Committee how she tried to raise her concerns regarding the defective valves, but was ignored by company managers. She reported this to the prime contractor, and they ignored her concerns as well. Ms. Gonter testified about how she made the decision to disclose the fraud as a whistleblower and how she alerted the Government to the problem.

Ultimately, Ms. Gonter filed a FCA qui tam complaint and assisted the Government during its five-year investigation. As a result of Ms. Gonter's efforts, the Government brought a criminal case against her company's owners and recovered more than \$13 million from the prime contractor despite a decision by the Depart-

<sup>49</sup> See S. Hrg. 110-412, *supra* note 42, at 194.

<sup>50</sup> Unfortunately, due to illness, Professor Bucy was unable to attend the hearing in person, but submitted written testimony.

ment of Justice not to intervene in that part of the case. Had Ms. Gonter not come forward, the Government would not have known about the defective valves, would not have brought a criminal case, and would not have recovered any money for the defective valves. Ms. Gonter concluded her testimony by noting that S. 2041 would clarify the scope of a subcontractor's liability under the FCA, the statute of limitations period, the public disclosure provisions, and the CID provisions, all of which would enhance the Government's effectiveness in using the FCA. Ms. Gonter's testimony highlighted the very goals of the FCA—empowering everyday citizens to come forward and report fraud against the Government.

Judge Clark discussed the need to amend the FCA from a practitioner's standpoint.<sup>51</sup> Judge Clark testified that S. 2041 provides much-needed clarification to the FCA by correcting several recent court decisions that have misconstrued the statute and limited its effectiveness. For instance, Judge Clark discussed how current case law has misinterpreted the public disclosure bar provisions in the 1986 Amendments and provided defendants with ammunition to have meritorious cases dismissed. Judge Clark believes that these decisions were directly contrary to the spirit and intent of Congress in passing the 1986 Amendments.

Judge Clark also emphasized the need to clarify the public disclosure bar provisions in the FCA because of a split among the Federal circuit courts of appeals. Most significantly, he testified that the Supreme Court's decision in *Rockwell International Corp. v. United States ex rel. Stone*, 549 U.S. \_\_\_\_, 127 S.Ct. 1397 (2007), misinterpreted the public disclosure bar and eroded the effectiveness of the FCA.

Judge Clark also testified that provisions in S. 2041 were needed to clarify the substantive liability provisions of the FCA outlined in 31 U.S.C. § 3729. Specifically, Judge Clark testified about clarifying the definition of the term "claim" in S. 2041 as necessary to bring the FCA back into line with the intent of the 1986 Amendments. Judge Clark observed that S. 2041 would overrule the D.C. Circuit Court's recent decision in *Totten* and its progeny, which the Committee views as critical to the future of the FCA. Those cases have misinterpreted the liability provisions of the FCA to include a "presentment" requirement, when Congress never intended that result. Judge Clark testified that S. 2041 makes clear that the FCA applies to funds administered by the United States under Government programs, noting that, as a result of the misapplication of this ruling, *Custer Battles*, was wrongly decided.

Professor Bucy's testimony also expressed general support for S. 2041, stating that the legislation properly clarifies the presentment issue raised in the *Totten* case, corrects the *Custer Battles* case, and properly broadens the Department of Justice's ability to use CIDs. Professor Bucy also supported S. 2041's goal of clarifying the rules governing the FCA's public disclosure bar provisions, although she offered the Committee some suggestions that she believes would make that provision even clearer.

Mr. John Boese testified on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform in opposi-

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<sup>51</sup>Judge Clark has worked as a qui tam relator's counsel after stepping down from the state bench in Texas.

tion to S. 2041. Mr. Boese testified that S. 2041 would greatly expand the scope of the FCA beyond what Congress intended in 1986. He claimed that S. 2041 would result in the application of the Act to private contractual disputes that do not affect Federal funds, would unjustifiably allow whistleblowers who provide the Government with no new information to still share in recoveries of Government funds, and would allow Government employees to abuse their positions for personal profit. He also raised the concern that the amended liability provisions would cover false claims submitted to Federal Government employees in their personal capacity, and paid from their salary checks. Moreover, he voiced the specific concern that the amended liability provision would cover false claims to Social Security beneficiaries, if they used their Government benefits to pay the claims.

## *2. Substitute bill*

In response to the concerns raised at the hearing, S. 2041 was revised and a substitute bill was prepared prior to the Committee mark-up on February 28, 2008. The substitute bill incorporated 13 of 16 recommendations made by the Department of Justice, as well as addressing a number of concerns raised by Mr. Boese.

First, the substitute bill modified the liability provisions of the FCA by removing ambiguous language that claims be presented to a Government officer or employee of the U.S. Government. The substitute also removed definitions of “Government money and property” and “Administrative Beneficiary” after hearing concerns from the Department of Justice that these new definitions would require substantive litigation and could render an outcome contrary to that which was intended. These modifications retained all the scienter requirements for liability to attach, but redefined the term “claim” to ensure that liability attaches to false claims to a Government contractor or grantee when the contractor or grantee pays the claim, at least in part, with funds that the Government has provided or for which the Government will provide reimbursement. Further, the substitute bill ensured that money or property under the trust of the Government or otherwise administered by the Government is protected as well. These changes made clear that false claims are covered whether made to the Government itself or to an organization that received Federal funds and expended them on the Government’s behalf or to further Government programs, purposes, or interests. However, the substitute bill did not amend any of the FCA’s current intent requirements. Additionally, in response to the concerns raised by the U.S. Chamber of Commerce, the substitute bill made clear that FCA liability will not attach to false claims submitted to individuals who receive employment compensation or income subsidies (such as Social Security) from the Federal Government.

Second, the substitute bill outlined the circumstances under which a Government employee can serve as a whistleblower in a qui tam lawsuit. The substitute bill made modifications to this provision to help alleviate concerns about the motives of a Government employee who may serve as a qui tam relator. Specifically, the provision defined narrow circumstances where a Government employee can act as a qui tam relator and created a defined procedure that a qualifying Government employee must follow before filing a

qui tam action. If the Government employee does not meet the qualifications or if proper procedure is not followed, the Government has the right to dismiss the relator from the case.

Regarding the Government relator's qualifications, the substitute bill specifically barred Government employees from being relators when they were auditors, attorneys, and other Government investigators. The substitute also barred family members of Government employees from filing qui tam lawsuits, closing a potential loophole for barred Government employees who could merely pass along the information to family members.

The substitute bill also created a defined procedure that a qualifying Government employee relator must follow. The substitute required that if the Government employee learned of the information that is the basis for his/her FCA case during the course of his/her employment for the Government, then that employee must first directly disclose such information to the agency's designated Inspector General or to the Attorney General if there is not an Inspector General. Further, the Government employee must also notify his/her supervisor of the disclosures as well as the Attorney General (if he/she had previously reported to the Inspector General). Only if the Attorney General fails to bring a claim based on the disclosed information within 18 months is the Government employee then free to bring the claim as a qui tam relator. In addition, the substitute bill prohibited Government employees from being qui tam relators if they derive information for their FCA claim from an indictment or information, or any ongoing active criminal, civil, or administrative investigation. The Committee notes that these modifications in the substitute bill are restrictions that were discussed by the Tenth Circuit Court of Appeals in then-Chief Judge Tacha's dissenting opinion in *United States ex rel. Holmes v. Consumer Ins. Group*, 318 F.3d 1199 (10th Cir. 2003). While the Committee strongly agrees with the majority opinion holding that Government employees may serve as qui tam relators without condition under the current FCA and these restrictions are currently *not* imposed upon Government employees that file FCA cases as qui tam relators in the Eleventh and Sixth Circuits, the Committee nonetheless believes such a limitation would help to clarify the split of authority across the country related to Government employee relators.

Third, the substitute bill empowered the Attorney General to file a timely motion to dismiss a claim, so that the only cases barred are those in which a qui tam relator truly contributed no information providing a new basis for recovery. This section incorporated much of the language submitted by the Department of Justice in its views letter. The provision allows courts to dismiss a claim if it relates to substantially the same matters and same wrongdoer that is the subject of an open and active criminal indictment or information, criminal, civil, or administrative fraud investigation or audit, news media report, or congressional hearing, report or investigation that is acted on by the Department of Justice or Inspector General within 90 days. This section also makes technical modifications to the FCA including a clarification that no claim for a violation of section 3729 may be waived or released from liability by a person other than the Government, unless it is part of a settlement of a section 3730(b) action. This section also included additional

language requested by the Department of Justice that ensures that this limitation will not prohibit the Government from pursuing FCA settlements with defendants. This provision will ensure that the courts dictate which violations of the FCA may be dismissed as part of an approved settlement agreement.

Fourth, with respect to the FCA's retaliation provisions, the substitute bill included a clarifying provision to include the term "agent" in the list of individuals who may use the anti-retaliation provisions of the FCA. The omission of the term "agent" was merely a clerical error in the original draft of S. 2041 and was always intended to be included.

Fifth, the substitute bill made two minor amendments to the use of CIDs by including a provision allowing the Department of Justice to share information derived from a CID with Federal, State, or local law enforcement officers conducting an investigation into allegations raised in a FCA case.

Sixth, the substitute made a clarifying amendment that information obtained from a CID by the Department of Justice, may be shared with qui tam relators who filed the FCA claim. The Committee included this provision because it is well-recognized that qui tam relators are often insiders who have substantive knowledge of how a corporation may work and can provide substantive background (as was the case with Ms. Gonter's support of Navy investigators).

Seventh, with respect to severability, the substitute bill adopted language offered by the Department of Justice designed to avoid the unnecessary use of Government resources to litigate the application of these amendments to current cases and to "ensure that any provision in the FCA that might be invalidated does not result in the invalidity of the remaining provisions."

Finally, the substitute bill incorporated a provision sought by the Department of Justice that would expressly apply to "all cases pending on the date of enactment, and to all cases filed thereafter." This provision was requested in order to avoid the same type of litigation that occurred following the passage of the 1986 Amendments. The Department of Justice noted that it spent significant resources and time litigating the application of the 1986 Amendments and that this provision would help to prevent a similar situation.

### *3. Executive business meeting*

The False Claims Act Corrections Act of 2008, S. 2041, was placed on the Committee's executive business meeting agenda on February 28, 2008. However, the bill was held over and not addressed by the Committee until April 2008. During this time, the sponsors of the bill drafted and circulated a second substitute bill that incorporated three additional changes. First, the second substitute amended a clerical error where the previous version of S. 2041 erroneously struck portions of 31 U.S.C. 3730(d)(1). Second, the substitute made a technical change requested by the Department of Justice to the CID provision. Finally, the second substitute made one substantive change creating a tiered application of the effective date as recommended by the Department of Justice. The second substitute also renamed the bill as "The False Claims Corrections Act of 2008," to reflect the changes made in 2008.

The bill was considered by the Committee at its executive business meeting on April 3, 2008. Chairman Leahy, on behalf of Senator Grassley, offered the complete second substitute bill as an amendment, which was accepted by unanimous consent. No other amendments were offered.

The Committee then voted to report the False Claims Act Correction Act of 2008, with an amendment in the nature of a substitute, favorably to the Senate by voice vote.

### III. SECTION-BY-SECTION SUMMARY OF THE BILL

#### *Section 1. Short title*

This section provides that the legislation may be cited as the “False Claims Act Correction Act of 2008.”

#### *Section 2. False claims generally*

This section of the bill updates the substantive liability provisions of the FCA which are contained in section 3729(a) of the Act. The bill contains clarifications to remove ambiguities and inconsistencies in the law that have been created through years of litigation. As the bill makes changes to the section and renumbers the liability provisions compared to the current statute, this report will outline the clarifications to the law based on each topic.

##### *A. Fraud against government contractors and grantees*

Following the decision in *United States ex rel. Totten v. Bombardier Corp.* a number of courts have held that the FCA does not reach false claims that are (1) presented to Government grantees and contractors, and (2) paid with Government grant or contract funds.<sup>52</sup> These cases are representative of the types of frauds the FCA was intended to reach when it was amended in 1986. This section of the bill clarifies that liability under 3729(a) attaches whenever a person knowingly makes a false claim to obtain money or property, any part of which is provided by the Government without regard to whether the wrongdoer deals directly with the Federal Government; with an agent acting on the Government’s behalf; or with a third party contractor, grantee, or other recipient of such money or property. The bill explicitly excludes from liability requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or has received as an income subsidy, such as Social Security benefits.

As some defendants have argued that *Totten* and *Atkins* restrict FCA liability from attaching to Medicaid claims, the bill clarifies the position taken by the Committee in 1986 that the FCA reaches all false claims submitted to State-administered Medicaid programs. By removing the offending language from section 3729(a)(1), which requires a false claim be presented to “an officer or employee of the Government, or to a member of the Armed Forces,” the bill clarifies that direct presentment is not required for liability to attach. This is consistent with the intent of Congress in amending

<sup>52</sup> 380 F.3d 488 (D.C. Cir. 2005); see, e.g., *United States, ex rel., Atkins v. McInteer*, 345 F. Supp. 2d 1302 (N.D. Ala. 2004), *aff’d on other grounds*, 470 F.3d 1350 (11th Cir. 2006); *United States, ex rel., Rafizadeh v. Continental Common, Inc.*, 2006 WL 980676 (E.D. La. April 10, 2006); *United States v. City of Houston*, 2006 WL 2382327 (S.D. Tex. Aug. 16, 2006); *United States, ex rel., Rutz v. Village of River Forest*, 2007 WL 3231439 (N.D. Ill. Oct. 25, 2007); *United States, ex rel., Arnold v. CMC Engineering*, 2007 WL 442237 (W.D. Pa. Feb. 7, 2007).

the definition of “claim” in the 1986 Amendments to include “any request or demand . . . for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.”<sup>53</sup>

### *B. Fraud against funds administered by the United States*

The Committee included provisions in Section 2 of the bill to address a decision recently decided involving funds administered by the U.S. Government during the reconstruction of Iraq. In *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, a trial court judge set aside a jury award finding that Iraqi funds administered by the U.S. Government on behalf of the Iraqi people were not U.S. Government funds within the scope of the FCA.<sup>54</sup> The Committee believes this result is inconsistent with the spirit and intent of the FCA.

When the U.S. Government elects to invest its resources in administering funds belonging to another entity, or providing property to another entity, it does so because use of such investments for their designated purposes will further interest of the United States.<sup>55</sup> False claims made against Government-administered funds harm the ultimate goals and U.S. interests and reflect negatively on the United States. The FCA should extend to these administered funds to ensure that the bad acts of contractors do not harm the foreign policy goals or other objectives of the Government. Accordingly, this bill includes a clarification to the definition of the term “claim” in new section 3729(b)(2)(A) and attaches FCA liability to knowingly false requests or demands for money and property from the U.S. Government, without regard to whether the United States holds title to the funds under its administration.

### *C. Conspiracy*

As noted above, the current FCA contains a provision that subjects those who knowingly conspire to defraud the Government by getting a false or fraudulent claim allowed or paid. Some courts have interpreted this provision narrowly.<sup>56</sup> The current FCA conspiracy provision does not explicitly impose liability on those who conspire to violate other provisions of the FCA, such as delivery of less Government property than that promised or making false statements to conceal an obligation to pay money to the Government.<sup>57</sup> Because of the confusion and uncertainty surrounding the application of the conspiracy provision, Section 2 amends current section 3729(a)(3) to clarify that conspiracy liability can arise

<sup>53</sup> 31 U.S.C. 3729(c) (2000). See also S. Rep. No. 99–345 supra note 1, at 5282–5301 (providing section-by-section analysis explaining that a false claim includes claims submitted to grantees and contractors if the payment ultimately results in a loss to the Government).

<sup>54</sup> 376 F. Supp. 2d 617 (E.D. Va. 2006).

<sup>55</sup> See, e.g., *United States ex rel. Haynes v. CMC Electronics, Inc.*, 297 F.Supp.2d 734 (D.N.J. 2003) (discussing sales of equipment to foreign governments under the Arms Export Control Act).

<sup>56</sup> See, e.g., *United States ex rel. Huangyan Import & Export Corp. v. Nature’s Farm Products, Inc.*, 370 F.Supp.2d 993 (N.D. Cal. 2005) (holding that section 3729(a)(3) does not extend to conspiracies to violate section 3729(a)(7)).

<sup>57</sup> 31 U.S.C. §§ 3729(a)(4)–(6) (2000).



whenever a person conspires to violate any of the provisions in Section 3729 imposing FCA liability.

*D. Wrongful possession, custody or control of government property*

Section 3729(a)(4) of the FCA has remained unchanged since enactment of the FCA in 1863. This provision establishes FCA liability upon an individual that has “possession, custody, or control of property or money used, or to be used, by the Government, and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate of receipt.”<sup>58</sup> This section allows the Government to recover losses that are incurred because of conversion of Government assets. However, because this section has remained unchanged from the original act that was drafted in 1863, the archaic language has made recoveries under a conversion theory contingent upon the individual receiving an actual receipt for the property. The new section, renumbered as section 3729(a)(1)(D) in the bill, updates this provision by retaining the core conversion principle while redrafting it in a more straightforward manner and removing the receipt requirement. Where knowing conversion of Government property occurs, it should make no difference whether the person receives a valid receipt from the Government. This amendment to 3729(a)(1)(4) was supported by the Department of Justice, as noted in its February 21, 2008 views letter.

*E. “Reverse” false claims*

Section 3729(a)(7) of the FCA currently imposes liability on any person who “knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.”<sup>59</sup> This provision is commonly referred to as creating “reverse” false claims liability because it is designed to cover Government money or property that is knowingly retained by a person even though they have no right to it. This provision is similar to the liability established under 3729(a)(2) for making “false records or statements to get false or fraudulent claims paid or approved.”<sup>60</sup> However, the provision does not capture conduct described in 3729(a)(1), which imposes liability for actions to conceal, avoid, or decrease an obligation directly to the Government. This legislation closes this loophole and incorporates an analogous provision to 3729(a)(1) for “reverse” false claims liability.

Further, this legislation addresses current confusion among courts that have developed conflicting definitions of what the term “obligation” in section 3729(a)(7) really means.<sup>61</sup> The term “obligation” now contains an express definition under new section 3729(b)(3) and includes both fixed and contingent duties owed to the Government—including fixed liquidated obligations such as judgments, and fixed, unliquidated obligations such as tariffs on

<sup>58</sup> 31 U.S.C. § 3729(a)(4) (2000).

<sup>59</sup> 31 U.S.C. § 3729(a)(7) (2000).

<sup>60</sup> 31 U.S.C. § 3729(a)(2) (2000).

<sup>61</sup> See, e.g., *United States ex rel. Praver & Co. v. Verrill & Dana*, 946 F.Supp. 87, 93–95 (D. Me. 1996) (discussing the definition of “obligation” at length); *Am. Textile Mfr’s Inst., Inc. v. The Limited, Inc.*, 190 F.3d 729, 736 (6th Cir. 1999) (discussing definition of “obligation”).

imported goods. It is also noteworthy to restate that while the new definition of “obligation” expressly includes contingent, non-fixed obligations, the Committee supports the position of the Department of Justice that current section 3729(a)(7) “speaks of an ‘obligation,’ not a ‘fixed obligation.’”<sup>62</sup> By including contingent obligations such as “implied contractual, quasi-contractual, grantor-grantee, licensor-licensee, fee-based, or similar relationship,” this new section reflects the Committee’s view, held since the passage of the 1986 Amendments,<sup>63</sup> that an “obligation” arises across the spectrum of possibilities from the fixed amount debt obligation where all particulars are defined<sup>64</sup> to the instance where there is a relationship between the Government and a person that “results in a duty to pay the Government money, whether or not the amount owed is yet fixed.”<sup>65</sup>

The new definition of the term “obligation” also includes “customs duties for mismarking country of origin,” a singular type of obligation that is specific and not a general class of obligations. The Committee included this provision in response to the decision in *American Textile Manufacturers Institute, Inc. v. The Limited, Inc.* where the Sixth Circuit Court of Appeals narrowly defined the term “obligation” to apply reverse false claims to only fixed obligations and dismissing a claim for false statements made by importers to avoid paying customs duties.<sup>66</sup> The inclusion of this express reference to customs duties is not intended to exclude other types of contingent or fixed obligations that are similar in effect and purpose or that otherwise meet the definition set forth in the proposed amendments.

The Committee also notes that the reverse false claims provision and amendments to that provision do not include any new language that would incorporate or should otherwise be construed to include a presentment requirement. This is consistent with various court decisions that have held that the current reverse false claims provision does not contain a presentment requirement.<sup>67</sup>

Finally, the new definition of “obligation” includes an express statement that an obligation under the FCA includes “the retention of an overpayment.” The Department of Justice supported the inclusion of this provision and provided technical advice that the proper place to include overpayments was in the definition of obligation.<sup>68</sup> This new definition will be useful to prevent Government contractors and others who receive money from the Government incrementally based upon cost estimates from retaining any Government money that is overpaid during the estimate process. Thus, the violation of the FCA for retention of a known overpayment oc-

<sup>62</sup> Brief for United States at 23, *United States v. Bourseau* No. 06–56741, 06–56743 (9th Cir. July 14, 2008).

<sup>63</sup> See S. Rep. No. 99–345 supra note 1, at 5283.

<sup>64</sup> See, e.g., *Am. Textile Mfrs. Inst. v. The Limited, Inc.*, 190 F.3d 729 (6th Cir. 1999); *United States v. Q Int’l Courier, Inc.*, 131 F.3d 770 (8th Cir. 1997).

<sup>65</sup> Brief for United States at 24, *United States v. Bourseau* No. 06–56741, 06–56743 (9th Cir. July 14, 2008) (citing *United States ex rel. Bahrani v. Conagra, Inc.*, 465 F.3d 1189, 1201 (10th Cir. 2006), *motn. for reh’g pending*, (10th Cir. 2007)); *United States v. Pemco Aeroplex, Inc.*, 195 F.3d 1234, 1237–38 (11th Cir. 1999) (en banc).

<sup>66</sup> See *Am. Textile Mfrs. Inst.*, 190 F.3d at 729.

<sup>67</sup> See, e.g., *United States ex rel. Bahrani*, 465 F.3d 1189, 1208 (10th Cir. 2006); *United States ex rel. Koch v. Koch Indus.*, 57 F.Supp.2d 1122, 1144 (N.D. Okla. 1999).

<sup>68</sup> Letter from Brian Benczkowski, Principal Deputy Assistant Attorney General, United States Department of Justice, to Senator Patrick Leahy, Chairman, Senate Committee on the Judiciary Appendix 3 (Feb. 21, 2008) (hereinafter “DOJ Views Letter”).

curs once a payment is retained following the final submission of payment as required by statute or regulation—including relevant statutory or regulatory periods designated to reconcile cost reports, but excluding administrative and judicial appeals.

#### *F. Damages*

The 1986 Amendments to the FCA created a system where damages are measured based on “the amount of damages which the Government sustains because of the act of that person.”<sup>69</sup> After determining that amount, the damages are trebled. This provision was designed to provide courts flexibility to measure damages on a case-by-case basis to ensure the broad remedial goal of the Act. Despite this legislative goal, some courts have read the damage provision narrowly and have made it difficult for the Government to recover the true losses sustained because of the fraud, let alone include penalties to provide a deterrent effect.

For example, problems have occurred with certain medical providers who were sued for violating the FCA. These providers received payments from Medicare and Medicaid despite being disqualified from participating in the programs because they received kickbacks from referring physicians, but argued there were no damages when they provided services and sought reimbursement.<sup>70</sup> While it may appear that there are no actual damages for simply seeking reimbursement when disqualified, the integrity of those Federal programs is seriously undermined by these practices which can cause overutilization of services, patient steering, and medical decisions made outside of the best interest of the patient.

To address problems that have occurred, this bill amends the damages provision in Section 3729(a) to a more simplified approach that measures damages based on the amount of money or property “paid or approved because of the act of the defendant.”

#### *Section 3. Government right to dismiss certain actions*

This section addresses the current split of authority between various courts regarding whether or not Government employees may act as qui tam relators under the FCA. The FCA was originally designed to be an avenue for any individual to bring a claim for recovery when the predicate elements for the offense were met. The FCA currently provides no specific guidance as to whether a Government employee may serve as a qui tam relator, and a number of courts have addressed this issue during the course of litigation.<sup>71</sup> The crux of the debate surrounding the role Government employees may play in qui tam litigation involves ethics concerns about Government employees filing potentially parasitic qui tam actions

<sup>69</sup> 31 U.S.C. § 3729(a)(2000).

<sup>70</sup> See *United States ex rel. Pogue v. Am. Healthcorp, Inc.*, 914 F.Supp. 1507, 1513 (M.D. Tenn. 1996) (hereinafter “Pogue I”) (holding that the FCA was “intended to govern not only fraudulent acts that create a loss to the government but also those fraudulent acts that cause the government to pay out sums of money to claimants it did not intend to benefit); *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am. Inc.*, 238 F. Supp.2d 258, 264–66 (D.D.C. 2002) (discussing various courts that have upheld implied certification theory for violations of the Anti-Kickback and Stark laws as sufficient to state a claim under the FCA and reaffirming Pogue I).

<sup>71</sup> See, e.g. *United States ex rel. Holmes v. Consumer Ins. Group*, 318 F.3d 1199 (10th Cir. 2003); *United States ex rel. LeBlanc v. Raytheon Co., Inc.*, 913 F.2d 17 (1st Cir. 1990); *United States ex rel. Maxwell v. Kerr-McGee Chemical Worldwide, LLC*, 486 F.Supp.2d 1217 (D. Colo. 2007).

based upon information learned in the course of fulfilling their job duties.

This issue first arose following the passage of the 1986 Amendments, when the House Judiciary Committee, Subcommittee on Administrative and Government Relations held hearings to discuss the topic in 1990.<sup>72</sup> At the hearing, Senator Grassley—the original Senate sponsor of the 1986 Amendments—testified that Government employees should be allowed to act as qui tam relators under the FCA provided, “he can show that he first made a good faith effort within the proper channels” to report the fraud.<sup>73</sup> Further, Senator Grassley stated that Government employee relators are a key check on the Government bureaucracy and are a basic resource to fight fraud.<sup>74</sup> Subsequent to the hearings, legislation was introduced in the next two sessions of Congress to remedy this open question.<sup>75</sup>

Over time, courts across the country began to take various approaches in addressing the question of whether a Government employee could serve as a qui tam relator. Currently, the prevailing case law in the Tenth and Eleventh Circuits supports the proposition that Government employees are not categorically barred from acting as relators in FCA cases regardless of whether reporting fraud was one of the employee’s main duties.<sup>76</sup> However, the prevailing case law in the First Circuit and the Ninth Circuit does not allow Government employees to act as qui tam relators.<sup>77</sup> Together these decisions create a patchwork of applications of the FCA to Government employee relators and the Committee believes providing clarity on the issue is consistent with the spirit and intent of the 1986 Amendments.

To achieve this goal, the bill includes section 3, which clarifies when Government employees could serve as qui tam relators. The section resolves the circuit split by providing that Government employees can file qui tam suits in narrow circumstances and only after following a specific procedure. If the specific procedure is not followed, the Government has the right to dismiss the relator from the case. For example, if the person learned of the information that is the basis for their FCA claim in the course of their employment for the Government, the person must disclose such information to the agency’s designated Inspector General or to the Attorney General directly if there is not an Inspector General. Further, that individual must also notify their supervisor of the disclosures as well as to the Attorney General (if they had previously reported to the inspector general). Only if the Attorney General fails to bring a claim based on the disclosed information within 18 months, is the employee then free to bring the claim as a qui tam relator.

<sup>72</sup> False Claims Act Implementation, Hearing Before the House Subcomm. on Admin. and Governmental Relations, 101st Cong., 2d Sess. 1 (Apr. 4, 1990).

<sup>73</sup> *Id.* at 7.

<sup>74</sup> *Id.*

<sup>75</sup> False Claims Act Amendments Act of 1992, H.R. 4563, 102 Cong., 2d Sess. (1992); False Claims Act Amendments Act of 1993, S. 841, 103rd Cong., 1st Sess. (1993).

<sup>76</sup> See *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1502 (11th Cir. 1991) (finding no general prohibition against government employees serving as qui tam relators); *United States ex rel. Holmes v. Consumer Ins. Group*, 318 F.3d 1199, 1214 (10th Cir. 2007) (en banc) (rejecting arguments seeking to preclude government employees per se from filing qui tam actions based upon information obtained during the course of their employment).

<sup>77</sup> See *United States ex rel. LeBlanc v. Raytheon Co., Inc.*, 913 F.2d 17 (1st Cir. 1990) *reh’g denied, cert. denied*, 499 U.S. 921 (1991); *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740 (9th Cir. 1995).

This section also includes new language that bars any Government employee from being a qui tam relator if they derive information for their FCA claim from an indictment or information, or any ongoing active criminal, civil, or administrative investigation. Government employees are also barred if they work as investigators, auditors, or attorneys who have a duty to investigate fraud and they learn about the alleged fraud from an ongoing investigation or audit. These are restrictions that were discussed by the Tenth Circuit in then-Chief Judge Tacha's dissenting opinion in *United States ex rel. Holmes v. Consumer Ins. Group*. The Committee believes these restrictions strike the proper balance between providing protections so that Government employees simply do not hide fraud in order to file a qui tam action, while ensuring that good faith claims brought by Government employees can remain a check on Government bureaucrats who may be disinterested in chasing allegations of fraud against taxpayer dollars.

#### *Section 4. Barred actions*

##### *A. Waiver of claims*

Section 4(a) of the bill adds language to the FCA that is designed to protect individuals from unknowingly waiving their right to file qui tam actions on behalf of the Government. This provision was included because of the growing number of employees who unwittingly waive the right of either the United States, or that individual, to file FCA cases.<sup>78</sup> These cases have created a situation where employers may use separation agreements as a method of preventing the Government's right to recover monies lost to fraud, waste, or abuse.

This section clarifies that no person who brings an action under the FCA may waive or release a claim unless it is part of a court-approved settlement of a false claim civil action. However, because the Department of Justice was concerned that the original language could be construed to require court approval of a non-qui tam settlement negotiated by the Department, the Committee included the requested modifications the Department sought in the second substitute bill adopted during the mark-up. These changes added the following language: "Nothing in this paragraph shall be construed to limit the ability of the United States to decline to pursue any claim brought under this subsection, or to require court approval of a settlement by the Government with a defendant, unless the person bringing the act objects to the settlement." This language is consistent with the intent of the sponsors not to restrict the Department of Justice in settling non-qui tam FCA cases, while protecting qui tam relators from accidentally waiving valid claims for themselves, or the Government.

##### *B. Basis for government dismissal*

Section 4(b) of the bill amends the provisions that were commonly referred to as the "public disclosure bar" which is contained in section 3730(e)(4) of the FCA. These amendments were required because of excessive litigation over perceived ambiguities in the statute following the 1986 Amendments. As a result, many meri-

<sup>78</sup>See, e.g., *United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953 (9th Cir. 1995); *United States ex rel. Gebert v. Transport Admin. Servs.*, 260 F.3d 909 (8th Cir. 2001).

torious cases brought by qui tam relators have been dismissed because of the misuse of the public disclosure bar and other related erroneous interpretations of the 1986 Amendments. The Committee believes that many of these court interpretations dismissing qui tam actions have created a situation where the prevailing case law in many jurisdictions is inconsistent with the original intent of the public disclosure bar.

The 1986 Amendments added the public disclosure bar to ensure the dismissal of truly parasitic cases filed where a qui tam relator brought no new information to the Government. It also sought to dismiss parasitic claims based solely upon public information. The one statutory exception to this public disclosure bar was for qui tam relators that were an “original source” of the public information. An original source was statutorily defined as an individual with direct and independent knowledge of the information and brought the information to the Government before filing suit. In creating both the public disclosure bar and the original source exception, the Committee explained that this provision was intended to only bar truly “parasitic” lawsuits, such as those brought by individuals who did nothing more than copy a criminal indictment filed by the Government.<sup>79</sup>

Section 4(b) replaces the “public disclosure” jurisdictional bar with a new section that provides the Government with the sole authority to move to dismiss parasitic qui tam cases that are brought based upon information that is known to the Government and has led to or was based upon part of an “open and active criminal, civil, or administrative investigation or audit.” This new dismissal for barred actions will apply only when the Government has already initiated an investigation into the same matter based on information received from an independent source. The Committee does not intend to bar suits solely because the Government already knew of the fraud or could have learned of the fraud from information in the public domain. This balance was designed to bar parasitic cases while encouraging relators to come forward with information that would assist the Government in recovering money or property lost to fraud, waste, or abuse.

Despite the Committee’s belief that the public disclosure bar and original source statutory provisions were clear when passed in 1986, many courts have interpreted these provisions to create ambiguities and have issued opinions contrary to the intent outlined in the 1986 Committee report. The result of these interpretations has been significant litigation, delays in settling FCA cases with clear violations of law, and, regrettably, the dismissal and presumptive barring of meritorious claims brought by qui tam relators. These decisions have created a chilling effect on relators coming forward with claims because certain types of cases cannot survive dismissal. Some examples—but by no means an exclusive list—of these decisions that run contrary to the intent of the Committee are:

- Using the public disclosure bar to deny an award to a qui tam relator despite the objections of the United States.<sup>80</sup>

<sup>79</sup> See S. Rep. No. 99–345 supra note 1, at 5275–5278.

<sup>80</sup> See *Rockwell Int’l Corp. v. United States*, supra note 4.

- Finding the public disclosure bar applies to bar cases that are “similar to” rather than the statutorily required standard of “derived from” information in the public domain, unless the relator has firsthand knowledge of the fraud—thus finding that any information about the matter that was available in the public domain, even if it was not readily accessible, is sufficient to prompt a Government investigation and bar the qui tam action.<sup>81</sup>
- Finding production of documents or information during the discovery phase of trial is a “public disclosure” even if documents are not put into the public record of the judicial proceeding.<sup>82</sup>
- Four Courts of Appeals have ruled that responses to FOIA requests are public disclosures and deprives jurisdiction even if the relator relies exclusively on knowledge gained as an insider to establish the requisite elements of liability.<sup>83</sup>
- Interpreting the public disclosure bar to mean that disclosure in a Government report includes disclosures even in a State or local government report, which were not required to be given to the Federal Government and might never have come to the Government’s attention.<sup>84</sup>
- Courts have concluded that a public disclosure occurs even when the information is not disclosed to the public at large.<sup>85</sup>
- Courts have concluded that when the Government enlists the qui tam relators help reviewing documents obtained from the defendant; either the act of the defendant producing the documents or the act of the Government showing the documents to the relator constitutes a public disclosure.<sup>86</sup>
- Courts have held that the public disclosure of an industry-wide fraud constitutes a public disclosure with respect to a particular defendant even though that defendant had not been identified and the Government would not be aware of the particular fraud by that entity.<sup>87</sup>

<sup>81</sup>See *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992) (holding that investigators questioning employees during execution of a search warrant was sufficient to make information about the fraud “public” and barring the qui tam action); *United States ex rel. Mistick PBT v. Housing Auth. of City of Pittsburgh*, 186 F.3d 376 (3d Cir. 1999) (holding release of information under Freedom of Information Act (FOIA) by Government agency was a public disclosure in an administrative report triggering jurisdictional bar).

<sup>82</sup>See, e.g., *United States ex rel. Paranich v. Sorngard*, 396 F.3d 326 (3d Cir. 2005) (holding that disclosures made in an unrelated state lawsuit constitute public disclosures); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1158 (3d Cir. 1991) (determining that absent a protective order information disclosed in court ordered discovery is “potentially accessible” to the public and therefore qualifies as a public disclosure).

<sup>83</sup>See, e.g., *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038 (10th Cir. 2004), *cert. denied*, 545 U.S. 1129 (2005); *United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg’l Healthcare Sys.*, 384 F.3d 168, 175–176 (5th Cir. 2004); *United States ex rel. Mistick PBT v. Housing Auth. of City of Pittsburgh*, 186 F.3d at 383, *cert. denied*, 529 U.S. 1018 (2000).

<sup>84</sup>See, e.g., *United States ex rel. Maxwell v. Kerr McGee Oil & Gas Corp.*, 486 F.Supp.2d 1217 (D. Colo. 2007); *United States ex rel., Bly-Magee v. Premo*, 470 F.3d 914 (9th Cir. 2006), *cert. denied*, 128 S.Ct.1119 (2008) (holding that an administrative report, audit or investigation prepared by a state entity qualifies as a “congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation” for purposes of the public disclosure bar).

<sup>85</sup>See, e.g., *United States ex rel. Fowler v. Caremark RX, LLC*, 496 F.3d 730 (7th Cir. 2007) (holding that disclosure to U.S. Attorney was a public disclosure for purposes of Section 3730(e)(4)(A)).

<sup>86</sup>*Id.* See also *United States ex rel. Montgomery v. St. Edwards Mercy Medical Center, et al.*, 2007 U.S. Dist. LEXIS 73376 (E.D. Ark. 2007) (holding reviewed by relators along with Government agents and Attorney’s after the filing of the initial complaint, but prior to the filing of an amended complaint, constitute public disclosures barring the action).

<sup>87</sup>See *United States ex rel. Gear v. Emergency Medical Assoc’s of Illinois, Inc.*, 436 F.3d 726 (7th Cir. 2006); see also 145 Cong. Rec. E1546 (July 14, 1999) (remarks of Rep. Berman and letter to Attorney General Reno) (critiquing the notion that report of industry-wide practice sufficiently informs Government of fraud against a particular defendant).

While these are examples of the problem with the overuse and overexpansion of the public disclosure bar, it is by no means an exclusive list. The Committee believes providing examples of these cases is helpful in explaining the need for legislating, but the Committee also wants to make clear that courts should not use this as an exhaustive list of problematic cases. All cases that have expanded the public disclosure bar and narrowed the original source doctrine threaten to limit the FCA more than the Committee ever intended in passing the 1986 Amendments.

The erroneous court interpretations of the public disclosure bar are particularly problematic for the FCA because once a court finds that a case is based upon a public disclosure, the qui tam relator then has an uphill battle to prove he/she was the original source of that information. Because courts have also narrowly construed the terms “direct” and “independent” under the original source exception to bar actions in which any aspect of the relator’s information was derivative or second-hand, real meritorious cases have been dismissed where the Government would have never been brought but for the qui tam action pointing the Government to the fraud. For instance, courts have dismissed cases where a relator has hired an investigator to corroborate information or has obtained Government documents to confirm that false claims were submitted.<sup>88</sup>

Many of these cases arose as a result of a motion by defendants because of the jurisdictional nature of public disclosure bar. However, the best source for determining whether a relator has provided meaningful, new information to the Government is the Government itself. Only the Government has an interest in ensuring that its resources are not squandered on litigation that does no more than duplicate a fraud matter already under investigation. In fact, the incentive is strongest with the Government to ensure that monies recovered based upon an internal Government investigation are not split or shared with qui tam relators who file truly parasitic suits. This is especially true when the law allows the Government to proceed against the defendant for the same damages even after a relator is dismissed.<sup>89</sup> Despite this, defendants continue to raise this jurisdictional defense in virtually all FCA cases, while searching in court filings across the country hoping to find that one piece of information the Government would never have found that may deny the court jurisdiction. In fact, in one case a court declared the Government could not intervene to collect a judgment despite the fact that a jury had awarded the judgment, all because the defendant successfully argued that the relator should be dismissed on public disclosure grounds.<sup>90</sup>

The amendments in section 4(b) of the bill are designed to stop this abuse of the public disclosure bar from occurring. The provision converts the public disclosure bar from a jurisdictional bar that may be invoked by either the defendant or the Government, to a basis for a motion to dismiss that may only be filed by the Government. The provision also clarifies that a FCA action may be

<sup>88</sup> See *United States ex rel. Grynberg v. Praxair, Inc.*, 380 F.3d 1038 (10th Cir. 2004), cert. denied, 545 U.S. 1139 (2005).

<sup>89</sup> See *United States ex rel. Stone v. Rockwell Int'l Corp.*, 127 S. Ct. 1397, 1411 (2007).

<sup>90</sup> See *United States ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp.*, 486 F.Supp.2d 1233 (D. Colo. 2007).



dismissed only if the action is truly parasitic. Thus, the provision provides for a motion to dismiss only when the Government learned of the matter from another source prior to the qui tam filing, and then either filed a criminal indictment or information, or launched an active fraud investigation or audit either prior to the filing, or, if the source was a media or congressional publication, with 90 days of the publication. Importantly, the media report or congressional matter must be the reason the Government opened its investigation or audit. If the court's examination of the relevant circumstances indicates that the Government actually opened its investigation or audit as a response to the qui tam filing, the qui tam case is not barred.

This new provision is designed to balance and further two important public policies. First, it encourages relators to come forward with information that will contribute in a meaningful way to the United States ability to exercise its remedies under section 3729. Second, it prevents relators from pursuing cases that do no more than add to the administrative workload of law enforcement and the judiciary. Accordingly, while this provision should operate to bar cases that do no more than replicate information that the Government already obtained from independent sources in a still active investigation, it should not discourage or bar qui tam cases with important information that provides a new basis for recovery.

To carry out these policies, amended section 3730(e)(4) applies when the prior Government criminal indictment or information, investigation, or audit, or the prior disclosure in the media or in a congressional publication, is focused on "the same wrongdoer" and "substantially the same matters." This means that the prior Government criminal indictment or information, investigation or audit, or the prior disclosure in the media or in a congressional publication, must concern the same transactions, claims or communications as those at issue in the qui tam complaint and must involve alleged violations of the FCA or other law imposing liability or penalties for knowing false claims or fraud.

For example, under Section 3730(e)(4), an investigation or audit into specific information about misconduct leading to false claims in one time period or at one company location does not provide a basis to dismiss a qui tam with specific information about the same type of conduct leading to false claims in a different time period or a separate company location. Likewise, an investigation or audit into particular kickback transactions does not bar a qui tam alleging different kickback transactions. Further, an investigation or audit into alleged fraud in one contract does not bar a qui tam case alleging fraud in a separate contract.

To help guard against the Government misusing the provision to dismiss cases for political or other inappropriate reasons, the amendment requires that the Government's investigation or audit be open and active. The Committee anticipates that courts will question and look critically at the Government's representations that it is conducting an "open" and "active" investigation and audit of the matter. Courts should ask for factual support for the Government's representation. In some cases, courts may see merit in permitting such information to be submitted under seal or pursuant to a protective order to ensure that the Government investigation is not compromised.

The new provision acknowledges that even when the Government is already looking into the same transactions, claims or communications as possible violations of the FCA or other false claims or fraud law, there will be instances in which a qui tam plaintiff's information or evidence brings new additional value to the case and that they should not be barred because of the similar claims. The goal of this is to promote and expedite the recovery for fraud and relators that add value to any case are encouraged to come forward. Thus, the provision states that a qui tam case shall not be dismissed when "new information" provided by the person adds "substantial grounds for additional recovery." The application of this exception should be fact-specific.

Finally, there is no basis for dismissal under new section 3730(e)(4) when the person filing the qui tam action brought information to the Government prior to the Government initiating its investigation or audit, or, in the case of a Government investigation or audit prompted by a media or congressional publication, prior to the publication in question. This exception applies regardless of whether the person's information prompted the Government's investigation or audit. The qui tam relator has no control over the diligence or competency of the particular Government official to whom they disclose information and should not be penalized if that official fails to follow up on the matter as required by their job duties. On the other hand, the clause "brought by the person to the Government" assumes that the person properly brought the information to the Government by making a full and comprehensible disclosure of the material facts to an office within the Government charged with responsibility for investigating fraud or false claims. This provision is designed to ensure that qui tam relators are not mere opportunists who file incomprehensible documents with the Government in the hopes of evading the disclosure responsibility and trying to obtain a windfall profit. The courts should view such actions as parasitic and take all appropriate steps to prevent this from occurring.

#### *Section 5. Relief from retaliatory actions*

The 1986 Amendments included Section 3730(h) which provides a cause of action for individuals who faced retaliation in response to bringing forth FCA claims of fraud against the Government.<sup>91</sup> Congress included this provision in the 1986 Amendments because, as the Committee noted, it recognized "that few individuals will expose fraud if they fear their disclosures will lead to harassment, demotion, loss of employment, or any other form of retaliation."<sup>92</sup> While this provision was designed to protect employees from employer retaliation, over the past 20 years courts have limited this protection through various decisions narrowly interpreting the definition of "employee" and thus leaving contractors and subcontractors open to retaliation.

For example, the Third and Fourth Circuits have held that an independent contractor is not protected under section 3730(h).<sup>93</sup> To correct this loophole, section 5 clarifies section 3730(h) by simply

<sup>91</sup> S. Rep. No. 99-345 supra note 1, at 5299.

<sup>92</sup> Id.

<sup>93</sup> See *United States ex rel. Watson v. Connecticut Gen. Life Ins.*, 2004 U.S. App. LEXIS 1736 (3d Cir. 2004); *Vessell v. DPS Assocs. of Charleston, Inc.*, 148 F.3d 407 (4th Cir. 1998).

including the terms “government contractor, or agent” in addition to the term “employee.” The Committee believes that it is necessary to include these additional terms to assist individuals who are not technically employees within the typical employer-employee relationship, but nonetheless have a contractual or agent relationship with an employer. The Committee believes this is a vitally important clarification that respects the spirit and intent of the 1986 Amendments while offering whistleblower protections to contractors and agents who may come across fraud against the Government and report it under the FCA.

### *Section 6. Statute of limitations*

#### *A. Statute of limitations period*

The FCA currently contains a statute of limitation provision in section 3731(b)(1) and 3731(b)(2). These provisions provide that a FCA action may not be brought more than six years after the date on which the violation is committed,<sup>94</sup> or not more than three years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances.<sup>95</sup> That current statute of limitations also includes a 10-year statute of repose that prohibits the filing of a FCA action, “more than 10 years after the date on which the violation was committed.”<sup>96</sup> This provision has been the subject of significant litigation over the years and varying interpretations of the statute of limitations have created significant questions as to the true applicability of the statute of limitations to certain provisions of the FCA.

Federal courts have taken two different approaches to determining the application of the statute of limitations.<sup>97</sup> One line of cases has taken the position that section 3731(b)(2), which contains the tolling provision, only applies to cases the Government initiates, imposing a shorter statute of limitations on cases that originate as qui tam actions.<sup>98</sup> Other cases have stated that the section 3731(b)(2) applies to suits brought solely by a qui tam relator, but that a relator is also subject to the tolling provision same as the Government and must file within three years of when they learn of the fraud.<sup>99</sup> The Supreme Court has also interpreted the statute of limitations provisions contrary to the spirit and intent of the 1986 Amendments.

In 2005, the Supreme Court held that the FCA statute of limitations which applies to “a civil action under section 3730”<sup>100</sup> is not available to individuals who file a claim alleging retaliation in vio-

<sup>94</sup> 31 U.S.C. § 3731(b)(1)(2000).

<sup>95</sup> 31 U.S.C. § 3731(b)(2)(2000).

<sup>96</sup> *Id.*

<sup>97</sup> See *U.S. ex rel. El Amin v. George Washington Univ.*, 26 F.Supp.2d 162, 171 (D.D.C. 1998).

<sup>98</sup> See, e.g., *Id.*; *United States ex rel. Thistlewaite v. Dowty Woodville Polymer, Ltd.*, 6 F.Supp.2d 263 (S.D.N.Y. 1998) (holding three year tolling provision only applies to the government); *United States ex rel. Sikkenga v. Regence BlueCross BlueShield of Utah*, 2006 WL 3491784 (10th Cir. 2006) (holding 3731(b)(2) inapplicable to private qui tam relators).

<sup>99</sup> See *United States ex rel. Hyatt v. Northrop*, 91 F.3d 1211 (9th Cir. 1996); *cf. United States ex rel. Pogue*, 474 F.Supp.2d 75 (D.D.C. 2007) (holding that in a qui tam case where the Government declined to intervene, the three year tolling provision runs from the date the Government official learned of the alleged violation, not the qui tam relator).

<sup>100</sup> 31 U.S.C. § 3731(b)(2000).

lation of section 3730(h).<sup>101</sup> The Supreme Court held that instead of utilizing the six year statute of limitations proscribed in section 3731(b)(1) or even the three-year tolling provision in 3730(b)(2), the plaintiff must follow the most applicable State law statute of limitations of a similar anti-retaliation statute. These similar State law statutes for unlawful termination or retaliation are usually shorter than the FCA statute of limitations and vary from 90 days, to six months, or up to one year after the alleged retaliation occurs.<sup>102</sup> This decision effectively renders the statute of limitations provision in section 3731 inapplicable to claims filed under 3730(h) and potentially incorporates 50 different State statute of limitations provisions for Federal courts to consider. Further, without clear guidance, Federal courts could mix and match different statutes of limitations from different analogous State law statutes on a case-by-case basis lending confusion to individuals seeking relief from retaliatory actions. The Committee believes that Congress did not intend to create such uncertainty when it included this provision in 1986, and that such uncertainty also frustrates the goal the Committee had in seeking to protect individuals from “harassment, demotion, loss of employment or any other retaliation”<sup>103</sup> for coming forward with claims of fraud and abuse of Government programs.

In seeking to correct these interpretations that are inconsistent with the intent of the 1986 Amendments, the bill clarifies the statute of limitations in section 3731(b). Section 6 of the bill addresses all of the aforementioned problems by adopting a simple and straightforward 10-year statute of limitations that begins when the violation occurs for claims brought under section 3729 or 3730, brought by either the United States or a qui tam relator on behalf of the United States, and it exclusively applies the provision to retaliation claims filed under section 3730(h), rejecting the State law application favored by the Supreme Court in *Graham County*.<sup>104</sup>

#### *B. Relation back doctrine*

The FCA is silent on the question of whether the United States may amend a qui tam plaintiff’s complaint or file its own complaint upon intervention in a qui tam case subject to the same rules that allow “relation back” of amended complaints as if it were the Government’s own complaint. Federal Rule of Civil Procedure 15(c)(2) provides that a party’s amendment of a pleading will relate back to the date of its original pleading when the claim, “asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.”<sup>105</sup> The Second Circuit recently ruled that the United States cannot use Rule 15(c)(2) when amending a qui tam plaintiff’s complaint.<sup>106</sup> The implication of this decision is that the United States will be forced to forego a complete and thorough investigation of the merits of a qui tam relators’ allegations in order to expedite a

<sup>101</sup> See *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409 (2005).

<sup>102</sup> See *Graham County*, 545 U.S. at 419, n3, citing Conn. Gen. Stat. 31–51m (2005) (90 days); Fla. Stat. 112.3187(8)(a), 448.103 (2003) (180 days); Mich. Comp. Laws Ann. 15.363(1) (West 2004) (90 days); N.Y.C.P.L.R. 215(4) (West 2003) (one year); Ohio Rev. Code Ann. 4113.52(D) (Lexis 2001) (six months); and Tex. Gov’t. Code Ann. 554.005 (West 2004) (90 days).

<sup>103</sup> S. Rep. No. 99–345, supra note 1, at 5299.

<sup>104</sup> See *Graham County*, 545 U.S. at 409.

<sup>105</sup> Fed. R. Civ. Pro. 15(c)(2).

<sup>106</sup> *United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263 (2d Cir. 2006).

filing so as not to have an action foreclosed upon due to the statute of limitations.

Section 6 of the bill clarifies that the Government's complaint in intervention or amended complaint will relate back to the date of the original qui tam complaint so long as the conditions of Federal Rule of Civil Procedure 15(c)(2) are met.

#### *Section 7. Civil investigative demands*

Currently, the FCA allows the Attorney General to issue CIDs for "any documentary material or information relevant to a false claims law investigation." The CID is authorized when the Attorney General "has reason to believe that any person may be in possession, custody or control" of the documents in question. The Attorney General may issue a CID before commencing a civil proceeding under the FCA. There are problems with the CID provision as written that prohibit its effective use by the Department of Justice in prosecuting FCA cases.

The CID is seldom-used because of two strict interpretations by the Department of Justice of the CID statute. First, the statute currently reads that only the Attorney General may issue a CID, which has been interpreted to mean that the Attorney General, Deputy Attorney General, or Assistant Attorney General must personally sign off on the CID order and that they cannot delegate that authority. This procedure is cumbersome and limiting for Government attorneys and as a result, CIDs are infrequently used. Second, the Department of Justice has interpreted the CID statute to prohibit discussions of information obtained from CIDs with qui tam relators. This lack of ability to share information makes FCA investigations more difficult and requires the utilization of court orders.

This section of the bill resolves both issues, first by inserting the phrase "or designee" after Attorney General to clarify that the Attorney General may delegate his or her authority to issue a CID. Second, this section states explicitly that any information obtained by the Attorney General under a CID may be shared with qui tam relators if the Attorney General determines that doing so is a necessary part of the investigation. Further, this section incorporates a new definition of "official use" to allow the Department to share information with Federal, State, and local government agencies in furtherance of a Department of Justice investigation or prosecution. This will allow the Department to properly investigate FCA cases by coordinating with relators and investigative entities.

#### *Section 8. Severability*

At the request of the Department of Justice, and out of an abundance of caution, the Committee included a severability clause that would ensure the integrity of the bill in the event any provision is found to be invalid by severing any invalid piece from the rest of the Act. This amendment is consistent with the intent of the Committee to provide narrowly tailored clarifications to the FCA and ensures the integrity of the FCA will remain even in the event of one section being held invalid.

*Section 9. Effective date and application*

The original draft of S. 2041 was silent on the question of what the effective date and application of the amendments would be. However, the Department of Justice views letter pointed out that after the 1986 Amendments, the Department spent “substantial time and resources litigating the effective date” of the amendments.<sup>107</sup> The Committee recognized the concerns and incorporated a provision applying the amendments contained in S. 2041 to “all cases pending on the date of enactment, and to all cases filed thereafter.”<sup>108</sup>

The Department of Justice filed a second views letter April 2, 2008, discussing additional views on the proposed substitute amendment circulated prior to mark-up. In the second views letter, the Department stated that it “was not clear whether the effective date should apply to all parts of the bill or only to its procedural provisions.”<sup>109</sup> As such, the Department revised its position on the effective date and application and supported a tiered system for application of the amendments.

The sponsors of the legislation agreed with the recommendation from the Department of Justice and incorporated a three-tiered effective date and application in the substitute amendment adopted by the Committee. First, section 9 of the bill provides that the substantive liability provisions amended in section 3729 take effect upon the date of enactment and “shall apply to conduct occurring after that date of enactment.” Second, the bill states that amendments to section 3731(b)(1)—the statute of limitations provisions—apply upon date of enactment and shall apply to civil actions filed after the date of enactment and not revive claims that are time-barred as of the date of enactment. Finally, section 9 of the bill states that all remaining provisions take effect on the date of enactment and apply to all civil actions before, on, or after that date.

IV. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The Committee sets forth, with respect to the bill, S. 2041, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

APRIL 21, 2008.

Hon. PATRICK J. LEAHY,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2041, the False Claims Act Correction Act of 2008.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Leigh Angres.

Sincerely,

PETER R. ORSZAG.

<sup>107</sup>DOJ Views Letter I supra note 96, at 16. See also *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997).

<sup>108</sup>See DOJ Views Letter supra note 96, at 16.

<sup>109</sup>United States Dept. of Justice, Comments on Manager’s Substitute Amendment to S. 2041 at 8 (April 2, 2008).

Enclosure.

*S. 2041—False Claims Act Correction Act of 2008*

S. 2041 would amend certain provisions of the False Claims Act (FCA), which allows a private individual with knowledge of past or present fraud committed against the government to file qui tam claims against federal contractors. In qui tam claims, such individuals (known as relators or whistleblowers) receive a share of any recovered claims against the government. CBO estimates that S. 2041 would have no significant effect on the federal budget. S. 2041 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

In most cases, the amendments that would be made by the bill would take effect on the date of enactment and apply to all civil actions filed before, on, or after such date. Specifically, the legislation would:

- Stipulate that individuals who present false claims to contractors, grantees, and others can be held liable under the FCA (under current law, that liability exists only for false claims presented to government employees);
- Permit qui tam suits by government employees, while allowing the government, under certain circumstances, to dismiss actions brought by a qui tam relator who is, or is related to, a federal employee;
- Bar waivers or releases of claims except as part of a court-approved settlement;
- Authorize a court, upon a motion by the Attorney General, to dismiss an action if, when it was filed, the same matters were disclosed in federal hearings or reports from the news media;
- Expand the court's authority to reduce the relator's share of proceeds under certain circumstances;
- Place a 10-year statute of limitations on the filing of civil actions against individuals who submit a false or fraudulent claim for payment; and
- Permit the Attorney General to delegate authority to other officials of the Department of Justice (DOJ) to issue a civil investigative demand against an individual possessing information relevant to a false claims investigation.

According to information from DOJ, each year its attorneys handle several hundred qui tam cases under the False Claims Act. In the past two years, the government has recovered more than \$5 billion from settlements and judgements in such cases. Because the proposed amendments would not appreciably change the workload of DOJ attorneys nor the monetary recoveries in such cases, CBO estimates that S. 2041 would have no significant impact on the federal budget.

The CBO staff contact for this estimate is Leigh Angres. This estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

## V. REGULATORY IMPACT EVALUATION

In compliance with rule XXVI of the Standing Rules of the Senate, the Committee finds that no significant regulatory impact will result from the enactment of S. 2041.

## VI. CONCLUSION

The False Claims Act Correction Act of 2008, S. 2041, will bring much needed clarity to the FCA and will enhance the efforts of the Federal Government in recovering monies lost to fraud, waste, and abuse of Government programs. It will streamline FCA litigation by clarifying the law and will reduce unnecessary and costly litigation. It will expedite settlements and will reward and protect qui tam relators for coming forward to alert the Government to fraud. Finally, the legislation will bring the FCA back into alignment with the 1986 Amendments and the expressed intent of Congress that has been overlooked and misinterpreted by some Federal courts.

## VII. CHANGES TO EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 2041, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

**UNITED STATES CODE****TITLE 31—MONEY AND FINANCE**

\* \* \* \* \*

**Subtitle III—Financial Management**

\* \* \* \* \*

**CHAPTER 37—CLAIMS**

\* \* \* \* \*

**Subchapter III—Claims Against the United States Government**

\* \* \* \* \*

**§ 3729. False claims**(a) **LIABILITY FOR CERTAIN ACTS.—**[Any person who—](1) *IN GENERAL.—Subject to paragraph (2), any person who—*

**[(1)](A)** knowingly presents, or causes to be presented, [to an officer or employee of the United States Government or member of the Armed Forces of the United States] a false or fraudulent claim for payment or approval;



[(2)](B) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved [by the Government];

[(3)](C) conspires to *commit a violation of subparagraph (A), (B), (D), (E), (F), or (G) or otherwise* to defraud the Government by getting a false or fraudulent claim *paid or approved* [allowed or paid];

[(4)](D) has possession, custody, or control of property or money used, or to be used, by the Government and *knowingly delivers, or causes to be delivered, less than all of that money or property*; [intending to defraud the Government or willfully to conceal the property, delivers, or cause to be delivered, less property than the amount for which the person receives a certificate or receipt;]

[(5)](E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

[(6)](F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge [the] property; or

[(7)](G) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, *or knowingly conceals, avoids, or decreases an obligation to pay or transmit money or property to the Government,*

is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, *as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410)*, plus 3 times the amount of [damages which the Government sustains] *money or property paid or approved* because of the act of that person [ , except that if the court finds that—].

(2) *REDUCED DAMAGES.—If the court finds that—*

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation[ ,];

The court may assess not less than 2 times the amount of [damages which the Government sustains] *money or property paid or approved* because of the act of that person. [A person

violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.】

(b) 【KNOWING AND KNOWINGLY DEFINED.—】 *DEFINITIONS.*—For the purposes of this section—

(1) the terms “knowing” and “knowingly” mean that a person, with respect to information—

(A) has actual knowledge of the information;

(B) acts in deliberate ignorance of the truth or falsity of the information; or

(C) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required【.】;

【(c) CLAIM DEFINED.—For purposes of this section, “claim” includes】 (2) *the term “claim”*—

(A) *means* any request or demand, whether under a contract or otherwise, for money or property, 【which】 *that*—

(i) *is presented to an officer, employee, or agent of the United States; or*

(ii) *is made to a contractor, grantee, or other recipient if the United States Government—*

(I) *provides or has provided* any portion of the money or property 【which is】 requested or demanded【.】; or

(II) 【if the Government】 will reimburse such contractor, grantee, or

other recipient for any portion of the money or property which is requested or demanded【.】; *and*

(B) *does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual’s use of the money or property; and*

(3) *the term “obligation” means a fixed duty, or a contingent duty arising from an express or implied contractual, quasi-contractual, grantor-grantee, licensor-licensee, fee-based, or similar relationship, including customs duties for mismarking country of origin, and the retention of any overpayment;*

【(d)】(c) EXEMPTION FROM DISCLOSURE.—Any information furnished pursuant to 【subparagraphs (A) through (C) of subsection (a)】 *subsection (a)(2)* shall be exempt from disclosure under section 552 of title 5.

【(e)】(d) EXCLUSION.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

### § 3730. Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.—

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government.

The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting. *No claim for a violation of section 3729 may be waived or released by any action of any person who brings an action under this subsection, except insofar as such action is part of a court approved settlement of a false claim civil action brought under this section. Nothing in this paragraph shall be construed to limit the ability of the United States to decline to pursue any claim brought under this subsection, or to require court approval of a settlement by the Government with a defendant of an action brought under subsection (a), or under this subsection, unless the person bringing the action objects to the settlement under subsection (c)(2)(B).*

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to **[Rule 4(d)(4)]** rule 4 of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(6)(A) *Not later than 120 days after the date of service under paragraph (2), the Government may move to dismiss from the action a qui tam relator that is an employee of the Federal Government, or that is a family member of an employee of the Federal Government, if—*

*(i) the necessary and specific material allegations contained in such action were derived from a filed criminal indictment or information or an open and active criminal, civil, or administrative investigation or audit by the Government into substantially the same fraud alleged in the action;*

(ii) the duties of the employee's position specifically include uncovering and reporting the particular type of fraud that is alleged in the action, and the employee, as part of the duties of that employee's position, is participating in or has knowledge of an open and active criminal, civil, or administrative investigation or audit by the Government of the alleged fraud;

(iii) the person bringing the action learned of the information that underlies the alleged violation of section 3729 that is the basis of the action in the course of the person's employment by the United States, and either—

(I) in a case in which the employing agency has an inspector general, such person, before bringing the action has not—

(aa) disclosed in writing substantially all material evidence and information that relates to the alleged violation that the person possessed to such inspector general; and

(bb) notified in writing the person's supervisor and the Attorney General of the disclosure under division (aa); or

(II) in a case in which the employing agency does not have an inspector general, such person, before bringing the action has not—

(aa) disclosed in writing substantially all material evidence and information that relates to the alleged violation that the person possessed, to the Attorney General; and

(bb) notified in writing the person's supervisor of the disclosure under division (aa); or

(iv) the person bringing the action learned of the information that underlies the alleged violation of section 3729 that is the basis of the action in the course of the person's employment by the United States, made the required disclosures and notifications under clause (iii), and—

(I) less than 18 months (and any period of extension as provided for under subparagraph (B)) have elapsed since the disclosures of information and notification under clause (iii) were made; or

(II) within 18 months (and any period of extension as provided for under subparagraph (B)) after the disclosures of information and notification under clause (iii) were made, the Attorney General has filed an action based on such information.

(B) Prior to the expiration of the 18-month period described under subparagraph (A)(iv)(II) and upon notice to the person who has disclosed information and provided notice under subparagraph (A)(iii), the Attorney General may extend such 18-month period by 1 additional 12-month period.

(C) For purposes of subparagraph (A), a person's supervisor is the officer or employee who—

(i) is in a position of the next highest classification to the position of such person;

(ii) has supervisory authority over such person, and

(iii) such person believes is not culpable of the violation upon which the action under this subsection is brought by such person.

(D) A motion to dismiss under this paragraph shall set forth documentation of the allegations, evidence, and information in support of the motion.

(E) Any person against whom the Government has filed a motion to dismiss under subparagraph (A) shall be provided an opportunity to contest a motion to dismiss under this paragraph. The court may restrict access to the evidentiary materials filed in support of the motion to dismiss, as the interests of justice require. A motion to dismiss and evidentiary material filed in support or opposition of such motion shall not be—

(i) made public without the prior written consent of the person bringing the civil action; and

(ii) subject to discovery by the defendant.

(F) Upon granting a motion filed under subparagraph (A), the court shall dismiss the *qui tam* relator from the action.

(G) If the motion to dismiss under this paragraph is granted, the matter shall remain under seal.

(H) Not later than 12 months after the date of the enactment of this paragraph, and every 12 months thereafter, the Department of Justice shall submit a report to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives relating to—

(i) the cases in which the Department of Justice has filed a motion to dismiss under this paragraph;

(ii) the outcome of such motions; and

(iii) the status of false claims civil actions in which such motions are filed.

(I) Nothing in this paragraph shall be construed to limit the authority of the Government to dismiss an action or claim, or a person who brings an action or claim, under this subsection for any reason other than the grant of a motion filed under subparagraph (A).

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for

purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

- (i) limiting the number of witnesses the person may call;
- (ii) limiting the length of the testimony of such witnesses;
- (iii) limiting the person's cross-examination of witnesses; or
- (iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceeding with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.—(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. *If the person bringing the action is not dismissed under subsection (e)(4) because the person provided new information*

*that adds substantial grounds for additional recovery beyond those encompassed within the Government's existing indictment, information, investigation, or audit, then such person shall be entitled to receive a share only of proceeds of the action or settlement that are attributable to the new basis for recovery that is stated in the action brought by that person. [Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation.] Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.*

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3)(A) *Whether or not the Government proceeds with the action, the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which a person would otherwise receive under paragraph (1) or (2) of this subsection (taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation), if the court finds that person—[Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.]*

*(i) planned and initiated the violation of section 3729 upon which the action was brought; or*

(ii) derived the knowledge of the claims in the action primarily from specific information relating to allegations or transactions (other than information provided by the person bringing the action) that the Government publicly disclosed, as that term is defined in subsection (e)(4)(A), or that the Government disclosed privately to the person bringing the action in the course of its investigation into potential violations of this subchapter.

(B) If the person bringing the action is convicted of criminal conduct arising from the role of that person in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expense if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.—(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer of employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4) A court shall dismiss an action or claim or the person bringing the action or claim under subsection (b), upon a motion by the Government filed on or before service of a complaint on the defendant under subsection (b), or thereafter for good cause shown if—

(A) on the date of the action or claim was filed, substantially the same matters, involving the same wrongdoer, as alleged in the action or claim were contained in, or the subject of—[No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.]



(i) filed criminal indictment or information, or an open and active criminal, civil, or administrative investigation or audit; or

(ii) a news media report, or public congressional hearing, report, or investigation, if within 90 days after the issuance or completion of such news media report or congressional hearing, report, or investigation, the Department of Justice or an Office of Inspector General opened a fraud investigation or audit of the facts contained in such news media report or congressional hearing, report, or investigation as a result of learning about the public report, hearing, or investigation;

(B) any new information provided by the person does not add substantial grounds for additional recovery beyond those encompassed within the Government's existing criminal indictment or information, or an open and active criminal, civil, or administrative investigation or audit; and [For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.]

(C) the Government's existing criminal indictment or information, or an open and active criminal, civil, or administrative investigation or audit, or the news media report, or congressional hearing, report, or investigation was not initiated or published after the Government's receipt of information about substantially the same matters voluntarily brought by the person to the Government.

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.—The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT.—In civil actions brought under this section by the United States, the provisions of section 2412(D) of title 28 shall apply.

(h) RELIEF FROM RETALIATORY ACTIONS.—

(1) IN GENERAL.—Any employee, government contractor, or agent shall be entitled to all relief necessary to make that employee, government contractor, or agent whole, if that employee, government contractor, or agent [who] is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment [by his or her employer] because of lawful acts done by the employee, government contractor, or agent on behalf of the employee, government contractor, or agent or associated others in furtherance of efforts to stop 1 or more violations of this subchapter. [an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief]

(2) RELIEF.—Relief under paragraph (1) shall include reinstatement with the same seniority status that [such] employee, government contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sus-

tained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An *action under this subsection may be brought* [employee may bring an action] in the appropriate district court of the United States for the relief provided in this subsection.

### § 3731. False claims procedure

(a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) [A civil action under section 3730 may not be brought—](1) *A civil action under 3730 may not be brought* more than [6] 10 years after the date on which the violation of section 3729 or 3730 is committed. [, or]

(2) *Upon intervention, the Government may file its own complaint in intervention or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purpose any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person. [more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.]*

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

### § 3733. Civil investigative demands

(a) IN GENERAL.—

(1) ISSUANCE AND SERVICE.—Whenever the Attorney General, or a designee (for purposes of this section) has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General, or a designee, may, before commencing a civil proceeding under section 3730(a) or other false claims law, or *electing under section 3730(b)*, issue in writing an cause to be served upon such person, a civil investigative demand requiring such person—

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may **[not]** delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from who the discovery was obtained and shall notify the person to whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served. *Any information obtained by the Attorney General or a designee of the Attorney General under this section may be shared with any qui tam relator if the Attorney General or designee determine it is necessary as part of any false claims act investigation.*

(2) CONTENTS AND DEADLINES.—

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall—

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall—

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall—

(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary.

【The Attorney General may not, notwithstanding section 510 of title 28, authorize the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph.】

(b) PROTECTED MATERIAL OR INFORMATION.—

(1) IN GENERAL.—A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under—

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) EFFECT ON OTHER ORDERS, RULES, AND LAWS.—Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the

person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) SERVICE; JURISDICTION.—

(1) BY WHOM SERVED.—Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(2) SERVICE IN FOREIGN COUNTRIES.—Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) SERVICE UPON LEGAL ENTITIES AND NATURAL PERSONS.—

(1) LEGAL ENTITIES.—Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by—

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) NATURAL PERSONS.—Service of any such demand or petition may be made upon any natural person by—

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(e) PROOF OF SERVICE.— A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of

such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) DOCUMENTARY MATERIAL.—

(1) SWORN CERTIFICATES.—The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by—

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) PRODUCTION OF MATERIALS.—Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) INTERROGATORIES.— Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by—

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) ORAL EXAMINATIONS.—

(1) PROCEDURES.—The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The offi-

cer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) PERSONS PRESENT.—The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) WHERE TESTIMONY TAKEN.—The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) TRANSCRIPT OF TESTIMONY.—When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) CERTIFICATION AND DELIVERY TO CUSTODIAN.—The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) FURNISHING OR INSPECTION OF TRANSCRIPT BY WITNESS.—Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the

witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness's testimony.

(7) CONDUCT OF ORAL TESTIMONY.—(A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

(8) WITNESS FEES AND ALLOWANCES.—Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) CUSTODIANS OF DOCUMENTS, ANSWERS, AND TRANSCRIPTS.—

(1) DESIGNATION.—The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) RESPONSIBILITY FOR MATERIALS; DISCLOSURE.—(A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice, who is authorized for such use under regulations which the Attorney General shall issue. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other



officer or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities. **[Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.]**

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe—

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) USE OF MATERIAL, ANSWERS, OR TRANSCRIPTS IN OTHER PROCEEDINGS.—Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) CONDITIONS FOR RETURN OF MATERIAL.—If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and—

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before

any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) APPOINTMENT OF SUCCESSOR CUSTODIANS.—In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly—

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) JUDICIAL PROCEEDINGS.—

(1) PETITION FOR ENFORCEMENT.—Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) PETITION TO MODIFY OR SET ASIDE DEMAND.—(A) Any person who has received a civil Investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such de-

mand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) PETITION TO MODIFY OR SET ASIDE DEMAND FOR PRODUCT OF DISCOVERY.—(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) PETITION TO REQUIRE PERFORMANCE BY CUSTODIAN OF DUTIES.—At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district

court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

(5) JURISDICTION.—Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) APPLICABILITY OF FEDERAL RULES OF CIVIL PROCEDURE.—The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) DISCLOSURE EXEMPTION.—Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

(l) DEFINITIONS.—For purposes of this section—

(1) the term “false claims law” means—

(A) this section and sections 3729 through 3732; and

(B) any Act of Congress enacted after the date of the enactment of this section which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

(2) the term “false claims law investigation” means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term “false claims law investigator” means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term “person” means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(5) the term “documentary material” includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(6) the term “custodian” means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1); **[and]**

(7) the term “product of discovery” includes—

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A) **b[.1]**; and

(8) *the term “official use” means any use that is consistent with the law, and the regulations and policies of the Department of Justice, including use in connection with internal Department of Justice memoranda and reports; communications between the Department of Justice and a Federal, State, or local government agency, or a contractor of a Federal, State, or local government agency, undertaken in furtherance of a Department of Justice investigation or prosecution of a case; interviews of any qui tam relator or other witness; oral examinations; depositions; preparation for and response to civil discovery requests; introduction into the record of a case or proceeding; applications, motions, memoranda and briefs submitted to a court or other tribunal; and communications with Government investigators, auditors, consultants and experts, the counsel of other parties, arbitrators and mediators, concerning an investigation, case or proceeding.*