

**Testimony of**

**Joseph E. B. White, President & C.E.O.  
Taxpayers Against Fraud**

**Hearing on Proposals to Fight Fraud  
and Protect Taxpayers:  
False Claims Act Corrections Act of 2009**

**COMMITTEE ON THE JUDICIARY  
UNITED STATES HOUSE OF REPRESENTATIVES**

**April 1, 2009, 10 a.m.**

**Testimony of Joseph E.B. White, President & CEO  
Taxpayers Against Fraud  
on  
False Claims Act Corrections Act of 2009  
before the  
Committee on the Judiciary  
United States House of Representatives  
April 1, 2009**

**Introduction**

I submit this testimony in support of the False Claims Act Corrections Act of 2009. At a time when we most need to protect every single tax dollar from fraudulent schemes, our country can ill afford to ignore the liability loopholes and statutory confusion that undermine the False Claims Act (“FCA”), the Government’s primary fraud-fighting weapon. My views on this much-needed legislation has been formed by my role as the President and C.E.O. of Taxpayers Against Fraud, a national nonprofit public interest organization dedicated to combating fraud against the federal government and state governments through the promotion of the use of the *qui tam* provisions of false claims acts, especially the federal FCA, 31 U.S.C. 3729-33. The FCA Corrections Act restores this important law enforcement mechanism, removes the statutory ambiguity that is breeding confusion for all parties, and deters dishonest entities who might seek to drain funds from the U.S. Treasury.

As President of Taxpayers Against Fraud, I have seen firsthand how meritorious fraud investigations and prosecutions are regularly derailed because of the problems addressed by the FCA Corrections Act. I have read every single published court decision from the past five years, and I can attest that this practice area is fraught with judicial confusion and statutory loopholes, which are leaving our tax dollars vulnerable to fraud. I have filed numerous *amicus curiae* briefs, including with the U.S. Supreme Court, echoing the position of the U.S. Department of Justice, only to see the court later reject our position, complaining that the statutory language ties its hands. I have the honor of working alongside the best federal and state government attorneys in the country, and they regularly share tales of promising fraud prosecutions dying under one of the extraneous procedural hurdles addressed by this Bill. The cases, of course, involve every area of government spending, including our war efforts in Iraq, Hurricane Katrina relief efforts, fraudulent Medicare and Medicaid spending, misappropriated NIH grants, and stolen federal highway funds, just to name a few.

Taxpayers Against Fraud strongly supports this commonsense legislation, the FCA Corrections Act of 2009. This Bill will significantly enhance the Government’s ability to identify, prosecute and deter fraud on U.S. Government programs. The Bill’s proposed corrections are needed to ensure that the Government’s primary fraud-fighting

weapon remains fully effective in an era of escalating expenditures and increased reliance on government contractors. The FCA Corrections Act is also needed to overrule judicial opinions which have made it unduly difficult for *qui tam* whistleblowers to even bring forward meritorious allegations that the Government could not or would not have uncovered and pursued on its own. Finally, the FCA Corrections Act contains important changes that modernize the law to address new types of fraudulent schemes, to clarify procedural questions, to clarify the applicable statutes of limitations, and to transform the Government's Civil Investigative Demand authority into a viable tool.

I strongly support each and every provision of this important legislation. However, my testimony focuses on the most important provisions of the Bill.

## **I. FULLY PROTECTING THE U.S. GOVERNMENT FROM FRAUD**

The FCA Corrections Act sensibly closes and “corrects” a number of loopholes that fraudfeasors have used and abused to drain billions of dollars from the U.S. Treasury. This important legislation clarifies, once and for all, the reach of the *existing* FCA liability provisions and rejects extraneous limits that judges have legislated from the bench. Restoring the full reach of the FCA, the FCA Corrections Act empowers our law enforcement efforts to finally reach those who are currently stealing taxpayer dollars with impunity. The most-needed improvements to the Section 3729(a) liability provisions are those designed to do the following: a) fully protect U.S. Government dollars even when the Government relies on others to make payment decisions for the federal Government; b) impose liability on those who steal funds administered by the U.S. Government; and c) recover funds from those who convert taxpayer funds to unauthorized uses or knowingly retain overpayments.

### **A. Liability for Those Who Seek to Steal Government Funds from Government Contractors or Grantees**

The U.S. Government has drastically changed since the FCA was last amended nearly a quarter century ago. Today, the U.S. Government largely relies on federal contractors for many traditionally government functions, including procurement and contract management. Unfortunately, with the FCA statutory language cemented to reflect the realities of the 1986 government contracting environment, a number of recent court decisions have read the Act in a way to expose the modern expenditure of Government funds to fraud and abuse. The FCA Corrections Act seeks to restore the Act to clearly reflect the Congressional intent behind the 1986 FCA amendments. Specifically, when Congress amended the FCA in 1986, it intended that, under the FCA, “. . . a claim is actionable although the claims or false statements were made to a party other than the Government, if the payment thereon would ultimately result in a loss to the United States . . . a false claim to a recipient of a grant from the United States or to a State under a program financed in part by the United States is a false claim to the United

States.”<sup>1</sup>

The need for this clarifying legislation is underscored by a recent U.S. Supreme Court decision that narrowed the Act to *only* apply to false claims that are potentially reviewable by the “Government itself.”<sup>2</sup> This limiting Court decision was reached notwithstanding the crystal clear legislative history and a definition of “claim” in the FCA that includes claims “made to a contractor, grantee, or other recipient if the United States provides any portion of the money or property which is requested or demanded.”<sup>3</sup>

The real-world impact of this decision was evident the very next day, when a district court dismissed, on the eve of trial, the Government’s prosecution of a substantial crop subsidy fraud scheme.<sup>4</sup> According to this decision, a false statement can *never* be “material to the Government’s decision to pay” when a private entity pays the claim and then seeks reimbursement from the Government. Since then, similar arguments have been parroted in courts throughout the country, seeking to squelch government investigations involving Medicare and Medicaid fraud,<sup>5</sup> defense subcontractor fraud,<sup>6</sup> and fraud on local and state programs, including those “funded in part by the United States where there is significant Federal regulation and involvement.”<sup>7</sup>

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<sup>1</sup> S. Rep. No. 99-345, 99th Cong., 2d Sess. 19-20 (1986), *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266, 5288-89.

<sup>2</sup> *Allison Engine Co. v. United States ex rel. Sanders*, 128 S.Ct. 2123 (2008).

<sup>3</sup> 31 U.S.C. § 3729(c).

<sup>4</sup> *United States v. Hawley*, 566 F.Supp.2d 918 (N.D. Iowa 2008).

<sup>5</sup> *See United States ex rel. Atkins v. McInteer*, 345 F. Supp. 2d 1302, 1305-06 (N.D. Ala. 2004), *aff’d*, 470 F.3d 1350 (11th Cir. 2006) (dismissing case involving nursing home claims on state Medicaid agency); *United States ex rel. Brunson v. Narrows Health & Wellness, LLC*, 469 F. Supp. 2d 1048, 1053 (N.D. Ala. 2006) (dismissing Medicare claims submitted to an insurance company hired by the federal government to administer the Medicare program).

<sup>6</sup> *See United States ex rel. Sanders v. Allison Engine Co.*, 364 F. Supp. 2d 710 (S.D. Ohio 2003), *rev’d by*, 471 F.3d 610 (6th Cir. 2006), *vacated and remanded by Allison Engine Co. v. United States ex rel. Sanders*, 128 S.Ct. 2123 (2008).

<sup>7</sup> S. Rep. No. 99-345 at 19-20 (citing an area in which Congress intended the FCA to be applicable). *See, e.g., United States ex rel. Rutz v. Village of River Forest*, 2007 WL 3231439 (N.D. Ill. Oct. 25, 2007) (federal Bureau of Justice Assistance block grant to county); *U.S. DOT ex rel. Arnold v. CMS Eng’g*, 2007 U.S. Dist. LEXIS 9118 (W.D. Pa. Feb. 6, 2007) (U.S. Department of Transportation grant to Pennsylvania Department of Transportation); *U.S. v. City of Houston*, 2006 U.S. Dist. LEXIS 57741 (S.D. Tex. Aug. 16, 2006) *affirmed on other grounds by*, 523 F.3d 333 (5th Cir. 2008) (U.S. Department of Housing funding of City of Houston housing authority); *United States ex rel.*

Most importantly, given the modern-day government contracting environment, these troubling court decisions are likely the tip of the iceberg of future court dismissals. The simple truth is the federal Government has outsourced an unprecedented number of governmental functions to private entities, including the contracting process itself.<sup>8</sup> Indeed, this trend has accelerated to a record level, with the Government now spending nearly *40 cents* of every discretionary dollar on contracts with private companies.<sup>9</sup> In fact, “Presidents and Congress have moved millions of jobs to an estimated contract workforce of more than 7.6 million employees, or three contractors for every federal employee. The number of contractors has grown by 70 percent since 2002, mostly through contracts that have been awarded without competition.”<sup>10</sup>

The pervasiveness of this government outsourcing was recently highlighted by the U.S. Comptroller General:

The government is relying on contractors to fill roles previously held by government employees and to perform many functions that closely support inherently governmental functions, such as contracting support, intelligence analysis, program management, and engineering and technical support for program offices.<sup>11</sup>

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*Rafizadeh v. Cont’l Common, Inc.*, 2006 U.S. Dist. LEXIS 18164 (E.D. La. April 10, 2006) *affirmed on other grounds by*, 553 F.3d 869 (5th Cir. 2008) (U.S. grants to state Department of Social Services and state Department of Health & Hospitals).

<sup>8</sup> Between 1993 and 2000, the size of the civilian workforce was reduced by 426,000 positions, reaching a level equal to that under President Eisenhower. Between 2000 and 2005, annual government procurement spending increased by 86%, or \$175 billion dollars. *Dollars, Not Sense: Government Contracting Under the Bush Administration* at i, 3 (Comm. Print 2006), H.R. Comm. Gov’t Reform – Minority Staff Special Investigations Division, 109th Cong., 2d Sess.

<sup>9</sup> *Id.* The Department of Energy spends approximately 98% of its budget on contractors, the Pentagon spends nearly half of its budget on contractors, and the National Air & Space Administration spends about 78% of its budget on contractors. Shane, Scott. “Uncle Sam keeps SAIC on Call for Top Tasks/Government Turns to California Company for Variety of Sensitive Jobs.” The Baltimore Sun, 26 Oct. 2003.

<sup>10</sup> Light, Paul C. “Open Letter to Presidential Candidates,” *available at* <http://www.nyu.edu/public.affairs/releases/detail/2182> (last visited March 29, 2009).

<sup>11</sup> *DOD’s Increased Reliance on Service Contractors Exacerbates Long-standing Challenges, 2008: Hearings on Defense Acquisitions before the Subcom. On Defense of the House of Representatives Comm. on Appropriations*, 110th Cong., 2d Sess. 10-12 (2008) (statement of David M. Walker, Comptroller General of the United States).

This trend was also recently identified in a Government Accounting Office report, noting that spending by the Department of Defense (DOD) on contractor services has more than *doubled* over the past decade.<sup>12</sup>

Additionally, at a time when we are increasingly relying on this so-called “shadow government”<sup>13</sup> to award and oversee contracts, disburse federal funds, and attempt to detect fraud in government contracting, procurement spending has reached all-time highs. Between 2000 and 2005, procurement spending rose by 86% to \$377.5 billion annually, and spending on federal contracts grew over twice as fast as other discretionary federal spending.<sup>14</sup>

Given the recent federal stimulus package paying out nearly a trillion additional dollars in government funds, the concerns over the protective reaches of the FCA are now even more pressing. Instead of having the “Government itself” pay out these funds, the federal Government will continue to rely on the usual third parties, including State agencies, government contractors, and government grantees, to distribute these funds.

In turn, when a person submits a claim for a government benefit, or for payment for services or goods provided as part of a government program, chances consequently are extremely high that the a government employee will not be involved in the payment decision. For example, when seeking reimbursement from the Medicare or Medicaid program, hospitals submit their claims to private insurance companies on contract with the federal or a state government, and the “Government itself” is *never* consulted on whether or not to pay the claims. Similarly, defense contractors typically find themselves billing another defense contractor who, in turn, bills another defense contractor, who may or may not be the one with the prime contract with the Department of Defense. In each of these examples, however, the person submitting the bill knows full well that he is being paid by the taxpayers to perform work in furtherance of governmental purposes.

In short, there is now a “free fraud zone” for the *numerous* situations in which companies bill entities that have been paid in advance by the federal Government. The FCA Corrections Act shuts down this gaping enforcement loophole. Consistent with the Congressional intent behind the 1986 amendments, the FCA Corrections Act would

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<sup>12</sup> *DOD Needs to Reexamine Its Extensive Reliance on Contractors and Continue to Improve Management and Oversight, 2008: Hearings on Defense Management Before the Subcomm. On Readiness of the House of Representatives Comm. On Armed Services, 110th Cong., 2d Sess. 3 (2008) (statement of David M. Walker, Comptroller General of the United States).*

<sup>13</sup> *GAO Report, 2008: Hearings on Defense Management Before the Subcomm. On Readiness of the House of Representatives Comm. On Armed Services, 110th Cong., 2d Sess. 3 (2008), available at <http://oversight.house.gov/story.asp?ID=1071> (last visited March 29, 2009).*

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

correct the FCA to make clear that liability attaches whenever a person knowingly makes a false statement or a false claim to obtain “Government money or property,” regardless of whether the Government funds are paid directly by the federal Government or are disbursed by a third party. In new paragraph 3729(b)(2), the proposed amendments would define “Government money or property” to include not only money “belonging” to the United States, but also money that the United States provides a contractor, grantee, agent or other recipient “to be spent or used on the Government’s behalf or to advance Government programs.”

Importantly, the proposed definition of “Government money or property” is sufficiently narrow to ensure that the FCA would apply *only* in situations in which a person makes a claim for money that is still subject to government restrictions on its use. (Indeed, the proposed legislation provides a governmental nexus that is missing in the current FCA statutory language.) Under the proposed language, two critical conditions must be met before liability will be imposed on a person submitting claims to a recipient of federal funds: First, the claimant must seek *specific* funds that the United States “provides or has provided” or “for which the United States Government will reimburse” the recipient of federal funds. Second, the funds must be ones that the recipient is disbursing “on the Government’s behalf or to advance a Government program.” Accordingly, the FCA Corrections Act would not inject the FCA into purely private commercial transactions such as a federal government employee’s spending of his *government* salary.

FCA defendants posit a red herring in arguing that the appropriate remedy when a government subcontractor submits false claims to a government prime contractor is a lawsuit by the prime contractor against the subcontractor under the law of contract or the law of fraud. As they certainly recognize, this remedy would be nowhere near as effective as the FCA at uncovering, deterring or remedying fraud in government programs. First, state contract and tort laws do not provide any means comparable to the *qui tam* provisions for a recipient of federal funds to learn about the fraud from an insider with financial incentives to come forward. Second, state contract and tort laws do not contain treble damage remedies that serve as both a powerful deterrent to fraud and a means of obtaining full compensation not only for the overcharge, but also the time value of money, and the costs inherent in detecting, investigating and pursuing fraud.

## **B. Liability for Those Who Steal Funds Administered by the United States**

In 1986, Congress surely could not foresee that the U.S. Government would enter into the role of administering the funds of another country, such as the Iraqi funds administered by U.S. officials at the Coalition Provisional Authority. However, as U.S. Department of Justice unsuccessfully argued to a recent court, when the United States elects to invest its limited resources in administering the funds of another entity, the FCA should protect these funds from fraud.<sup>15</sup> Unfortunately, because the FCA does not

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<sup>15</sup> *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617, 636-641

expressly impose liability for false claims for money administered, but not owned by the United States, fraudsters are now able to drain these critical funds with impunity.

However, as the U.S. Department of Justice has argued on numerous occasions, there are a myriad of reasons why the Act should cover such situations. Perhaps most importantly, when the United States elects to invest its resources in administering the funds of another, it does so only because the achievement of important foreign or domestic policy goals turns on proper management of the funds. Indeed, while the Act does not explicitly cover these funds, the U.S. Government has previously pursued cases of this nature, recovering millions of dollars from oil, gas and mining companies that have underreported the royalties owed under leases on Native American land.<sup>16</sup>

The FCA Corrections Act codifies, once and for all, the Government's ability to protect these funds under the FCA. The proposed language prudently amends the FCA so that it covers fraud on U.S.-administered funds by adding new paragraph 3729(b)(2)(C) that would define "Government money or property" to include funds managed by the United States for an administrative beneficiary, as that term is defined in new paragraph (b)(4). This amendment takes on added importance given the concern about fraud on Iraqi funds paid out by the U.S. Government. As noted on the editorial pages of the *New York Times*: "Investigators say that current war fraud runs into the untold billions, including faulty ammunition and vehicles and not-so-bullet-proof vests."<sup>17</sup>

### **C. Liability for Those Who Convert Taxpayer Funds to Unauthorized Uses or Knowingly Retain Overpayments**

Since the FCA was last amended in 1986, a gaping liability loophole has been recognized by fraudsters, allowing a "finders' keepers" regime to flourish when it comes to the overpayment of federal funds. Specifically, the knowing retention of overpayments is a tremendous problem in government health programs and government procurements. Moreover, as then-CBO Director Peter Orszag stressed last year, "[f]uture health care spending is the single most important factor determining the nation's long-term fiscal condition."<sup>18</sup> For this fiscal reason alone, this legislation should be supported by all

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(E.D. Va. 2006).

<sup>16</sup> See, e.g., *Kennard v. Comstock Resources, Inc.*, 363 F.3d 1039 (10th Cir. 2004), cert. denied, 545 U.S. 1139 (2005); *U.S. v. Chevron*, 186 F.3d 644 (5th Cir. 1999); *United States ex rel. Wright v. Agip Petroleum Co.*, 2006 U.S. Dist. LEXIS 93415 (E.D. Tex. Dec. 27, 2006); *United States ex rel. Koch v. Koch Indus.*, 57 F. Supp. 2d 1122 (N.D. Okla. 1999).

<sup>17</sup> "The Imprecise Meaning of War." Editorial. *The New York Times*. July 3, 2008.

<sup>18</sup> "Opportunities to Increase Efficiency in Health Care," Statement of Peter R. Orszag, Director, Congressional Budget Office, at the Health Reform Summit of the Committee on Finance, United States Senate, June 16, 2008, at 8.

members of Congress.

An example is a health care provider that mistakenly overbills the federal Government for services, identifies its mistake, and then decides not to disclose the mistaken billing to the Government in order to fraudulently hold on to the overpayment. Understandably, the provider's mistake might have stemmed from a misunderstanding of the billing rules or some other error, but, in each case, FCA liability would not attach, for the original claims would not be "knowingly" false.<sup>19</sup> However, after the provider discovers the mistaken payment and retains it, the provider has committed a criminal offense.<sup>20</sup> The Compliance Guidelines of the Office of Inspector General of the U.S. Department of Health & Human Services ("OIG") warn that failure to return overpayments within a "reasonable period of time" following discovery may be interpreted as an intentional attempt to conceal the overpayment from the Government.<sup>21</sup> Paradoxically, however, because of a drafting problem with the 1986 FCA Amendments, the Government is not able to use the FCA to protect these funds. In short, this common fraud scheme of dishonest providers remains largely concealed, for *qui tam* whistleblowers are not able to expose the scheme under the FCA.

Equally disturbing, unless a contractor submits something to the Government concealing its dishonesty, the FCA currently does not apply when someone wrongfully converts Government funds to an unauthorized use. An example of this scenario would be a government contractor's decision to spend an advance payment intended for hurricane relief efforts on his personal enrichment instead. When our country is in the midst of a war or rebuilding roads in the wake of a major hurricane, government funds are often disbursed quickly in advance of the work being performed, and without the usual required certifications of performance under the contract. Moreover, when a contractor uses an advance payment for an improper purpose in these circumstances, there will rarely be a false claim or false statement submitted to the Government that would trigger FCA liability. In short, these dishonest contractors are also able to evade FCA liability.

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<sup>19</sup> In many situations of this nature, there also would no false statement to trigger liability. With the exception of long term health care providers that must submit quarterly statements to the Medicare program disclosing any known overpayment ("Credit Balance Reports" submitted by Medicare Part A providers), health care providers generally are not asked to submit statements disclosing known overpayments.

<sup>20</sup> 42 U.S.C. § 1320a-7b(a)(3).

<sup>21</sup> See, e.g., Hospital Compliance Guidelines, 63 FED. REG. 8987 (February 23, 1998); Supplemental Compliance Program Guidance for Hospitals, 70 FED. REG. 4858 (January 31, 2005); Compliance Program for Individual and Small Group Physician Practices, 65 FED. REG. 59,434 (October 5, 2000).

The FCA Corrections Act seeks to address both of these common fraud schemes by amending paragraph 3729(a)(4) in the current Act (which would be renumbered as paragraph 3729(a)(1)(C)) so that it imposes liability on anyone who:

has possession, custody, or control of Government money or property and, intending to . . . (ii) retain a known overpayment, or (iii) knowingly convert the money or property, permanently or temporarily, to an unauthorized use, fails to deliver or return, or fails to cause the return or delivery of, the money or property, or delivers, returns or causes to be delivered or returned less money or property than the amount due or owed.

As outlined above, this amendment is needed to plug a gaping loophole that is currently draining our public fisc and undermining the long-term viability of our government health care programs. This provision alone should recover millions of additional stolen tax dollars.<sup>22</sup>

## **II. REMOVING EXTRANEOUS PROCEDURAL HURDLES UNDERMINING THE FCA'S LAW ENFORCEMENT CAPABILITIES**

To understand the need for the clarifications offered under the FCA Corrections Act, one must first understand the important and necessary role *qui tam* whistleblowers and their counsel play in uncovering fraud against the U.S. Government. During my tenure with Taxpayers Against Fraud, I have come to truly appreciate the unique public-private fraud-fighting partnership encouraged under the FCA *qui tam* provisions. I have been equally impressed by the evolving ingenuity of those who seek to steal the U.S. tax dollar. Over the years, as the complexity of fraud has become increasingly buried behind innocuous transactions, there is a heightened need for the inside fraud evidence *qui tam* whistleblowers bring to fraud investigations.

Equally important, as the limited resources of the federal Government have been stretched thin, especially in the wake of the September 11<sup>th</sup> attacks, the Government has relied, more and more, on the supplementary resources and capabilities of *qui tam* counsel. Indeed, *qui tam* whistleblowers and their counsel have been the driving force behind nearly 70% of the FCA dollars recovered in recent years and were the ones to originally file nearly all of the top FCA settlements of all time. In fact, several FCA settlements during my tenure were achieved after *qui tam* whistleblowers and their

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<sup>22</sup> Nearly a decade ago, before the baby boomer generation even qualified for Medicare, HHS-OIG researched the instances of overpayment in the Medicare system and concluded that \$23.2 billion, or 14% of total program costs, were lost each year due to fraud, waste and abuse. *HCFA's FY 1996 Medicare Audit, 997: Hearing before the Subcomm. On Health of the House Comm. On Ways and Means, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1997)* (statement by June Gibbs Brown, Inspector General, Dep't of Health & Human Services).

counsel devoted years either trying to persuade the Government of the merits of the case before achieving an intervention decision, or litigating the case following a Government declination.

Perhaps the best example of the benefits *qui tam* assistance brings to FCA enforcement was seen in a 2006 settlement involving Northrop Grumman. Here, the United States negotiated a \$134 million FCA settlement that simply never would have been achieved without the dedication, hard work and perseverance of two *qui tam* whistleblowers and their counsel.<sup>23</sup> This settlement resolved allegations that were originally brought to light in 1989, that the defense contractor was overcharging the Government for radar jamming devices installed on Air Force airplanes. When the Government declined to intervene, the *qui tam* whistleblowers and their counsel continued working the case for the next *nine years* on their own, undertaking extensive document and deposition discovery, and risking their personal resources on the case. Finally, in 2002, they were able to convince the Government to take a second look and to intervene in the suit.

The good news for the public fisc is that this settlement is not an outlier. Time and time again, *qui tam* whistleblowers and their counsel have recovered the country's stolen tax dollars.<sup>24</sup> FCA defendants, however, argue that *qui tam* suits recover few dollars for the public fisc, especially after the Government declines to intervene. To support their argument, they point to Justice Department statistics that show a relatively low number of settlement dollars under the "non-intervened *qui tam* suits" category. However, while settlements like the above *Northrop Grumman* case are tallied in the "intervened *qui tam* suits" category, it is dishonest to argue that *qui tam* whistleblowers and their counsel brought little to the table in the nine years that they solely carried the case during the post-declination period.

However, for every successful FCA settlement, there are perhaps a dozen meritorious *qui tam suits* that have been derailed by atextual procedural hurdles found

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<sup>23</sup> *United States ex rel. Holzrichter v. Northrop Grumman*, Civil Action No. 89C 6111 (N.D. Ill. 2006).

<sup>24</sup> Another good example is the settlements of *United States ex rel. Alderson v. HCA-The Healthcare Company* and *United States ex rel. Schilling v. HCA-The Healthcare Company*. Although the Justice Department originally intervened in all aspects of both cases in 1998, when it came time to litigate the consolidated cases following a lengthy stay of the proceedings, the Government declined to pursue a number of the allegations, instead restricting its efforts to the strongest claims. The *qui tam* whistleblowers and their counsel pursued the rest of the claims on their own, recovering about \$100 million for the Government through their independent efforts. In addition, at the request of the Justice Department, they assumed almost all of the affirmative discovery work on the intervened parts of the case, with the Government's lawyers focusing on defending depositions of government witnesses and producing government documents. In 2003, the two cases settled for more than \$600 million in cash and credits.

nowhere in the FCA or underlying legislative history. FCA defendants counter that the current FCA is working “well enough” and that the \$22 billion recovered under the Act since the 1986 FCA Amendments is somehow sufficient. They paint our country’s courageous whistleblowers as “parasites” whose cases should be silenced, not because of the merits of their suits, but because existing judicial rewrites to the Act. Their similar tactics in courts have silenced countless *meritorious* whistleblower suits, undermining FCA enforcement to the detriment of the U.S. Department of Justice and the public fisc. The truth is that over the last twenty plus years of FCA enforcement, FCA defendants have been successful in highlighting some of the statutory deficiencies and procedural inefficiencies in the current law. The FCA Corrections Act rectifies these deficiencies, for when it comes to fighting fraud, particularly in the current economic crisis, it is not a matter of settling for “well enough.”

In turn, the FCA Corrections Act has received broad bipartisan support not only because it sensibly closes liability loopholes, but also because it rejects judge-created, extraneous procedural hurdles that have wrongfully derailed meritorious suits. Accordingly, the FCA Corrections Act fully restores the law enforcement capabilities of the FCA, allowing the Government to uncover and prosecute complex fraud schemes. The proposed amendments include several important provisions that honor the Congressional intent of the 1986 FCA amendments of fostering a public-private partnership that ushers meritorious *qui tam* actions forward to the benefit of the U.S. Treasury. The Bill clarifies that *qui tam* whistleblowers with *detailed* knowledge of fraudulent schemes may bring cases even when they lack access to the FCA defendants’ underlying billing documentation. The Bill also takes out of the defendants’ hands the ability to delay or even preclude adjudication of the merits by challenging the whistleblowers’ right to bring a case under the “public disclosure” bar, a provision originally crafted to protect the interests of the Government alone, not the defendant.

**A. Encouraging *Qui Tam* Suits That Specifically Detail Fraudulent Schemes, Regardless of Whether the Allegations Include Innocuous Billing Documentation**

The FCA Corrections Act injects predictability into the FCA practice by explicitly clarifying *how* Federal Rule of Civil Procedure 9(b) applies to FCA *qui tam* suits. Currently, courts are in disarray on the proper application of Rule 9(b). Different standards apply in different federal circuits--and *even in the same courthouse and same type of case*--with some requiring claims evidence at the pleading stage<sup>25</sup> and others not requiring such evidence.<sup>26</sup> This confusion is compounded by the fact that no other category of cases has demanded pleading of specific pieces of evidence at the *pleading*

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<sup>25</sup> See, e.g., *United States ex rel. Duxbury v. Ortho Products*, 551 F.Supp.2d 100 (D. Mass. 2008).

<sup>26</sup> See, e.g., *United States ex rel. West v. Ortho-McNeil Pharmaceuticals*, 538 F. Supp. 367 (D. Mass. 2008).

stage of litigation. The FCA Corrections Act rejects this excessively rigid evidentiary standard by making Rule 9(b) apply to *qui tam* whistleblowers the *same* as it applies to any other litigant in a case where the Rule applies.

The simple fact is that the Government needs whistleblowers to provide inside information about fraudulent schemes; the Government already has easy access to the underlying invoice documentation. This is precisely why the Justice Department has consistently argued that requiring *qui tam* whistleblowers to plead specific false claims is a “formalistic and rigid interpretation of Rule 9(b) which distorts the purpose of the Rule.”<sup>27</sup> The Government contends that it “hamstring[s] the parties in counter-productive pleading and motion practice that [ ] unduly delay[s] examination of False Claims Act cases on the merits.”<sup>28</sup>

Even with the Justice Department raising this argument in courts across the country, including to the U.S. Supreme Court,<sup>29</sup> courts continue to squelch meritorious FCA cases under this erroneous standard.<sup>30</sup> In addition to misapplying Rule 9(b), these courts have failed to grasp the real-world limitations that prevent *qui tam* whistleblowers from meeting an overly harsh evidentiary standard prior to discovery. Whistleblowers

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<sup>27</sup> *Statement of Interest of the United States, United States ex rel Hopper v. Solvay Pharmaceuticals*, Civil No. 8:04-CV-2356 (M.D. Fla. 2007).

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

<sup>29</sup> *See, e.g.*, Solicitor General’s Brief, *Rockwell International v. United States ex rel. Stone*, 2006 WL 3381295 (U.S. 2007) (arguing that “In the view of the United States, it is possible for a relator (or the government) in an FCA action to describe the alleged fraudulent scheme with sufficient specificity to satisfy Rule 9(b)’s ‘particularity’ requirement even without identifying specific false claims”); *United States ex rel. Rost v. Pfizer, Inc.*, Civil No. 03-CV-11084 (D. Mass 2008) (stressing that “Such an analysis is consistent with FCA cases in which courts have found that when a complaint sets forth with particularity allegations of a fraudulent scheme or course of conduct, it is not also necessary to identify specific claims because doing so adds little to the sufficiency of the complaint as a whole.”).

<sup>30</sup> *See, e.g.*, *United States ex rel. Bledsoe v. Community Health Systems, et al.*, 501 F.3d 493, 504-05 (6th Cir. 2007); *United States ex rel. Joshi v. St. Luke’s Hospital, Inc.*, 441 F.3d 552, 559 (8th Cir. ), *cert. denied*, 127 S. Ct. 189 (2006); *United States ex rel. Sikkenga v. Regence Bluecross BlueShield*, 472 F.3d 702, 727 (10th Cir. 2006); *Sanderson v. HCA-the Healthcare Co.*, 447 F.3d 873, 877 (6th Cir. 2006), *cert. denied*, 127 S.Ct. 303 (2006); *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1013-14 (11th Cir. 2005), *cert. denied*, 127 S. Ct. 42 (2006); *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220 (1st Cir.), *cert. denied*, 543 U.S. 820 (2004); *In re Genesis Health Ventures, Inc.*, 112 Fed. Appx. 140, 144 (3rd Cir. 2004); *United States ex rel. Clausen v. Lab Corp. of Am.*, 290 F.3d 1301, 1308-09 (11th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003).

typically know the details of the fraudulent scheme, not the innocuous information on an invoice. However, by requiring a *qui tam* whistleblower to produce an invoice, or some other sheet of paper, at the pleading stage, courts have prevented fraudulent schemes from seeing the light of day. Moreover, some laws prevent or discourage compiling claims data. For example, national and state patient privacy laws may discourage a physician-insider from disclosing this information, even if he knows everything about the underlying fraud scheme.

Time and time again, *qui tam* whistleblowers have alleged significant details of the fraudulent schemes, only to have courts dismiss the suits on the basis that the whistleblowers lacked access to the billing documentation, and consequently could not allege details of the invoices sent to the Government, such as which billing department employee submitted the false claims, on which date, and with regard to the care of which patient. In fact, the Eighth and Eleventh Circuits both recently dismissed cases under Rule 9(b) simply because the whistleblowers “did not work in the billing department.”<sup>31</sup>

The Eighth Circuit *Joshi* decision is a perfect example of the real-world absurdity of this Rule 9(b) misapplication. Here, the court acknowledged that it “fully recognize[d] Dr. Joshi alleges a systemic practice of St. Luke’s and Dr. Bashiti submitting and conspiring to submit false claims over a sixteen year period.”<sup>32</sup> In particular, in the court’s own words:

Dr. Joshi, an anesthesiologist who practiced from 1989 to 1996 at St. Luke’s, brought a *qui tam* action under the FCA against St. Luke’s and Dr. Bashiti, alleging violations [of the FCA] . . . In Count I, Dr. Joshi alleges St. Luke’s requested and received Medicare reimbursement from the government for anesthesia services performed by Dr. Bashiti at the reimbursement rate for medical direction of anesthesia services, when St. Luke’s was entitled only to the lower reimbursement rate for medical supervision or no reimbursement at all. Dr. Joshi alleged Dr. Bashiti failed both to perform pre-anesthetic evaluations and prescribe anesthesia plans, and Dr. Bashiti falsely certified he supervised or directed the work of several certified registered nurse anesthetists (CRNAs).<sup>33</sup>

In short, Dr. Joshi provided more than enough details of the scheme for the defendants to know exactly the nature of the fraud at issue. As an anesthesiologist, Dr. Joshi witnessed Dr. Bashiti’s failure to perform the work and the supervision required to bill Medicare for specified services, and he alleged the specifics of what he had observed. Then, Dr. Joshi detailed how the services were being billed, and the fact that Medicare

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<sup>31</sup> See, e.g., *United States ex rel. Joshi v. St. Luke’s Hospital*, 441 F.3d at 557; *Corsello*, 428 F.3d at 1013-14.

<sup>32</sup> *Joshi* at 557.

<sup>33</sup> *Joshi* at 554.

was being billed. Nonetheless, the Eighth Circuit affirmed the lower court's ruling that Dr. Joshi's failure to identify specific billing documentation was fatal to his complaint, noting: "Dr. Joshi was an anesthesiologist at St. Luke's, not a member of the billing department."<sup>34</sup>

Regrettably, court decisions such as *Joshi* drastically undermine the Government's ability to uncover false claims targeting the U.S. tax dollar. This is especially true when the fraud takes place behind corporate walls, where organizational knowledge is regularly compartmentalized: the billing department employees rarely know the details of what is happening on the operational side, and the reverse is true as well. For example, in a hospital overbilling case, it would be highly unusual for billing department employees to be in a position to discern that a given doctor was misrepresenting the nature of the services delivered to any particular patient. On the flip side, the doctors practicing alongside another doctor will see what medical work he is performing, and may overhear how the work is being billed, but will not have access to the actual billing documentation itself.

While these court decisions may not pose a problem for the rare whistleblower-billing department employee, they pose a serious threat to the vast majority of potential whistleblowers who witness the fraud but do not work in the billing department. The reality is that the employees with the necessary inside information and knowledge of the underlying fraudulent schemes do not have ready access to the actual claims or invoices submitted to the Government. However, the information that would be supplied by these employees is *precisely* the evidence needed to unravel complex fraud schemes.

Moreover, as some courts have correctly recognized, the chief objective of Rule 9(b) -- putting the defendant sufficiently on notice of the allegations so that it can mount a defense--is easily met by a complaint that details other aspects of the fraudulent scheme, such as the category of claims alleged to be false, the perpetrators, time and location of the scheme, and the factual predicate for the whistleblower's belief that the claims are false.

The FCA Corrections Act adopts the rulings of courts that have applied Rule 9(b) in a manner designed to take into account the aforementioned realities of whistleblower cases. Explicitly embracing the language championed by these courts and the Justice Department, the Bill adds a new subsection 3731(e) to the FCA that would provide that "[i]n pleading an action brought under section 3730(b), a person shall not be required to identify specific false claims that result from an alleged course of misconduct if the facts alleged in the complaint, if ultimately proven true, would provide a reasonable indication that one or more violations of section 3729 are likely to have occurred, and if the allegations in the pleading provide adequate notice of the specific nature of the alleged misconduct to permit the Government effectively to investigate and defendants fairly to defend the allegations made."

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<sup>34</sup> *Joshi* at 557.

This amendment correctly highlights the inside information the Government actually needs for a successful fraud prosecution. Notably, the amendment expressly requires *qui tam* whistleblowers to either “identify *specific* claims that result from an alleged course of misconduct” or “provide adequate notice of the *specific* nature of the alleged misconduct to permit the Government effectively to investigate and defendants fairly to defend the allegations made.” In turn, the Government would be greatly assisted by detailed *qui tam* suits without concerns that meritorious fraud allegations will be silenced under an erroneous pleading standard, and the defendants would have more than enough information to mount a defense.

### **B. Vesting the Government with the Power to Dismiss Whistleblowers Who File FCA Lawsuits Based Solely on Public Allegations**

In an attempt to decipher the application of the FCA public disclosure bar, 31 U.S.C. 3730(e)(4), a court recently summarized the current sentiment: “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>35</sup> This confusion is reflected in the 200+ published and unpublished rulings in well over 100 separate cases concerning the meaning of the “public disclosure” bar. The seemingly simple act of flow charting the steps in the public disclosure bar provision quickly produces a maze of diverging roads leading to confusion. The myriad of conflicting court decisions has facilitated the ability of defendants to evade liability, greatly undermining the Government’s fraud-fighting efforts.

Ironically, Congress added this so-called “public disclosure” bar in 1986 with the sole goal of protecting the Government’s interests in allowing non-parasitic *qui tam* suits to survive dismissal. This provision replaced an earlier provision known as the “government knowledge bar” that deprived courts of jurisdiction over *qui tam* actions “based on evidence or information the Government had when the action was brought.” Courts interpreted this provision so broadly that few *qui tam* actions survived, and the FCA well into virtual disuse. By 1986, Congress had determined to eliminate this so-called “government knowledge bar” in light of its stated concern about cases in which “the Government knew of the information that was the basis of the *qui tam* suit, but in which the Government took no action.”<sup>36</sup> Congress wished to “encourage more private enforcement suits” and consequently amended the statute to eliminate the government knowledge bar in 1986.<sup>37</sup> Congress remained concerned, however, about “parasitic” *qui*

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<sup>35</sup> *United States ex rel. Montgomery v. St. Edward Mercy Medical Center*, 2008 WL 110858 (E.D. Ark. 2008).

<sup>36</sup> H. R. Rep. No. 660, 99<sup>th</sup> Cong., 2d Sess. 22-23 (1986).

<sup>37</sup> S. Rep. No. 99-345, 99<sup>th</sup> Cong., 2d Sess. 23-24 (1986), *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266, 5288-89.

*tam* whistleblowers such as those who filed complaints simply by copying information from a government indictment.

The resulting public disclosure bar provision was an attempt to strike a balance between "encouraging people to come forward with information and . . . preventing parasitic lawsuits."<sup>38</sup> Unfortunately, however, by depriving courts of jurisdiction over cases barred under the provision, Congress unwittingly handed defendants a tool that has been used and abused to derail meritorious suits and prevent judgments on liability.

Now, virtually every *qui tam* suit is faced with a motion to dismiss pursuant to the public disclosure bar. Even over the frequent objections of the *Government*, courts have allowed defendants to use the public disclosure bar as a weapon to kill meritorious *qui tam* actions. The rampant use of this provision has deterred countless insiders from risking their livelihoods in filing *qui tam* suits. For those who have braved the *qui tam* waters, the courts' unreasonably broad interpretations of what constitutes a "public disclosure" has forced many *qui tam* counsel from thoroughly investigating fraud allegations, fearful that their due diligence will trigger the public disclosure bar. For example, counsel are quite reluctant to use the Freedom of Information Act (FOIA) to corroborate their client's understanding of transactions, for some courts have barred *qui tams* based even in part on responses to a private party's FOIA request.<sup>39</sup>

Recently, the public disclosure bar confusion boiled up to the U.S. Supreme Court in a case where the Government wished to pay a whistleblower for being the original source in a successful fraud prosecution.<sup>40</sup> The Court, rejecting the Government's own assessment of the whistleblower's contributions, ruled that the statutory language of the public disclosure bar *prevented* the Government from awarding this particular whistleblower.

The FCA Corrections Act would appropriately place the public disclosure bar solely in the hands of the Government. Moreover, the Bill would remove the uncertainty plaguing the Act by explicitly defining key statutory terms, including the term "public disclosure" to make clear that it includes only disclosures on the public record and those that have been "disseminated broadly to the general public," with responses to FOIA

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<sup>38</sup> *FCA Implementation, Hearing Before the Subcomm. on Admin. Law and Gov. Relations of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 3 (1990) (Statement of Sen. Grassley).

<sup>39</sup> *See, e.g., United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1051 (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.*, 186 F.3d 376, 383 (3rd Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000).

<sup>40</sup> *Rockwell Int'l Corp. v. United States*, 127 S. Ct. 1397 (2007).

requests and exchanges with law enforcement expressly excluded from the definition. Finally, to eliminate the circular analysis engaged in by many courts, an action would be deemed to be “based upon” a public disclosure only when all elements of liability are “derived exclusively from” the public disclosure. The much-litigated “original source” language would drop out of the provision, as the new definition of “based upon” would have the effect of carving out complaints by original sources. Notably, the Bill would still protect the Government from situations where a whistleblower derived most, but not all, of the information underlying the case from prior Government disclosures. The court could take these circumstances into account and, where appropriate, reduce the *qui tam* whistleblower’s share of the proceeds below the minimum threshold.

For the above reasons, I strongly support the proposed amendment to the public disclosure bar provision. This proposal alone would greatly improve the ability of the Government to investigate and prosecute those who target the U.S. tax dollar.

FCA defendants lament that they would no longer be able to dismiss suits under the public disclosure bar, but the simple truth is that the Government is in the best position to determine whether a whistleblower was a “parasite” of public information. Moreover, because the Government takes on the primary role of prosecuting these suits and must pay a share to a successful whistleblower, they have a sizeable incentive to ensure that *only* non-meritorious suits are dismissed. The FCA defendants, on the other hand, have *every* incentive to get rid of meritorious whistleblower suits.

FCA defendants also argue that they will no longer be able to use the public disclosure bar to dismiss frivolous *qui tam* suits. However, this is a red herring, for the FCA public disclosure bar has *nothing* to do with the merits of a case. If cases are truly frivolous, defendants may and should rely upon the following:

- F.R.C.P. 11 (providing sanctions for unwarranted factual contentions and legal theories)
- F.R.C.P. 12(b)(6) (dismisses a complaint that “fails to state a claim upon which relief may be granted”)
- F.R.C.P. 56(b) (permits defendant to move “at any time” for judgment on the facts set forth in the pleadings)
- F.R.C.P. 54(d) (awards costs to prevailing defendants)
- 31 U.S.C. 3730(d)(4) (awards attorneys’ fees and expenses to defendants that prevail in *qui tam* actions that are “clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment”)

In short, the FCA Corrections Act correctly vests the public disclosure bar solely with the Government, while still preserving the defendant’s current options for dismissing truly frivolous *qui tam* suits.

### C. Setting Uniform Statute of Limitations Period

The FCA Corrections Act removes the confusion over the statute of limitations period by adopting a straightforward ten year period. Under the current law, the statute of limitations period is *currently* up to ten years for cases where the defendants have concealed the fraud. The truth is that because of the subversive nature of fraudulent schemes, the vast majority of *current* FCA cases qualify for the 10-year period. However, because some courts have adopted differing standards, it behooves Congress to adopt one uniform 10-year standard for all cases.

The FCA defendants complain that the Bill will greatly expand the limitations period from six years to ten years. However, the statute of limitations on FCA claims currently runs *on the later* of six years from the date of violation, or three years from the date that the United States learned of the violation, *not to exceed ten years*. The proposed amendment is necessary only because this language has proven confusing for the courts and the parties. Courts across the country now read the confusingly-worded limitations period in a myriad of ways, only adding to the confusion of all parties.<sup>41</sup>

The proposed amendment is especially needed to permit the U.S. Government to pursue fraud by contractors providing goods and services in Iraq. Some courts have effectively required the FCA plaintiff--whether the Government or a *qui tam* whistleblower--to file suit within six years of the date when the defendant violated the FCA. Six years is far too short a time to uncover many of the fraudulent schemes aimed at Government programs. In fact, Congress has provided the Government with a ten year statute of limitations for recovery of debts owed to the United States.<sup>42</sup> Surely when fraud

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<sup>41</sup> The FCA currently requires an FCA complaint to be filed by *the later of*: (i) six years from the date of the violation, or (ii) three years from the date “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,” not to exceed ten years from the date of the violation. 31 U.S.C. § 3731(b). The chief source of confusion has been the three year tolling provision in 31 U.S.C. § 3731(b)(2). The courts have been unclear how to apply this provision when a relator files a case, or proceeds with a case declined by the United States. Some courts have held that the relator does not get the benefit of the tolling provision at all. *See, e.g., United States ex rel. Sikkenga v. Regence Blue Cross Blue Shield of Utah*, 472 F.3d 702, 724-25 (10th Cir. 2006); *Neal v. Honeywell*, 33 F.3d 860, 865-66 (7th Cir. 1994); *United States ex rel. Amin v. George Washington Univ.*, 26 F. Supp. 2d 162, 171 (D.D.C. 1998). Other courts have held that the relator may file within three years of when he or she first knew or reasonably should have known the facts material to the rights of action. *See, e.g., United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1218 (9th Cir. 1996); *United States ex rel. Lowman v. Hilton Head Health Sys., L.P.*, 487 F. Supp. 2d 682, 697 (D.S.C. 2007). Yet other courts have ruled that the relator may file within three years of when the Government knew or reasonably should have known about the violation. *See, e.g., United States ex rel. Pogue v. Diabetes Treatment Ctrs. of America, Inc.*, 474 F. Supp. 2d 75, 88-89 (D.D.C. 2007).

<sup>42</sup> *See* 31 U.S.C. § 3716(e).

is involved, the Government needs at least as long a period of time to uncover the matter as it would need to look into an ordinary debt.

Moreover, a ten year statute of limitations is even more important when the Government must surmount the special challenges of locating and acquiring evidence in a war-torn country. These special challenges include working with foreign law enforcement personnel, arranging for special security in high threat zones, and finding witnesses willing to risk their lives to cooperate with the Government's investigation. The United States is entering its seventh year in Iraq. Under some of the incorrect readings of the FCA statute of limitations, the United States will soon lose the ability to pursue many claims for Iraq war fraud that took place in the initial year of the Iraq war and reconstruction effort. This amendment is critical to preserve the ability of the Justice Department to effectively pursue and obtain recoveries for such fraudulent activities. In short, the Bill not only removes the confusion plaguing the FCA practice, but it ensures that the Government will be able to fully prosecuting fraud targeting our war efforts in Iraq and Afghanistan.

#### **D. Empowering the Government With A Practical Subpoena Tool That Clearly Defines Appropriate Use of Subpoenaed Material**

Perhaps most importantly for the day-to-day capabilities of the Justice Department, the FCA Corrections Act would amend the FCA to permit the Attorney General to delegate the issuance of Civil Investigative Demands (CIDs), a form of administrative subpoena that may be used to obtain documents, testimony and interrogatory responses. In 1986, when Congress added the CID to the Act, the Senate Judiciary Committee viewed this as an authority "supplementing the investigative powers of the IGs [Inspectors General]." <sup>43</sup> Unfortunately, the statutory language did not make the CID power delegable. Thus, when an Attorney General is occupied with matters that he or she considers more important than FCA investigations, the line attorneys at the Department of Justice and in the Offices of U.S. Attorney are unable to utilize CIDs to investigate their cases.

To compound matters, the current CID provision does not spell out permissible "official uses" of materials obtained under the CID. This uncertainty over appropriate use of materials has caused most Department of Justice trial attorneys and Assistant U.S. Attorneys to shy away from utilizing the CID authority in the first place.

The FCA Corrections Act addresses these debilitating concerns by permitting the Attorney General to delegate the authority to issue CIDs, and by clearly defining the term "official use" to include the normal, lawful uses of subpoenaed information during a Department of Justice investigation or litigation.

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<sup>43</sup> S. Rep. No. 99-345, 99th Cong., 2d Sess. 33, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266, 5298 (1986).

Finally arming the Justice Department with usable CID powers will permit it to effectively investigate FCA cases on its own means, thereby allowing it to investigate many more cases and recover millions of additional dollars each year.

### **III. PROTECTING *QUI TAM* WHISTLEBLOWERS IS VITAL TO THE GOVERNMENT’S EFFORTS TO FIGHT FRAUD**

If the Act does not sufficiently protect potential whistleblowers from retaliation, fraud allegations will not come to light. The simple fact is that those who report fraud make tremendous sacrifices that greatly outweigh the financial benefits at the end of the road. During my tenure with Taxpayers Against Fraud, I have seen the same screenplay play out a hundred times. First, the suspected whistleblower suffers retaliation from their employer, usually in the form of unpaid leave or termination. Moreover, their severance is usually held back as blackmail to foreclose their pursuit of a *qui tam* suit. Once his or her name is made public, the company seeks to tarnish the person’s name in the public as a “disgruntled employee” or “mentally unstable.” Second, with a tarnished reputation, the whistleblower usually has great difficulty in finding a new job. Third, the stress of blowing the whistle oftentimes leads to emotional stress and social costs, including divorce, familial ostracization and bankruptcy.

With the hopes of mitigating some of these identifiable concerns, the FCA Corrections Act plugs some of the anti-retaliation loopholes that have been abused over the years to discourage potential *qui tam* whistleblowers. Specifically, the FCA Corrections Act provides a uniform ten year statute of limitations for anti-retaliation claims, and clarifies that internal whistleblowing, including efforts to stop the wrongdoing, is protected activity.

#### **A. Protecting Efforts to Stop Violations of the FCA**

In my experience, the vast majority of *qui tam* whistleblowers actively confronted their employers about their false claims before deciding to file a *qui tam* case, taking courageous steps to stop the violations from within the corporate walls. Unfortunately, however, the FCA does not expressly protect this activity from retaliation. Ignoring the realities of the corporate environment, the courts have instead blindly applied a standard that requires the whistleblower to prove that he or she took steps “in furtherance of an FCA suit.” In turn, some courts have held that the anti-retaliation provision does not apply unless the person has actually indicated his intent to report fraud to law enforcement.<sup>44</sup>

By refusing to provide clear protection for internal whistleblowing, and only expressly protecting action “in furtherance of” litigation, courts have regrettably pushed

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<sup>44</sup> See, e.g., *Robertson v. Bell Helicopter Textron*, 32 F.3d 948, 951-952 (5th Cir. 1994).

whistleblowers towards FCA litigation over internal compliance efforts, thus making it more difficult for corporations to institute a viable compliance program.

Thus, I strongly support the FCA Corrections Act amendment that would protect those who take steps “in furtherance of other efforts to stop one or more violations of this chapter.”

## **B. Extending Statute of Limitations for Anti-Retaliation Actions**

Lastly, the FCA Corrections Act removes the confusion over the proper statute of limitations for lawsuits brought under FCA Section 3730(h), the FCA anti-retaliation provision. Even though the Act by its terms permits any “civil action under Section 3730” to be brought within six years from the violation of Section 3729, the Supreme Court recently held that Congress, in fact, did not intend the FCA’s six year statute of limitations to apply to anti-retaliation claims, for they arise under Section 3730 rather than under Section 3729.<sup>45</sup>

Instead of applying the Act’s explicit statute of limitations period, the majority rummaged through the state statutes of limitations for examples of possible limitation periods, and held that victims of retaliation must comply with the state statute of limitations applicable to the most “analogous” sort of action available under state law.

However, the state statutes of limitations identified by the majority were unreasonably short. For example, the Court pointed to the 90- day statutes of limitations in Connecticut, Michigan and Texas, and 180-day statutes of limitation in Florida and Ohio.<sup>46</sup>

The shortened filing period drastically undercuts the remedy provided by Section 3730(h), making it practically unavailable to many whistleblowers who have been fired or demoted for blowing the whistle. In the majority of the cases, it is highly unlikely that a whistleblower will be able to identify her cause of action and locate experience *qui tam* counsel within 90 days, much less be in a position to file an adequately drafted complaint.

Moreover, as correctly recognized by the *Graham County* minority opinion, a longer period is needed, for the retaliation claim is ordinarily accompanied by an FCA *qui tam* claim. Otherwise, the Section 3730(h) filing might foreclose a confidential government investigation of the alleged fraudulent activities underlying the *qui tam* claim, for retaliation claims are not placed under seal unless they are in the same complaint as a *qui tam* claim. Thus, to comply with an abbreviated Section 3730(h) time

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<sup>45</sup> *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409 (2005).

<sup>46</sup> 545 U.S. at 419, n. 3.

limit, *qui tam* counsel would have to decide between foregoing the anti-retaliation action all together or hurriedly researching, investigating and fleshing out a complex FCA complaint that complies with the abbreviated Section 3730(h) statute of limitations.

The FCA Corrections Act solves this conundrum by amending Section 3731(b) to provide *expressly* that the statute of limitations for anti-retaliation claims brought under Section 3730(h) of the Act is the same as the statute of limitations for *qui tam* actions brought on behalf of the United States, which will be ten years pursuant to the FCA Corrections Act. It is highly advisable given the current pressure place on whistleblowers to file *qui tam* actions prematurely to comply with the extremely short statutes of limitations for wrongful discharge found in state law.