FALSE CLAIMS ACT CORRECTION ACT OF 2007

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

AND THE

SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

ON

H.R. 4854

JUNE 19, 2008

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FALSE CLAIMS ACT CORRECTION ACT OF 2007

THURSDAY, JUNE 19, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS,
THE INTERNET, AND
INTELLECTUAL PROPERTY, AND THE
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittees met, pursuant to notice, at 10:05 a.m., in Room 2141, Rayburn House Office Building, the Honorable Howard L. Berman (Chairman of the Subcommittee on Courts, the Internet, and Intellectual Property) presiding.

Present from the Subcommittee on Courts, the Internet, and Intellectual Property: Representatives Conyers, Berman, Boucher, Johnson, Coble, Sensenbrenner, Smith, Goodlatte, Cannon, and Issa.

Present from the Subcommittee on Commercial and Administrative Law: Representatives Conyers, Sánchez, Johnson, Cannon, and Feeney.

Staff Present from the Subcommittee on Courts, the Internet, and Intellectual Property: Julia Massimino, Majority Counsel; Christal Sheppard, Majority Counsel; and Rosalind Jackson, Majority Professional Staff Member.

Staff Present from the Subcommittee on Commercial and Administrative Law: Michone Johnson, Subcommittee Chief Counsel; and Blaine Merritt, Minority Counsel.

Mr. BERMAN. I call to order the joint legislative hearing on H.R. 4854, the "False Claims Act Correction Act of 2007," held by the Subcommittees on Courts, Internet and Intellectual Property and the Subcommittee on Commercial and Administrative Law.

Before I give my opening statement, I am going to yield to the Ranking Member of the Subcommittee on Commercial and Administrative Law for a unanimous consent request.

Mr. CANNON. Thank you, Mr. Chairman. I appreciate your holding this hearing. I have a conflict right now so I would ask unanimous consent to have my opening statement inserted into the record.

Mr. BERMAN. Without objection.

[The prepared statement of Mr. Cannon follows:]

PREPARED STATEMENT OF THE HONORABLE CHRIS CANNON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH, MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY, AND RANKING MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

Statement of Ranking Member Chris Cannon
Joint Courts and CAL Subcommittee Hearing on H.R. 4854,
the "False Claims Act Correction Act of 2007"
June 19, 2008, 10:00 a.m., Room 2141 RHOB

The False Claims Act is an important weapon in the federal government's arsenal for fighting fraud against the U.S. Treasury. And, it has been very successful towards that end. Since the Act was last amended in 1986, the federal government has recovered over $20 billion from false claims.

Because the False Claims Act is such an important tool in returning money to the treasury, Congress has a duty to the American taxpayers to make necessary changes to the Act that will further help maximize the Government's recovery.

However, Congress also has a duty to the taxpayers to ensure that the companies that employ them, the hospitals that that provide them with healthcare, and the charities and non-profits that contribute to their communities are not overly burdened by the risk of being entrapped by an illegitimate False Claims Act case.

In other words, the goal of maximizing recoveries under the Act must be balanced with the interests of those who legitimately receive money from the federal government.

Another balance must also be struck. That is the balance between encouraging prompt whistleblowing while at the same time discouraging claims that do not help the Government protect against fraud. I am concerned that the bill we are considering today abandons that balance.

No one doubts the tremendous importance whistleblowers have been to the success of the False Claims Act. However, I am skeptical that some of the provisions contained in H.R. 4854 go too far in the name of encouraging whistleblowers to file False Claims Act cases.

I hope that through today's hearing we can get some specific answers as to whether all of the changes contained in H.R. 4854 are necessary and, if so, why. For instance:

- Why do we need to allow federal government employees, who already have a duty to report fraud, to serve as False Claims Act plaintiffs?

- Why do False Claims Act cases need the longest federal civil statute of limitations on the books, longer than the limitations period for RICO or Sherman Act cases?

- Why do we need to give private plaintiffs leeway to bring cases based on information that has already been publicly disclosed?

- Why do private plaintiffs need a lower standard of proof than the United States is subject to under Federal Rule of Civil Procedure 9(b)?

Ultimately, the question that must be answered is what types of fraud are not able to be caught under the False Claims Act as currently written?

If we can identify fraud against the government that the law is currently unable to address, obviously we should amend the law as necessary to close the gaps. But the Act has been hugely successful. And, this success calls into question the need for reform. Especially, reform as sweeping as is encompassed in H.R. 4854.

The False Claims Act is an important statue, but it cannot become an all-purpose federal anti-fraud statute. So while I am open to considering reforms to the Act, those reforms must continue to keep the balance between maximizing return to the Treasury and ensuring that innocent people that do business

with the federal government are not burdened with frivolous litigation.

I look forward to the witnesses' testimony and hope that they can answer some of the questions I have raised.

I yield back the balance of my time.

Mr. CANNON. Thank you, Mr. Chairman.

Mr. BERMAN. I will now yield to myself for an opening statement.

The False Claims Act represents one of Congress' great success stories. As fraud by defense contractors ran rampant during the Civil War, President Lincoln implored Congress to pass legislation that would recruit citizen soldiers to help uncover schemes that were harming the war effort. My recollection was the Union Army was buying barrels filled with what they thought were ammunition, and when they opened the barrels they were sawdust.

In response to that, Congress passed the False Claims Act of 1863. The Act created incentives for private individuals—referred to sometimes as relators—to report false claims and fraudulent activity. It also allows private parties to sue on behalf of the United States to recover money lost to fraud. If the Government investigates and finds merits to a relator's allegations, it may join the action and take control of the lawsuit, bringing to bear the Government's resources.

The False Claims Act has been hugely successful since its passage, though not without some bumps along the road. Amendments made to the Act in the 1940's gutted key parts of the law, making it virtually toothless. After 4 decades of relative dormancy in which the law was barely used, Senator Charles Grassley and I worked together to pass amendments that restored incentives for whistleblowers and clarified that the law was intended to reach all types of fraud on the Government regardless of the form of the transaction.

The 1986 amendments provided a host of new tools for the Government and private citizens to utilize in order to make the law an effective tool against fraud once more. Since these changes were made, the False Claims Act has recovered over $20 billion of taxpayer money that otherwise would have been lost to fraud. Government funds spent on the pursuit of the False Claims Act cases have proven to be money well spent.

A recent study found that for every dollar invested in healthcare-related False Claims Act enforcement, the Federal Government receives $15 in return. I suspect that this is still a gross underestimate because though it is impossible to measure, the money saved through the deterrence as a result of this law is almost assuredly much greater. If construed to Congress' original intent, the False Claims Act could be bringing in many billions of additional dollars in recoveries from those who have cheated at the expense of the taxpayer.

Unfortunately, over the last several years, a series of judicial decisions have severely weakened key provisions of the False Claims Act and narrowed its application. These courts have misconstrued our intent even in clear language in the law and legislative history, in a manner that leaves entire categories of fraud outside the reach of the law.

For example, courts have thrown out cases in which the Government has administered Government programs and expended its funds through contractors and other agents as opposed to direct expenditure. Many courts have barred suits by whistleblowers who are insiders with key details of fraudulent schemes because while they know the key details, they cannot plead specific details of the

billing documentation such as the dates and identification numbers of invoices—information ordinarily sought and obtained in discovery.

Finally, due to procedural requirements and an oversight in our original drafting, the Department of Justice has not employed the civil investigative demand authority as hoped.

The amendments proposed in this legislation will remove these debilitating qualifications and clarify that the Act is intended to reach all types of fraud, without qualification, leading to Government losses. The bill would apply these amendments to all future cases, as well as all cases that are pending in the courts on the date the amendments become law.

The most critical provisions of the legislation will clarify that the Act covers fraud on Government programs even when the Government uses agents or other third parties to administer a program or contract. For example, when a third party administers a program like Medicare Part D, false claims against funds in that program are covered even though the claims may not be presented to a fiscal Government employee, but rather the intermediary.

The bill will clarify that the Government's new or amended complaint in a *qui tam* action relates back to the original *qui tam* complaint to the same extent it would relate back if the Government had filed the original complaint. This would ensure that when a case is filed near the end of the statute of limitations, the Government still can conduct a thorough evaluation of whether or not to join a relator's case, and when they join, they join as though they filed with the relator on the first day of the case.

We also clarify that plaintiffs do not need to have access to individual claims data or documents to bring a False Claims Act case. As I noted earlier, in many cases judges have required relators to provide things such as alleged false invoices or phony billing documents, information that is available only to a handful of employees in the company's billing department and generally out of reach of most whistleblowers until the discovery process.

The bill would also amend the Act to return the public disclosure bar to its original intent—a shield for the Government, not a jurisdictional shield for defendants. The public disclosure bar is meant to keep the Government from losing a share of a False Claims Act recovery to a parasitic claim filed by a relator only with information that was available to the public. In other words, it is designed to stop the parasitic lawsuit, not to provide a basis for the defendant to escape without responsibility for the fraud that he or she has committed.

We would also amend and clarify that Act to know how the Act's chief investigative tool, the civil investigative demand, may be used to investigate violations of the Act.

And finally, the bill clarifies how the Act applied to Federal employees who discover fraud during the course of their employment by providing the Government authority to move to dismiss the action of any Federal employee who brings a *qui tam* action without first having provided the Government fair notice and opportunity to pursue such wrongdoing through its own false claims action or other appropriate remedy.

I have heard concerns about this provision allowing Government employees to "enrich themselves by just doing their jobs." That is not what this provision does. This provision is a safeguard, a backstop if you will, for situations in which a Government employee identifies fraud, tries to get his supervisor, the inspector general of his agency, or even the attorney general to act on it, and his concerns are ignored. Only then after meeting those standards may he file a *qui tam* suit on his own, and even then the Government may move to dismiss it.

When Senator Grassley and I worked on the 1986 amendments, we were joined by legislators on both sides of the aisle. The 2 decades since have not changed much. The bill we are considering today was introduced with my friend and colleague, the gentleman from Wisconsin, and the former Chairman of the Judiciary Committee, and the Judiciary Committee in the other body has reported similar legislation introduced by Senators Grassley, Leahy, Durbin and Specter.

These coalitions illustrate that the fight against fraud is neither a partisan nor political issue. It is about protecting taxpayer funds judiciously and protecting an approach to doing so that has proven very successful.

I look forward to hearing the testimony of the witnesses. I apologize for the length of this opening statement, but I did want to at least run through the key procedural changes in this bill.

[The text of the bill, H.R. 4854, follows:]

I

110TH CONGRESS
1ST SESSION

H. R. 4854

To amend the provisions of title 31, United States Code, relating to false claims to clarify and make technical amendments to those provisions, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 19, 2007

Mr. BERMAN (for himself and Mr. SENSENBRENNER) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend the provisions of title 31, United States Code, relating to false claims to clarify and make technical amendments to those provisions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "False Claims Act Correction Act of 2007".

SEC. 2. LIABILITY FOR FALSE CLAIMS.

Section 3729 of title 31, United States Code, is amended to read as follows:

"§ 3729. False claims

"(a) LIABILITY FOR CERTAIN ACTS.—

"(1) IN GENERAL.—Any person who—

"(A) knowingly presents, or causes to be presented for payment or approval a false or fraudulent claim for Government money or property,

"(B) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim for Government money or property paid or approved,

"(C) has possession, custody, or control of Government money or property and, intending to—

"(i) defraud the Government,

"(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,

"(D) 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,

"(E) 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,

"(F) 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

"(G) conspires to commit any violation set forth in any of subparagraphs (A) through (F),

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government or its administrative beneficiary sustains because of the act of that person, subject to paragraphs (2) and (3).

"(2) LESSER PENALTY IF DEFENDANT COOPERATES WITH INVESTIGATION.—In an action brought for a violation under paragraph (1), the court may assess not less than 2 times the amount of damages which the Government or its administrative beneficiary sustains because of the act of the person committing the violation if the court finds that—

"(A) such person provided to those officials of the United States who are responsible for investigating false claims violations, all information known to the person about the violation within 30 days after the date on which the person first obtained the information;

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

"(C) at the time such person provided to the United States the information about the violation under subparagraph (A), no criminal prosecution, civil action, or administrative action had commenced with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation.

"(3) ASSESSMENT OF COSTS.—A person violating paragraph (1) shall, in addition to a penalty or damages assessed under paragraph (1) or (2), be liable to the United States Government for the costs of a civil action brought to recover such penalty or damages.

"(b) DEFINITIONS.—For purposes of this section—

"(1) the terms 'known', '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;

"(2) the term 'Government money or property' means—

"(A) money or property belonging to the United States Government;

"(B) money or property that—

"(i) the United States Government provides or has provided to a contractor, grantee, agent, or other recipient, or for which the United States Government will reimburse a contractor, grantee, agent, or other recipient; and

"(ii) is to be spent or used on the Government's behalf or to advance a Government program; and

"(C) money or property that the United States holds in trust or administers for any administrative beneficiary;

"(3) the term 'claim' includes any request or demand, whether under a contract or otherwise, for Government money or property; and

"(4) the term 'administrative beneficiary' means any entity, including any governmental or quasi-governmental entity, on whose behalf the United States Government, alone or with others, serves as custodian or trustee of money or property owned by that entity.

"(c) STATUTORY CAUSE OF ACTION.—Liability under this section is a statutory cause of action all elements of which are set forth in this section. No proof of any additional element of common law fraud or other cause of action is implied or required for liability to exist for a violation of these provisions.

"(d) EXEMPTION FROM DISCLOSURE.—Any information that a person provides pursuant to subparagraphs (A) through (C) of subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

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

SEC. 3. CIVIL ACTIONS FOR FALSE CLAIMS.

(a) ACTIONS BY PRIVATE PERSONS GENERALLY.—Section 3730(b) of title 31, United States Code, is amended—

(1) in paragraph (1), by striking the last sentence and inserting the following: "The action may be dismissed only with the consent of the court and the Attorney General.";

(2) in paragraph (2), by inserting after the second sentence the following: "In the absence of a showing of extraordinary need, the written disclosure of any material evidence and information, and any other attorney work product, that the person bringing the action provides to the Government shall not be subject to discovery.";

(3) in paragraph (4), by striking subparagraph (B) and inserting the following:

"(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, and, within 45 days after the Government provides such notice, shall either—

"(i) move to dismiss the action without prejudice, or

"(ii) notify the court of the person's intention to proceed with the action and move the court to unseal the complaint, and any amendments thereto, so as to permit service on the defendant and litigation of the action in a public forum.

A person who elects to proceed with the action under subparagraph (B)(ii) shall serve the complaint within 120 days after the person's complaint is unsealed under such subparagraph."; and

(4) by amending paragraph (5) to read as follows:

"(5) When a person brings an action under this subsection, no person other than the Government may join or intervene in the action, except with the consent of the person who brought the action. In addition, when a person brings an action that is pled in accordance with this subsection and section 3731(e), no other person may bring a separate action under this subsection based on the facts underlying a cause of action in the pending action.".

(b) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—Section 3730(c)(5) of title 31, United States Code, is amended by striking the second sentence and inserting the following: "An alternate remedy includes—

"(A) anything of value received by the Government from the defendant, whether funds, credits, or in-kind goods or services, in exchange for an agreement by the Government either to release claims brought in, or to decline to intervene in or investigate the action initiated under subsection (b); and

"(B) anything of value received by the Government based on the claims alleged by the person initiating the action, if that person subsequently prevails on the claims.

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, except that the person initiating the action may not obtain an award calculated on more than the total amount of damages, plus any fines or penalties, that could be recovered by the United States under section 3729(a).".

(c) AWARD TO QUI TAM PLAINTIFF.—Section 3730(d) of title 31, United States Code, is amended—

(1) in paragraph (1)—

(A) in the first sentence, by inserting "an award of" after "receive";

(B) by striking the second and third sentences and inserting the following: "Any payment to a person under this paragraph or under paragraph (2) or (3) shall be made from the proceeds, and shall accrue interest, at the underpayment rate under section 6621 of the Internal Revenue Code of 1986, beginning 30 days after the date the proceeds are paid to the United States, and continuing until payment is made to the person by the United States."; and

(C) in the last sentence, by striking "necessarily";

(2) in paragraph (2)—

(A) in the second sentence, by striking "and shall be paid out of such proceeds"; and

(B) in the third sentence, by striking "necessarily"; and

(3) by amending paragraph (3) to read as follows:

"(3)(A) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who either—

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

"(ii) derived his or her knowledge of 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, within the meaning of subsection (e)(4)(A), or that it disclosed privately to the person bringing the action in the course of its investigation into potential violations of section 3729,

then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action that 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. The court shall direct the defendant to pay any such person an amount for reasonable expenses that the court finds to have been incurred, plus reasonable attorneys' fees and costs.

"(B) 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.".

(d) CERTAIN ACTIONS BARRED.—Paragraph (4) of section 3730(e) of title 31, United States Code, is amended to read as follows:

"(4)(A) Upon timely motion of the Attorney General of the United States, a court shall dismiss an action or claim brought by a person under subsection (b) if the allegations relating to all essential elements of liability of the action or claim are based exclusively on the public disclosure of allegations or transactions in a Federal criminal, civil, or administrative hearing, in a congressional, Federal administrative, or Government Accountability Office report, hearing, audit, or investigation, or from the news media.

"(B) For purposes of this paragraph, a 'public disclosure' includes only disclosures that are made on the public record or have otherwise been disseminated broadly to the general public. An action or claim is 'based on' a public disclosure only if the person bringing the action derived the person's knowledge of all essential elements of liability of the action or claim alleged in the complaint from the public disclosure. The person bringing the action does not create a public disclosure by obtaining information from a request for information made under section 552 of title 5 or from exchanges of information with law enforcement and other Government employees if such information does not otherwise qualify as publicly disclosed under this paragraph.".

(e) RELIEF FROM RETALIATORY ACTIONS.—Subsection (h) of section 3730 of title 31, United States Code, is amended to read as follows:

"(h) RELIEF FROM RETALIATORY ACTION.—Any person who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms or conditions of employment, or is materially hindered in obtaining new employment or other business opportunities, by any other person because of lawful acts done by the person discriminated against or others associated with that person—

"(1) in furtherance of an actual or potential action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, or

"(2) in furtherance of other efforts to stop one or more violations of section 3729,

shall be entitled to all relief necessary to make the person whole. Such relief shall include reinstatement with the same seniority status such person would have had but for the discrimination, 2 times the amount of back pay or business loss, interest on the back pay or business loss, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.".

(f) RELIEF TO ADMINISTRATIVE BENEFICIARIES.—Section 3730 of title 31, United States Code, is amended by adding at the end the following new subsection:

"(i) DAMAGES COLLECTED FOR FINANCIAL LOSES SUFFERED BY ADMINISTRATIVE BENEFICIARIES.—After paying any awards due one or more persons who brought an action under subsection (b), the Government shall pay from the proceeds of the action to any administrative beneficiary, as defined in section 3729(b), all amounts that the Government has collected in the action for financial losses suffered by such administrative beneficiary. Any remaining proceeds collected by the Government shall be treated in the same manner as proceeds collected by the Government for direct losses the Government suffers from violations of section 3729. Nothing in section 3729 or this section precludes administrative beneficiaries from pursuing any alternate remedies available to them for losses or other harm suffered for them that are not pursued or recovered in an action under this section, except that if such alternate remedy proceedings are initiated after a person has initiated an action under subsection (b), such person shall be entitled to have such alternative remedies considered in determining any award in the action under subsection (b) to the same extent that such person would be entitled under subsection (c)(5) with respect to any alternate remedy pursued by the Government.".

SEC. 4. FALSE CLAIMS PROCEDURE.

(a) STATUTE OF LIMITATIONS; INTERVENTION BY THE GOVERNMENT.—Subsection (b) of section 3731 of title 31, United States Code, is amended to read as follows:

"(b) STATUTE OF LIMITATIONS; INTERVENTION BY THE GOVERNMENT.—

"(1) STATUTE OF LIMITATIONS.—A civil action under section 3730 (a), (b), or (h) may not be brought more than 10 years after the date on which the violation of section 3729 or 3730(h) is committed.

"(2) INTERVENTION.—If the Government elects to intervene and proceed with the action under section 3730, the Government may file its own complaint, or amend the complaint of a person who brought the action under section 3730(b), to clarify or add detail to the claims in which it is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For purposes of paragraph (1), 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 Government's claim arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the person's prior complaint.".

(b) STANDARD OF PROOF.—Section 3731(c) of title 31, United States Code, is amended—

(1) by striking "(c) In" and inserting "(c) STANDARD OF PROOF.—In"; and

(2) by striking "United States" and inserting "plaintiff".

(c) NOTICE OF CLAIMS; VOID CONTRACTS, AGREEMENTS, AND CONDITIONS OF EMPLOYMENT.—Section 3731 of title 31, United States Code, is amended by adding at the end the following new subsections:

"(e) NOTICE OF CLAIMS.—In pleading an action brought under section 3730(b), a person shall not be required to identify specific 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.

"(f) VOID CONTRACT, AGREEMENTS, AND CONDITIONS OF EMPLOYMENT.—

"(1) IN GENERAL.—Any contract, private agreement, or private term or condition of employment that has the purpose or effect of limiting or circumventing the rights of a person to take otherwise lawful steps to initiate, prosecute, or support an action under section 3730, or to limit or circumvent the rights or remedies provided to persons bringing actions under section 3730(b) and other

cooperating persons under section 3729 shall be void to the full extent of such purpose or effect.

"(2) EXCEPTION.—Paragraph (1) shall not preclude a contract or private agreement that is entered into—

"(A) with the United States and a person bringing an action under section 3730(b) who would be affected by such contract or agreement specifically to settle claims of the United States and the person under section 3730; or

"(B) specifically to settle any discrimination claim under section 3730(h) of a person affected by such contract or agreement.".

(d) CONFORMING AMENDMENTS.—Section 3731 of title 31, United States Code, is amended—

(1) in subsection (a), by striking "(a) A subpena" and inserting "(a) SERVICE OF SUBPOENAS.—A subpoena"; and

(2) in subsection (d), by striking "(d) Notwithstanding" and inserting "(d) ESTOPPEL.—Notwithstanding".

SEC. 5. FALSE CLAIMS JURISDICTION.

Section 3732 of title 31, United States Code, is amended by adding at the end the following new subsection:

"(c) SERVICE ON STATE OR LOCAL AUTHORITIES.—With respect to any State or local government that is named as a co-plaintiff with the United States in an action brought under subsection (b), a seal on the action ordered by the court under section 3730(b) shall not preclude the Government or the person bringing the action from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action on the law enforcement authorities that are authorized under the law of that State or local government to investigate and prosecute such actions on behalf of such governments.".

SEC. 6. CIVIL INVESTIGATIVE DEMANDS.

(a) CIVIL INVESTIGATIVE DEMANDS.—Section 3733(a)(1) of title 31, United State Code, is amended—

(1) in the matter preceding subparagraph (A), by inserting ", or a designee (for the purposes of this section)," after "Whenever the Attorney General"; and

(2) in the matter following subparagraph (D), by—

(A) striking "may not delegate" and inserting "may delegate"; and

(B) adding at the end the following: "Any information obtained by the Attorney General or a designee of the Attorney General under this section may be shared with any a person bringing an action under section 3730(b) if the Attorney General or the designee determines that it is necessary as part of any false claims law investigation.".

(b) PROCEDURES.—Section 3733(i)(3) of title 31, United States Code, is amended to read as follows:

"(3) USE OF MATERIAL, ANSWERS, OR TRANSCRIPTS IN FALSE CLAIMS ACTIONS AND OTHER PROCEEDINGS.—Whenever any attorney of the Department of Justice has been designated to handle any false claims law investigation or proceeding, or any other administrative, civil, or criminal investigation, 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 investigation, case, or proceeding as such attorney determines to be required. Upon the completion of any such investigation, 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 a court, grand jury, or agency through introduction into the record of such case or proceeding.".

(c) DEFINITIONS.—Section 3733(l) of title 31, United States Code, is amended—

(1) in paragraph (6), by striking "and" after the semicolon;

(2) in paragraph (7), by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following:

"(8) the term 'official use' means all lawful, reasonable uses in furtherance of an investigation, case, or proceeding, such as disclosures in connection with interviews of fact witnesses, settlement discussions, coordination of an investigation with a State Medicaid Fraud Control Unit or other government personnel, consultation with experts, and use in court pleadings and hearings.".

SEC. 7. GOVERNMENT RIGHT TO DISMISS CERTAIN ACTIONS.

Section 3730(b) of title 31, United States Code, is amended by adding at the end the following:

"(6)(A) Not later than 60 days after the date of service under paragraph (2), the Government may move to dismiss from the action the person bringing the action if the person is an employee of the Federal Government and—

"(i) all the necessary and specific material allegations contained in such action were derived from an open and active fraud investigation by the executive branch of the Government; or

"(ii) subject to subparagraph (B), 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.

"(B) In the case of a person to whom subparagraph (A)(ii) applies—

"(i) if the employing agency has an Inspector General and the person, before bringing the action—

"(I) disclosed in writing to the Inspector General substantially all material evidence and information that relates to the alleged violation that the person possessed, and

"(II) notified in writing the person's supervisor and the Attorney General of the disclosure under subclause (I), or

"(ii) if the employing agency does not have an Inspector General and the person, before bringing the action—

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

"(II) notified in writing the person's supervisor of the disclosure under subclause (I),

the motion under subparagraph (A) may be brought only after a period of 12 months (and any extension under subparagraph (C)) has elapsed since the disclosure of information and notification under clause (i) or (ii) was made, and only if the Attorney General has filed an action under this section based on such information.

"(C) Before the end of the 12-month period described under subparagraph (B), and upon notice to the person who has disclosed information and provided notice under subparagraph (B)(i) or (ii), the Attorney General may file a motion seeking an extension of that 12-month period. The court may extend that 12-month period for an additional period of not more than 12 months upon a showing by the Government that the additional period is necessary for the Government to decide whether or not to file an action under this section based on the information. Any such motion may be filed in camera and may be supported by affidavits or other submissions in camera.

"(D) For purposes of subparagraph (B), 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.

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

"(F) Any person bringing an action under paragraph (1) 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 papers filed in support or opposition of such motion may 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.

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

"(H) Not later than 6 months after the date of the enactment of this paragraph, and every 6 months thereafter, the Attorney General shall submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report on—

"(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 the civil actions in which such motions were filed.".

SEC. 8. EFFECTIVE DATE.

The amendments made by this Act shall take effect on the date of the enactment of this Act and shall apply to any case pending on, or filed on or after, that date.

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Mr. BERMAN. I recognize the Ranking Member, Mr. Coble, for his opening statement.

Mr. COBLE. Thank you, Mr. Chairman.

Mr. Chairman, about 600 years ago the British admitted the *qui tam* action in which citizens were encouraged to expose fraudulent acts perpetrated at the expense of the crown In return for their assistance, the participating citizens were rewarded. The rationale behind this arrangement was that the crown could not police every attempt to defraud it of money. Compensation paid to whistleblowers was more than offset by recovered revenue, fines and a deterrence factor that might dissuade future graft or greed.

This fundamental attribute of the *qui tam* action survives in our legal system today. Its use has waxed and waned for more than 200 years of American jurisprudence, but the *qui tam* concept remains a prominent feature of the False Claims Act. Written in 1863, the FCA is still used to prosecute theft of Federal resources.

The Act was amended, as you pointed out, Mr. Chairman, in 1986 in response to defense contractor fraud that was prevalent at the time. Mr. Berman, the distinguished Chairman of this Subcommittee, wrote the House bill and he is the author of the legislation that is the subject of our hearing this morning.

None of us is indifferent to the theft of public resources. Food stamps, defense, Medicare, Medicaid, education and more—no area of Federal spending is immune to theft. We must be vigilant and we must give the Department of Justice the resources it needs to combat fraud.

But there is always a flip-side to every legislative coin. Well-intentioned critics of H.R. 4854 and a bill pending in the other body believe that we may be overreaching. These critics argue that the Government, not the whistleblowers, is largely responsible for recovery of public resources that are fraudulently obtained.

Moreover, some believe that the FCA as written is too often used as a bludgeon against small businesses and other entities that deal with the Federal Government. Opponents of these *qui tam* actions—and by the way, Mr. Chairman, am I pronouncing that correctly? Is it *qui tam* or *qui tam*?

Mr. BERMAN. Qui tam.

Mr. COBLE. Qui tam. I don't want to violate the rules of grammar here.

Opponents of these actions say these organizations do business in an above-board manner. They are guilty of committing innocent paperwork mistakes, it is alleged. That, or they simply lack the resources to defend themselves against questionable *qui tam* actions, resulting in forced settlements.

In conclusion, Mr. Chairman, I approach today's hearing with an open mind. If criminals are defrauding the Federal Government with greater frequency and the FCA is in need of an update, let's

figure out how to change the law to increase legitimate prosecutions. I think we ought to be careful in doing so, Mr. Chairman, so that it does not dispense collateral damage.

I thank you, Mr. Chairman, for having called this hearing. I am looking forward to the testimony. I yield back.

Mr. BERMAN. Thank you, Mr. Coble. I look forward to working with you on the concerns that you expressed.

I now am pleased to recognize the Chair of the Commercial and Administrative Law Subcommittee, one of the two Subcommittees holding this hearing, the gentlelady from California, Ms. Sánchez.

Ms. SÁNCHEZ. Thank you, Mr. Chairman.

We are here today to hear testimony from several witnesses on H.R. 4854, the "False Claims Act Corrections Act of 2007." This legislation introduced by Chairman Berman and Representative Sensenbrenner would amend the False Claims Act, which was enacted in response to complaints about fraud and corruption against the United States government during the Civil War.

The central purpose of the False Claims Act has been to enlist private citizens in combating fraud against the United States. The Act's *qui tam* provision provides a clear process to assist and encourage private citizens not only to report fraud against the United States, but also to participate in investigating and prosecuting those who steal from the Federal Government.

Since 1986, filings under the False Claims Act have led to recovery for the United States government of over $20 billion in taxpayer funds. Such a success should be commended. However, over the course of the Act's history, court decisions have led to conflicting interpretations that have limited the reach of the Act, discouraged *qui tam* relators from filing suits under the Act, and left billions of dollars vulnerable to fraud.

The various interpretations, in fact, were noted earlier this year when an Arkansas Federal court invited Congress to take legislative action to clarify the False Claims Act, 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."

H.R. 4854 is a legislative response to the court's plea for clarification of many issues and resolves the split among the Federal circuits. The bill provides that False Claims Act liability protects all Federal funds. Among other things, the legislation defines what are recoverable damages and strengthens anti-retaliation protections.

Finally, H.R. 4854 establishes a statute of limitations period and revitalizes the Government's investigative powers under the Act.

At a time when billions of American taxpayer dollars are being poured into the hands of contractors in Iraq, this legislation is particularly timely. Often, fraud cannot be discovered unless a whistleblower comes forward, and this bill makes sure that whistleblowers have better tools to hold fraudulent individuals and companies accountable.

Accordingly, I thank Chairman Berman and Representative Sensenbrenner for their leadership on this issue, and I look forward to hearing the testimony from our witnesses today.

With that, I yield back the balance of my time.

[The prepared statement of Ms. Sánchez follows:]

PREPARED STATEMENT OF THE HONORABLE LINDA T. SÁNCHEZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND CHAIRWOMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

We are here today to hear testimony from several witnesses on H.R. 4854, the "False Claims Act Corrections Act of 2007." This legislation, introduced by Chairman Berman and Representative Sensenbrenner, would amend the False Claims Act, which was enacted in response to complaints about fraud and corruption against the United States government during the Civil War.

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I thank Chairman Berman and Representative Sensenbrenner for their leadership on this issue and look forward to hearing the testimony from our witnesses.

Mr. BERMAN. I thank the gentlelady.

I am now pleased to recognize the Ranking Member of the full Judiciary Committee, Lamar Smith, the gentleman from Texas, for his opening statement.

Mr. SMITH. Thank you, Mr. Chairman.

False claims actions have a distinguished legal pedigree. They evolved in England during the 13th century as a way to help the crown prosecute fraud perpetrated against the government. Like its modern-day American equivalent, these actions of old empowered an ordinary citizen to sue a transgressor on behalf of the government and himself. If a transgressor was penalized for his misconduct, the whistleblowing citizen kept a portion of the fine.

During the Civil War, many companies supplying the Union Army with goods and services indulged in fraudulent conduct. This compelled Congress to create the first False Claims Act in 1863. Defense fraud motivated Congress to revisit the False Claims Act again in 1986. Amendments adopted that year encouraged greater use of the law. Since then, the Government has recovered more than $20 billion under the Act.

The bill before us, H.R. 4854, represents the largest potential change to the Act in more than 20 years. It eliminates the requirement that a false claim be presented directly to a member of the Government. It revises the ban against retaliatory measures by including material hindering of a complainant in obtaining new employment. And it expands the Act's statute of limitations from 6 years to 10 years.

Why should we amend the False Claims Act once more? While the statute applies to a broad spectrum of industry fraud in housing, defense and food stamp programs, many proponents argue that healthcare fraud has become a major problem. Most recently, the Washington Post reported that healthcare fraud cost Americans $60 billion annually.

Are stories such as these a reflection of a trend, or are they anecdotal? That is one of the main issues we need to explore today. Are fraudulent claims on the rise? If so, are the provisions of H.R. 4854 necessary to combat this upsurge in commercial crime? Some critics of the House and Senate bills believe the legislation constitutes an overreaction. They maintain the Government is better suited to policing misconduct and bringing transgressors to justice.

To these critics, the False Claims Act is counterproductive and has devolved into a lottery for plaintiffs attorneys who can't resist the lure of a big payoff. If the Department of Justice intervenes in only 20 percent of false claims cases, as The Wall Street Journal points out, doesn't that suggest the other 80 percent might be meritless? And why since 1986 have these cases in which the Government did not participate generated less than 2 percent of all recoveries under the Act?

Other detractors argue that the majority of defendants in false claims cases do not fit the stereotype of a venal corporation. Rather, they are small businesses, local governments and nonprofit institutions. Strapped for legal resources, they settle questionable cases rather than risk bankruptcy.

Similarly, many individuals who do business with the Government believe that advocates of the False Claims Act confuse fraud with honest mistakes. For example, if a contractor checks a box attesting to his familiarity with the rules and regulations of the Medicare program, which reportedly exceed 100,000 pages, but subsequently fails to comply with one of these rules, has he really committed fraud?

Mr. Chairman, I support whistleblower laws that help the Government uncover fraud. If there is a demonstrable need to pass H.R. 4854, we should support it. But we should not support legislation that does little to combat fraud, while placing additional burdens on the backs of businesses, local governments and nonprofit institutions. These are the issues that I think this Committee and other Committees should explore.

With that, Mr. Chairman, I yield back the balance of my time.

Mr. BERMAN. I thank the gentleman.

Now, I am pleased to yield to the Chairman of the Judiciary Committee, my friend Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

I am going to just put my statement in the record. As usual, you remind me of my professors at Wayne University.

Mr. BERMAN. Who does?

Mr. CONYERS. You do, because you cover everything in such detail that there is nothing left for me to add, except that I am glad we cleared up the Latin pronunciation.

Mr. BERMAN. Are those the ones you thought of as pedantic and boring? [Laughter.]

Mr. CONYERS. Well, I will save those descriptions for some other part of your opening statement.

But I did take a Latin course that if it didn't do anything else, it helped me pronounce words that began with "qui" in Latin.

This is an important hearing because we are really talking about whistleblowers. Of course, when we get disturbed about people cheating the Government, the focus becomes some poor little bloke that is getting unemployment compensation for a few weeks more than he was eligible, or something like that. But this is the beginning of a subject that goes into a far deeper and more important dimension of the Government being treated fairly, which is really all of us being treated fairly as citizens and taxpayers.

So today, we are looking at the big guys. I have another area that we will be talking with the Department of Justice about when the attorney general comes next month. One of the issues are these deferred prosecution practices in which we have huge settlements that are being arrived at to avoid prosecution. There is a lot to learn from this practice. By the way, I say to my good friend, the Ranking Member of the full Committee, Lamar, guess who some of the biggest violators are? They are people in the healthcare industry, the pharmaceuticals—Tenet, $900 million; HCA, $731 million; Serono, $567 million; TAP Pharmaceuticals, $559 million; Schering-Plough; and Abbott Labs.

For all of us, we are worried about the healthcare problem, and these are the greatest—between oil and the pharmaceuticals—areas where most of the largest profit-taking in this capitalist system of ours is taking place. And look who the biggest violators are?

So, this raises some very interesting questions. I close with the IRS. We are not collecting from the big people anymore. I mean, IRS reviews of the big people's returns, all the time we are lowering their taxes over the last 2 decades. And so if I sound slightly disturbed about it, you got that right.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, CHAIRMAN, COMMITTEE ON THE JUDICIARY, MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY, AND MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

Thank you Mr. and Ms. Chairman for this joint hearing today.

This bill takes, head on, the issue of fraud against the government. The proposed changes to the False Claims Act would provide a better mechanism for the public to stand up and speak out when they see fraud against the government.

It would provide better incentives and remove substantial disincentives such as the fear of retaliation.

The aim of these amendments to the False Claim Act are the same as when the law was first enacted in 1863 to enable citizens to help in the fight against the misappropriation of government fund provided through the taxpayer.

I fully support my friends Mr. Berman and Mr. Sensenbrenner in spearheading this effort to strengthen the national ability to fight fraud and recover damages particularly in the subcontractor context.

The Rockwell, Totten, and Custer Battles cases created a situation which discouraged citizens from coming forward, effectively exempted a whole range of subcontractors and allowed defendants to overuse the public disclosure bar as a defense. It's time to revisit this issue.

The criminals who commit this type of fraud are not just cheating the government, they are cheating each and every one of us—taking money out of the pockets of taxpayers.

More over, by redirecting government funds, this impacts so many good programs and priories that get shortchanged financially because of limited resources. The False Claims Act has rooted out $20 billion in fraud since 1986, including $5 billion since 2005.

In a time such as now, we have to be more vigilant than ever that every dollar is used efficiently and effectively for the purpose in which it was intended.

This nation is in the midst of a double punch, no, a triple punch, the housing crisis, astronomical gas prices which have led to high food prices and a general economic slump. We have to make the taxpayers dollars go farther and do more. We can not tolerate theft, not now or ever. This bill puts more eyes and ears toward ferreting out and shining the light on taxpayer money that would have been lost to fraud.

I am dedicated to making sure that in attacking fraud, we do not unintentionally harm our nations universities and research institutions or our hospitals.

The research institutions have legitimate concerns that I will be working with my colleagues on to find a compromise that targets the intended parties and not innocent intermediaries. I am also dedicate to ensuring that this bill does not encourage unfounded claims in its loosening of the standards for instituting and maintaining lawsuits and that retroactivity of the provision is done in a equitable manner for pending cases currently under seal.

I look forward to hearing from our witnesses today as we consider this important step toward better fraud control and deterrence.

Mr. BERMAN. Thank you, Chairman Conyers.

Now, I will introduce our distinguished panel of witnesses.

Our first witness today is Mr. Albert Campbell, who is with us from Winter Springs, FL. From 1973 to 1976, Mr. Campbell served as a crew chief on CH-47 Chinook helicopters as part of the 101st Airborne Division. He earned a bachelor of science in business administration from Austin Peay in Clarksville, Tennessee.

In 1978, Mr. Campbell began a 21-year career in the defense industry as a financial analyst for the Honeywell Corporation, working on programs that produced cryptic communications equipment. In 1981, Mr. Campbell started work as a financial analyst for the Martin Marietta Corporation, which later became Lockheed Martin. There, he served as a senior analyst for the Patriot missile launcher programs, supervisor of cost control for the Apache helicopter TADS/PNVS program, and chief of cost control for the LANTIRN program, the latter of which was the subject of a False Claims Act action filed in 1995.

Mr. Campbell now serves on the board of directors of Taxpayers Against Fraud and runs a family real estate business with his wife, Kimberly, in Central Florida.

Shelley Slade is a partner at Vogel, Slade and Goldstein in Washington, DC, where she maintains a nationwide practice representing *qui tam* plaintiffs under the False Claims Act. She earned her undergraduate degree at Princeton University and her J.D. from Stanford.

From 1990 to 1997, Ms. Slade investigated and litigated fraud matters in the Civil Fraud Section of the Commercial Litigation Branch of the Justice Department, the office which handles the

most significant and large-scale False Claims Act cases in the country.

As a trial lawyer attorney in the Commercial Litigation Branch, Ms. Slade specialized in matters involving fraud on the U.S. Department of Defense and fraud involving state and foreign government entities.

Prior to entering private practice in 2000, Ms. Slade was the senior counsel for healthcare fraud in the Civil Division at DOJ, where she coordinated the healthcare fraud enforcement efforts, handled related policy and legislative matters, and instructed Department of Justice attorneys and investigators on the investigation and prosecution of False Claims Act matters.

She speaks regularly at key legal conferences on the False Claims Act and has published a number of articles in the area.

Peter Hutt is a partner at Akin Gump Strauss Hauer and Feld in Washington, DC. He advises clients on a broad range of Federal Government contract issues and has litigated more than a dozen False Claims Act cases, including many *qui tam* matters. He has also litigated cases in Federal courts ranging from securities fraud to constitutional issues, and has conducted numerous internal investigations.

Mr. Hutt is a former chair of the Procurement Fraud Committee of the ABA Section of Public Contract Law and he writes frequently on the False Claims Act. He earned his B.A. from Yale College in 1984 and his J.D. in 1989 from Stanford Law School, where he was the senior articles editor of the Stanford Law Review.

He was a law clerk for Judges William Schwarzer and Vaughn Walker of the U.S. District Court for the Northern District of California.

James Helmer, Jr., is a senior partner and president of Helmer, Martins, Rice and Popham in Cincinnati. Approximately half of his practice involves the representation of employees blowing the whistle on fraudulent Government contractors. He has been trial counsel in over 200 published legal decisions.

Most recently, Mr. Helmer was the lead relator's counsel in *Allison Engine Company v. United States,* and argued the case for the plaintiff at the 6th Circuit and at the Supreme Court. Mr. Helmer testified before this Committee over 20 years ago, the last time we were considering amendments to the False Claims Act, and I am pleased to see him back again today. His False Claims Act cases have returned over $700 million to the taxpayers and have resulted in 13 criminal indictments.

He has written extensively on the False Claims Act and the practice of *qui tam* litigation, including the text False Claims Act Whistleblower Litigation. Mr. Helmer earned his undergraduate degree from Dennison University, law degree from Cincinnati College of Law, where he was editor-in-chief of the Cincinnati Law Review. He began his legal career as a law clerk for the chief judge of the United States District Court for the Southern District of Ohio.

We appreciate all of you being here today. Your entire written statements will be made part of the record. I ask each of you to summarize your testimony in 5 minutes or less. To help stay within that timeframe, there is a light in front of you. When 1 minute

remains on your time, the light will switch from green to yellow, and then red when the 5 minutes are up.

We are glad to have you here, and look forward to hearing your testimony.

Mr. Campbell, why don't you begin?

TESTIMONY OF ALBERT CAMPBELL, WINTER SPRINGS, FL

Mr. CAMPBELL. Good morning, Mr. Chairman, and good morning to the other Members of this Committee.

My name is Al Campbell, and as you know, I am a whistleblower. Now, my task is to help you understand what it is like to be a whistleblower under the False Claims Act, and I am supposed to do it in less than 5 minutes. My previous attempts to do this have taken me about 1 hour, so here we go.

I thought that I would speak metaphorically to you, and that it might help you understand what it is. A whistleblower uses the False Claims Act not as a sword. What a whistleblower uses as a sword is his or her truth. What they use as a shield is their conviction of what they believe.

What we use the False Claims Act for is as a coat of armor. The way that coat of armor is constructed is the Congress of the United States and Senate of the United States passed the False Claims Act, and that False Claims Act was to protect us if we stepped forward and did what we thought was the right thing. As you have pointed out, going all the way back to the Civil War, we have been encouraged to do it.

Now, if you encourage someone to go out into battle and you promise to provide them with the armor they need to be protected, shouldn't that armor be as complete and as defensive as it possibly can? If you have a suit of armor and you knew there was a chink in it, would you suit me up and send me into battle with that chink? Or would you work to try to correct it?

Keep in mind that the Department of Justice does not initiate a False Claims Act, a relator does. The relator is the person who puts himself or herself out on the line initially. Relators do not have deep pockets. Relators for the most part are not lawyers. But relators end up engaged in a battle with companies, whether they are SBAs or whether they are multinational, multi-billion dollar corporations. They have lawyers and they have funds. The Department of Justice has funds. The relator only has the truth that he or she believes.

When I was going through my litigation with a defense contractor, the first thing the defense contractor did was attack my character because that is normally the first thing that they do. The second thing the defense contractor does is seek to prove that if there was any wrongdoing done, I somehow was the person who did it. So our character is continually under attack.

I was one of those relators who ended up having to use the anti-retaliation clause of the False Claims Act because I was retaliated against not by the contractor that I filed the lawsuit against, but I was retaliated by a subsequent contractor because of the fact that that provision, the way it was interpreted by the Federal courts in our district, it said that any subcontractor or any contractor who did anything to retaliate against me was subject to the law.

Now, if it had been ruled a different way, that contractor would have gotten away with having violated the intent of the law by using a loophole. Those loopholes that exist in the False Claims Act are chinks and holes in the armor that you give a whistleblower to fight the battles for you, to fight the battles for the people of the United States, to fight the battle for themselves.

It is not about windfall lotteries. It is about a fight to make sure that the right thing is done. Regardless of how you question a whistleblower's motives or his or her beliefs, at the end of the day what we are trying to do is make sure that if there was in fact a violation, that the violation is corrected. Not that the violation fell through a loophole, not that the whistleblower, who has put on hold his life and his family's life and has risked his reputation to do what he thinks is right and what he believes in—that is not the ultimate goal. The ultimate goal is to correct what is wrong.

So if we close the loopholes, if we fix the armor, the relators will be much better served through this process. If you don't fix the holes in it, you will not only lose the relators who step forward and get shot down, but you will lose those other people who considered becoming a relator, but said, I am not going to step into that with armor that has those kinds of holes in it.

So all I ask you to do is consider the whistleblower. Consider closing the loopholes so that the whistleblower can do what you have asked him to do, and that is help you fight fraud.

Thank you.

[The prepared statement of Mr. Campbell follows:]

PREPARED STATEMENT OF ALBERT D. CAMPBELL

TESTIMONY OF ALBERT D. CAMPBELL BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY

Subcommittee on Courts, the Internet and Intellectual Property and Commercial and Administrative Law

Hearing on H.R. 4854, "The False Claims Act Corrections Act of 2007"

This is my personal statement regarding my experiences as a whistleblower using the False Claims Act.

I originally decided in the summer of 1993 that the actions of the defense contractor I was working for appeared to violate the laws that governed financial reporting on defense acquisitions. I was the Chief of Cost Control for the LANTIRN program at the Lockheed Martin Corporation. This program designed and built the original navigation and targeting pods for high performance fighter aircraft like the F-15E and the F-16.

My primary responsibilities included monitoring and reporting on cost expenditures on a multibillion dollar program that ultimately had domestic and foreign customers. As a result of my position, I was able to observe a pattern

of cost charging that was disproportionate to the amount of work that was being completed on the program.

Initially, I took my analyses of the cost and performance data to my immediate supervisor and ultimately to the program director who was responsible for the entire program. Their first response was to rebuff my analysis as lacking a substantial understanding of what was actually going on with regards to program performance.

During this time, I was the lead cost controller on the largest single profit objective in our division. I had more than 15 years of financial analysis experience on DoD programs, a staff of 30+ analysts and clerks and I was consistently rated outstanding with regards to my job performance. The prospect that I could be so inept at my job was very difficult for me to accept. I assigned some of my senior analysts to perform some very specific analytical exercises designed to either confirm or refute my suspicions.

After completing these exercises and confirming my original beliefs, I went to my manager accompanied by one of my senior analysts. I presented the data to him and was immediately rebuffed. He even stated to my analyst that it

would be suicidal to carry any such information forward to upper management. Over the next several months, I developed a reputation of not being a team player because I became more and more vocal about my feelings regarding the cost charging schemes being used on the program. Even more troubling to me was the fact that the improper charging schemes were being used to price new contracts with the DoD which was causing inflated estimates to be given to support future business thus resulting in defectively priced contracts. These contracts were Foreign Military Sales contracts.

After several months I found myself in a somewhat precarious position. I didn't want to lose my job. But it was becoming increasingly difficult to continue as things were. Because of my position on the program, I also felt that I ran a risk of being included with the people who were intentionally defrauding the government.

Eventually, I reluctantly decided to try and find a resolution outside of the company. The first action I took was to call the DoD hotline established by the government for defense industry employees to call and report perceived instances of fraud waste and abuse. I was connected to an

intake specialist whose job seemed to be to determine if there was any validity to my complaint. After about a half hour conversation of questions and answers, he concluded that based on the contractor involved, and the fact that these were firm fixed priced contracts, he seriously doubted that the government would be interested in pursuing any investigation into my allegations.

At this point in time, I was unaware of the existence of the False Claims Act. I tried with very little success to find a lawyer who could help me, but for months I couldn't even find a lawyer who understood what I was talking about.

Finally, in March of 2005, I serendipitously found a lawyer who was familiar with dealing with fraud against the government. I discussed my situation with him, and he explained the consequences of the actions that I was contemplating, and he explained to me how the False Claims Act could help facilitate those actions. We set up the required meeting with the local US Attorney and representatives from the FBI and the DCIS. We submitted the required disclosure memorandum and I agreed to wear a recording device and to surreptitiously record phone conversations with selected employees of the company.

Because of the unique provisions of the False Claims Act, I was able to procure competent legal council with no significant financial expense to myself. Realizing the enormous cost of trying to litigate against a very large multi-national corporation, it would have been cost-prohibitive for me to have engaged in the litigation that I did against Lockheed-Martin without the Act.

The comprehensive nature of the Act is such that I was even afforded legal protection from a subsequent employer who retaliated against me because they wanted to do business with Lockheed-Martin but were told that they had to get rid of me first. And it highlights the importance of keeping the Act current and relevant in light of the changing environment that vendors operate in when doing business with the government. Not to be overlooked, this subsequent employer ended up being a sub-contractor to Lockheed-Martin. But their actions were every bit as illegal as if Lockheed-Martin had committed them, themselves.

Being a whistleblower is a very isolating endeavor. But whistleblowers are the most effective tool that the government has to combat fraud. I once had a manager tell

me that he would never be concerned about a government auditor because he could talk rings around them.

"They only know what you tell them" was his mantra. And it is very true. It is the courageous and perilous actions of the whistleblower, under the blanket of protection of the False Claims Act, that has returned billions of dollars to the coffers of the U.S. Treasury.

I was fortunate in that my litigation ended favorably for me. But it was not without significant challenges from the contractor. They seek to find loopholes in the Act, and to exploit any perceived rules which favor their position. In my case the contractor actually tried to make a legal argument that even though their contract was with the U.S. Government, because the end user was a foreign country, they should not be prosecuted for making false claims. As I have stated before, they are always looking for ways to circumvent the act. That is why it is critically important to keep the Act current.

I wholeheartedly endorse the Act and would ask that this Congress do everything in its power to keep the Act strong and effective.

Mr. BERMAN. Thank you very much, Mr. Campbell.
Ms. Slade?

TESTIMONY OF SHELLEY R. SLADE, PARTNER, VOGEL, SLADE & GOLDSTEIN, LLP, WASHINGTON, DC

Ms. SLADE. Mr. Chairman of the Committee, Mr. Chairman, Madam Chairwoman, and Members of the Subcommittees, thank you for inviting me to testify on H.R. 4854, the "False Claims Correction Act of 2007." I have handled False Claims Act cases on behalf of the *qui tam* plaintiffs in the United States for 18 years—8 years with a private firm and 10 years with the Department of Justice in Washington, DC.

The *qui tam* bar wholeheartedly supports H.R. 4854. The bill's proposed corrections are badly needed to ensure that the law remains fully effective in an era in which so many Government functions have been outsourced to Government contractors and grantees.

According to 2008 testimony by the U.S. Controller 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.

A handful of large companies are now effectively serving as a shadow government that awards and oversees contracts, disburses Federal funds, and attempts to detect fraud in Government contracting. We must do all we can to make sure that the False Claims Act covers false claims submitted to this shadow government of Government contractors.

As we all know, the *qui tam* provisions in the False Claims Act as amended in 1986 have been a resounding success, returning over $20 billion to the treasury since 1986. This law is one of the most brilliant on the books and *qui tam* plaintiffs are key to its success. In most cases, only an informant from the inside will produce a smoking gun that conclusively establishes liability.

Moreover, time and time again, it has been the relentless, zealous pursuit of *qui tam* litigation by *qui tam* plaintiffs and their counsel that has played a major role in the large FCA recoveries that we read about in the papers. I will provide you this morning with just one example, although I would be happy to provide many more upon request.

In 1989, two Northrop Grumman employees filed a *qui tam* case. They alleged that Northrop Grumman was overcharging the Government for radar-jamming devices installed on Air Force jets. After a 3-year investigation, the Department of Justice declined to intervene in this case. Convinced of the fraud, the relators and their counsel litigated the case for 9 years on their own.

Finally, in 2002, 12 years after the original case was filed, the former Northrop Grumman employees were able to convince the U.S. of the merits of the case, and the DOJ then did intervene. In 2006, the case finally settled for $134 million.

Now, I would like to emphasize a very important point here. This case I just described to you, in which the *qui tam* relators litigated on their own, going into their own resources for 9 years, this is in

the DOJ statistics as an intervened case. The DOJ did intervene in this case a couple years prior to the settlement. There are many, many other cases like that in that category called intervened cases. So you need to examine closely what is in those stats. Upon request, I could provide you a paper with many such examples.

The fact that the Act has worked in many ways as planned does not mean that we should sit on our laurels, however. There are deficiencies in the current operation of the law, many created by judicial misinterpretations of the statute and others created by the unintended consequences of certain of the provisions in the Act.

Here are four examples of how H.R. 4854 fixes these problems. Number one, for the first time the Act would impose liability on healthcare providers who identify overpayments they have received through their mistaken billing, and then make the deliberate decision to avoid reporting the overpayment so as to fraudulently secure the overpayment for their own use.

Under Medicare's rules, providers are liable to repay such overpayments that they have identified. Moreover, the nondisclosure runs afoul of a criminal statute. There should be a civil fraud remedy here, too. In my judgment, this provision should generate hundreds of millions of dollars more in additional recoveries to the U.S. government each year.

In the mid-1990's, HHS Inspector General June Gibbs Brown looked into the level of overpayments in the Medicare program and concluded that $23.2 billion or 14 percent of total program costs were lost each year due to fraud, waste and abuse. This number undoubtedly has only grown larger with the aging of our population, the increased cost of healthcare, and the addition of Medicare Part D, the new pharmaceutical benefit for seniors.

Second, H.R. 4854 clarifies that the Act imposes liability on those who submit false claims to Government contractors and grantees to get Government money. Under the *Allison Engine* Supreme Court decision that came out just last week, and under a 2005 decision by the D.C. Court of Appeals, the Act is being interpreted to cover only those situations in which false claims are submitted to an employee or official of the U.S.

This change in the bill, which focuses on the nature of the funding rather than the entity paying the claim, is fully consistent with the original intent behind the 1986 amendments and reflective of the fact that our Government has outsourced even the contracting function to private companies.

Importantly, this change would not get rid of the nexus between the Federal interest and the claim. For one thing, there would only be recovery permitted when the damages were damages to the United States. Secondly, the funds would have to be ones that were being held by the contractor or grantee to be spent on behalf of the Government or for a Government program.

Third, as has been referenced by some of the congressmen, the bill makes clear that a *qui tam* plaintiff can proceed with his case even if he can't get his hands on the actual invoices submitted to the Government. In a large business, information is compartmentalized. The engineer who sees his bosses intentionally taking shortcuts that result in defective military products won't have access to the billing department's files.

Conversely, the billing department employees are unlikely to know that the engineers are submitting false information to the billers about the work that they have performed. Unless we fix this problem that the courts are creating, we will find that *qui tam* plaintiffs will not be able to bring cases against large businesses with compartmentalized functions.

Fourth, the bill takes out of the defendant's hands the ability to move to dismiss *qui tam* cases on the ground that they are based on a public disclosure. The public disclosure bar is designed to protect the Government from copycat pleadings by *qui tam* plaintiffs. It is not designed to protect any interest of the defendants. It is the Government that should properly assess whether the plaintiff's pleading is parasitic of a matter in the public domain.

Yet, the defendants these days are filing motions to dismiss under this provision time and time again to delay adjudication on the merits and wear down their opposition. In many of the cases in which defendants make these motions, there is no active Government investigation that had been generated by the arguable public disclosure. If there had been, the Government would have been concerned enough to file a motion on its own.

Thank you very much.

[The prepared statement of Ms. Slade follows:]

TESTIMONY OF SHELLEY R. SLADE
BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY

Subcommittee on Courts, the Internet and Intellectual Property and Commercial and Administrative Law

H.R. 4854
The "False Claims Act Correction Act of 2007"

Introduction

As an attorney who has represented both *qui tam* plaintiffs and the United States under the False Claims Act ("FCA"), I submit this testimony in support of H.R. 4854, the FCA Correction Act of 2007. My views on the merits of H.R. 4854 have been formed not only by my private practice, but also by the decade I spent at the Department of Justice enforcing the Act on behalf of the United States.

For the last eight years, as a member of Vogel, Slade & Goldstein, LLP, a Washington, D.C. firm with a nationwide *qui tam* practice, I have specialized in representing the private parties who bring cases under the federal and state false claims laws. The majority of my cases have involved false claims on the Medicare, Medicaid and TRICARE programs and agencies of the Department of Defense. At the present time, most of my cases involve confidential investigations of pharmaceutical companies and pharmacies for kickbacks, violations of Medicaid billing rules and off-label marketing of drugs.

Prior to joining the private sector, I handled FCA matters in the Civil Fraud Section of the Commercial Litigation Branch of the Department of Justice. The Civil Fraud Section is the office within Main Justice that handles the largest and most significant FCA cases in the country and coordinates the FCA enforcement activities of the U.S. Attorneys. For eight of my years in the Civil Fraud Section, I investigated and litigated FCA cases as a trial attorney. In 1998 and 1999, I served as the Senior Counsel for Health Care Fraud for the Civil Division, handling policy and legislative issues relating to the FCA, and coordinating the Civil Division's health care fraud work with other offices of the Department of Justice, with other government agencies and with the private sector.

I strongly support H.R. 4854. It is a bill that will significantly enhance the Government's ability to remedy and

deter fraud on U.S. Government programs. The Bill's proposed corrections are needed to ensure that the law remains fully effective in an era in which so many government functions have been outsourced to government contractors and grantees who, in turn, subcontract with others to deliver goods and services for the government. The Bill's amendments also are needed to overrule judicial opinions which have made it unreasonably difficult for *qui tam* plaintiffs to bring forward meritorious allegations that the Government could not or would not have uncovered and pursued on its own. Finally, the Bill contains important changes that update the law to address new types of fraudulent schemes, to clarify procedures in declined cases, to clarify the applicable statutes of limitations, and to turn the Government's Civil Investigative Demand authority into a viable tool.

In my testimony, I will address my reasons for supporting what I believe are the most important provisions of H. R. 4854. I strongly support each and every provision of the bill, however, not only those focused on herein.

I. PROVISIONS STRENGHTENING LIABILITY PROVISIONS

Section Two of H.R. 4854 amends various aspects of the liability provisions of Section 3729(a) of the Act. The most needed changes are those designed to:

a) Fully protect taxpayer funds from false claims even when expended by private entities performing work for the federal Government;

b) Impose liability on those who convert taxpayer funds to unauthorized uses or wrongfully retain overpayments; and,

c) Protect funds administered by the United States such as Tribal Funds and the Iraqi funds that were previously administered by the Coalition Provisional Authority.

A. Liability for False Claims for U.S. Government Money or Property

1. Federal Contractors have Assumed Many Government Functions, Including Procurement and Contract Management

It is vitally important that the FCA protect not only taxpayers' funds in the possession of the Government, but also taxpayers' funds that the Government pays a private party so it

can carry out government programs. Since 1993, when President Clinton initiated the "National Partnership for Reinventing Government," the federal Government has outsourced an increasing number of governmental functions to private entities, including the contracting process itself.[1] Under President Bush, this trend has accelerated, and the Government is now spending nearly 40 cents of every discretionary dollar on contracts with private companies, a record level.[2] According to 2008 testimony 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.[3]

For example, rather than using government personnel to perform contracting support services, the Army Contracting Agency's Contracting Center for Excellence (CCE) in fiscal year 2007 awarded 5,800 contracts and obligated almost $1.8 billion to provide contract specialists for 125 Department of Defense offices, including the Joint Chiefs of Staff, the TRICARE Management Activity, the Defense Information Systems Agency and the DOD Inspector General.[4]

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[1] 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. H.R. Comm. Gov't Reform – Minority Staff Special Investigations Division, 109th Cong., 2d Sess., Dollars, Not Sense: Government Contracting Under the Bush Administration at i, 3 (Comm. Print 2006).

[2] H.R. Comm. Gov't Reform – Minority Staff Special Investigations Division, 109th Cong., 2d Sess. Dollars, Not Sense: Government Contracting Under the Bush Administration i, 3 (Comm. Print 2006). 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.

[3] 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.)

[4] *Id.*

According to the Government Accounting Office, spending by the Department of Defense (DOD) on contractor services has more than doubled over the past decade, measured in constant 2006 dollars, and, with this growth in spending:

> DOD has become increasingly reliant on contractors both overseas and in the United States. For example, the Department has relied extensively on contractors for services that include communication services, interpreters who accompany military patrols, base operations support (e.g., food and housing), weapon systems maintenance, and intelligence analysis to support military operations in Southwest Asia.[5]

The Government's procurement spending is highly concentrated on a few large contractors, with the 20 largest federal contractors receiving over 36% of the contract dollars awarded in 2005.[6] What this means is that a handful of large companies are now effectively serving as a "shadow government" that awards and oversees contracts, disburses federal funds, and attempts to detect fraud in government contracting.

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 claim will not be presented to an official of the federal Government itself. For example, when seeking reimbursement from a federally-funded health insurance program such as Medicare or Medicaid, health care providers submit their claims to private health maintenance organizations or private insurance companies on contract with the federal or a state government. Likewise, most companies performing work for the Department of Defense 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 the foregoing 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.

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[5] *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.)

[6] H.R. Comm. on Gov't Reform - Minority Staff Special Investigations Division, 109th Cong., 2d Sess., Dollars, Not Sense: Government Contracting Under the Bush Administration 6 (Comm. Print 2006).

2. In Enacting the 1986 Amendments to the FCA, Congress Intended to Cover the False Claims of those Billing Government Contractors and Grantees

When it amended the FCA in 1986, one of Congress' key goals was to impose liability on those who knowingly submitted false claims "although the claims were made to a party other than the Government, if the payment therefore would ultimately result in a loss to the United States." S. Rep. No. 99-345, 99th Cong., 2d Sess. 10, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266, 5275 (1986). Towards this end, Congress defined the term "claim" in the statute to include:

> [A]ny request or demand, whether under a contract or otherwise, for money or property *which is 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,* 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.

31 U.S.C. § 3729(c) (emphasis added). In adding this provision, Congress made clear that it intended to overrule a court decision, *U.S. v. Azzarelli Construction Co.*, 647 F.2d 757 (7th Cir. 1981), that held that the FCA did not cover false claims submitted to the recipient of a federal block grant. S. Rep. No. 99-345, 99th Cong., 2d Sess. 22, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266, 5287 (1986).

3. The Judiciary Has Refused to Apply the Act to Claims Against Government Contractors and Grantees

Notwithstanding the FCA's definition of "claim" quoted above, and the legislative history cited above, the U.S. Supreme Court and the D.C. Court of Appeals have rendered rulings that, together, make it doubtful whether the FCA, as currently drafted, protects government funds once they have left the federal Government's coffers. Relying exclusively on the statutory language of § 3729(a)(1), the D.C. Court of Appeals ruled in 2004 that liability for false claims will arise only if the false claims are "presented to" a U.S. Government official or employee; liability will not lie just because a contractor used federal money to pay the claims. *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 492-93 (D.C. Cir.

2004), *cert. denied*, 544 U.S. 1032 (2005). Adopting the logic of the *Totten* case, the Supreme Court ruled just last week that liability under § 3729(a)(2) for false statements made to get false claims paid will arise only if the false claims are actually paid or approved by the federal Government itself; it is not sufficient that the claims are paid with federal funds. *Allison Engine Co. v. United States ex rel. Sanders*, 2008 U.S. LEXIS 4704 (U.S. June 9, 2008).

These court decisions threaten to insulate from liability misconduct by the many companies who submit claims to government contractors and other intermediaries who are then, in turn, reimbursed by the federal government through the submission of a facially accurate statement of the intermediary's "costs." In addition, these rulings threaten to create a "free fraud zone" for the numerous situations in which companies bill entities that have been paid in advance by the federal Government. In these situations, the false claims of subcontractors and subgrantees are not subsequently passed on to the Government for reimbursement.

As Judge Merrick Garland opined in his dissent in the *Totten* case, the Court of Appeals' interpretation of Section 3729(a)(2) was "inconsistent" with the plain text of the statute and "irreconcilable" with the legislative history. Moreover, as a practical matter:

> Under the Court's interpretation, the Government cannot recover against a contractor that obtains money by presenting a false claim to a federal grantee – even if every penny paid to the contractor comes out of an account comprised wholly of federal funds – unless the grantee 're-presents' that false claim to a federal employee.

380 F.3d 488 at 502-03.

Indeed, the *Totten* decision already has led a number of lower courts to rule that the FCA may not be used to remedy misconduct involving knowing false claims unless the defendant is dealing directly with a U.S. Government official. These decisions fly directly in the face of the expressed legislative intent in that they hold that the FCA is not available as a tool against Medicare and Medicaid fraud,[7] against defense

[7] 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

subcontractor fraud,[8] or against fraud on local and state programs, even those "funded in part by the United States where there is significant Federal regulation and involvement."[9] Sen. Rep. No. 99-345 at 19-20 (citing an area in which Congress intended the FCA to be applicable).

4. H.R. 4854 Reinstates Liability for False Claims Submitted to Government Contractors and Grantees

Consistent with the Congressional intent behind the 1986 amendments, H.R. 4854 would correct the Act 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, H.R. 4854's 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. Accordingly, H.R. 4854 would not inject the FCA into purely private commercial transactions such as a federal government worker's spending of his *government* salary, or the Metropolitan Museum's purchases for its cafeteria.

(N.D. Ala. 2006), (dismissing Medicare claims submitted to an insurance company hired by the federal government to administer the Medicare program).

[8] *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*, 2008 U.S. LEXIS 4704 (U.S. June 8, 2008).

[9] *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) (U.S. Department of Housing funding of City of Houston housing authority); *United States ex rel. Rafizadeh v. Cont'l Common, Inc.*, 2006 U.S. Dist. LEXIS 18164 (E.D. La. April 10, 2006) (U.S. grants to state Department of Social Services and state Department of Health & Hospitals.)

Critics of this proposed amendment maintain 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. While in theory such a lawsuit is feasible, in practice this remedy would be nowhere near as effective as the FCA at uncovering, deterring or remedying fraud in government programs. First, the prime would be far less likely to obtain information about the fraud in the first place if the *qui tam* provisions were unavailable to bring forward whistle blowers. Second, in many instances, the prime will lack the incentive to pursue the fraud as it knows it can recover the overcharges through subsequent charges to the federal Government that are based on past cost history. Finally, the prime could not avail itself of the FCA's remedies of treble damages and civil penalties, a powerful deterrent to fraud, and remedies that provide full compensation not only for the overcharge, but also the time value of money, and the costs inherent in detecting, investigating and pursuing the fraud.

B. Protecting Funds Administered by the United States

The FCA currently does not expressly impose liability for false claims for money administered, but not owned by the United States. From the perspective of public policy, it is advisable for the Act to cover such situations. When the United States elects to invest its resources in administering the funds of another person, it does so only because the achievement of important foreign or domestic policy goals turns on proper management of the funds. The Department of Justice zealously has 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.[10]

The United States' ability to pursue cases involving U.S.-administered funds is threatened by a recent district court decision. In 2006, the U.S. District Court for the Eastern District of Virginia held that the FCA does not reach false claims on money administered but not owned by the U.S. Government, such as Iraqi funds administered by U.S. officials at the Coalition Provisional Authority. *See United States ex*

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[10] *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).

rel. DRC, Inc. v. Custer Battles, LLC, 376 F. Supp. 2d 617, 636-641 (E.D. Va. 2006).

H. R. 4854 prudently amends the FCA so that it covers fraud on U.S.-administered funds. The Bill adds 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).

C. Imposing Liability for Unauthorized Diversion of Government Funds and Retention of Government Overpayments

A gaping hole in the FCA is the lack of liability for wrongful retention of overpayments and diversion of funds to unauthorized purposes. In these situations, there frequently is no false statement or false claim to trigger liability under the current Act.

An example of the first situation 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. The company's mistake might be due to a misunderstanding of the billing rules, a computer glitch or a computational error, but, in each case, the FCA would not impose liability for the entity's original claims as they would not be "knowingly" false.[11] The provider's retention of the *known* overpayment would be illegal, however. It is a criminal offense to fail to disclose receipt of an overpayment from the federal Government "with an intent fraudulently to secure" such payment.[12] Unless the provider was without fault in billing for and accepting payment, the provider would be liable to repay the overpayment to Medicare (assuming the overpayment was discovered within three years of the year in which the overpayment was made.)[13] The Compliance Guidelines of the Office of Inspector

[11] 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.

[12] 42 U.S.C. § 1320a-7b(a)(3).

[13] Centers for Medicare and Medicaid, U.S. Dept. of Health & Human Services, Pub. No. 100-06, Medicare Financial Management Manual, Ch. 3, Overpayments (2008).

General of the U.S. Department of Health & Human Services ("OIG") advise that failure to repay overpayments within a "reasonable period of time" following detection may be interpreted as an intentional attempt to conceal the overpayment from the Government.[14]

An example of the second scenario would be a government contractor's decision to spend an advance payment intended for Iraqi reconstruction work on his personal enrichment instead. When our country is at war or responding to natural disasters, funds are often disbursed on an emergency basis in advance of the work being performed, and without the usual required certifications of performance under the contract. When a government contractor diverts an advance payment to an improper purpose in these circumstances, there often will be no false claim or false statement submitted to the government that would serve as the hook on which to hang liability.

H.R. 4854 addresses these deficiencies in the current statute 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.

I fully support this amendment. Not only does it accord with the Supreme Court's admonition that Americans should "turn square corners" when doing business with the Government,[15] it also provides a means for the Government to recover what likely exceed hundreds of millions of dollars in wrongfully retained overpayments each year. In the mid-1990's, HHS-OIG looked into the level of overpayments in the Medicare program, and concluded

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[14] 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).

[15] *Rock Island, A & M RR v. United States*, 254 U.S. 141, 143 (1920).

that $23.2 billion, or 14% of total program costs, were lost each year due to fraud, waste and abuse.[16] This number undoubtedly has only grown larger with the aging of our population, the increased costs of health care, and the addition of Medicare Part D, the new pharmaceutical benefit for seniors. *In short, this provision will be a significant revenue generator for the federal Government.*

D. Conforming Changes to Damage Provision

To conform the damage provision to the changes in the liability provisions discussed above, H.R. 4854 amends the FCA to provide that a person who violates one of the liability provisions:

> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government or its administrative beneficiary sustains because of the act of that person, subject to paragraphs (2) and (3).

H.R. 4854's amendment to the damage provision is an appropriate change to conform the provision to the changes in the liability provisions. In my opinion, it is vastly superior to the amended damage provision in current S. 2041. S. 2041's damage remedy on the one hand is too broad in that it permits the United States to recover treble the amount of a false claim even when the United States did not fund the entire claim, or, for other reasons, was not damaged in the full amount of the claim. On the other hand, it is too limited in that it does not provide for the recovery of reasonably foreseeable damages beyond the value of the false claim itself, such as the loss of a helicopter due to a contractor's knowing provision of a defective helicopter part. I urge the Committee to retain H. 4856's damage provision in the final bill.

II. PROVISIONS ENHANCING INCENTIVES AND PROTECTIONS FOR *QUI TAM* PLAINTIFFS

H.R. 4854 contains several important provisions that make it easier for *qui tam* plaintiffs to pursue meritorious cases. The Bill takes out of the defendants' hands the ability to delay or even preclude adjudication of the merits by challenging the

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[16] *HCFA's FY 1996 Medicare Audit, 1997: Hearing before the Subcomm. On Health of the House Comm. On Ways and Means*, 105th Cong., 1st Sess. (1997) (statement by June Gibbs Brown, Inspector General, Dep't of Health & Human Services.)

relator's right to bring a case under the "public disclosure" jurisdictional provision -- a provision enacted to protect the interests of the Government, not the defendant. The bill also clarifies that *qui tam* plaintiffs with detailed knowledge of a fraudulent scheme may bring cases even when they lack access to the defendant's false billing documentation.

H.R. 4854 also includes several amendments that enhance the protections for whistle blowers subject to retaliation. These amendments provide a uniform ten year statute of limitations for anti-retaliation claims, and clarify that internal whistle blowing, including efforts to stop the wrongdoing, is protected activity.

These provisions in H.R. 4854 will vastly improve the workings of the *qui tam* provisions by increasing the incentives for insiders to come forward, and mitigating the costs of blowing the whistle.

A. Rewarding and Protecting *Qui Tam* Plaintiffs is Vital to the Government's Efforts to Fight Fraud

During the eighteen years that I have worked as a FCA practitioner, I have come to appreciate the tremendously important role that private citizens play in the Government's efforts to root out fraud and abuse. I have also learned how much they suffer for their unwillingness to go along with the defendants' fraudulent schemes and their decisions to step forward and become government informants.

Qui tam plaintiffs are key to the Government's efforts to fight fraud, mainly for two reasons. First, as inside witnesses, they produce evidence that can be absolutely critical to establishing liability. Fraudulent activity by its very nature is concealed. The individuals who are willing to cheat the Government often are willing to cover up the evidence of their dishonesty as well. They are willing to destroy or alter documents when audited or served with subpoenas. They are inclined to fabricate, omit or "forget" key information when subpoenaed for testimony. Without the help of insiders who brought the Government documents and other hard evidence of the fraud, it would have been extremely difficult for the Government to develop sufficient evidence to establish liability in many of the successful FCA cases.

Second, it is the relentless, zealous pursuit of *qui tam* litigation by *qui tam* plaintiffs and their counsel that has led

to many of the largest FCA cases in the last eighteen years. A close study of the largest recoveries will reveal that, in many instances, the *qui tam* plaintiff spent years either trying to persuade the government of the merits of the case before finally achieving an intervention decision, or litigating the case following a government declination.

For example, in 2006, the United States negotiated a $134 million FCA settlement with Northrop Grumman that would never have been achieved without the dedication, hard work and perseverance of two *qui tam* plaintiffs and their counsel. This recovery settled claims in a 1989 *qui tam* suit filed by two Northrop Grumman employees who believed that the defense contractor was overcharging the government for radar jamming devices installed on Air Force jets. After a three year investigation, the Department of Justice declined to intervene. Convinced of the fraud, the relators and their counsel litigated the case *for nine years* on their own, undertaking extensive document and deposition discovery, and risking their personal resources on the case. Finally, in 2002, the former Northrop Grumman employees were able to convince the United States of the merits of the case, and the Department of Justice intervened. In 2006, the case finally settled for $134 million. (See proceedings in *United States ex rel. Holzrichter v. Northrop Grumman*, Civil Action No. 89C 6111 (N.D. Ill.)).[17]

Another good example is the role of the relators and their counsel in pursuing claims of cost report fraud in the cases brought against the Columbia/HCA Healthcare Corp. chain of hospitals in the mid-1990's. In *United States ex rel. Alderson v. HCA-The Healthcare Company*[18] and *United States ex rel. Schilling v. HCA-The Healthcare Company*,[19] the *qui tam* plaintiffs alleged that the hospital chain and its corporate predecessors had cheated Medicare of hundreds of millions of dollars through

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[17] These cases, and other like them, are ultimately included in the government's statistics as "intervened cases." Accordingly, when determining the contribution of *qui tam* relators towards litigation that leads to successful FCA recoveries, it is important to focus not only on the recoveries in the cases that the Department of Justice identifies as "declined cases," but also the recoveries in the cases identified as "intervened cases" that were pursued by the relator on his or her own prior to the government intervention, as well as the recoveries in the intervened cases in which the *qui tam* relator's counsel tried the case as co-counsel with the Government.

[18] Civ. A. No. 01-MS-50 (RCL) Case No. 99-3290 (D.D.C.).

[19] Civ. A. No. 01-MS-50 (RCL) Case No. 99-3289 (D.D.C.).

false entries on the cost reports submitted to Medicare to obtain reimbursement for the indirect costs of providing hospital care to Medicare beneficiaries. Although the United States 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 United States declined to pursue a number of the relators' allegations regarding cost report fraud, instead restricting its efforts to the cost report allegations it felt were the strongest. The relators and their counsel pursued many of the declined cost report claims on their own, however, and ultimately recovered about $100 million for the Government through their independent efforts. Moreover, at the request of the Department of Justice, the relators and their counsel 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.

Yet another example involves the recent $334 million FCA judgment against Amerigroup - the largest jury verdict and judgment in the history of the FCA. Relator Cleveland Tyson sued HMO Amerigroup for discriminating against Medicaid recipients based on their health status and thereby overcharging the Illinois Medicaid program by tens of millions of dollars. Both the State of Illinois and the United States declined to intervene in the case soon after it was filed. The Relator brought on a Chicago law firm that put in more than 25,000 hours of time and $2 million in out-of-pocket expenses to bring the case to trial. After uncovering incriminating documents during discovery, the Relator and his counsel re-presented the case to the state and federal governments, each of which then intervened on the condition that the Relator's counsel continue to shoulder the laboring oar and fund 100 percent of the expenses. At trial, Relator's counsel presented the case arm-in-arm with the state and federal governments.

Unfortunately, however, while a few *qui tam* plaintiffs each year recover awards in the millions of dollars, the overwhelming majority of *qui tam* plaintiffs who bring successful cases make sacrifices that overwhelm the financial benefits at the end of the road. First, they suffer retaliation by their current or former employer. When a defendant learns the identity of the individual who assertively has objected to its wrongdoing, the screenplay is practically identical every time: if the individual is still employed, they are placed on paid or unpaid

leave, and ultimately fired. Their severance is often held back as leverage to foreclose their pursuit of a *qui tam* case. If the individual becomes a government informant, and sometimes even before, every effort is made to develop evidence of wrongdoing by the individual. By taking these steps, the defendant apparently hopes to be able to impeach the testimony of the *qui tam* plaintiff in the eyes of the Government and possibly at trial, and to punish the whistleblower, thereby chilling other potential whistleblowers in their midst.

Second, whistle blowers have difficulty finding new employment once word of their reporting surfaces. Potential employers are wary of taking a chance on someone they view as a potential trouble maker. Without employment, and, in some cases, having to fund the costs of the litigation process, some *qui tam* plaintiffs face personal bankruptcy

Third, this financial stress is heightened by the emotional stress and social cost of being under attack from the defendant and their former colleagues. Many *qui tam* plaintiffs end up going through divorce, ostracization within their families and communities, and psychological turmoil.

B. Extending Statute of Limitations for Anti-Retaliation Cause of Action

H.R. 4854 clarifies the statute of limitations for lawsuits brought under the FCA against those who retaliate against whistle blowers by discriminating against them in the terms of employment. Section 3730(h) of the FCA provides a remedy for whistle blowers suffering such retaliation. Although 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, since they arise under Section 3730 rather than under Section 3729. *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409 (2005). Writing for the majority, Justice Thomas identified a number of state statutes of limitations as examples, 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.

Unfortunately, however, the state statutes of limitations for comparable state causes of action identified by Justice Thomas are unreasonably short. For example, he pointed to 90-

day statutes of limitations in Connecticut, Michigan and Texas, and 180-day statutes of limitation in Florida and Ohio. 545 U.S. at 419, n. 3.

In my experience, a 90- or even 180-day statute of limitations severely undercuts the remedy provided by Section 3730(h), making it unavailable to many whistle blowers who have been fired or demoted for blowing the whistle. In the majority of cases, it is barely possible for a discharged employee to identify his or her cause of action, and then locate and retain experienced *qui tam* counsel within six months, let alone be in a position to file a well-drafted complaint.

Since attorneys generally take these cases on a "contingency" basis, and necessarily will incur the risk of no recovery, potential *qui tam* plaintiffs often find it necessary to present their information to a number of attorneys before finding counsel with both the experience and inclination to take the case. This process can take months. Moreover, since the retaliation claim is ordinarily accompanied by a *qui tam* claim, counsel ordinarily will not want to file the retaliation claim on its own, since that might foreclose a confidential government investigation of the alleged fraudulent activities underlying the *qui tam* claim; retaliation claims are not placed under seal unless they are in the same complaint as a *qui tam* claim. Accordingly, to be in a position to file the *qui tam* claim within the statute of limitations for the retaliation claim, counsel would have put aside all other matters to expend the considerable effort required to learn the applicable billing rules and assemble and analyze the evidence of the false claims before filing the Section 3730(h) claim.

H.R. 4854 amends 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 H.R. 4854. The proposed amendment is advisable to protect the viability of the anti-retaliation remedy in Section 3730(h). It is also advisable to alleviate the pressure on whistle blowers to file *qui tam* actions prematurely to comply with the extremely short statutes of limitations for wrongful discharge found in state law.

C. Protecting Efforts to Stop Violations of the FCA

Many of my clients actively confronted their employers about their false claims before deciding to file a *qui tam* case, taking brave steps to try to correct the conduct of their colleagues or supervisors. Unfortunately, however, the FCA does not expressly protect this activity from retaliation. It is not until an individual takes steps in furtherance of a potential FCA action that the anti-retaliation provision in the Act clearly provides protection. As a result, 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. *See, e.g., Robertson v. Bell Helicopter Textron*, 32 F.3d 948, 951-952 (5th Cir. 1994).

By failing to provide clear protection for internal whistle blowing, and only expressly protecting steps taken towards litigation, the FCA regrettably favors litigation over internal compliance efforts, and makes it harder for well-meaning corporations to monitor their workforce. This gap in protection also denies a remedy to the most courageous whistle blowers of all -- those who confront the wrongdoers and try to get them to change their ways.

I support the provision in H.R. 4854 that would provide a remedy for retaliation for lawful acts not only in furtherance of an action or potential *qui tam* action, but also "in furtherance of other efforts to stop one or more violations of this chapter." This provision is superior to S. 2041's amendment of the anti-retaliation provision as the latter, apparently through a transcription error, has dropped the language in the current statute that protects employees from retaliation for taking steps towards filing a *qui tam* action.

D. Amendments to the Public Disclosure Provision

The FCA provides that a court lacks jurisdiction over a *qui tam* claim that is based on the "public disclosure" of "allegations or transactions" in the news media, or in an administrative, congressional or judicial report, audit or proceeding, unless the *qui tam* plaintiff is an "original source" of the information and has disclosed it to the government before filing suit. 31 U.S.C. § 3730(e)(4).

Congress added the so-called "public disclosure" provision to the Act in 1986 as a replacement for an earlier provision

that deprived courts of jurisdiction over *qui tam* actions "based on evidence or information the Government had when the action was brought." This provision had caused the FCA to fall into virtual disuse as whistle blowers were unwilling to come forward and risk their livelihood without knowing whether their case might be jurisdictionally barred. 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." H. R. Rep. No. 660, 99th Cong., 2d Sess. 22-23 (1986). Congress wished to "encourage more private enforcement suits" and consequently amended the statute to eliminate the government knowledge bar in 1986. S. Rep. No. 99-345, 99th Cong., 2d Sess. 23-24 (1986), *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266, 5288-89. Congress remained concerned, however, about "parasitic" relators such as those who filed complaints simply by copying information from a government indictment.

To address the continued concern about the parasitic relator, Congress' 1986 amendments created a jurisdictional bar that was intended to strike a balance between "encouraging people to come forward with information and . . . preventing parasitic lawsuits."[20] As stated by the Court of Appeals for the District of Columbia:

> Seeking the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own, Congress has frequently altered its course in drafting and amending the *qui tam* provisions since initial passage of the FCA over a century ago.

United States ex rel. Springfield Terminal Ry., v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994).

Unfortunately, however, by depriving courts of jurisdiction over cases falling within the ambit of the public disclosure provision, Congress unwittingly handed defendants a powerful weapon to postpone and even prevent judgments on liability. The public disclosure provision is rarely invoked by the Government. Rather, it is the defendants who raise the scepter of this jurisdictional bar almost reflexively in every case by pointing

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[20] *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).

to an arguable public disclosure of their fraud. As of 2007, courts had rendered nearly 200 published and unpublished rulings in 103 separate cases concerning the meaning of the "public disclosure" bar. The jurisdictional bar has led to a myriad of conflicting and confusing court decisions which have facilitated the ability of defendants to evade liability.

The defendants' aggressive use of this provision, combined with some courts' unreasonable interpretations of what constitutes a "public disclosure," has forced many *qui tam* counsel, including myself, to caution clients against undertaking investigative and other efforts that otherwise would be in the best interests of building a case on behalf of the United States. For example, counsel are reluctant to use the Freedom of Information Act (FOIA) to confirm their client's understanding of transactions between the potential defendant and the Government because some courts have barred *qui tams* based even in part on responses to a private party's FOIA request.[21]

Counsel are also concerned about disclosing newly acquired evidence of false claims to a government investigator prior to amending an existing *qui tam* complaint as a leak by the investigator could create a public disclosure that might bar the relator's new claim. Several Courts of Appeals have ruled that private exchanges of information, such as those between a government investigator and a potential fact witness, constitute "public disclosures" even when a relator is not part of the information exchange.[22]

Counsel are also wary of filing a wrongful termination or contract claim before a *qui tam* claim as at least one court has held that a relator can bar *himself* from filing a future *qui tam* by doing so. *See United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326 (6th Cir. 1998). This can lead counsel to prematurely file *qui tam* cases that are not fully developed, but that must be filed because of the pressure of

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[21] *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).

[22] *See U.S. v. Bank of Farmington*, 166 F.3d 853, 861 (7th Cir. 1999) (disclosure by defendant to public official with managerial responsibility for the allegedly false claims); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2nd Cir. 1992)(disclosures by government investigators to employees of defendant.)

meeting statute of limitations deadlines applicable to wrongful termination claims.

Moreover, the Supreme Court's public disclosure jurisprudence poses a disincentive for *qui tam* plaintiffs to assist the Government during the investigation or litigation of a case in developing stronger legal theories or evidentiary bases to pursue a defendant. Under a recent Supreme Court decision, a court must look to the final articulation of the claim at the time of judgment to determine if the public disclosure provision bars a relator from receiving an award from the Government's recovery. *Rockwell Int'l Corp. v. United States*, 127 S. Ct. 1397 (2007). Under *Rockwell*, a district court must deny an award to a relator -- even if the Department of Justice believes it would be fair and appropriate to pay the award -- if the defendant convinces the court that the relator's claim is barred by the public disclosure provision.

H.R. 4854 would remedy the problems discussed above by amending the FCA so that only the Government could seek the dismissal of parasitic actions. Moreover, H.R. 4854 would define 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 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. The House Bill would still protect the Government from situations where a relator 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 relator's share of the proceeds below the minimum threshold.

I strongly support the proposed amendment for the reasons set forth above. This proposal is one of the most valuable sections of the Bill.

Moreover, I believe that this proposal is vastly preferable to S. 2041's amendment to the public disclosure provision, which would enable the United States to dismiss *qui tam* cases based on preexisting audits or investigations involving substantially the

same misconduct by the same entity. Given the ambiguity in the terms "investigation" and "audit," the proposal in the Senate Bill would effectively resurrect much of the "government knowledge bar" which caused the FCA to fall into virtual disuse for almost half a century. Program agencies and their contractors routinely conduct wide-ranging audits that examine a small sample of claims for compliance with numerous billing rules. Without the inside evidence that a relator might be capable of providing, most of these "audits" would simply lead to dead ends.

If S. 2041's provision becomes law, witnesses to fraud once again will be reluctant to risk their livelihood on a case that could easily be barred by an obscure entry in an auditor's report in the Government's vast files. Moreover, given the historic resistance of many program agencies to *qui tam* cases, which often shine the spotlight on inadequacies in executive branch oversight, program agencies can be expected to rely on this provision to seek dismissal of *qui tam* cases in these circumstances. Regrettably, however, the fact that misconduct of the same nature is arguably identified in a government audit or investigation does not mean that it will be diligently investigated or pursued on a fraud theory.

The defense bar objects to the fact that the Government is the only party that may file a motion to dismiss under H.R. 4854's public disclosure provision. The defense bar argues that a defendant's greater resources and self-interest in seeing the case dismissed increase the likelihood that someone will undertake the search to determine whether there has been a public disclosure. This is a red herring. The defendant remains free to meet with Government counsel and petition them to file a motion to dismiss based on any public disclosure it locates. Moreover, the Government frequently relies on outside parties for assistance in drafting pleadings and other documents. If the Government believes that it is appropriate to file a motion to dismiss, it can and will seek the defendant's assistance in preparing such a motion. Most importantly, if the Government declines to put its resources into filing such a motion, it is highly unlikely that the Government is proceeding with an overlapping fraud investigation based on the alleged public disclosure.

E. Bringing *Qui Tam* Cases Without Access to Billing Documentation

One of the most discouraging features of current FCA case law for those considering filing or pursuing a *qui tam* case is

the growing tendency of the courts to require *qui tam* plaintiffs to allege in their initial pleadings the specifics of the billing documentation submitted to the Government. Relying on court interpretations of F.R.C.P. Rule 9(b) in the context of common law fraud, the courts require *qui tam* plaintiffs to identify not only the "who, what, when and where" of the overarching scheme, but also the "who, what, when and where" of the claims made to the Government.[23]

Even in cases in which the qui tam plaintiffs have alleged significant details of the fraudulent schemes, the courts are refusing to allow cases to proceed on the sole basis that the qui tam plaintiffs 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. Thus, both the 8th and 11th Circuits have dismissed cases under Rule 9(b) because the qui tam plaintiffs "did not work in the billing department."[24]

In the *Joshi* case, for example, the 8th Circuit 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." *Joshi* at 557. 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

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[23] *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).

[24] *See, e.g, United States ex rel. Joshi v. St. Luke's Hospital, supra*, 441 F.3d at 557; *Corsello v. Lincare, Inc., supra*, 428 F.3d at 1013-14.

> 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).

Joshi at 554.

In short, Dr. Joshi provided sufficient details of the fraudulent scheme for the defendants to know exactly the nature of the misconduct at issue. From his position 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. He then alleged how the services were being billed, and the fact that Medicare was being billed. Nonetheless, the Court of Appeals agreed with the trial court 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." *Joshi* at 557.

Regrettably, the *Joshi* Court's analysis severely undercuts the Government's ability to learn about false claims on its programs. This is because knowledge within an organization is ordinarily compartmentalized: the billing department employees rarely know the details of what is happening on the operational side, and the reverse is true as well. In a hospital overbilling case, it would be unusual for the hospital billing department to be in a position to discern that a given doctor was misrepresenting to the billing department the nature of the medical 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.

Unfortunately, the *Joshi* case is not an outlier. In the 11th Circuit *Corsello* case cited above, the relator alleged a scheme by his former employers -- suppliers of oxygen equipment and services -- to pay kickbacks to doctors to get them to prescribe the suppliers' products, even for patients with no medical need for oxygen, and to falsify the physician "Certificates of Medical Necessity" required as a condition of Medicare coverage of oxygen services. Even though Corsello

pointed out that he had "alleged many details of numerous schemes, employees and claims" and "provided the initials of patients whose Medicare forms were improperly completed and, eventually . . . resulted in the submission of fraudulent claims," *Corsello* at 1013, the 11th Circuit Court of Appeals refused to allow Corsello to bring his case, holding:

> Corsello is neither a "corporate outsider" nor an employee in the billing department . . . Corsello conceded that he "did not have access to company files outside his own office."

Corsello at 1013-14.

These court opinions may not pose a problem for the relator who happens to work in the defendant's billing department. They pose a serious problem, however, for almost every other potential insider to a fraudulent scam. Neither the engineers and quality assurance personnel who witness products deliberately manufactured in violation of government specifications, nor the pharmaceutical company salesmen pressured to sell off-label or pay kickbacks to doctors, nor the executives sitting in on high-level discussions of how to bilk the Government, will have ready access to the actual claims or invoices submitted to the Government.

The courts are misguided in applying this aspect of Rule 9(b) jurisprudence in the FCA context. In contrast to common law fraud cases, the *qui tam* plaintiff in a FCA lawsuit is not a party to the fraudulent transaction. It is the United States -- on whose behalf he sues -- that is the party to the transaction. It is consequently unreasonable to expect the *qui tam* plaintiff to have access to the transactional documents, which are almost always held exclusively by the wrongdoer on the one hand, and the Government itself on the other.

Moreover, the chief objective of Rule 9(b) -- putting the defendant sufficiently on notice of the allegations so that it can prepare its defense, is easily met by a complaint that provides details of 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 relator's belief that the claims are false.

H.R. 4854 would add 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."

For the reasons set forth above, I believe this amendment would play an important role in encouraging *qui tam* plaintiffs to pursue meritorious cases.

III. PROVISIONS CLARIFYING PROCEDURES AND REMEDIES

H.R. 4854 corrects and clarifies several aspects of *qui tam* procedure and remedies that have been the subject of confusion by the courts, the Government and the *qui tam* bar and that have impeded the Act from operating as smoothly as it could. I support each of these changes.

A. Procedural Clarifications

1. Proceeding with a Declined Case

With regard to procedure, through an amendment to subparagraph 3730(a)(4)(B), the Bill sets out a firm timetable for a *qui tam* plaintiff's proceeding with a declined case. It has been unclear as whether Federal Rule of Civil Procedure 4(m), which provides 120 days for service "after the filing of the complaint," governs service when a complaint has been pending under seal for sixty days or more.

2. Statute of Limitations

The bill also enacts a uniform ten year statute of limitations for all claims brought under Section 3730, again redressing confusion among the courts, the Government and the *qui tam* bar as to the operation of the current statute.[25]

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[25] 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

3. Service on State Plaintiffs

H.R. 4854 clarifies the procedure for service of the complaint on the state plaintiffs when a *qui tam* suit is brought on behalf of states as well as the federal government. In light of the seal on the federal claim, the U.S. Attorneys and Main Justice have a confounding array of different policies as to whether the *qui tam* plaintiff should serve the states in this situation, and the states, likewise, have different views on whether they should be served simultaneously with the federal Government.

4. Delegating Civil Investigative Demand Authority, and Defining Appropriate Uses of CID Material

One of the most significant procedural amendments is the provision in H.R. 4854 that would 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, Congress enacted a new § 3733 of the Act that authorized the Department of Justice to issue CIDs. The Senate Judiciary Committee viewed this as an authority "supplementing the investigative powers of the IGs [Inspectors General]." S. Rep. No. 99-345, 99th Cong., 2d Sess. 33, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266, 5298 (1986). The Committee noted that "perhaps the most serious problem plaguing effective enforcement is a lack of resources on the part of Federal enforcement agencies." S. Rep. No. 99-345 at 7. Having independent subpoena authority also fosters the independence of the Department of Justice in investigating some matters that program agencies might prefer to close down for reasons unrelated to the merits.

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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. Northrup 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).

Unfortunately, when Congress enacted § 3733, it did not make the CID power delegable. As a result, 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. I recall learning from an attorney at Main Justice, an Assistant U.S. Attorney, and several *qui tam* counsel, that requests for the issuance of CIDs sat untouched on the Attorney General's desk for as long as a year during a period of time about four to five years ago.

The use of CIDs has been stymied by another flaw in the original CID provision – the failure to specify the permissible "official uses" of the subpoenaed material in FCA cases. Paradoxically, through an apparent drafting oversight, the Act expressly provides that only government attorneys handling "other proceedings" have the discretion to determine the nature of the "official uses" of CID material required by the proceeding. 31 U.S.C. § 3733(i)(3). While the statute provides that attorneys handling FCA matters may be provided CID material for "official use," not only is the term undefined in the statute, but paragraphs in the CID provision designate certain prohibited and certain allowable uses in FCA proceedings without expressly noting that DOJ attorneys have discretion to use CID material in other situations in which such use is necessary to investigate or litigate the FCA case. 31 U.S.C. § 3733(i)(2). This oversight has compounded the uncertainty as to how Congress intended the Department of Justice to use this potentially valuable investigative tool. As a result, most Department of Justice trial attorneys and Assistant U.S. Attorneys shy away from utilizing the CID authority.

Through amendments to Paragraphs 3733(a)(1) and (i)(3), H.R. 4854 permits the Attorney General to delegate the authority to issue CIDs, and clearly defines the term "official use" to include the normal, lawful uses of subpoenaed information during a Department of Justice investigation or litigation.

In his testimony before the Senate Judiciary Committee, Michael F. Hertz, the Deputy Assistant Attorney General for the Civil Division, testified that the provisions concerning CIDs in S. 2041 are the most valuable aspects of the legislation from

the perspective of the Department of Justice.[26] I agree with Mr. Hertz's testimony.

Approximately three years ago, an Assistant U.S. Attorney who supervises civil health care fraud cases informed me that the U.S. Department of Health & Human Services no longer assigned investigators to cases involving allegations of Medicaid fraud in her district. As a result, if neither the FBI nor the state had the resources to investigate a case alleging Medicaid fraud, her office would have to decline to intervene in the case.

Providing the U.S. Department of Justice with a viable tool to investigate FCA cases on its own means that the Government will be able to investigate many more cases and recover millions of additional dollars each year. Like the provision expanding liability for knowing retention of overpayments, this amendment should greatly increase the revenue brought in by the Department of Justice each year.

B. Clarification of Remedies

1. Alternative Remedies

With regard to remedies, the Bill amends Paragraph 3730(c)(5), the provision of the Act that allows *qui tam* plaintiffs to recover if the Government pursues an "alternative remedy," to clarify the meaning of that term. The proper interpretation of this term has been subject to debate in discussions between qui tam plaintiffs and the Government. H.R. 4854 appropriately defines the term to include, among other things, recoveries obtained in exchange for a release of, or agreement not to pursue the claims asserted by the *qui tam* plaintiff.

2. Interest on *Qui Tam* Award

The bill also amends paragraph 3730(d)(1) to provide that the Government will pay the *qui tam* plaintiff interest on his or her award whenever the Government takes more than thirty days to pay the relator after collecting the proceeds from the defendant. This amendment is necessary because, due to the slow

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[26] *The False Claims Act Correction Act: Strengthening Government's Most Effective Tool Against Fraud for the 21st Century, 2008: Hearings on S. 2041 Before the Senate Comm. on the Judiciary*, 110th Cong., 2d Sess. (2008) (Testimony by Michael F. Hertz, Deputy Assistant Attorney General for the Civil Division).

workings of government bureaucracy, the Department of Justice from time to time does not pay the relator until many months after collecting the recovery. In a case I handled several years ago, our client received his share approximately six months after the United States received its recovery from the defendant.

This amendment is also necessary because the Government sometimes declines to pay a relator any money at all during the period of time that two relators are attempting to resolve their dispute over whom is entitled to the share, and during the period of time that the Government and the relator are disputing a proper share. Resolving these disputes can take years, and it is unjust for the relator, who has often been left with no means of earning a living as a result of his whistle blowing, to be denied the time value of money determined to be rightfully his. It is also inappropriate for the United States to be able to use the time value of money as a form of leverage to force the relator to accept a lower amount than that to which he is rightfully entitled.

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Each of these clarifications to the Act's procedures and remedies are badly needed, and should be part of the final bill.

Mr. BERMAN. Thank you.
Mr. Hutt?

TESTIMONY OF PETER B. HUTT, II, PARTNER, AKIN GUMP STRAUSS HAUER & FELD, LLP, WASHINGTON, DC

Mr. HUTT. Chairman Berman, Chairwoman Sánchez, and Members of the Committee, I thank you for inviting me to testify here today.

I am here on behalf of the United States Chamber of Commerce and the U.S. Chamber Institute for Legal Reform in opposition to H.R. 4854. For 20 years, I have analyzed and written on the False Claims Act and its *qui tam* provisions. I have also defended individuals and companies both small and large and other entities that were sued by *qui tam* plaintiffs under the statute.

The Chamber, let there be no doubt, fully supports the Department of Justice in its ongoing efforts to root out and eliminate instances of fraud against the Federal fisc. The Chamber recognizes that the False Claims Act has provided the Government with an effective tool to combat fraud against the Federal treasury.

The $20 billion that has been returned to the Federal treasury over the last 2 decades is a testament to the reach of the statute, and the hundreds of *qui tam* actions that are filed each year show that the statute already provides sufficient incentives for whistleblowers to come forward. Accordingly, the Chamber strongly believes that no amendment to the statute is necessary or desirable.

The current proposed amendments would not assist the Department of Justice in its efforts to protect the Federal treasury. Rather, they would encourage *qui tam* plaintiffs to file baseless and derivative actions that are not in the interests of the United States government or its taxpayers.

At the outset, I would like to dispel any misconception that the Supreme Court's recent decision in the *Allison Engine* case has weakened the statute or compels any legislative change. To the contrary, that decision illustrates precisely why no amendments to the current legislation are needed.

The Supreme Court reversed the Totten decision that the bill before you today was in part designed to reverse. The Supreme Court unanimously agreed with the Department of Justice that a false statement of record is actionable even if no claim is directly presented to the United States. There is no need, therefore, for the provisions in the current bill that would eliminate presentment as a requirement under the statute.

Moreover, the *Allison Engine* decision left untouched sections a(1) and a(3) of the statute and imposed only modest, if any, limitations in the liability provisions of section a(2). More broadly, the *Allison Engine* case exemplifies that the current legislative undertaking is unnecessary. It is far better, we urge, to let the courts continue to apply and interpret the current statute which has worked so well.

I will now briefly touch on some of the more objectionable features of H.R. 4854. First, the bill contains expansive new definitions of Government money or property, and administrative beneficiary that would expand the liability provisions of the statute to situations that are currently covered by state contract laws and

tort laws. The unanimous Supreme Court in the *Allison Engine* case concluded that expanding the False Claims Act to encompass all claims submitted to private entities where the claimant never intended to seek Government funds would threaten to transform the False Claims Act into an all-purpose anti-fraud statute.

Second, H.R. 4854 would destroy the logical structure of the public disclosure provision of the current law. Since 1986, the Act has effectively encouraged true whistleblowers to come forward, but deputized the defendants to seek dismissal where the action was based on publicly disclosed information. By stripping defendants of the ability to raise this defense, parasitic lawsuits that bring no new or useful information to the Government will routinely go forward.

Third, the proposed legislation would unfairly exempt *qui tam* plaintiffs, but not the Department of Justice, from the requirements of Federal rule of civil procedure 9(b) that all persons asserting fraud actions in Federal court must plead the elements of fraud with particularity. The sensible purpose of rule 9(b) is to prevent abusive plaintiffs from using conclusory allegations of fraud to embroil defendants in litigation and to give defendants sufficient information to prepare their defense. There is no basis whatsoever for holding *qui tam* plaintiffs to a lower standard than all other litigants in Federal court, and certainly no basis for holding them to a lower standard than the Department of Justice in False Claims Act cases.

Fourth, the bill would encourage Government employees to file *qui tam* lawsuits based on information they learned on the job. The Chamber agrees with the Department of Justice that this represents a terrible policy that would lead to conflicts of interest within the Government workforce and would regularly undermine public trust in the integrity and the impartiality of Government personnel.

Finally, the package of amendments in H.R. 4854 if enacted would disproportionately fall on nonprofits, educational institutions, hospitals, and small businesses. The legislation would encourage a spate of unfounded and parasitic lawsuits. Without the gate-keeping device of rule 9(b) and without the defense of the existing public disclosure bar, these nonprofits, universities, and small businesses will bear the enormous costs of litigating cases that the Department of Justice has declined to prosecute. The costs of doing business with the Government and participating in vital Federal programs will go up. The Government will lose the benefit of working with some of its most valuable partners or will pay more for their services.

In sum, the Chamber submits that it is only the *qui tam* plaintiffs and their attorneys who will benefit from the amendments proposed today. The Government, the American taxpayer, and nonprofits, universities, hospitals and small businesses will all be the losers.

[The prepared statement of Mr. Hutt follows:]

PREPARED STATEMENT OF PETER B. HUTT, II

Written Statement of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform In Opposition to H.R. 4854 The False Claims Act Corrections Act of 2007

By
Peter B. Hutt II
Partner, Akin Gump Strauss Hauer & Feld LLP
Washington, D.C.

June 19, 2008

I appreciate this chance to present my views on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform in opposition to H.R. 4854.

For 20 years I have analyzed, written on, and advised clients about the False Claims Act ("FCA") and its qui tam provisions. I have also defended individuals and companies both small and large in many qui tam lawsuits.

The Chamber supports the Department of Justice in its ongoing efforts to root out and eliminate instances of fraud against the federal fisc. The Chamber recognizes that the False Claims Act has provided the government with an effective tool to combat fraud against the federal Treasury. The $20 billion returned to the federal Treasury over the past two decades is a testament to the reach of the statute, and the hundreds of qui tam actions filed every year show that the statute already provides sufficient incentives for whistleblowers to come forward. Accordingly, the Chamber strongly believes that no amendment to the statute is necessary or desirable.

The current proposed amendments would not assist the Department of Justice in its efforts to protect the federal Treasury. Rather, they would encourage private qui tam plaintiffs ("relators") to file baseless and derivative actions that are not in the interests of the government or the taxpayers of the United States.

Most significantly:

- The bill would unwisely turn the FCA into an all-purpose anti-fraud statute, by expanding liability to situations where companies and individuals submit claims for payment to any private entities or persons that have received government funds – situations that currently are governed by state tort and contract laws, not the federal FCA.

- The bill would permit the government and relators to realize unjustified windfall recoveries, by allowing recovery of treble damages sustained by third party "administrative beneficiaries," even when no loss is suffered by the government.

- The bill would virtually eliminate the FCA's "public disclosure" bar that safeguards against parasitic qui tam lawsuits, opening the door to huge financial recoveries for relators who bring no new information to the government.

- The bill would create conflicts of interest within the federal workforce and undermine public trust in government by permitting current and former government employees to file qui tam actions and thereby use information learned in government service for their own personal gain.

- The bill would invite baseless qui tam lawsuits by exempting relators, but not the Department of Justice, from the requirement that all federal court litigants plead with particularity all elements of claims sounding in fraud.

- The bill would extend the six-year statute of limitations to ten years, allowing stale claims and encouraging relators to delay filing their claims in order to maximize the government's financial loss and thereby increase their own recovery.

- The bill would unnecessarily and confusingly expand the anti-retaliation provisions of the statute.

- The bill would expand the use of Civil Investigative Demands and allow relators to review and piggyback off pre-discovery information obtained by the Department of Justice.

In sum, the real effect of the package of amendments in H.R. 4854 would not be to assist the Department of Justice in its fight against fraud on the federal Treasury, but to assist qui tam plaintiffs in bringing unfounded and parasitic actions that benefit no one but the plaintiffs themselves and their lawyers.

I. H.R. 4854 IS DESIGNED TO STRENGTHEN THE HAND OF QUI TAM PLAINTIFFS AT THE EXPENSE OF THE GOVERNMENT AND DEFENDANTS

There are several important facts about the FCA and qui tam enforcement that serve as an important backdrop to consideration of H.R. 4854.

First, it is crucial to recognize that although the FCA has overall been an effective fraud-fighting tool, qui tam enforcement without DOJ intervention does not result in large recoveries for the Federal treasury. To the contrary, of the $20 billion recovered under the FCA since the 1986 Amendments, less than 2 percent was recovered in qui tam cases in which the DOJ declined to intervene. *See* Fraud Statistics – Overview, October 1, 1986 – September 20, 2007, Civil Division, U.S. Department of Justice, *available at* http://www.taf.org/statistics.htm (copy appended as Ex. 1). In other words, non-intervened qui tam actions are rarely meritorious, and secure a very low return to the United States.

Second, the cost to defendants of defending against qui tam actions is very high and sometimes debilitating. A great number of the defendants to qui tam actions are non-profits,

local governments, universities, hospitals, individuals, small businesses, and other entities that receive federal funding. A sample of defendants from the last few years, as compiled by John T. Boese in his written testimony in opposition to S. 2041, includes:

Arkansas
Game and Fish Commission

California
Santa Clara County Office of Education
Old Baldy Council of Boy Scouts of America

Georgia
Augusta-Richmond County
Providence Missionary Baptist Church of Atlanta

Illinois
Village of River Forest
Board of Education of Chicago
Pekin Memorial Hospital

Michigan
Oakland Livingston Legal Aid

Missouri
City of St. Louis

New York
State Division of Housing and Community Renewal
Erie County Medical Center

North Carolina
Easter Seals UPC

Ohio
Cuyahoga Falls General Hospital

Pennsylvania
Mercy Hospital of Pittsburgh
Tyrone Hospital
Lavender Hill Herb Farm

Tennessee
St. Jude's Children's Research Hospital
Memphis Baptist Hospital
Valley Milk Products, LLC

Texas
Dallas-Forth Worth Int'l Airport Board
Hudson Independent School District
Ector County Hospital

Vermont
City of South Burlington

Washington
Housing Authority of Seattle

Even under existing law, these non-profit institutions and public entities are often very hard-pressed to defend themselves against allegations asserted by qui tam plaintiffs under the FCA. To avoid a massive loss under the FCA – which allows for recovery of treble damages as well as statutory penalties – these institutions have little choice but to devote valuable and scarce resources to their defense, often degrading their ability to meet their core missions. By expanding the scope of FCA liability and reducing available defenses, the effect of the amendments proposed in H.R. 4854 would disproportionately fall on non-profits, local governments, universities, and small businesses, who are least able to afford the high cost of defending against qui tam actions. In assessing H.R. 4854, it is crucial to keep firmly in mind the very high cost the proposed amendments would exert on these entities.

II. H.B. 4854 WOULD UNWISELY TURN THE FCA INTO AN ALL-PURPOSE ANTIFRAUD STATUTE BY EXTENDING LIABILITY TO CLAIMS THAT IMPLICATE NO FEDERAL INTEREST

Summary. H.R. 4854 includes new definitions of "government money or property" and "administrative beneficiary" that would transform the FCA into an all-purpose antifraud statute. Ten days ago, the Supreme Court issued a decision in the *Allison Engine* case that cautioned against precisely such an expansive interpretation of the FCA. *Allison Engine Co., Inc. v. United States ex rel. Sanders*, 2008 WL 2329722 (2008). At the same time, the Court's opinion effectively reversed the D.C. Circuit's decision in the *Totten* case, removing one of the principal justifications for the current proposed language in H.R. 4854. In light of the *Allison Engine* decision, there is now little reason to enact the expansion of liability found in H.R. 4854, and good reason to heed the Court's unanimous warning against transforming the FCA into an expansive all-purpose antifraud statute.

The expansive new language in H.R. 4854 would impose liability on claims between private entities, as long as any portion of the funding used to pay the claims derived at some time from the federal Treasury. Moreover, H.R. 4854 would also impose liability on claims not even involving any federal funds, such as claims for private money held by a federal Bankruptcy Trustee. The current requirement for some nexus between a claim for payment and the interest of the United States Treasury would be severed. The proposed bill would effectively displace state contract and tort laws, imposing treble damages and penalties on claims between private entities that currently are addressed by state law. The expansion of liability envisioned by H.R. 4854 would reach far into the nation's economy and federalize routine disputes between private

parties. This expansion is entirely unnecessary, and will impose substantial burdens and costs on a broad panoply of non-profits, universities, hospitals, small businesses, and other entities ill-equipped to deal with the enforcement regime of the FCA.

Current Law. As currently drafted, the three principal liability sections of the FCA impose liability on a person who submits a false or fraudulent claim, who makes or uses a false record or statement to get a false or fraudulent claim paid or approved, or who conspires to defraud the government by getting a false or fraudulent claim paid or approved. 31 U.S.C. §§ 3729(a)(1)-(2). The current law defines the crucial term "claim" as "any request or demand 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." 31 U.S.C. § 3729(c).

Under this structure, the FCA does not impose liability when federal interests are not implicated, such as when false claims are submitted to private entities or false claims are presented for funds that are not U.S. government funds. *See, e.g., United States ex rel. Hutchins v. Wilentz, Goldman and Spitzer*, 253 F.3d 176 (3d Cir. 2001). Thus, the FCA generally has not imposed liability on claims for payment seeking private or foreign funds that the United States holds as custodian for the owner. *E.g., United States ex rel. DRC v. Custer Battles LLC*, 444 F. Supp. 2d 678 (E.D. Va. 2006) (the FCA does not apply to claims submitted for funds belonging to the Coalition Provisional Authority in Iraq.) Historically, such conduct has been actionable under other provisions, including state tort or contract laws, not under the FCA.

Current law also makes clear that false claims made upon funds belonging to federal employees do not fall within the ambit of the FCA, even though the funds ultimately derive from the federal government. As one court stated, "it would indeed be an illogical result if any time a federal employee spent her federal wages, she was considered to be expending federal funds and therefore protected from fraud by the FCA." *United States ex rel. Bustamante v. United Way/Crusade of Mercy, Inc.*, 2000 WL 690250 (N.D. Ill. May 25, 2000).

Finally, the Supreme Court's decision in the *Allison Engine* case makes clear that, at least under sections (a)(2) and (a)(3) of the FCA, the current FCA imposes liability even when false claims for payment are "presented" to intermediaries, rather than directly to the United States. In so holding, the Supreme Court effectively overruled the case of *United States ex rel. Totten v. Bombardier*, 380 F.3d 488 (D.C. Cir. 2004), which had held to the contrary. The Supreme Court further clarified that under section (a)(2), "a defendant must intend that the Government itself pay the claim," and a defendant must further "intend[] that the false record or statement be *material* to the Government's decision to pay or approve the false claim." In other words, the FCA does not require that a claim be submitted directly *to* the government, but it does require that the defendant intended for a claim to be paid *by* the government.

The Proposed Amendments. Section 2 of the bill includes a new definition of "Government money or property" and other provisions that would represent a dramatic expansion of the scope of FCA liability into areas now covered by state contract and tort law. The bill defines "Government money or property" broadly as:

(a) money belonging to the United States Government;

(b) money or property the United States Government provides, has provided, or will reimburse to a contractor, grantee, agent, or other recipient to be spent or used on the Government's behalf or to advance Government programs; or

(c) money or property belonging to any 'administrative beneficiary.'

The phrase "administrative beneficiary" in turn is defined broadly as any "natural person or entity, including any governmental or quasi-governmental entity, on whose behalf the United States Government, alone or with others, collects, possesses, transmits, administers, manages, or acts as custodian of money or property."

A. Unwise Removal of the Nexus Between a Claim and the Government's Interests.

This expansion unwisely disassociates FCA liability from the act of seeking funds from the federal government. As currently drafted, the FCA subjects to liability a concrete act that is targeted at the federal government: namely, a defendant's attempt to have the government pay money to which the defendant is not entitled. By focusing on defendants who fraudulently seek payment from the government, the FCA properly combats "fraud *against* the Government." *Rainwater v. United States*, 356 U. S. 590, 592 (1958) (emphasis added). But Section 2 of H.R. 4854 softens the sharp focus of the FCA and transforms it into a general antifraud statute that has only a tenuous connection to the government's interests. Suppose, for example, that a nonprofit institution receives a general grant from a federal agency for its daily operations. Under the proposed bill, *any activity* paid for with those funds could be subject to a qui tam lawsuit simply because the original source of the funds was the federal government – even though the government has no articulable interest in the specific purposes for which those funds were expended. H.R. 4854 thus expands FCA liability to the broadest extent of federal funding, without regard to how attenuated or even nonexistent the government's interests may be at such a remove.

Further, Section 2 of H.R. 4584 is even less necessary today in light of the Supreme Court's decision in *Allison Engine*. One of the apparent purposes of H.R. 4584 was to eliminate *Totten*'s requirement of direct "presentment"; such a requirement, it was feared, would allow defendants to avoid FCA liability while still raiding the public fisc by submitting their false claims to a grantee and having that grantee use federal funds to pay those claims. But there is no longer any need for a statutory amendment to achieve this purpose; *Allison Engine* made clear that direct "presentment" is not a requirement for liability under subsections (a)(2) or (a)(3) of the FCA

However, despite removing any "presentment" requirement for section (a)(2) and (a)(3), the Supreme Court in *Allison Engine* crucially preserved the FCA's nexus between a false claim and a payment by the federal government by requiring that defendants at least have the *intent* of

having claims paid by the government, as opposed to paid from private funds. This rule properly correlates the government's interest in protecting its funds with those activities that most threaten that interest. Although the precise details of the ruling in *Allison Engine* will have to be fleshed out by the lower courts in the years to come, there is no need for the dramatic revisions that Section 2 of H.R. 4584 would make to the FCA.

B. The Broad Sweep of the Proposed Amendments.

The proposed new definition of "Government money or property" would sweep broadly, potentially encompassing a broad range of conduct that has never been thought within the ambit of the FCA. The statute would encompass claims for money "to be spent or used on the Government's behalf," and even more broadly, money used "*to advance Government programs*." Relators can reliably be expected to argue for expansive interpretations of that language, and, contrary to current law, the language could conceivably encompass claims for virtually any funds that at some point derived from the U.S. government. For example:

- A false claim that a supplier submitted to a university laboratory that previously received a grant of federal funds could be actionable under the FCA, with the potential for treble damages and penalties.

- A disputed claim submitted to a building contractor that received federal money and commingled these funds with non-government money could fall within the scope of the FCA, even if the claim related to the contractor's commercial activities, and there is no federal interest whatsoever.

- Given the breadth of the language in the bill, conceivably any false claim submitted to a federal employee or other recipient of federal government benefits (such as Social Security) would be actionable under the statute, including, for example, claims from landscapers, telephone companies, hairdressers, and internet providers.

Indeed, the proposed bill could have the effect of displacing state laws, by imposing treble damages and penalties on fraud claims between private persons that are currently addressed by state contract and fraud laws. H.R. 4854 would dramatically expand the treble damages and penalties regime of the FCA into many facets of normal commercial activity. This expansion of federal liability is particularly unwarranted when state tort, contract, and antifraud laws already provide adequate protection against such alleged false claims. The fifty states have diverse and comprehensive regimes – including state-specific statutes and regulatory agencies – to police fraud within their borders. But Section 2 of H.R. 4584 would effectively supplant these regimes and unnecessarily replace them with a broad, generalized federal antifraud law.

Moreover, the broad new definition of "administrative beneficiary" would mean that the FCA encompasses claims made for non-U.S. funds that are in the possession of the U.S. government, contrary to the decision in *Custer Battles*. Under this language, all foreign government and private party funds the U.S. holds as a custodian would fall within the ambit of the FCA. Moreover, for example, claims against various trust funds administered by the United

States but funded with non-U.S. funds (such as environmental remediation trusts) could also be actionable under the FCA. There is no justification for these expansions of the statute, since the FCA's purpose is to protect the federal Treasury from fraudulent claims, not to protect monies of foreign governments or other third parties.

C. Effect of the Expansion of Liability.

Given the broad reach of federal funds, the scope of the proposed expansion of liability is truly breathtaking. As Justice Breyer recognized during the oral argument for the *Allison Engine* case, "government money today is in everything. So if it's in everything, then everything is going to become subject to this False Claims Act." Oral argument in *Allison Engine v. United States ex rel. Sanders*, US Supreme Court, No. 07-214 (Feb. 26, 2008, at 36 ll. 3-8). The Supreme Court's unanimous decision also acknowledged this point: if FCA liability extended to any false claim for "Government money or property," then the scope of the FCA would be "'almost boundless: for example, liability could attach for any false claim made to any college or university, so long as the institution has received some federal grants – as most of them do.'" *Allison Engine*, 2008 WL 2329722, at *5 (quoting *Totten*, 380 F.3d at 496). The Court expressly warned against interpretations that would "transform the FCA into an all-purpose antifraud statute." *Id.* Congress should heed this warning.

III. H.R. 4854 WOULD PERMIT THE GOVERNMENT AND RELATORS TO REALIZE WINDFALL RECOVERIES WHERE NO LOSS IS SUSTAINED BY THE GOVERNMENT

Summary. As a corollary to its expansion of liability to cover moneys belonging to third-party administrative beneficiaries, H.R. 4854 would permit the government to recover treble the amount of damages sustained by such administrative beneficiaries. Contrary to current law, this would permit the government and relators to recover substantial damages even where the government has suffered no loss at all. Permitting the government and relators to realize such pure windfalls is irrational, and underscores the folly of the proposed expansion of liability to protect moneys of third parties, rather than the federal Treasury.

Current Law. The current FCA provides that a person who violates the statute is liable "for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the government sustains because of the act of that person." 31 U.S.C. § 3729(a). "Damages" are meant to represent compensation for an actual loss or injury suffered by the government. The Supreme Court has stated that the purpose of the damages provision is to "afford the government complete indemnity for the injuries done it" and to make the government "completely whole." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549-52 (1943).

Courts have thus routinely refused to award damages where they have concluded the government suffered no actual loss. *See, e.g., United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 923 (4th Cir. 2003); *Ab-Tech Construction, Inc. v. United States*, 31 Fed. Cl. 429, 434 (1994). In such cases, however, a defendant found liable must still pay statutory penalties (now increased to the range of $5,500 to $11,000).

The Proposed Amendments. H.R. 4854 would upset the basic principle of the FCA that defendants are liable to pay damages only when the government sustains an actual loss. Instead, Section 2 of H.R. 4854 would permit trebling of "damages which the Government *or its administrative beneficiary* sustains." The bill defines an "administrative beneficiary" as "any entity, including any governmental or quasi-governmental entity, on whose behalf the United States Government, alone or with others, serves as custodian or trustee of money or property owned by that entity."

This change unnecessarily unmoors the statute from its stated purpose for almost 150 years – guarding against fraud to the federal treasury, rather than fraud against third parties. Third party administrative beneficiaries can already avail themselves of tort, contract, and fraud remedies if their funds are subjected to fraudulent claims.

Moreover, this proposed amendment would allow both the government and qui tam plaintiffs to obtain windfall recoveries in situations where third parties, but not the government, have suffered losses. The bill contemplates that, after any relator's share is paid, the government would return to the injured third party the amount of its "financial losses." H.R. 4854 section 3(f). But, because the FCA provides for treble damages and statutory penalties, this would mean that in most cases the government and any qui tam relator would realize a sizeable windfall. Assume, for example, the government recovers $3 million in trebled damages because of a $1 million loss sustained by a third party, plus $1 million in statutory penalties. After returning the $1 million to the injured party, the government would retain $3 million – even though it had suffered no loss whatever. In qui tam cases, some portion of the $3 million windfall would be shared with the relator. There is no justification or rationale for permitting the government and relators to recover windfalls in cases where the government suffers no loss itself.

Furthermore, H.R. 4854 inappropriately seeks to protect the interests of relators at the expense of the injured third parties. If the goal of this revision were to protect injured administrative beneficiaries, any FCA award would be applied first to compensate the financial losses of the beneficiaries. But section 3(f) of the bill makes clear that any FCA recovery will go *first* to pay any award due the qui tam plaintiff, and only afterward to compensate the administrative beneficiary for its losses. Because of the relator's prior right to payment, the administrative beneficiary may never recover the full amount of its loss. And even if the administrative beneficiary is fully compensated, the relator will in many cases recover more than the administrative beneficiary that suffered the loss. These are unjustifiable results.

In yet another sign of the priority that H.R. 4854 gives to qui tam plaintiffs, section 3(f) further provides that if the injured third party seeks to avail itself of alternative remedies to make itself whole for its losses, relators will be able to claim a share of any amounts recovered directly by the third party through these separate, unrelated proceedings. This is truly perverse, and seems unjustifiably aimed at strengthening the hand of the relator at the expense of the government and the third party that actually suffers the loss. Under this provision, a relator could seek to recover as part of his statutory "share" of the proceeds amounts far in excess of the amounts recovered by the injured third party, and these amounts would all come out of amounts that otherwise would remain in the federal treasury. For example, building on the example

above, assume that the administrative beneficiary recovers an additional $1 million in alternative remedies. The relator would then have a claim for 25 to 30 percent of this amount from the government, although the government would not have any right to seek any portion of the alternative remedy from the administrative beneficiary. This result is bizarre and amounts to a gratuitous "windfall-sharing" scheme set up for the benefit of relators.

In short, H.R. 4854 sets up a scheme that is fundamentally irrational and operates to the benefit of relators, not the government or the third parties that have suffered losses.

IV. H.R. 4854 WOULD EVISCERATE THE FCA "PUBLIC DISCLOSURE" BAR THAT HAS EFFECTIVELY SAFEGUARDED AGAINST PARASITIC QUI TAM LAWSUITS

Summary. H.R. 4854 would upset the delicate and effective balance of the qui tam provisions in the current FCA by severely curtailing the "public disclosure" bar that safeguards against parasitic qui tam actions that are of no value to the United States. In 1986, Congress developed the public disclosure bar and its original source exception, 31 U.S.C. § 3730(e)(4), in an effort to balance the need to encourage true whistleblowers while at the same time preventing parasitic suits brought by relators who had nothing new to offer. The public disclosure bar has thus ensured that the incentives of the FCA's qui tam provisions – namely, a share of any recovery – would be given to those who genuinely deserved such a reward – whistleblowers who were aware of fraud and brought that information to light.

This statutory bar has worked effectively for 20 years to permit the government and defendants to seek dismissal of lawsuits filed by individuals who are motivated by the prospect of a potential bounty, but who offer no new information of fraud to the government. In fact, the public disclosure bar has been one of the most effective means for smaller defendants to have meritless and parasitic lawsuits dismissed without engaging in expensive discovery or protracted litigation.

However, by stripping defendants of the ability to seek dismissal of parasitic suits under the public disclosure bar, and by weakening the provisions of the bar, H.R. 4584 will encourage parasitic lawsuits and upset the sensible structure of the qui tam provisions of the FCA.

Current Law. The purpose of the qui tam provisions of the Act is to "enhance the Government's ability to recover losses sustained as a result of fraud," by encouraging whistleblowers to come forward with fresh information concerning such fraud, in exchange for a percentage of the government's ultimate recovery. S. Rep. No. 99-345, at 1 (1986), *reprinted in* 1986 U.S.C.A.A.N. 5266, 5266. As one court aptly noted, the qui tam enforcement mechanism essentially allows the Government to "purchase" from private citizens the information they may have about fraud on the U.S. Treasury. *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 309 (5th Cir. 1999).

In the 1986 Amendments, Congress enacted the current public disclosure bar in an effort to ensure that the rewards of a qui tam action are afforded only to individuals who assist the government by providing valuable information, not to those who merely echo public information. Its core purpose is to safeguard against "parasitic exploitation of the public coffers

[by] . . . opportunistic plaintiffs who have no significant information to contribute of their own," while rewarding "whistle-blowing insiders with genuinely valuable information." *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994).

As currently drafted, the public disclosure bar in the FCA deprives a court of jurisdiction over qui tam actions that are "based upon the public disclosure of allegations or transactions," unless the qui tam relator is the "original source of the information." 31 U.S.C. § 3730(e)(4)(A). An original source is a person with "direct and independent knowledge" of the information who "voluntarily provided the information to the Government" before filing an action. *Id.* § 3730(e)(4)(B). Both the United States and defendants are able to seek dismissal of a qui tam lawsuit that fails to meet the requirements of the public disclosure bar. In addition, because the bar is jurisdictional in nature, a court can also dismiss a qui tam lawsuit *sua sponte* on public disclosure grounds.

The public disclosure bar has worked effectively, by deputizing defendants to determine if relators have the type of fresh information that Congress intended to reward and to move to dismiss actions where relators do not. Although several aspects of the current public disclosure bar have been subject to varying interpretations, courts agree on its basic purpose and utility, and they have been converging on the specific details of the law as they flesh out the meaning of the statutory language. Just last year, for example, the Supreme Court decided its first case construing the public disclosure bar, in *Rockwell International Corp. v. United States ex rel. Stone*, 127 S. Ct. 1397 (2007), which addressed the scope of knowledge that a relator must possess to qualify as an "original source." Defendants have come to rely upon the public disclosure bar to protect themselves from meritless and parasitic lawsuits. In fact, for smaller defendants that do not have sufficient resources to engage in lengthy discovery or trial litigation – such as nonprofits and similar entities – the public disclosure bar has proven essential to protecting their interests.

The Proposed Amendments. Section 3 of H.R. 4854 would eviscerate the public disclosure bar and open the door to the most egregious types of "parasitic" lawsuits that the statute since 1986 has effectively eliminated.

A. Stripping Defendants' Ability to Seek Dismissal.

The bill would provide that only the DOJ may seek to dismiss relator claims on public disclosure grounds. Defendants would not be able to seek dismissal of parasitic qui tam suits, nor would a court be able to raise the issue sua sponte as a jurisdictional matter. This change would have the effect of gutting any enforcement of the public disclosure provision. As a practical matter, the defendant to an FCA lawsuit, not the DOJ, has the incentive to investigate whether a relator based his lawsuit on public disclosures, and if so to seek dismissal. Although the DOJ may in obvious and egregious cases decide to seek dismissal, in most non-intervened matters it will have little incentive to do so.

Giving the DOJ the exclusive burden of "policing" all qui tam actions to winnow out the parasitic suits places a huge additional burden on the DOJ. There are hundreds of new qui tam actions filed every year. As a practical matter, the DOJ will likely devote its limited resources to

investigating qui tam allegations and prosecuting meritorious cases, rather than further investigating qui tam matters in which it has already decided not to intervene.

The end result of H.R. 4854 is apparent – parasitic lawsuits that are now routinely dismissed will be permitted to go forward. The better policy, by far, is that embodied in the current structure of the public disclosure provision – deputize defendants and empower courts to ensure that only true whistleblowers, rather than parasitic plaintiffs, go forward with qui tam actions.

B. Weakening the Public Disclosure Standard.

Moreover, even where the DOJ might seek to dismiss a parasitic case under the proposed bill, it would need to meet a much higher threshold than under the current statute. Under H.R. 4854, the DOJ would need to establish that the relator's "allegations relating to all essential elements of liability of the action or claim are based *exclusively*" on a public disclosure. The DOJ would also need to establish that the relator "derived his knowledge of *all* essential elements of liability" from the public disclosure. In practice, parasitic qui tam relators would easily be able to evade these standards, making it very difficult for the DOJ to dismiss on public disclosure grounds. Relators and their counsel in most cases will be able to add a scrap of new information to the publicly disclosed information that underlies most of their allegations, and argue that their case is therefore not based "exclusively" on the public disclosure, or that they did not derive "all" information from the public disclosure. The result would be a flood of cases in which relators take publicly disclosed information of fraud and add minor and inconsequential details to evade the public disclosure bar. This flouts the policy behind the qui tam provisions, which are intended to reward only qui tam plaintiffs who bring fresh information to the government.

In addition, H.R. 4854 further dilutes the public disclosure bar by defining "public disclosures" as disclosures that are "made on the public record or have otherwise been disseminated broadly to the general public." This language is hopelessly unclear and will inevitably lead to a great deal of litigation. It is unclear under this language, for example, whether publication of allegations of fraud in certain types of the news media would meet this standard. Thus publication of allegations in newspapers of limited circulation might, arguably, not qualify as "public disclosures." It is also unclear whether a public disclosure in an administrative audit or investigation – particularly in an industry that is obscure to the "general public," if not to participants in and regulators of that industry – would qualify as being made "on the public record" or being "disseminated broadly to the general public."

H.R. 4854 would also unjustifiably limit "public disclosures" to information revealed in *federal* – and not state – proceedings, hearings, reports, etc. There is no basis for this limitation. The source of a parasitic lawsuit's information has no effect on its lack of justification. A relator that does no more than parrot information derived from state or local investigations or audits is not providing "fresh" information to the federal government. To the contrary, the states and local governments routinely cooperate with the federal government on investigations of potential fraud, and it would be perverse to permit relators to file qui tam lawsuits based on information

from state or local investigations that might soon be provided to federal investigators. In such cases, the relator has provided no benefit whatever to the federal government.

In sum, the purpose and likely effect of H.R. 4854 is clear: to kill the public disclosure provision altogether. Although the DOJ in theory would be able to seek dismissal of parasitic lawsuits, in practice it does not have the resources or inclination to do so, particularly in light of the far more restrictive language in H.R. 4854. Relators and their attorneys will have no reason to fear dismissal, and, as the history of the qui tam provisions teaches, there will be a flood of cases asserting claims based largely, and sometimes exclusively, on information already known to the government or reported in the news media. H.R. 4854 would thus destroy the core purpose of the public disclosure bar – to safeguard against parasitic qui tam suits that bring no value to the government in its fight against fraud.

V. H.R. 4854 WOULD ENCOURAGE GOVERNMENT EMPLOYEES TO PROFIT PERSONALLY FROM INFORMATION LEARNED IN GOVERNMENT SERVICE

Summary. The House should not under any circumstances pass Section 7 of H.R. 4854, which would permit current and former government employees to "cash in" on information they learn in the course of government employment, by filing qui tam actions based on such information. This section of the bill represents terrible public policy. The DOJ has for two decades opposed qui tam lawsuits filed by government employees, and in its letter to the Senate Judiciary Committee concerning S. 2041 it expressed its continuing strong opposition to the parallel provision in that bill. For the same reasons expressed by the Department of Justice, the Chamber strongly opposes Section 7.

Current Law. The current FCA does not include any express prohibition on government employees serving as qui tam plaintiffs. But investigators and auditors – the government employees most likely to learn of potential false claims – are often barred from filing qui tam actions by the "public disclosure" bar of the statute, 31 U.S.C. § 3730(e)(4)(A). Several courts have held that after a public disclosure of information, such employees cannot qualify as "original sources" of information because they do not have "independent" knowledge of the false claims, *e.g., United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17 (1st Cir. 1990) or because they have an obligation to report such information to the government and thus cannot be deemed to have "voluntarily" provided information to the government. *E.g., United States ex rel. Biddle v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 147 F.3d 821, 829 (9th Cir. 1998); *United States ex rel. Fine v. Chevron, U.S.A.*, 72 F.3d 740 (9th Cir. 1995) (en banc). Although several courts have permitted government employees to serve as qui tam plaintiffs, most have done so while recognizing that there are serious policy arguments against permitting such actions. *E.g., United States ex rel. Holmes v. Consumer Ins. Group*, 318 F.3d 1199, 1212 (10th Cir. 2003).

The Proposed Amendments. Section 7 of the proposed legislation would, in practice, allow virtually all current and former government employees to profit from their employment by filing qui tam actions. Although the proposed bill sets up certain apparent hurdles that a government employee would need to clear, these hurdles would not deter many cases from going forward as a practical matter. The likely effect – indeed, the intended effect – of the legislation would be a dramatic increase in the number of qui tam cases filed by current and former government employees.

The proposed bill provides that current employees could act as qui tam plaintiffs if the DOJ failed to move to dismiss the action within 60 days of service of the suit. Moreover, the bill would permit the DOJ to seek dismissal only in limited circumstances – essentially, where: (1) "all the necessary and material allegations" were derived from an "open and active" government fraud investigation; or (2) the allegations were derived from the person's employment, the employee failed to disclose the evidence to the Inspector General, a supervisor, and the Attorney General, and the Attorney General failed to file an action within 12 months. For most government employees who are would-be relators, these threshold disclosures will be relatively simple to make, and it is doubtful that the DOJ will be successful in dismissing many actions.

These difficulties are exacerbated by the practical obstacles imposed by the proposed bill. Given its limited resources, it is unlikely that the DOJ will be able to seek dismissal of many cases filed by government employees. The DOJ will rarely have sufficient information within 60 days of receiving a qui tam suit to determine whether it has grounds to dismiss the relator. Passage of this bill would likely lead to a dramatic increase in the number of qui tam cases filed by government employees, further taxing DOJ resources and making it even more unlikely that the DOJ would be able to investigate the propriety of such cases adequately.

There is simply no justifiable policy reason to enact this change to the statute and encourage government employees to become qui tam plaintiffs in derogation of their job responsibilities and to the detriment of the federal treasury. The proposed bill would provide perverse incentives for every government auditor, investigator, and other employee to seek to profit from government employment by filing a qui tam suit. Any government employee who identifies a potential false claim as part of his job would have an incentive to file a qui tam lawsuit. Investigators within DOD, DHS, HHS, and elsewhere would have an incentive to retain for themselves any information about fraud so that they could later capitalize on this information for personal gain, making at best minimal disclosures to the Inspector General, Attorney General, and supervisors, and hoping that the DOJ would *not* file any action in response. Government investigators and auditors would also have an incentive to race to the courthouse before a case is fully developed, undermining the potential effectiveness of the case. Fraud recoveries that the government would have recouped in full under the current FCA would be reduced by up to 30 percent – the amount that a government employee could receive as a relator.

As the government has argued, and as the Ninth Circuit has recognized, government employees who are given an opportunity to gain privately from the use of information discovered during the course of their employment would be motivated:

> [t]o spend work time looking for personally remunerative cases . . . rather than doing their assigned work; to conceal information about fraud from superiors and government prosecutors so that they can capitalize on it for personal gain; to race the government to the courthouse to file ongoing audit and investigatory matters as *qui tam* actions before those cases have been sufficiently developed by the government to justify a lawsuit, thus prematurely tipping off the target, undermining the likely effectiveness of the case, and diverting unnecessarily up to 30% of the government's recovery to the government employee; and to use the substantial powers of the federal government conferred upon public investigators . . . to advance their personal financial interests.

Fine, 72 F.3d at 745 (quoting Amicus Brief of the United States in Support of Defendants-Appellees' Petitions for Rehearing and Suggestions for Rehearing En Banc at 8-9).

Moreover, encouragement of government employee relators runs directly contrary to the policy of the government to encourage voluntary disclosures of potential wrongdoing. Contractors and others receiving federal funds will have little incentive to make voluntary disclosures if they know that the government employees receiving these disclosures can turn around and file a qui tam action based upon the disclosure.

The proposed bill would potentially also provide incentives for government employees learning of fraud to quit their government service, rather than face any restrictions on their ability to file suit. The restrictions set forth in H.R. 4854 appear to apply only to *current* employees of the Federal Government. Thus, it appears that the legislation may impose no restrictions on *former* government employees, who could act as qui tam plaintiffs without restriction, even where their information is derived from their government service.

The inevitable result of these disastrous amendments would be a decrease in public confidence in the integrity and impartiality of government employees. The public trusts the government only when it believes that government officials are acting objectively and impartially in the public interest. But that belief is unsustainable if government employees have a powerful monetary incentive to pursue their private interests at the expense of their public duties. *See Fine*, 72 F.3d at 748 (Trott, J., concurring) ("Such an abuse could only cause the public to distrust government officials even more than the public already does."). As Justice Jackson prophetically noted in his dissent in *United States ex rel Marcus v. Hess*, 317 U.S. 537, 560 (1943), referring to the initial qui tam legislation passed in 1863:

> To accept the view of 1863 to mean that today law-enforcement officials could use information gleaned in their investigations to sue as informers for their own profit, would make the law a downright vicious and corrupting one. . . . If we were to add motives of personal avarice to other prompters of official zeal the time might come when the scandals of law-enforcement would exceed the scandals of its violation.

VI. H.R. 4854 WOULD ENCOURAGE UNFOUNDED QUI TAM LAWSUITS BY EXEMPTING RELATORS FROM COMPLIANCE WITH RULE 9(b)

Summary. H.R. 4854 would exempt relators, but not the DOJ, from the requirement that federal court litigants plead with particularity all elements of claims sounding in fraud. Contrary to the requirements of Rule 9(b), the bill would permit relators to allege facts that provide merely a "reasonable indication" of a violation of the FCA. This is a dramatic weakening of the standard imposed by Rule 9(b), and would allow relators with little or no knowledge of fraud to assert speculative, unfounded allegations. This special relaxation of the Federal Rules of Civil Procedure for qui tam plaintiffs would flout the central purposes of Rule 9(b) – to ensure that defendants do not suffer serious public accusations of fraud unless plaintiffs have specific information about the fraud, and to put defendants on notice of the crucial facts so they can prepare a defense.

Moreover, there is no basis whatsoever for relaxing the standard of Rule 9(b) for relators, but holding the DOJ to compliance with Rule 9(b) when it files a complaint. The purpose of H.R. 4854 is evident: To allow relators an exemption from the pleading rules every other litigant in federal court is required to meet. The result of H.R. 4854 will be a torrent of qui tam cases asserting speculative, baseless claims of the sort that now are dismissed under Rule 9(b).

Current Law.

Rule 9(b) of the Federal Rules of Civil Procedure provides that "in alleging fraud . . . , a party must state with particularity the circumstances constituting fraud." Virtually every court has agreed that actions asserted under the False Claims Act sound in fraud, and therefore must comply with the requirements of Rule 9(b). A complaint that fails to comply with Rule 9(b) is subject to dismissal under Rule 12(b)(6).

Courts are generally in agreement as to the important purposes served by Rule 9(b). As the Fourth Circuit has stated:

> First, the rule ensures that the defendant has sufficient information to formulate a defense by putting it on notice of the conduct complained of . . . . Second, Rule 9(b) exists to protect defendants from frivolous suits. A third reason for the rule is to eliminate fraud actions in which all the facts are learned after discovery. Finally, Rule 9(b) protects defendants from harm to their goodwill and reputation.

Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999) (citations omitted); *see also* 5A Wright & Miller, *Federal Practice and Procedure* § 1296 (noting that "Rule 9(b) is necessary to safeguard potential defendants from lightly made claims charging the commission of acts that involve some degree of moral turpitude. . . . [T]he pleading rule is for the protection of the defendant's reputation and goodwill."). Moreover, as one court noted, it is particularly inappropriate to relax Rule 9(b) for qui tam complaints, since the very purpose of the qui tam provision is to permit suits by individuals who "have independently obtained knowledge of fraud . . . A special relaxing of Rule 9(b) is a *qui tam* plaintiff's ticket to the discovery process

that the statute itself does not contemplate." *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 309 (5th Cir. 1999).

Although courts differ in how they characterize the pleading standards of Rule 9(b), most courts have stated that a complaint must allege "the who, what, when, where, and how: the first paragraph of any newspaper story." *United States ex rel. Garst v. Lockheed Martin Corp.*, 328 F.3d 374, 376 (7th Cir. 2003). Other have stated that the DOJ and relators must allege with particularity "'the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby.'" *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999).

Many courts have recognized that the alleged "false or fraudulent claim" is the lynchpin for liability under the FCA, and therefore require that details concerning the claims allegedly submitted must be pleaded with particularity. *E.g., United States ex rel. Clausen v. Laboratory Corp. of America, Inc.*, 290 F.3d 1301 (11th Cir. 2002); *Sanderson v. HCA*, 447 F.3d 873 (6th Cir. 2006); *United States ex rel. Rost v. Pfizer, Inc.*, 446 F. Supp. 2d 6 (D. Mass. 2006).

The Proposed Amendments.

Section 4(c) of H.R. 4854 would add a provision entitled "Notice of Claims" to the FCA:

> "In pleading an action brought under section 3730(b), a person shall not be required to identify specific 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."

This provision would gut the requirement of Rule 9(b) that qui tam plaintiffs plead claims under the FCA with the degree of specificity required of every other person asserting fraud claims in federal court. This provision would allow qui tam plaintiffs to assert speculative, baseless claims of the sort that are routinely dismissed under current law, and go forward to discovery.

H.R. 4854 would run directly contrary to the central purposes of Rule 9(b) - to ensure that defendants do not suffer serious public allegations of fraud unless plaintiffs have specific information about the fraud, and to put defendants on notice of the crucial facts so they can prepare a defense. One of the most critical factual allegations for a defendant is often what claims are allegedly false. Defendants typically need to know what claims are at issue, so they can identify the statements made in the claims or the associated documentation that are allegedly "false or fraudulent." Knowing merely the alleged "course of misconduct" is frequently insufficient to put a defendant on notice of the alleged fraud, especially "when the defendant is a business entity that engages in a high volume of transactions and might have difficulty in identifying the one that is being challenged." 5A Wright & Miller, *Federal Practice and Procedure* § 1296. Particularity as to the specific claims at issue is also important because the FCA imposes penalties of $5,500 to $11,000 for each false claim. Without a clear sense of the

claims that a relator is targeting, a defendant may have little idea about the extent of its potential liability.

Moreover, even if a relaxation of the Rule 9(b) standards were justified, the standard proposed in H.R. 4854 is very unclear and will lead to extensive litigation. First, it will be very difficult to determine what sorts of allegations "provide a reasonable indication" that violations are "likely" to have occurred. Second, it will be difficult to determine whether the allegations provide "adequate" notice to the government and defendants. By contrast, existing case law applying Rule 9(b) is fairly well-developed and provides standards that litigants can understand in assessing the pleading requirements for qui tam complaints.

Finally, as drafted, the provision only applies to actions brought under the qui tam provision of the FCA, 31 U.S.C. § 3730(b). Thus it would not apply to actions brought directly by the government under section 3730(a). There is no basis whatsoever for holding relators to a lower standard than the government in pleading their cases. The purpose of H.R. 4854 is thus clearly *not* to assist the DOJ in its fight against fraud. Rather, its purpose is to relax for relators alone the pleading rules by which every other litigant in federal court must abide, so that relators can proceed to discovery with cases that otherwise would be subject to dismissal for lack of particularity.

VII. H.R. 4854 WOULD ENCOURAGE STALE CLAIMS BY EXTENDING THE STATUTE OF LIMITATIONS TO AN UNJUSTIFIABLE 10 YEARS

Summary. Section 4(a) of H.R. 4854 would dramatically lengthen the time period for filing qui tam cases, from 6 to 10 years. This would be longer than almost all other federal limitations periods, and in practice would subject defendants to claims concerning events as old as 12 to 15 years. This unwarranted extension of the limitations period would allow lawsuits to be asserted long after crucial documents have been lost, and after witnesses' recollections have dimmed or vanished. Defendants will be unfairly prejudiced by such a long period. Moreover, businesses and other entities receiving money from the government would need to retain records for ten years or longer, imposing substantial costs that, ultimately, will be borne in part by the government and the taxpayer.

Current Law. The current FCA prohibits actions that are brought either (1) more than 6 years after the date on which the FCA violation is committed, or (2) 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 relevant government official, but in no event more than 10 years after the date on which the violation is committed. 31 U.S.C. § 3731(b). The 3-year "tolling" provision sensibly allows the government time to uncover fraud and bring an FCA action, while the 10-year limit just as sensibly prevents defendants from being subjected to overly stale fraud actions. Most courts have ruled that the 3-year tolling provision does not apply in non-intervened qui tam actions because otherwise relators would delay filing lawsuits in order to maximize their potential recovery. *E.g., United States ex rel. Sikkenga v. Regence Bluecross Blueshield*, 2006 WL 3491784, at *6, *15 (10th Cir. Dec. 5, 2006).

The Proposed Amendments. Section 4(a) of the proposed bill would lengthen the statute of limitations applicable to *all* FCA actions from 6 years to 10 years. Moreover, the practical effect of this amendment would be to extend the limitations period for qui tam actions for several years longer than 10 years – up to 15 years or more. This is because qui tam cases typically remain under seal for 1-2 years, and often up to 5 years, while DOJ investigates the allegations. Thus, when the case is finally unsealed, the defendant could be facing allegations that are 12 or even 15 years old.

Briefly put, 10 years is too long, let alone 15 years. It is difficult to determine any legitimate need for this extension. The existing 6-year statute is already more generous than almost all other federal statutes of limitations. By comparison, Clayton Act antitrust actions must be asserted within 4 years, *see* 15 U.S.C. § 15b; civil RICO claims within 4 years, *see* 18 U.S.C. § 1961; and Fair Labor Standards Act claims based on "willful" conduct within 3 years, *see* 29 U.S.C. § 255(a). Perhaps most analogous is the 5-year statute of limitations applicable to private rights of action involving claims of fraud concerning the federal securities laws. *See* 28 U.S.C. § 1658(b) It is impossible to explain why the FCA's existing 6-year statute, with a "tolling" provision of up to 10 years, is insufficient to protect the government's interests.

Such a lengthy limitations period would be fundamentally unfair to defendants, by subjecting them to claims involving events that took place 10 or more years ago. Inevitably, recollections will have dimmed. Witnesses will have died or otherwise become unavailable. Documents in the defendant's files will be misplaced, lost, or destroyed. Crucial documents in the hands of the government or third parties, which are often essential to establishing a defense, will be missing.

The proposed extension of the already generous statute of limitations is evidently designed to permit qui tam plaintiffs to increase the size of their recovery, by reaching 4 years further back in time than the FCA currently permits. The bill would provide a further incentive for would-be relators to delay filing suit as long as possible, to increase the financial harm to the government and therefore increase their potential qui tam recovery.

Moreover, section 4 of the proposed bill provides that when the government intervenes in a qui tam case, any additional claims it asserts arising out of the same "conduct, transactions, or occurrences" relate back to the date of the original qui tam complaint, even if those claims would otherwise be barred. The bill would thus allow the government to revive stale claims by adding otherwise time-barred claims to qui tam cases, potentially including breach of contract claims and other claims that otherwise would have been barred for many years.

The proposed change would impose substantial costs on American nonprofits, small businesses, and others receiving government funds. The potential for punitive liability under the FCA will force all responsible entities and individuals to maintain their records for to 15 years so that they can defend themselves against stale allegations of fraud. These added costs imposed on nonprofits, businesses, and others will in part be borne by the government and by taxpayers. These added costs could far outweigh any benefit to the government in extending the limitations period.

Finally, it is impossible to justify any government need for the extension of the limitations period. Where the DOJ truly needs more time to investigate the merits of a qui tam action filed under seal, it has the ability to enter into a tolling agreement with the defendant, and it routinely does so.

VIII. H.R. 4854 WOULD UNNECESSARILY AND CONFUSINGLY EXPAND THE ANTI-RETALIATION PROVISIONS OF THE STATUTE

Summary. Section 3(e) of H.R. 4854 would expand the FCA anti-retaliation provision, 31 U.S.C. § 37830(h), in ways that are both unnecessary and confusing. First, there is no evidence that the proposed expansions of the provision to encompass new types of plaintiffs and new types of protected conduct are necessary to safeguard actual or would-be qui tam plaintiffs from retaliation. Second, the proposed expansions are poorly drafted, confusing, and will open the door to lawsuits that are based on conduct unrelated to actual or proposed qui tam actions.

Current Law. The current FCA includes an anti-retaliation provision that provides employees with the right to bring claims against their employers if they are discriminated against because of "lawful acts" taken "in furtherance of" a qui tam action, "including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section." 31 U.S.C. § 3730(h). Courts have generally agreed that only an "employee" can assert a claim, and that the claim lies only against the employee's employer, not a third party or employees of the corporate employer. *E.g., Vessell v. DPS Assocs. of Charleston*, 148 F.3d 407, 412-13 (4th Cir. 1998); *Mruz v. Caring*, 991 F. Supp. 701 (D.N.J. 1998). Courts also agree that a plaintiff must establish that (1) the employee engaged in protected conduct, (2) the employer was aware of the employee's protected conduct, and (3) the employee was discriminated against wholly or in part because of that conduct. *E.g., Robertson v. Bell Helicopter*, 32 F.2d 948, 952 (5th Cir. 1994); *Norbreck v. Basin Elec. Power Coop.*, 215 F.3d 848, 851 (8th Cir. 2000). The statute provides for remedies including reinstatement, double the amount of backpay, interest, and litigation costs and attorneys' fees. Relators frequently file qui tam cases that not only assert substantive violations of the FCA, but also include claims seeking redress for alleged retaliation.

The Proposed Amendments. Section 3(e) of H.R. 4854 would make several changes to the language of the anti-retaliation provision to expand its reach. First, the proposed bill would expand the class of potential plaintiffs beyond merely "employees" to include "any person." Although the proposed language is not clear, it seems designed to expand the class of plaintiffs to include, *inter alia*, independent contractors, third-party agents, or others. It does not appear that this expansion of liability is necessary, since independent contractors and others that experience "discrimination" causing economic harm ordinarily can bring actions asserting breach of contract or tortious interference. The class of potential plaintiffs identified in H.R. 4854 is hopelessly vague and potentially expansive. At the least, the bill should carefully define the types of individuals who are within the class of potential plaintiffs.

Second, the bill would expand the class of potential defendants beyond "employers" to include "any other person" that "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against" the plaintiff. Whereas the current statute imposes liability for actions done to the plaintiff "by his or her employer," the proposed legislation includes no such limiting language – instead, actionable retaliation could come from "any other person."

Under this bill, disgruntled employees might be able to sue not only their employers, but also their supervisors and others they blame for alleged retaliation. Plaintiffs might also be able to sue individuals and corporations that are unconnected to their employers. For example, a disgruntled subcontractor employee might attempt to sue a prime contractor or its employees for engaging in alleged retaliatory acts. Again, it does not appear that this expansion of liability is necessary, and at the least the bill should define with care the types of individuals and entities that are within the class of potential defendants.

Third, the bill would greatly expand the type of protected conduct to include any "efforts to stop one or more violations" of the FCA. Plaintiffs would no longer have to prove, as they do under the current statute, that their efforts were "in furtherance of" a qui tam action. This murky language could burden the federal courts with broad new classes of claims that are unconnected to FCA disputes. For example, a subcontractor that is disappointed at its treatment by a prime contractor in a routine contract dispute could allege "retaliation" in an attempt to achieve leverage in the contract dispute. Employees of government contractors, Medicare and Medicaid providers, and others that receive federal funding could assert liability by claiming they were attempting to stop a "violation" of the FCA, even if they never intended to file a qui tam lawsuit.

In sum, there is no need to expand the anti-retaliation provisions of the FCA. Relators who believe they were subjected to retaliation have been able to assert claims under the existing statutory language, and if the statute did not afford relief would be able to vindicate their interests through state law actions for breach of contract, tortious interference, or other claims. There is no substantial reason for the proposed amendments. And the murky, confusing language of the proposed amendments would guarantee years of litigation over its meaning.

IX. H.R. 4854 WOULD UNNECESSARILY EXPAND USE OF CIVIL INVESTIGATIVE DEMANDS AND IMPROPERLY PERMIT RELATORS TO PIGGYBACK OFF INFORMATION RECEIVED THEREBY

Summary. The current FCA gives the Attorney General the ability to issue Civil Investigative Demands ("CIDs") to investigate potential violations of the FCA. Section 6 of H.R. 4854 would expand the use of these CIDs and permit the DOJ to share information obtained from CIDs with relators. This is completely unwarranted and perverts the structure of the FCA. Under H.R. 4854, qui tam plaintiffs would be afforded access to information gained from government investigations, presumably so the qui tam plaintiffs can strengthen their cases in the event the government declines to intervene. This runs directly counter to the purpose of the qui tam provisions, which envision that relators will bring information of fraud to the government, not piggyback off government information.

Current Law. The current FCA gives the Attorney General the ability to issue CIDs to investigate potential violations of the FCA. 31 U.S.C. § 3733. This CID provision gives the Attorney General broad powers to seek documents, answers to written interrogatories, and oral testimony concerning potential violations in advance of commencing an FCA suit.

The statute expressly forbids any individual other than a DOJ employee or a government false claims law investigator to examine any documents, answers to interrogatories, or transcripts of oral testimony provided in response to a CID. 31 U.S.C. § 3733(i)(2)(C). Thus, neither

relators nor their attorneys are permitted to review any information provided to the DOJ in response to a CID.

The Proposed Amendments. Section 6 of H.R. 4854 would change the statute to allow relators and their counsel access to the information obtained by the DOJ under a CID, if the DOJ "determine[d] it is necessary as part of any false claims act investigation."

There is no need for this change to the CID provisions of the FCA. First, the existing statute is fully effective at providing the DOJ with the means to collect information it needs to investigate potential false claims. The purpose of the CID provision is to afford the government an investigative tool that will permit it to investigate potential FCA violations, and determine whether there is sufficient evidence to file suit. There is no reason to allow CID materials to be shared with relators or their attorneys.

Second, the proposed change runs completely counter to the purpose of the qui tam provisions. The FCA contemplates that relators are whistleblowers who are bringing information to the United States. It is for that reason alone that relators are afforded a recovery under the FCA. Permitting relators to piggyback off the DOJ's investigative efforts in furtherance of their own interests is completely is at odds with the purpose of the qui tam provisions. The proposed change is simply designed to allow relators and their counsel an advance look at evidence they would otherwise not be able to review. Sharing CID information with relators before a qui tam suit is unsealed will mean that in cases the DOJ does not join, relators will be able to amend their complaints with information that they did not bring to the table – thus rewarding them despite the absence of any contribution to the elimination of fraud. Relators who receive CID materials will be piggybacking off the government's efforts, not their own information, which is directly contrary to the purpose of the FCA.

CONCLUSION

The ostensible goals of the proposed legislation are to improve the FCA so that it can be a more effective tool in the fight against waste, fraud, and abuse. But the proposed amendments, unfortunately, do nothing to clarify the statute or make it any more effective. Instead, the amendments unjustifiably expand the rewards for qui tam plaintiffs and their attorneys, while making it more difficult for defendants and the government to dismiss meritless suits. If enacted as written, these amendments will create intolerable conflicts of interest within the federal workplace, will virtually guarantee a dramatic increase in parasitic lawsuits asserted by bounty-hunters, will impose the spectre of treble damages and penalties on commercial transactions far afield from the government marketplace, and will make a potpourri of other ill-considered changes. These amendments will disproportionately impose costs on non-profits, universities, and small businesses, and discourage them from further participation in government programs. These amendments should not be enacted.

Exhibit 1

FRAUD STATISTICS - OVERVIEW

October 1, 1986 - September 30, 2007
Civil Division, U.S. Department of Justice

FY	NEW MATTERS[1]		SETTLEMENTS AND JUDGMENTS[2]					RELATOR SHARE AWARDS[3]		
	NON QUI TAM	QUI TAM	NON QUI TAM[2]	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
1987	340	31	86,479,949	0	0	0	**86,479,949**	0	0	0
1988	210	43	173,287,663	2,309,354	33,750	2,343,104	**175,630,767**	88,750	8,437	97,187
1989	221	88	197,202,180	15,111,719	1,681	15,113,400	**212,315,580**	1,446,770	200	1,446,970
1990	240	75	189,564,367	40,483,367	75,000	40,558,367	**230,122,734**	6,590,936	20,670	6,611,606
1991	234	84	270,445,467	70,384,431	154,500	70,538,931	**340,984,398**	10,667,537	18,750	10,686,287
1992	285	113	137,358,206	134,549,447	994,456	135,543,903	**272,902,109**	24,196,648	259,784	24,456,432
1993	304	138	181,945,576	183,643,787	6,078,000	189,721,787	**371,667,363**	27,576,235	1,766,902	29,343,137
1994	279	219	706,022,897	379,018,205	2,822,323	381,840,528	**1,087,863,425**	69,453,350	838,896	70,292,246
1995	232	269	269,989,642	239,024,292	1,635,000	240,659,292	**510,648,934**	45,162,296	465,800	45,628,096
1996	186	344	247,357,271	124,361,203	13,390,011	137,751,214	**385,108,485**	22,119,619	3,731,978	25,851,597
1997	187	546	465,568,061	621,919,274	6,021,200	627,940,474	**1,093,508,535**	65,857,419	1,658,485	67,515,904
1998	118	467	151,435,793	438,834,846	30,248,075	469,082,921	**620,518,714**	70,264,372	8,486,645	78,751,017
1999	140	493	195,390,485	492,924,785	5,067,503	497,992,288	**693,382,773**	63,018,064	1,374,487	64,392,551
2000	95	363	367,887,197	1,208,715,188	1,688,957	1,210,404,145	**1,578,291,342**	183,682,977	375,143	184,058,120

FRAUD STATISTICS - OVERVIEW

October 1, 1986 - September 30, 2007

Civil Division, U.S. Department of Justice

FY	NEW MATTERS[1]		SETTLEMENTS AND JUDGMENTS[2]					RELATOR SHARE AWARDS[3]		
	NON QUI TAM	QUI TAM	NON QUI TAM[2]	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
2001	86	311	492,196,974	1,167,531,786	128,587,151	1,296,118,937	**1,788,315,911**	186,908,812	30,701,881	217,610,693
2002	62	318	119,598,292	1,077,375,794	25,786,140	1,103,161,934	**1,222,760,226**	160,914,076	4,582,319	165,496,395
2003	92	334	703,003,368	1,512,457,284	5,185,911	1,517,643,195	**2,220,646,563**	331,873,857	1,382,741	333,256,598
2004	120	431	115,656,023	557,080,136	9,261,879	566,342,015	**681,998,038**	110,113,220	2,376,128	112,489,348
2005	107	406	276,914,983	1,148,057,102	7,081,143	1,155,138,245	**1,432,053,228**	168,409,043	1,911,560	170,320,603
2006	85	384	1,714,824,081	1,482,048,337	22,493,863	1,504,542,200	**3,219,366,281**	218,392,497	5,598,336	223,990,833
2007	128	356	559,255,115	1,436,468,132	15,370,120	1,451,838,252	**2,011,093,367**	173,221,033	4,169,498	177,390,531
TOTAL	**3,751**	**5,813**	**7,621,383,590**	**12,332,298,469**	**281,976,663**	**12,614,275,132**	**20,235,658,722**	**1,939,957,511**	**69,728,640**	**2,009,686,151**

NOTES:

1. "New Matters" refers to newly received referrals, investigations, and *qui tam* actions.
2. Non *qui tam* settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
3. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims, which may be less than the total settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

FRAUD STATISTICS - HEALTH & HUMAN SERVICES[1]

October 1, 1986 - September 30, 2007
Civil Division, U.S. Department of Justice

FY	NEW MATTERS[2]		SETTLEMENTS AND JUDGMENTS[3]			
	NON QUI TAM	QUI TAM	NON QUI TAM[3]	QUI TAM		TOTAL QUI TAM AND NON QUI TAM
			TOTAL	TOTAL	RELATOR SHARE[4]	
1987	12	3	11,361,826	0	0	**11,361,826**
1988	8	5	2,182,675	355,000	88,750	**2,537,675**
1989	20	16	350,460	5,099,661	50,000	**5,450,121**
1990	27	11	10,327,500	903,158	119,474	**11,230,658**
1991	22	12	8,670,735	5,420,000	861,401	**14,090,735**
1992	29	15	9,821,640	2,192,478	446,648	**12,014,118**
1993	22	38	12,523,165	151,760,404	22,946,101	**164,283,569**
1994	42	76	381,470,015	6,520,815	1,185,597	**387,990,830**
1995	26	87	96,290,779	85,681,789	14,803,782	**181,972,568**
1996	20	179	63,059,873	51,576,698	9,374,568	**114,636,571**
1997	50	274	351,440,027	579,079,581	58,872,855	**930,519,608**
1998	35	275	40,107,920	258,638,736	47,822,301	**298,746,656**
1999	28	315	38,000,792	408,128,379	45,492,385	**446,129,171**
2000	36	210	208,899,015	725,011,203	115,759,246	**933,910,218**
2001	35	177	433,549,179	900,260,345	147,318,543	**1,333,809,524**
2002	24	194	74,567,427	960,450,528	153,825,657	**1,035,017,955**
2003	26	219	536,834,879	1,287,796,031	279,770,601	**1,824,630,910**
2004	28	275	34,816,447	475,370,142	97,434,278	**510,186,589**
2005	34	271	204,821,548	911,972,558	122,597,758	**1,116,794,106**
2006	18	223	1,047,745,714	1,239,957,154	166,506,405	**2,287,702,868**
2007	22	196	461,582,993	1,084,809,242	153,138,241	**1,546,392,235**
TOTAL	**564**	**3,071**	**4,028,424,609**	**9,140,983,902**	**1,438,414,591**	**13,169,408,511**

NOTES:

1. The information reported in this table covers matters in which the Department of Health and Human Services is the primary client agency.
2. "New Matters" refers to newly received referrals, investigations, and *qui tam* actions.
3. Non *qui tam* settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
4. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims, which may be less than the total settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

FRAUD STATISTICS - DEPARTMENT OF DEFENSE[1]

October 1, 1986 - September 30, 2007
Civil Division, U.S. Department of Justice

FY	NEW MATTERS[2]		SETTLEMENTS AND JUDGMENTS[3]			
	NON QUI TAM	QUI TAM	NON QUI TAM[3]	QUI TAM		TOTAL QUI TAM AND NON QUI TAM
			TOTAL	TOTAL	RELATOR SHARE[4]	
1987	236	22	27,897,128	0	0	**27,897,128**
1988	122	28	149,136,213	33,750	8,438	**149,169,963**
1989	119	32	154,588,297	10,002,058	1,394,770	**164,590,355**
1990	74	41	117,715,978	21,743,463	3,804,470	**139,459,441**
1991	78	44	227,813,245	57,327,000	8,636,300	**285,140,245**
1992	73	61	62,003,695	129,294,456	23,874,784	**191,298,151**
1993	93	53	83,742,840	29,707,641	4,951,923	**113,450,481**
1994	62	82	226,083,266	370,666,206	68,163,879	**596,749,472**
1995	54	87	111,424,866	140,563,237	28,348,711	**251,988,103**
1996	44	81	78,085,099	61,833,653	12,522,473	**139,918,752**
1997	46	82	33,723,347	36,528,913	6,392,620	**70,252,260**
1998	29	62	71,063,139	150,180,185	20,511,801	**221,243,324**
1999	33	70	30,522,711	15,859,646	2,863,936	**46,382,357**
2000	10	46	53,007,693	96,287,825	15,812,059	**149,295,518**
2001	10	42	17,715,878	116,188,794	25,067,682	**133,904,672**
2002	16	44	15,017,365	19,407,658	2,957,196	**34,425,023**
2003	10	36	107,337,000	205,124,468	48,640,795	**312,461,468**
2004	16	50	10,098,491	17,684,000	3,031,610	**27,782,491**
2005	16	49	19,049,935	102,234,052	21,649,855	**121,283,987**
2006	13	74	586,430,385	48,809,599	10,488,996	**635,239,984**
2007	22	66	16,400,000	32,035,609	1,681,419	**48,435,609**
TOTAL	**1,176**	**1,152**	**2,198,856,571**	**1,661,512,213**	**310,803,717**	**3,860,368,784**

NOTES:

1. The information reported in this table covers matters in which the Department of Defense is the primary client agency.
2. "New Matters" refers to newly received referrals, investigations, and *qui tam* actions.
3. Non *qui tam* settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
4. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims, which may be less than the total settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

FRAUD STATISTICS - OTHER (NON-HHS, NON-DOD)[1]
October 1, 1986 - September 30, 2007
Civil Division, U.S. Department of Justice

FY	NEW MATTERS[2]		SETTLEMENTS AND JUDGMENTS[3]			
	NON QUI TAM	QUI TAM	NON QUI TAM[3]	QUI TAM		TOTAL QUI TAM AND NON QUI TAM
			TOTAL	TOTAL	RELATOR SHARE[4]	
1987	92	6	47,220,995	0	0	**47,220,995**
1988	80	10	21,968,775	1,954,354	0	**23,923,129**
1989	82	40	42,263,423	11,681	2,200	**42,275,104**
1990	139	23	61,520,889	17,911,746	2,687,662	**79,432,635**
1991	134	28	33,961,487	7,791,931	1,188,586	**41,753,418**
1992	183	37	65,532,871	4,056,969	135,000	**69,589,840**
1993	189	47	85,679,571	8,253,742	1,445,113	**93,933,313**
1994	175	61	98,469,616	4,653,507	942,770	**103,123,123**
1995	152	95	62,273,997	14,414,266	2,475,603	**76,688,263**
1996	122	84	106,212,299	24,340,863	3,954,557	**130,553,162**
1997	91	190	80,404,687	12,331,980	2,250,430	**92,736,667**
1998	54	130	40,264,734	60,264,000	10,416,915	**100,528,734**
1999	79	108	126,866,982	74,004,263	16,036,231	**200,871,245**
2000	49	107	105,980,489	389,105,117	52,486,815	**495,085,606**
2001	41	92	40,931,918	279,669,798	45,224,468	**320,601,716**
2002	22	80	30,013,500	123,303,748	8,713,542	**153,317,248**
2003	56	79	58,831,489	24,722,697	4,845,202	**83,554,186**
2004	76	106	70,741,084	73,287,873	12,023,461	**144,028,957**
2005	57	86	53,043,500	140,931,636	26,072,989	**193,975,136**
2006	54	87	80,647,982	215,775,447	46,995,431	**296,423,429**
2007	84	94	81,272,122	334,993,400	22,570,872	**416,265,522**
TOTAL	**2,011**	**1,590**	**1,394,102,410**	**1,811,779,018**	**260,467,847**	**3,205,881,428**

NOTES:

1. The information reported in this table covers matters in which the primary client agency is neither the Department of Health and Human Services nor the Department of Defense.
2. "New Matters" refers to newly received referrals, investigations, and *qui tam* actions.
3. Non *qui tam* settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
4. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims, which may be less than the total settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

FRAUD STATISTICS
***QUI TAM* INTERVENTION DECISIONS & CASE STATUS**
As of September 30, 2007

Civil Division, U.S. Department of Justice

	ACTIVE	SETTLEMENT OR JUDGMENT	DISMISSED	UNCLEAR	TOTAL
U.S. Intervened	93	947	52	2	1,094
U.S. Declined	363	212	3,170	7	3,752
Under Investigation					967
					5,813

Mr. BERMAN. Thank you very much, Mr. Hutt.
Mr. Helmer?

TESTIMONY OF JAMES B. HELMER, JR., PRESIDENT, HELMER, MARTINS, RICE & POPHAM COMPANY, LPA, CINCINNATI, OH

Mr. HELMER. Thank you, Mr. Chairman.

In the mid-1980's, many people in this country became alarmed by reports of $400 hammers and $6,000 coffee pots being purchased by the Department of Defense. This body also became alarmed and took action as a result of those reports. In February 1986, I testified before this Subcommittee concerning amending the Civil War-era False Claims Act because I had the only pending *qui tam* case in the United States at that time.

With Chairman Berman's leadership, this House passed the False Claims Act amendments in 1986 and President Reagan signed them into law in October of that year. Now, prior to that, prior to 1986, the entire Department of Justice, with all of its lawyers and jet airplanes and resources, recovered $26 million for fraud. Since 1986, and the amendments that were made at that time, the average now is close to $1 billion a year year after year after year.

The False Claims Act has 3,000 words in it. I thought in 1986 that the concept was simple enough: go out and enlist citizens to assist their Government in fighting those who would abuse the public trust and steal tax dollars, and at the same time encourage those citizens and protect them. I thought that was a simple enough concept.

But I have now spent 25 years litigating under this statute, the False Claims Act. I have done that all over the United States. I have been involved in cases involving Medicare theft, violation of the environmental protection laws, cheating on Federal oil and gas leases, and on trade duties. But I have spent most of my time prosecuting this country's major defense contractors, and these are not small businesses. These are not universities. These are the largest corporations known to Western civilization.

What I have learned in those 25 years of using this statute is set out in a 1,600-page book I wrote, now five times—it has been written five times on this subject—and what I have learned is that nearly all of those 3,000 words in the False Claims Act have been challenged and are being challenged by those who represent the minority of Government contractors who are unscrupulous.

As a result, several courts have lost sight of what this body was intending to accomplish, and this magnificent public-private partnership, the device of using the *qui tam* cases is in my opinion doomed to become the toothless tiger that it was after 1944 when Congress at that time legislated the ability to use *qui tam* cases out of existence.

Every provision of the False Claims Act Corrections Act of 2007, H.R. 4854, is designed to clarify parts of the False Claims Act which have been tortured by various judicial decisions over those 22 years since 1986. The *Allison Engine* case, which was referred to, I have worked on that case for 14 years. The next paycheck I get on that case will be the first one in those 14 years. It is not a get-rich-quick scheme to bring a *qui tam* case against a major de-

fense contractor—in that case, four major defense contractors. You might even end up having your case go to the United States Supreme Court after 14 years.

While Mr. Hutt is correct that the Supreme Court determined that presentment no longer exists in a(2) or a(3), although some judges had seen it there—it is not in my copy of the statute, and Chairman Berman, it is not in your copy of the statute either—but some courts have found it there. He is incorrect to say that is inconsequential, because what the Supreme Court did add last week was four new elements that you will find nowhere in the 1986 version of the statute or the 1863 version of the statute. Intent, materiality, reliance, and even damages—none of those are in the False Claims Act. All of those can be found in the Supreme Court's *Allison Engine* decision.

I urge your Subcommittees, just as I did in 1986, to give full consideration to passing this bill out of Committee and joining with your colleagues in the Senate in getting these amendments made so that citizens like Mr. Campbell, who is a real patriot in my opinion, can continue to play a vital and necessary role in helping their Government to protect the billions and billions of tax dollars that remain at risk.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Helmer follows:]

PREPARED STATEMENT OF JAMES B. HELMER, JR.

TESTIMONY OF JAMES B. HELMER, JR.
BEFORE THE HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY
AND
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
Hearing on the "False Claims Act Corrections Act of 2007"
June 19, 2008

I. INTRODUCTION

Good morning Mr. Chairman and members of the Committee. My name is James B. Helmer, Jr., and I thank you for inviting me to testify in support of House Bill H.R. 4854, the "False Claims Act Corrections Act of 2007." I am currently President of the Cincinnati law firm of Helmer, Martins, Rice & Popham Co., L.P.A. I also serve on the President's Counsel of Taxpayers Against Fraud, an organization whose sole enduring purpose is to combat fraud against the Federal public fisc through use of the False Claims Act and specifically its *qui tam* whistleblower provisions.

In 1986 this body sought my testimony on the False Claims Amendments Act of 1986 because I had the only *qui tam* case then pending in the United States. All of my suggestions were eventually followed and became part of the Bill passed by this House and signed into law by President Ronald Reagan in October 1986.

I have been representing whistleblowers under the False Claims Act ("FCA") for the last 25 years in dozens of cases all across the country. Those cases have collectively resulted in over $700 million being returned to the Treasury by some of the most well-known and largest Federal Government contractors in history, including: General Electric; Boeing; Columbia HCA; Northrop Grumman; General Dynamics; Lockheed Martin; and almost all of the major oil companies. These companies were cheating the United States taxpayers, and they were caught

because courageous whistleblowers were empowered and encouraged by the FCA to put an end to the misconduct.

It has been my honor to represent whistleblowers over the years, and that is why I have devoted much of my private practice to it for so long. I previously served as a law clerk to the Honorable Timothy S. Hogan, United States Chief District Judge for the Southern District of Ohio from 1975 to 1977, and since that time I have been engaged in the private practice of law focused on prosecuting FCA litigation. There are more than 250 published opinions by jurists located throughout the country in cases in which I was lead trial counsel. I have lectured and written extensively about the FCA, and have even authored a book called *False Claims Act: Whistleblower Litigation* (5th ed. Top Gun Publishing, 2007) that is designed to help lawyers navigate their way through the complexities of this law. This treatise, originally published in 1993, is now in its fifth edition.

I have litigated at all levels of the Federal court system including, most recently, arguing to the United States Supreme Court on behalf of the Relators in a case decided June 9, 2008 captioned *Allison Engine Company v. United States ex rel. Sanders*, Case No. 07-214, 2008 U.S. LEXIS 4704 (2008). I was successful in convincing every Justice of the Supreme Court that the FCA applied to the subcontractor fraud alleged in my case, even though the defendant subcontractors never "presented" their false claims for payment directly to a Federal Government employee. However, while the Supreme Court agreed that the FCA does not contain a blanket "presentment" requirement, the opinion included additional language that I believe could be interpreted and applied in a way that will leave billions of taxpayer dollars unprotected. The clarifications in these FCA amendments will ensure this will not happen.

There are not many lawyers who have devoted their careers to the representation of whistleblowers pursuing Government contractors under the FCA—the *qui tam* bar numbers only in the low hundreds. I often hear suggestions made by those aligned with the FCA defense bar that *qui tam* attorneys view the FCA as some kind of get-rich-quick opportunity. I know most of the lawyers who are part of the small *qui tam* bar, and not one of them shares this view. In reality, it is exceedingly difficult to succeed as a *qui tam* lawyer, and those that are able to do so have found that there is absolutely nothing quick about the process.

FCA lawsuits are complex, very lengthy endeavors, with hurdles that are simply foreign to those who are classic plaintiffs' trial lawyers. This is why *qui tam* lawyers are, in really, a different breed than the classic trial lawyer. Because we sue Government contractors, every day we face adversaries with near-limitless resources who are represented by the largest law firms in the world, with hoards of paid-by-the-hour attorneys charging upwards of $1,000 per hour or more. We do not have the luxury of bringing and resolving cases within a matter of months or a year or two, nor can we afford a voluminous caseload as a way to manage our risk. We know and have accepted that these cases take many, many years, they are hard to win, they take thousands of hours of time, and they require expense outlays of at least hundreds of thousands, often millions of dollars. And even when we do achieve a successful outcome, it has invariably taken many years, sometimes more than a decade before any resolution is reached.

A perfect example is the *Allison Engine* litigation. We filed that case in 1995, so it is approaching the end of its 13th year. My co-counsel and I have spent thousands of hours, millions in attorney time and millions in out-of-pocket expenses to this point. We won the case on summary judgment, had that victory overturned and then we tried the case for five weeks in

Dayton, Ohio. However, before the jury was permitted to render a verdict, the trial court dismissed the case on the ground that even though we proved that all money paid to the defendants came from the Navy, the case could not proceed because we had only shown that the defendant subcontractors had submitted their thousands of false claims to a prime contractor and not directly to the Navy. The Supreme Court has now afforded us the chance to try this case again, though the outcome is, of course, anything but certain. We have not yet received anything as a result of our work in this case, much less quickly, which my experience has found to be the norm in this area of the law. But even with such hindsight, I can tell you that we absolutely would do it all over again.

For the few of us who fight these fights, we find them worthwhile because our clients are true patriots. In my experience, whistleblowers are driven by a singular goal: They want to right the wrongs they see being committed against the taxpayers. They do not think to start this struggle by contacting a lawyer. They first work to resolve the problems on their own, for example by reporting to their employers the misconduct that they see and imploring the company do the right thing. The vast majority of Government contractors do so. But, of course, some do not. And in those situations, when a whistleblower eventually realizes that the company will not act voluntarily to rectify fraudulent conduct, the FCA gives whistleblowers another option. The False Claims Act Corrections Act of 2007 helps maintain the viability of that option.

Having testified back in 1986, my current perspective prompts this general observation: The 1986 Amendments were of a much different character than those we are discussing here today. The 1986 Amendments were an overhaul, a substantial re-writing of the FCA by which Congress expressed its intention that this law should be strengthened—after decades of relative

disuse following amendments to the FCA in 1943 that weakened the *qui tam* provisions—so that it could again be a useful weapon against fraudulent claims for taxpayer funds. The proposed 2007 amendments, by contrast, are not an overhaul and are not an expression of new Congressional intent. These amendments are simply a reaffirmation of the intent behind the 1986 Amendments, and are needed due to various judicial decisions that have gone against that intent.

By any measure, the 1986 Amendments have proven wildly successful in recovering taxpayer money fraudulently taken from the Treasury, with more than $20 billion dollars returned to the Treasury as of the end of fiscal year 2007. I am happy to report that nearly all of that money has been recovered in suits initiated by *qui tam* whistleblower Relators. The future effectiveness of the Act, though, is being eroded by successful attacks from the well-organized, well-financed FCA defense bar. This erosion has been accomplished, in large measure, by the FCA defense bar advocating interpretations of the FCA without regard for the intentions of Congress as expressed in the 1986 legislative history—which unambiguously stated that the FCA must be construed broadly to responsibly protecting taxpayer funds. By ignoring Congress's intent, and thus consistently pressing for narrow constructions of the FCA, the defense bar has achieved a growing body of caselaw erecting new hurdles making it much harder for both the United States and individual whistleblowers to redress fraudulent conduct with the FCA.

I am here today to urge this Congress to pass the False Claims Act Corrections Act of 2007 so that the intentions of Congress in 1986 can again be given full effect. In large part the Bill introduced in the House tracks the version introduced in the Senate, and my testimony will focus on the value of the most important of those shared provisions. In so doing, I will also

discuss the impact of the Supreme Court's recent *Allison Engine* decision on the Bills as they have been introduced. Finally, I will discuss an important aspect of the House version that does a better job of re-energizing the FCA than the Senate's Bill—the provision that would clarify the types of information that need be pled in a *qui tam* FCA complaint to satisfy Civil Rule 9(b).

II. KEY PROVISIONS SHARED BY THE HOUSE BILL AND SENATE BILL

A. False Claims Act Liability For Indirect Fraud Against The Government

Section Two of H.R. 4854 would amend the FCA to clarify its application to those making false claims for Federal Government funds even when those false claims are not physically presented to an employee of the United States Government. This is an important clarification given the realities of Government procurement. The Government buys all manner of goods and services, from military hardware to healthcare for the aged and disabled, and the interest that the Government has in the proper use of those funds does not necessarily end when the funds leave the Treasury.

Government funds are often distributed by private entities on behalf of the Government, and in those situations, there are Government strings still attached to the funds. The proposed amendments ensure that those claiming Federal dollars at all levels—whether directly from the Government or from those tasked with distributing Government funds—will be held accountable if such claims are against the purpose for which the Government allocated the funds.

Though the recent *Allison Engine* decision by the Supreme Court confirmed that the FCA reaches fraudulent conduct by subcontractors who do not "present" their false claims to the Government, the Supreme Court used language that could be misapplied to narrow the FCA in a way never intended by Congress. H.R. 4854 should be enacted without revision because it

provides a comprehensive framework for redressing fraud against the public fisc. The Bill covers issues not raised in *Allison Engine*. And the Bill also clarifies the reach of the FCA in light of potentially restrictive interpretations of the FCA that could flow from misapplication of the *Allison Engine* opinion.

1. Need For Clarification.

Prior to the 1986 Amendments, courts had usually, but not always, applied the FCA to reach indirect fraud committed by Government subcontractors against the public fisc. In 1986, both the House and Senate clarified that the FCA should, indeed, protect Federal Government funds even if they are not distributed by a Federal Government employee: "[C]laims or false statements made to a party other than the Government are covered by this term if the payment thereon would ultimately result in a loss to the United States." H.R. Rep. No. 99-660, at 21 (1986). "[A] false 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." S. Rep. No. 99-345, 99th Cong., 2d Sess. 10.

To ensure this reach, Congress added a new definition of actionable false "claims" to include "any request or demand, whether under a contract or otherwise, 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." 31 U.S.C. § 3729(c). The Senate was quite explicit as to the application of this definition: "For example, 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." S. Rep. No. 99-345 at 10 (1986).

Despite the clarity of the FCA and Congress's clear intent, in 2004 the Court of Appeals for the District of Columbia Circuit decided that a false claim to a Federal Government grantee could never support liability under the FCA unless that false claim was eventually re-presented by the grantee to a Federal Government employee. *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 1032 (2005). While "presentment" of a false claim directly to the Federal Government is only mentioned as an element of liability in Section (a)(1) of the FCA, *Totten* decided that there must be a blanket "presentment" requirement in all provisions of the FCA in order to ensure that the Federal Government is truly the defrauded party. The rationale for *Totten* seems to have been driven by fact-specific concerns: The grantee (Amtrak) received both Federal grant money as well as private funds, so it was not clear whether Federal Government funds were used to pay the claims. And there was no identification of Government requirements violated by the subcontractors, so it was not clear whether the claims were false in a way that truly defrauded the Government.

Following the *Totten* decision, many lower courts throughout the country began to dismiss cases based on a rote application of the so-called *Totten* "presentment" requirement. Even where Government money was involved and Government requirements were violated, the FCA was found inapplicable to subcontractors unless their false claims actually reached a Government employee. The FCA was systematically being narrowed so that it no longer applied to Government subcontractors. Perhaps the starkest example of this involved the *Allison Engine* case that we tried for five weeks in early 2005 in Dayton, Ohio.

Allison Engine involved Navy subcontractors hired to build generator sets for the Navy's

new fleet of *Arleigh Burke* class destroyers. Over the course of a five-week trial, we introduced evidence that the defendant subcontractors made the generator sets in violation of Navy specifications that had been specifically imposed upon them by contract. We also showed that the defendants were required to certify in writing to the Navy that the generator sets had been made to the Navy's specifications in order to be paid with Navy funds. These defendants submitted thousands of invoices to the shipyards, and each one falsely claimed payment of Navy funds for their defective work. And the defendants were in fact paid with Navy funds after they falsely certified to the Navy that the generator sets met the Navy's standards. Accepting all this as true in passing on a Motion for Directed Verdict, the district court still dismissed the action because, while the defendants made false statements to the Navy in order to get paid with Navy funds, the district court found that the defendants did not violate the FCA because their invoices were not "presented" to the Navy.

The Court of Appeals for the Sixth Circuit reversed the district court. *United States ex rel. Sanders v. Allison Engine Co.*, 471 F.3d 610 (6th Cir. 2006). The Sixth Circuit found that while "presentment" of false claims to the Government was required for liability under FCA Section (a)(1), FCA Sections (a)(2) and (a)(3) did not mention "presentment"—liability was triggered under those sections for the much different conduct of making false statements to get false claims paid, or for conspiring to defraud the Government. The Sixth Circuit found clear evidence of that misconduct in this case. In reaching this decision, the Sixth Circuit found that "presentment" of false claims to the Government was not required to establish FCA liability so long as there was evidence that the false claims were paid with Federal Government funds.

The defendants in *Allison Engine* convinced the Supreme Court to grant *certiorari* by

misstating the Sixth Circuit's holding. Ignoring the facts of the case, the defendants claimed that the Sixth Circuit greatly expanded the FCA to reached any and all claims made to anyone that has "Government funds." In reality, the Sixth Circuit merely held that the FCA reaches claims for Federal Government funds that are false claims because the claimant violated the Federal Government requirements attendant to those claims. These were not simply claims for "Government funds." These were claims for Government funds that the defendants were only permitted to make by certifying to the Government that Government requirements had been met.

Notwithstanding the factual context, the Supreme Court clearly was concerned about whether the Sixth Circuit had somehow effected a broad expansion of the FCA. Thus, in *Allison Engine*, the Supreme Court would address the split with *Totten*, namely whether there is a blanket "presentment" requirement throughout the FCA (as *Totten* held) or whether the FCA applies to all claims for "Government funds" (as the defendants mischaracterized the Sixth Circuit decision). Before the Supreme Court's decision issued, though, both the House and Senate introduced the proposed FCA amendments that charted an appropriate middle course.

2. Proposed Amendments Covering Indirect Fraud Against The Government.

The proposed amendments rectify the "presentment" problem caused by the *Totten* opinion, and in a fashion that keeps the FCA focused on fraud perpetrated on the Federal Government rather than on all claims, without qualification, that might seek "Government funds." Section Two of the Bill clarifies that the FCA does reach false claims that are not "presented" to a Government employee, so it does not matter whether the Federal Government itself pays the claim or whether the Government funds are distributed by a third party. The important inquiry is not whether "presentment" has occurred, but instead whether "Government

money or property" is requested. But this does not mean that the FCA reaches any and all claims for "Government funds."

Amended Section 3729(b)(2) would define "Government money or property" as money "belonging" to the United States. And when it is Government money being distributed indirectly by a "contractor, grantee, agent, or other recipient," the FCA will only be implicated if the Government money "is to be spent or used on the Government's behalf or to advance a Government program[.]" This provision thus addresses any concerns that the FCA somehow reaches false claims merely because they are made to and paid by a private entity that has received funds from the Government. Claims to a private entity will only be actionable "false claims" if the private entity is essentially acting as conduit for disbursing Government funds in a manner prescribed by the Government. This structure would ensure that the FCA will continue to be an effective weapon against fraud on Government programs (such as Medicare and Medicaid) that are administered on the Government's behalf by Government contractors, but do not necessarily involve "presentment" of claims to the Government.

As a result of the new definition of "Government money or property," the current definition of "claim" in Section 3729(c)(2) could be vastly simplified. There would no longer be any need for "claim" to address whether and when funds should be considered sufficiently "Government" funds for purposes of triggering FCA liability. Instead, "claim" would need only clarify that the FCA covers "any request or demand" for the separately-defined "Government money or property."

The amended Section Two would also allow the Government recourse against those making false claims for money or property the United States holds in trust or administers for an

"administrative beneficiary." This clarification is needed in light of the recent decision involving Iraq reconstruction fraud, where a district court found the FCA inapplicable to claims made for reconstruction money administered but not owned by the U.S. Government. *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 444 F. Supp.2d 678 (E.D. Va. 2006). This decision (and others that will surely follow) does not appreciate the ranging Government interests advanced when the United States holds and administers property of another. Though Government funds may not be sought by the fraudfeasor, the Government certainly loses administrative resources that were invested in order to advance important Government interests. In addition, properly protecting such funds often saves the Government from having to satisfy funding gaps in programs the Government administers for others. The FCA should reach such claims.

Finally, H.R. 4854 closes a loophole in the present conspiracy provision. As it now exists, Section (a)(3) only reaches those who conspire "to defraud the Government by getting a false or fraudulent claim allowed or paid[.]" But defrauding the Government via false or fraudulent claims is not the only method addressed in the current FCA—the other liability sections involve such actions as making false record or statements, or delivering less Government property than promised. The amendments clarify that the FCA reaches conspiracies to violate any of the liability provisions in Section 3729.

3. The Impact Of *Allison Engine*.

While the Supreme Court's *Allison Engine* decision post-dates the introduction of the proposed FCA amendments, the House and Senate Bills provide the very same clarification that the Supreme Court unanimously did—that "presentment" of false claims is not an element of liability for all provisions of the FCA, so that subcontractors are still answerable for their false or

fraudulent statements that impact the public fisc. But the amendments go further by specifying that FCA liability attaches where "Government money or property" is sought from a private party only when that money or property is distributed for a distinctly Government purpose. In this way, the Bills provide better guidance to future litigants and courts than *Allison Engine* does.

As with both the House and Senate Bills, *Allison Engine* strikes a balance between the rigid *Totten* "presentment" requirement, on the one hand, and some perhaps too-broad language in the Sixth Circuit's opinion, on the other. The Supreme Court unanimously rejected the *Totten* "presentment" requirement, but also unanimously found that FCA liability should not extend to all claims merely because the claims are paid with "Government funds." For the Supreme Court, the best middle ground involved a more searching inquiry to determine whether the Federal Government is being defrauded in a given circumstance. The Supreme Court stated this inquiry in a variety of ways—whether a subcontractor makes a false statement to a prime contractor "intending for the statement to be used by the prime contractor to get the Government to pay its claim" (2008 U.S. LEXIS 4704 *16), or whether there is a "direct link between the false statement and the Government's decision to pay or approve a false claim" (2008 U.S. LEXIS 4704 *16).

Of course, there was such "intent" and a "direct link" for the subcontractors in *Allison Engine*, since Navy money did not flow for the generator sets until the subcontractors specifically and falsely certified to the Navy in writing that the generator sets were of the required quality. With that being said, however, the language used by the Supreme Court to construe the FCA (including atextual references to "intent" and "materiality" and "reliance" and "direct link") will, in my experience, provide opportunities for FCA defendants to argue for narrow constructions of

the FCA—in effect creating hurdles that are not supported by the text or intent behind the FCA.

The False Claims Act Corrections Act of 2007 provides a clearer and more easily applied standard that does not invite judicial decisions against the FCA text and Congressional intent. "Presentment" is not required. But there must still be a "direct link" to impacting the Government's funding process. This is why the amendments will allow the FCA to reach false claims made to private entities only if the Government money involved is being used "on the Government's behalf or to advance a Government program[.]" This formulation of the "direct link" standard is also satisfied by the subcontractors in *Allison Engine*, since the Government money spent for the generator sets certainly was to advance the Navy's procurement of new destroyers.

After nearly a quarter century fighting defense lawyers over the proper construction of the FCA, I can certainly appreciate how some of the Supreme Court's language regarding such matters as "intent" and "direct link" could be twisted and misconstrued to add hurdles to the FCA and make it harder to redress fraud against the Government. Both the House and Senate Bills will forestall such potential for abuse.

B. Clarifying True "Public Disclosures"

The primary goal of the 1986 FCA Amendments was to create a statutory scheme that would encourage true whistleblowers to report fraud on the Government, while at the same time still preventing the truly "parasitic" lawsuits—such as when an opportunistic Relators merely takes a criminal indictment, attaches a Civil Cover Sheet, and files it as a *qui tam* FCA suit. It was and continues to be very important that this balance is achieved, since the effectiveness of the FCA absolutely depends upon it being used as intended, as a tool for real whistleblowers.

In 1986, then, Congress decided in Section 3730(e)(4) to prohibit FCA suits "based on 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." Unfortunately, the language in this so-called "public disclosure" provision has been increasingly used by FCA defendants, and applied by the courts, to dismiss meritorious cases, rather than parasitic ones. The proposed 2007 amendments will help put an end to this misuse in a variety of ways.

First, and perhaps most important, Section 3(d) of the H.R. 4854 converts the "public disclosure" bar from a jurisdictional issue to one that can be raised only by the Government "upon timely motion." This is entirely appropriate because the "public disclosure" provision is meant to prevent parasitic lawsuits, not provide FCA defendants a grounds to escape liability. Indeed, this is why publically-disclosed allegations can always be used by the Government to initiate an FCA action on its own. But because the current "public disclosure" provision is framed in jurisdictional terms, FCA defendants are absolutely entitled to raise subject-matter jurisdiction challenges even though that provision was never meant for their benefit. This inconsistency is rightly corrected by the amendments.

Second, the Bill clarifies that some types of information gathered by a whistleblower should not be considered "publically disclosed" information. Most notable on this issue are the judicial decisions finding that information obtained by a Relator through a Freedom of Information Act request is sufficiently "public" to potentially bar a *qui tam* action. *E.g. United States ex rel. Mistick PBT v. Housing Authority,* 186 F.3d 376, 383 (3rd Cir. 1999); *United States*

ex rel. AD Roe Co., 186 F.3d 717, 723024 (6th Cir. 1999). The amendments clarify that FOIA information obtained by a Relator does not raise "public disclosure" issues. Similarly, the amendments provide that information obtained by the Relator due to "exchanges of information" with Government employees is not, of itself, sufficient to disqualify a *qui tam* suit. These are common-sense provisions, since such information obtained by the Relator cannot credibly be deemed "public."

Third, the Bill corrects court decisions that have dismissed cases that are not really "based upon" publically disclosed information, but instead merely contain some allegations that are loosely "similar to" some publically disclosed information. I have seen FCA defendants in my cases exploit such decisions to great advantage. The defendants will take each allegation in a Complaint, conduct a search for any public statement anywhere that might mention anything about the allegation (no matter how far removed, either geographically or temporally, from my whistleblower), and then submit reams of such "public" information to the court and argue that my Relator's case must have been "based upon" the "public" information. These are not efforts to weed out parasitic lawsuits. They are, all too often, successful efforts to end lawsuits brought by whistleblowers who have brought real "insider" information to the Government—and by whistleblowers who knew nothing of the "public disclosures" concocted by the defendants.

This is a situation in clear need of correction, and the amendments do a fine job. H.R. 4854 provides for dismissal of an action on "public disclosure" grounds only if the action really is a parasitic one: The Relator's knowledge of the allegations regarding "all essential elements of liability" in the action must have been derived "exclusively" from the publically disclosed information. And the Bill clarifies that a public disclosure occurring in a Government

proceeding refers to a Federal Government proceeding, not a State Government proceeding.

Finally, the proposed amendments resolve the much litigated and very inconsistent jurisprudence regarding whether a Relator who has filed an action based upon public information is an "original source" of the information. Currently, the "original source" inquiry is only triggered if a court finds that there has been a public disclosure, after which a Relator must demonstrate having "direct and independent knowledge of the information on which the allegations are based." It has been my experience, and the reported decisions attest, that even the most obvious insider Relators have great difficulty making such a showing, usually because they cannot conclusively show that they personally had the information and were not "tainted" because it may have been elsewhere in the public realm.

The amendments appropriately remove the "original source" inquiry. Now, since a case will only be dismissed if the Relator derives all the allegations exclusively from public information—and will thus not have any "direct and independent knowledge" of the information—the "original source" concept is subsumed in the "public disclosure" provisions. This will greatly simply prosecution of FCA actions for all involved.

C. Statute Of Limitations

The amendments clarify the FCA statute of limitations in two important respects so that they are consistent with Congressional intent. First, a uniform statute of limitation must be clarified for those bringing actions under the Act's anti-retaliation provisions. Although the current FCA does provide for a statute of limitations for all civil actions "under Section 3730," the Supreme Court recently held that this limitation provision did not apply to the anti-retaliation action found in 3730(h). *Graham County Soil & Water Conservation District v. United States ex*

rel. Wilson, 545 U.S. 409 (2005). According to the Supreme Court, those wishing to file such actions must comply with whatever statute of limitations governs the most similar sort of action available under that person's state law.

This is inappropriate protection for whistleblowers. Usually the most analogous state laws are for unlawful discharge, and statutes of limitations governing those actions are often quite short, sometimes as little as six months. It has been my experience and that of many others in the *qui tam* bar that those suffering retaliation for trying to expose fraud sometimes do not learn why they were really fired for many months or years. After all, fraud is secretive business. To account for this reality, the amendments provide for a uniform ten-year limitations period.

For FCA actions, the applicable statute of limitations has been the subject of much wasteful litigation and should also be clarified. As currently written, an action may be brought within six years of the violation, or within 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, but in no event more than 10 years after the date on which the violation is committed." This provision has been inconsistently applied, with litigation regarding who is the appropriate "official" who has the "responsibility" to act, and differing judicial views as to the applicability of the 10-year period in non-intervened cases.

There is no reason for such confusion. The amendments provide for a uniform 10-year period for all FCA claims, without regard for whether the Government intervenes. As one who has litigated the statute of limitations issue on countless occasions, I believe that this clarification will be beneficial to all.

D. "Relation Back" Of The Government's Complaint

When the Government decides to intervene in a *qui tam* case, it usually files its own complaint at that time. An issue has recently arisen regarding whether the Government's complaint would, for statute of limitations purposes, properly relate-back to the date that the Relator's complaint was filed. The current FCA is silent on the issue, so the amendments clarify that the "relation back" doctrine does apply. This has positive practical significance. It will mean that the Government does not have to compromise or prematurely end its under-seal investigation solely for statue of limitation concerns.

While the FCA does not address the issue, Civil Rule 15(c)(2) provides that an amended pleading relates back to the date of the original pleading if the claims "asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the in the original pleading." In a matter of first impression, the Second Circuit recently ruled that the Government's complaint does not "relate back" to the Relator's complaint under this rule. *United States v. Baylor Univ. Medical Center*, 469 F.3d 263 (2nd Cir. 2006). This decision certainly hampers the Government's ability to combat fraud. So the proposed amendments expressly provide that the Government's complaint does "relate back" to the originally-filed *qui tam* complaint.

III. SOLVING THE RULE 9(b) ISSUE.

There is one major substantive improvement that the House Bill adds over the Senate version, and that involves the interplay between the FCA and the pleading requirements found in Civil Rule 9(b), which governs actions alleging fraud or mistake. For more than a decade, Rule 9(b) challenges have been raised by FCA defendants as a matter of course at the very initial

stages of post-seal litigation, and it has resulted in dismissal of countless meritorious actions based upon nothing more than this: The inability of a Relator to identify specific false claims for payment. The House Bill rightfully removes this judicially-created obstacle to FCA actions.

The Rule 9(b) problem has arisen because FCA defendants have successfully convinced most courts that Rule 9(b) applies to FCA actions. But that conclusion is a mistake. Rule 9(b) requires that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." But FCA actions are not fraud actions. They are statutory causes of actions whose elements have already been defined by Congress. And unlike fraud cases, where the victim alleging fraud is exclusively in control of and knowledgeable of most, if not all, elements of the cause of action, whistleblowers filing *qui tam* cases often—if not usually—know only those parts of a contractor's misconduct to which he or she has been privy. The details of that conduct are typically known only, and certainly known best, by the Government contractor defendant.

Moreover, the policy considerations which underlie Rule 9(b)—that "fraud" claims are disfavored and therefore a defendant needs particularized information about claims of fraud made against it in order to defend—have no application here. Congress has been very clear that FCA cases are not at all disfavored but are, quite the opposite, to be actively encouraged. Thus, the heightened pleading requirements of Rule 9(b), which apply to common law causes of action for fraud, should not be and should never have been applied to statutory FCA allegations.

Though it should not apply to FCA actions, Rule 9(b) has been regularly used to test the sufficiency of FCA allegations, and with decidedly harsh consequences. Most importantly, many courts have decided that a *qui tam* complaint will not satisfy Rule 9(b) unless the Relator has

identified "with specificity" the specific claims for payment that are alleged to be false. As a practical matter, this often means that a Relator who is not a billing clerk or at least an office worker with access to the billing documents will be forever unable to bring a *qui tam* case. While they may well have vast information about the underlying fraudulent conduct, they simply will not have any information regarding the claims. This leads to anomaly: A factory machinist who sees his employer making military hardware with substandard parts is surely witnessing fraud on the taxpayers, but he cannot and will not ever be able to get the claims for payment his company makes to the Government for that hardware. Similarly, a physician assistant who sees his employer taking kickbacks from a hospital to refer Medicare patients to that hospital will never see the false claims—the hospital claims for payment to Medicare—though the assistant certainly knows that such claims were made because the hospital is not in the business of treating patients for free.

These pleading hurdles are actually not even overcome by billing clerks. They may have copious detail regarding the claims for payment, but they will have no idea that they are false. If the factory accountant may never speak to the machinist, or the hospital billing clerk never speaks to the physician assistant, those with information about the claims will never have information indicating that those claims are in any way false. And this, of course, is an absolute business-model blueprint for fraud: Segregate the billing office from every other employee, and that will effectively ensure that Rule 9(b) can never be met.

Congress certainly did not intend Rule 9(b) to systematically thwart whistleblower actions. The House Bill contains an reasonable and appropriate remedy for this situation. Section 4(e) provides that the identification of specific claims for payment that result from

fraudulent conduct need not be identified by a *qui tam* Relator so long as that person alleges sufficient other facts that "provide a reasonable indication" that FCA violations have occurred—and so long as the allegations give the Government sufficient notice to investigate the case and the defendants sufficient notice to defend themselves.

The House provision is a decided compromise. It does not take FCA actions outside the ambit of Rule 9(b), since the allegations will still need to be more specific than required by the classic notice-pleading standard of Civil Rule 8(a). But the House provision does remove any requirement that only certain kinds of information must be pled to overcome Rule 9(b). Congress should amend the FCA to include this provision because is will certainly result in better detection and reporting of fraud on the Government.

IV. Conclusion.

Let me close by again thanking the Committee for the opportunity to testify in support of the False Claims Act Corrections Act of 2007.

Twenty-two years ago this House, pursuant to legislation sponsored by Congressman Berman, undertook to modernize the Civil War-ear False Claims Act so that it could become an effective tool in protecting taxpayer dollars. The wisdom of this body in enacting the False Claims Amendments Act of 1986 has been demonstrated repeatedly. Billions of taxpayer dollars have been recovered from those Government contractors who have abused the public trust. Undoubtedly, fraud against billions of additional taxpayer dollars has also been deterred.

The clarifying amendments proposed by both the House and Senate should be adopted as a full expression of the intent Congress has for the FCA as the Government's chief weapon for combating fraud.

Mr. BERMAN. Thank you all very much.

I yield myself 5 minutes for the first round of questions.

Mr. Hutt, I appreciated your comments and support for the existing law. I don't know if you are aware that 22 years ago your client didn't like the bill that was proposed or the law that had just passed. Your client felt like it would unfairly drive up the costs of doing business with the Federal Government and therefore make contracts more expensive; that it would disproportionately fall on the backs of small businesses and nonprofits; and felt that the law you now so strongly defend would do all the things you predict these new amendments to the law would do. Is there any irony in that?

Mr. HUTT. Well, I would just say in response to that that the statute as drafted is not perfect, but certainly the Chamber, and I think everyone who litigates under the statute recognizes that over the past 20 years it has provided the Department of Justice with a very effective tool in enforcing fraud. Primarily when it has been used by the Department of Justice, it has been an effective tool in bringing recoveries back to the Federal treasury.

But I will say that I do feel strongly that it is very difficult for small businesses and smaller entities, not the large defense contractors, to defend themselves against allegations of fraud, especially ones asserted by *qui tam* plaintiffs under the statute which tend in many, many circumstances not to have substantial or sometimes any merit. That is really the reason for the continued opposition to any expansion of the False Claims Act or the reduction of available defenses.

Mr. BERMAN. Would the Chamber change its position on this bill if we simply added an amendment that said these amendments don't apply to companies doing less than a certain amount of business a year, or below a certain net worth? Would that cause the Chamber to be supportive of this legislation?

Mr. HUTT. I think it would be difficult to craft any line that could be workable in practice. The statute has always been a statute of broad applicability and I think that is the best way to frame the statute.

Mr. BERMAN. The public disclosure issue—we wanted to then and we want now to stop parasitic lawsuits. It is the Federal Government and the taxpayers that this is supposed to be protecting, and we in Congress, don't want to see private parties grabbing a significant part of a recovery for actions that the Federal Government was about to move on in any event, and that is an important consideration.

Why should that be an issue a defendant raises, rather than the Department of Justice, or rather than the Government? Why should the defendants have this as a jurisdictional shield to dismiss a case where, and for the sake of this question let's assume, they had committed the fraud and in fact were appropriately liable? Why should they get out of their liability when the Justice Department, which has a high interest in being sure that the taxpayers recover all the damages contemplated, chooses not to file the motion?

In other words, all this does is give the party who has the real interest in preventing the parasitic lawsuit the power to stop the

lawsuit where there has been clear public disclosure of the fraud already, and the whistleblower is adding nothing to it in that situation? I am not sure why we should consider continuing to allow defendants to have the tool to raise this issue when their goal in raising that issue is to avoid their liability.

Mr. HUTT. I think that in a nutshell the reason that it makes sense to continue to allow defendants to raise the public disclosure bar is best answered by looking at the overall purpose and structure of the statute as it exists since 1986. Since 1986, the structure of the statute has worked very well at weeding out parasitic lawsuits and allowing only true whistleblowers to go forward. Essentially, what the statute does is deputizes whistleblowers like Mr. Campbell to come forward with allegations of fraud. It does that by providing significant financial incentives for them to come forward, a share in a potential recovery.

At the same time, from the very outset in 1986, Mr. Berman, you and others were concerned that there could be the possibility for more parasitic actions. Therefore, the public disclosure bar was put in the statute. The way the statute has worked, because this was a jurisdictional provision, since 1986 defendants have been able to raise this defense.

The statute essentially deputizes defendants to do the Department of Justice's work for it. Defendants have the ability and the incentive to determine which of the whistleblowers or *qui tam* plaintiffs who come forward in fact have true, fresh new information of fraud, and which ones are merely parasites or echoing information already in the public domain or already known to the Government.

It simply makes sense to allow the public disclosure provision of the statute to be policed effectively by defendants who have the tools of discovery and other tools available to them to determine which whistleblowers really are bringing the kind of information forward that the Congress has said they want to reward.

Mr. BERMAN. My time has expired.

And now, the gentleman from North Carolina, Mr. Coble.

Mr. COBLE. Thank you, Mr. Chairman.

I thank the witnesses for the testimony.

Mr. Hutt, since you are in the witness box, I will visit with you again, and relate to your testimony regarding the pleadings with particularity. Now, the Government still has that burden, as I understand it. The bill would relieve the whistleblower of that responsibility. Am I reading it correctly?

Mr. HUTT. Yes, that is the way H.R. 4854 is worded.

Mr. COBLE. And some might allege that this results inequitably to named defendants. What do you say to that?

Mr. HUTT. I would concur wholeheartedly. It makes simply no sense to allow anyone to come into Federal court and fail to identify in an action sounding in fraud, all elements of the fraud with particularity. The goal of 9(b) is very simple. Courts have recognized uniformly that the purpose of 9(b) is really two-fold. First of all, to ensure that litigants coming into Federal court making serious accusations that sound in fraud have to have the goods. They have to have specific information about all elements of the fraud.

And then second, they need to put defendants on notice of these very serious accusations against them.

Mr. COBLE. All right. Let me insert Mr. Helmer into the witness box, and let's hear from him regarding my question.

Mr. HELMER. Fraud is a different animal, the type of fraud that Mr. Hutt is talking about, sir. In this area, fraud is disfavored by the courts throughout the country in common law fraud. It is a disfavored tort. As a result of that, 9(b) was constructed to add an additional level or additional hurdle that litigants had to get over before they had their ticket to the courtroom.

The False Claims Act is not disfavored. In fact, this body has spoken very clearly and very eloquently that the False Claims Act, the *qui tam* provisions, are to be encouraged, that citizens like Mr. Campbell and others are to be encouraged to come forward with their information.

What has happened is that 9(b) has been engrafted onto the False Claims Act. I don't think it should ever have been engrafted there to start with. This is a statutory cause of action, not a common law cause of action where the elements are set by this body.

But be that as it may, 9(b) now having been the landscape, the whistleblowers like Mr. Campbell see a portion of the elephant. They see where the part for the Chinook is not being made pursuant to the regulations and the contract requirements. They see that fraud going on, but they don't see the claim process that is being made by the contractor to the United States Army. That is being done in the billing department.

What Mr. Hutt and his colleagues want is that the whistleblower has to have the entire picture of the elephant when he comes into court. He has to not only know the fraud that occurred, but he has to know the claim process and where the claim is and why that claim is false, and tie it back to the allegations and what Mr. Campbell saw on the shop-room floor.

Mr. COBLE. Thank you, Mr. Helmer.

Before my time expires, Ms. Slade, you wanted to insert your oar into these waters?

Ms. SLADE. Sure. The statute as it would be amended by this bill does not get rid of rule 9(b). That is a misperception. There is nothing in the statute that says that rule 9(b) no longer applies. All it says is that the *qui tam* plaintiff when he first goes to court in his opening pleading doesn't need the specifics of the billing documentation.

I think an important distinction is in your common law fraud case, the two parties in the case are the two parties to the transaction, who presumably do have access to the documents reflecting the transaction. When the *qui tam* plaintiff comes in, he comes in on behalf of the United States.

Mr. COBLE. My time is about to expire. The red light is about to illuminate.

Mr. Hutt, let me ask you this, what happens to a whistleblower now who brings a frivolous claim?

Mr. HUTT. There are two principal safeguards that a defendant has in an un-intervened *qui tam* action. First is rule 9(b). Many frivolous actions are thrown out because of the staunch conclusions

of the courts I think uniformly that rule 9(b) applies. That weeds out many cases.

The second principal tool that defendants have to weed out frivolous *qui tam* cases is the public disclosure provision. Many cases that are frivolous in fact are based upon public disclosures.

Mr. COBLE. Should we include new penalties in this bill?

Mr. HUTT. I am sorry?

Mr. COBLE. Should new penalties be included in the bill before us?

Mr. HUTT. No. There is no reason to impose any additional penalties. The existing statute is, as I have said before and as everyone has recognized, has returned $20 billion to the Federal treasury. There is no reason for any additional penalties to be imposed by this legislation.

Mr. COBLE. I see the red light. Mr. Chairman, I yield back.

Mr. BERMAN. I thank the gentleman.

The gentlelady from California, Ms. Sánchez.

Ms. SÁNCHEZ. I am going to pick up where Mr. Coble left off. I am going to ask our witness, Ms. Slade, to perhaps comment on the response that Mr. Hutt just gave.

Ms. SLADE. Regarding the issue of penalties?

Ms. SÁNCHEZ. Yes.

Ms. SLADE. The damage provision in the Act remains the same. And then if there is a frivolous unsubstantiated case, there already is a provision in the law, as I recall, for the defendant to be able to recover its costs.

Ms. SÁNCHEZ. Attorney fees and the like?

Ms. SLADE. Yes.

Ms. SÁNCHEZ. Thank you.

Mr. Helmer, based on your experience and expertise, why do you think the Government has increasingly relied on *qui tam* relators and their counsel to locate and investigate Federal claims allegations? In addition, how do you think that those public and private partnerships have grown over the last 22 years?

Mr. HELMER. If I could give a real-life example, I was involved in litigation against the 17 major oil companies in Texas who were cheating the taxpayers on leases for oil and gas revenues. In that case, the size of the defendants and the size of the defendants' counsel, this room would not be large enough to hold them all. In fact, we had to move the proceedings into a different facility so that all the defense counsel could attend the hearings in the case.

What happened was the Department of Justice was very interested in the case and assigned a very top-notch lawyer to it. But the size of the case was just so overwhelming that eventually the Government allowed the relator's counsel to prosecute most of those oil companies. We recovered $432 million for the taxpayers. On the day that the settlements were reached and the cases were dismissed, the United States Department of Justice intervened in those cases. You will not find that $432 million listed in the department's statistics for a non-intervened case because they did intervene at the 11th hour.

Ms. SÁNCHEZ. At the 11th hour. So it is a question of resources, to some degree?

Mr. HELMER. Yes. And what I was going to add, in that case we hired 80 additional lawyers—"we" being the private counsel representing the relators in Texas—at a cost of in excess of $10 million. The entire Civil Fraud Division of the Department of Justice does not have 80 lawyers in it. We supplemented the resources of the department in prosecuting that case, and in carrying out the intent of this body.

That is one of the things that I think Congressman Berman and his colleagues back in 1986 were interested in, not just people coming forward and bringing information to Government, but in coming forward and putting their neck on the line and helping the Government prosecute these cases so that there can be a recovery for the taxpayers. That is exactly what happened.

The public-private partnership is working very well. But the bottom-line answer to your question is, the Department of Justice could use additional resources, and until they have those resources, they need the *qui tam* relators and the *qui tam* relators' bar, small as it is, to complement their abilities.

Ms. SÁNCHEZ. Thank you.

Mr. Campbell, I just wanted to thank you for your testimony. I had an opportunity to read your written testimony, and I think that your oral testimony with the metaphor about the armor was on point. So I want to thank you for your courage in coming today to tell your story.

Mr. Hutt, when Congress was considering amendments to the False Claims Act over 2 decades ago, witnesses testified that they didn't blow the whistle on fraud because there was no anti-retaliation protection. So Congress included the protection in the 1986 amendments to the Act, and since then court decisions have weakened that protection. H.R. 4854, the bill that we are discussing today, would seemingly restore that protection that the courts have undermined in their decisions.

I would like for you to perhaps explain briefly why in your written testimony you suggest that this legislation would unnecessarily and confusingly expand the anti-retaliation provisions. I would think, and I would hope that you would think and hope, that we would want to protect employees like Mr. Campbell, future employees and others, from retaliation for basically blowing the whistle on fraud.

Mr. HUTT. Yes, certainly, I don't think anyone would take position in favor of retaliation against someone who is trying to blow the whistle on fraud. Certainly, I would not take that position. Our position is simply that the proposed changes are largely unnecessary. I would respectfully disagree with the characterization that the courts have somehow cut back on protections which are available under the anti-retaliation provision.

In my experience, many *qui tam* plaintiffs assert claims under the 3730(h) provision and are successful in doing so. I view that provision as having worked quite well. Right now, the way that provision has been crafted is understood. The courts have addressed that provision. The rules of the road, if you will, are fairly well understood.

A large part of the concerns that we have with the current provision is that it is confusingly drafted. It seems to have new terms

which are unclear, such as making an effort to stop the violation of the False Claims Act. The kind of language embedded in H.R. 4854 we urge is unclear and will lead to a great deal of litigation over the years as the courts have to work through what the language might mean.

Mr. BERMAN. Time of the gentlelady has expired.

The gentleman from Florida, Mr. Feeney, is recognized for 5 minutes.

Mr. FEENEY. Thank you, Mr. Chairman.

I wasn't here when the original Act was passed, so this has been a good education about the nuances of this important area of the law. I think that even Mr. Hutt, whose organization apparently opposed the original legislation, agrees that when there is general intentional wrongdoers who defraud taxpayers, there ought to be a way to protect those people.

I think Mr. Campbell's testimony points out that there is a lot of pressure not to come forward in normal circumstances. You have colleagues who are going to be mad at you, coworkers, not to mention your bosses or the wrongdoers. And then there is always the concern about loss of job, so retaliation.

On the other hand, it is important to find a way to balance those interests that taxpayers have with the higher costs associated with total risk avoidance, not to mention lawsuits or frivolous claims, which are a huge burden on the American economy and one of the reasons that increasingly international companies, or even American companies, are moving offshore because of the civil litigation abuse here.

So finding some balance I think is what all of us want to do to one extent or another. All of the witnesses have talked about some positive experiences with the Act. We want to create a shield and an incentive for people to come forward, without giving a sword and sort of a lottery mentality that there is nothing to lose. So some of my concerns, and maybe it is just because I don't understand enough of it——

Mr. Hutt, you talked about the 9(b) problem. Right now in most cases, whether they are common law or in this case statutory, and I suppose we could do away with virtually anything as long as it wasn't unconstitutional in terms of a defense, but one of the typical claims that a defendant has is that you have to state a full cause of action. You have to plead your entire case.

I guess my initial question is, supposing that I am an employee and I am aware that a contractor I work for is guilty of a specific case or incidence of fraud in a contract. But supposing during the discovery period, or if the Government intervenes during their discovery, that it becomes apparent that it is not just the widgets we produce, but it is the paper clips and it is whatever else we sell to the Government, and this is routine.

Is my potential share of the proceeds for bringing this initial claim, am I just subject to the fact that I knew about the widget problem, but not about a dozen other problems? Or am I eligible to share in the benefits that the taxpayer receives from everything that is discovered as a consequence of my bringing the case forward?

Mr. HUTT. I would answer that question this way. It seems to me that the statute is seeking to reward individuals who come forward with concrete knowledge, particularized knowledge of fraud. That is the benefit to the United States taxpayer that is rewarded through the *qui tam* provisions.

If a relator comes forward with specific instances of fraud and only those instances, let's call it X, then the relator should be rewarded only for a share of the X that he brings forward. If the United States government using its own resources uncovers additional fraud, Y, let's say, I would urge that it is inappropriate to allow the relator a recovery of a share of that Y, when it was the Department of Justice and its resources that led to recovery for Y.

Mr. FEENEY. But let me ask this, suppose that I hire Mr. Helmer or Ms. Slade and during our discovery period, we discover that it is not just X, but it is A, B, and C. Can we amend our complaint?

Mr. HUTT. Complaints can always be amended, yes. Qui tam plaintiffs, if they bring a case, are permitted I think fairly routinely to amend complaints. But there is a real question you raise as to whether it is appropriate to allow a recovery for something the relator has not brought forward.

Mr. FEENEY. But does anybody disagree that if I amend my complaint because of something I have discovered, to add specifics, that I would be eligible?

Ms. Slade?

Ms. SLADE. I believe that under the current law, many courts would rule that, no, you would not be eligible because it was a public disclosure that generated your new knowledge. Many courts would rule that way at the current time.

Mr. HUTT. I would just add this, that the facts you posit are fairly close to what I believe happened in the Stone case, where a relator came forward with information as to fraud and he was wrong. The Department of Justice then investigated and found out the real fraud. The Supreme Court decided that in those circumstances, it was not appropriate to afford a recovery to the *qui tam* plaintiff because he had not brought forward new, fresh, accurate information of fraud.

Mr. FEENEY. Well, let me just finally say, and if there is time left perhaps we can get a couple of comments. The fact that a defendant cannot move to dismiss based on public disclosure is a huge concern for two reasons for me. Number one, philosophically I think those motions ought to be available to a defendant, and a judge ought to decide based on the requirements of the statute.

But even Mr. Helmer acknowledge that this division of the Justice Department I think you said has less than 80 attorneys in it, so that they are probably disinclined to be out there defending hundreds of contractors that may be subject to these sorts of after-the-fact lawsuits from employees. Number one, they are disinclined. And number two, they don't have the resources. So it seems to me that seems to be an unfair part of this proposal.

With that, I will yield back the balance of my time.

Mr. BERMAN. I thank the gentleman.

I would love to get more into this, but Mr. Johnson, I would like to be able to yield to him his 5 minutes, notwithstanding the fact

that there are about 50 things I would love to pursue with you, I think we will do it informally.

Mr. Johnson is recognized for 5 minutes.

Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. Hutt, the Federal Claims Act was first enacted in 1863 in response to widespread fraud in defense contracting during the U.S. Civil War. It is ironic that we are in the midst of two wars and we are dealing with this False Claims Correction Act at this point.

But now, given the fact that the original Act is over 100 years old, and I suppose that the Federal rules of civil procedure are not quite that old. How was it that the Federal rule of civil procedure 9(b) has been found to apply to Federal Claims Act cases? Was it statutory or was it the result of, say, judicial activism?

Mr. HUTT. I would say that every court except two that I am aware of over the last 20 years has concluded that a case asserted under the False Claims Act sounds in fraud. Rule 9(b) is simply a general rule of pleading embedded in the Federal rules that says that if you are going to plead an action asserting fraud or mistake, then you need to allege all the elements of the fraud or mistake with particularity.

Mr. JOHNSON. Courts have even ruled that particularity in the case of fraud with respect to billing would require that the relator produce the billing records and attach them to the complaint.

Mr. HUTT. Not attach them to the complaint, but what courts have generally——

Mr. JOHNSON. Or actually refer to them in the complaint.

Mr. HUTT. Refer to them in the complaint. Many courts have said——

Mr. JOHNSON. Which is the same as pretty much being able to produce them.

Mr. HUTT. I would answer it this way. Many courts have said that it is not enough to allege a general, inchoate, non-particular scheme of fraud unconnected to specific claims for payment. The claims for payment, keep in mind this is the False Claims Act. The claims are at the heart of the fraud. As a defense counsel, I will tell you the first thing you need to prepare a defense is to find the claims, find the documents that are associated with the claims.

Mr. JOHNSON. I understand. But now, if a complaint specifically is reasonable with no documentation, an individual who was in Mr. Campbell's position would not be able to produce records. I mean, if you can make the allegations, colorable allegations which puts you on specific notice, but you don't have the specific billings records, courts are using 9(b) to exclude those kinds of claims.

Now, Mr. Helmer, did Congress intend that Federal Claims Act cases would be subject to the strict pleading provisions of rule 9(b)?

Mr. HELMER. Congressman Johnson, it is my opinion that they did not, and the reason for that is they didn't call this the Fraud Claims Act. It is the False Claims Act. The Fraud Claims Act is something that has been overlaid onto this statute by some very well-paid, very competent defense counsel, and bought by a number of courts around the country.

The problem with that is it adds additional elements of proof that both the Government and the relators have to get over to es-

tablish their case, additional elements of proof that this body never intended to put in there.

Mr. JOHNSON. What is that conclusion based on?

Mr. HELMER. The False Claims Act is a statutory cause of action that has very specific elements. Fraud is not one of the elements of the False Claims Act. Okay? Fraud conjures up terms of materiality.

Mr. JOHNSON. So this is a False Claims Act, that is a species of case——

Mr. HELMER. Yes.

Mr. JOHNSON [continuing]. As opposed to fraud, which is a species of case, but not a False Claims Act case.

Mr. HELMER. That is right. When you think of fraud, there are two people, one lies and the other they know what the statement is and what the causation is and the materiality. They know those elements. When you have an action involving a crime against the sovereign, which is what this statute is designed for——

Mr. JOHNSON. Very distinctive.

Mr. HELMER. Those individuals are not going to have access to that type of information.

Mr. JOHNSON. Okay.

Mr. HUTT. I would have to disagree strongly. Rule 9(b) speaks of fraud or mistake. Most cases asserted under the False Claims Act allege fraud, outright fraud, or false claims, but usually fraud in addition to false claims. In any event, an allegation of a false claim very much is like an action for mistake. By its very terms, rule 9(b) is intended to apply broadly to all actions sounding in fraud or mistake. Certainly, the False Claims Act sounds either in fraud or mistake.

I would also note there are many other Federal actions which are statutory involving fraud, such as securities fraud, all of which have been held to my understanding to require compliance with rule 9(b).

Mr. JOHNSON. All right. Thank you.

Ms. Slade, any comment, briefly?

Mr. BERMAN. Well, all right, we have about 3 minutes and 52 seconds to get our vote.

Ms. SLADE. These amendments do not take away the applicability of rule 9(b). In fact, to the contrary, they require a *qui tam* plaintiff to allege facts that provide a reasonable indication that one or more violations are likely to have occurred, to provide adequate notice of the specific nature of the alleged misconduct.

This language tracks one of the court rulings that did apply rule 9(b), but felt that in the False Claims Act case, that was the way rule 9(b) should apply. In other words, you do need to allege your fraud or your false claims with particularity, but that doesn't necessarily mean that you need to have the invoices.

Mr. JOHNSON. Thank you.

Mr. BERMAN. The time of the gentleman has expired.

We have a vote. While I would love to pursue this further, I think the story of Mr. Campbell and how the successor employer retaliated and under what circumstances would be very interesting, but time is not going to let us do this.

I thank all of you for being here and sharing your insights with us.

Without objection, Members will have 5 legislative days to submit any additional written questions for you, which we will forward and ask that you answer as promptly as you can, to be made part of the record. Without objection, the record will remain open for 5 legislative days for the submission of any other materials.

Once again, with our thanks for your being here and your testimony, the hearing is adjourned.

[Whereupon, at 11:31 a.m., the Subcommittees were adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

SHEILA JACKSON LEE
18TH DISTRICT, TEXAS

WASHINGTON OFFICE:
2435 Rayburn House Office Building
Washington, DC 20515
(202) 225-3816

DISTRICT OFFICE:
1919 Smith Street, Suite 1180
The George "Mickey" Leland Federal Building
Houston, TX 77002
(713) 655-0050

ACRES HOME OFFICE:
6719 West Montgomery, Suite 204
Houston, TX 77019
(713) 691-4882

HEIGHTS OFFICE:
420 West 19th Street
Houston, TX 77008
(713) 861-4070

FIFTH WARD OFFICE:
3300 Lyons Avenue, Suite 301
Houston, TX 77020

Congress of the United States
House of Representatives
Washington, DC 20515

COMMITTEES:
JUDICIARY
SUBCOMMITTEES:
COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY
IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW
CRIME, TERRORISM AND HOMELAND SECURITY
HOMELAND SECURITY
SUBCOMMITTEES:
CHAIR
TRANSPORTATION SECURITY AND INFRASTRUCTURE PROTECTION
BORDER, MARITIME, AND GLOBAL COUNTERTERRORISM
FOREIGN AFFAIRS
SUBCOMMITTEES:
AFRICA AND GLOBAL HEALTH
MIDDLE EAST AND SOUTH ASIA
SENIOR WHIP
DEMOCRATIC CAUCUS
WHIP
CONGRESSIONAL BLACK CAUCUS
CHAIR
CONGRESSIONAL CHILDREN'S CAUCUS

CONGRESSWOMAN SHEILA JACKSON LEE, OF TEXAS

STATEMENT BEFORE THE COMMITTEE ON JUDICIARY

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

AND

SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

JOINT LEGISLATIVE HEARING ON H.R. 4854, THE FALSE CLAIMS ACT CORRECTION ACT OF 2007

JUNE 19, 2008

Thank you, Mr. Chairman, for convening today's very important hearing. The purpose of the hearing is to examine H.R. 4854, the "False Claims Correction Act of 2007," introduced by Subcommittee on Courts, the Internet, and Intellectual Property Chairman Howard L. Berman and Rep. F. James Sensenbrenner, Jr. on December 19, 2007.

The False Claims Act creates an avenue for individual whistleblowers who have knowledge that a company, entity, or person has defrauded the United States Government to act as a private attorney general in an effort to recover the damages owed to U.S. taxpayers. The law was first enacted in 1863 in response to widespread fraud in defense contracting during the U.S. Civil War. Amendments enacted in 1943 and 1986 developed the False Claims Act into a highly successful fraud recovery tool.

Since the 1986 amendments to the False Claims Act were enacted, suits filed under the Act have allowed the United States Government to recover over $20 billion in taxpayer money that would otherwise have been lost to fraud. As the Supreme Court explained, the False Claims Act "was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." Nevertheless, in the 22 years since Congress passed the 1986 Amendments, a number of federal court decisions have narrowed the application of this tool.

In the nearly 22 years since the amendments were enacted, actions brought under the False Claims Act have allowed taxpayers to recover more than $20 billion dollars for the government. Despite the success of the 1986 Amendments, several federal courts, in multiple jurisdictions, have applied and interpreted provisions of the Act in ways that have severely weakened the law. These court

decisions have caused widespread confusion among courts, relators (and their counsel), defendants (and their counsel), and the Government, regarding the scope of liability and various other provisions under the statute, several of which are important to highlight.

Scope of Liability Under the False Claims Act

In 2005, the U.S. Court of Appeals for the D.C. Circuit ruled that the False Claims Act does not reach false claims that are (I) presented to Government grantees or contractors; and (ii) paid with Government grant or contract funds. The court responded that Congress's intent to include these claims under the law was not clear. Several other courts, in various jurisdictions, have also held that the False Claims Act cannot be applied unless the defendant dealt directly with an official of the Government, leading to widespread confusion regarding the scope of the law.

Another federal court ruled in 2006 that the False Claims Act does not cover false claims on funds that are administered by, but not owned by, the Government. Even though false claims made against Government-administered funds harm Government interests and frustrate Government programs and purposes, courts have narrowly read the Act not to cover these claims, removing protection, for example, from Iraq war funds.26 Moreover, although the Act prohibits conspiring to defraud the Government, several courts have read the conspiracy provision narrowly, and have only applied it to some violations of the Act.

Wrongful Possession or Retention of Government Money or Property

In 1998, the Tenth Circuit decided a case involving 31 U.S.C. § 3729(a)(4), a provision of the False Claims Act that imposes liability upon those who wrongfully

possess more Government money or property than the amount for which they have a certificate or receipt. In its decision, the court focused on the technical element of whether the defendant had a receipt or certificate for the property, not on whether the defendant actually wrongfully possessed or otherwise converted the property.28 As a result, a seemingly meritorious case was dismissed.

Similarly, several cases have greatly limited the "reverse false claims" provision of the Act, which imposes liability on those who make or use false records or statements to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government. Indeed, the provision has been read so narrowly that the Government is only able to prosecute those rare fraud-feasors who submit reports concealing their wrongful retention of Government funds. Without adequate prosecutorial tools, fraud through the wrongful possession of Government property continues to permeate government contracting unchecked.

Public Disclosure Bar

When the 1986 amendments were enacted, Congress expressly stated that the public disclosure bar was intended to bar only truly parasitic qui tam lawsuits; the provision was not intended 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, such as from a media report. Congress crafted the public disclosure bar in an effort to provide a balance between "encouraging people to come forward with information and preventing parasitic lawsuits." Yet, despite the clear intent of Congress and the recommendations of the Department of Justice, courts have turned the public disclosure bar into a jurisdictional defense, allowing defendants to routinely move successfully to dismiss relators from cases – cases that are still pursued by the Government – on public

disclosure grounds.

In the most important of these rulings, the U.S. Supreme Court in Rockwell Int'lCorp. v. U.S upheld the granting of a defendant's motion to dismiss a relator from a lawsuit after judgment against the defendant was entered and against strong objections from the Department of Justice, which filed a brief with the Court in support of the relator. Many other courts have made similar readings of the public disclosure bar in decisions, further contorting it into a jurisdictional defense completely contrary to what Congress intended.

The confusing patchwork of public disclosure case law has not only discouraged relators from filing qui tam suits, but it has also silenced meritorious suits, undermining government investigations.

Anti-Retaliation Provisions

Courts have limited the scope of the False Claims Act's anti-retaliation provisions as well. For example, several courts have read new limits into the Act, holding that the protections of the Act's anti-retaliation provisions only apply to "employees," and not to independent contractors, subcontractors, or agents.

The Statute of Limitations

The 1986 amendments extended the False Claims Act's statute of limitations to give greater freedom to the Government and qui tam relators to develop strong cases against perpetrators of fraud. However, in interpreting the False Claims Act in a 2005 decision, the U.S. Supreme Court held that the law's statute of limitations did not apply to retaliation claims brought under the False Claims Act itself; rather, the Court reasoned, relators must conform their claims to the most similar type of action available under

state law. Because many state false claims statutes of limitations are short, the Court's decision created a significant obstacle to recovery for legitimate retaliation claims. Consequently, many whistleblowers who encounter retaliatory tactics from their employers are now forced to file their false claims actions within a narrow window in order to obtain relief, or face other less attractive legal avenues of relief. The Court's decision further clouded an already complicated provision of the statute that is often misunderstood by courts and practitioners alike.

Notice of Claims

Many courts have struggled with the application of Rule 9(b) of the Federal Rules of Civil Procedure to False Claims Act suits. Rule 9(b) requires claims to be pled with

particularity to ensure that defendants are given proper notice of any claims that are being leveled against them so that they can formulate a vigorous defense.36 However, courts have applied this standard strictly in False Claims Act suits, requiring a degree of specificity beyond a general outline of the allegations necessary to give defendants notice of the charges against them and far beyond the breadth of information available to many qui tam relators with meritorious allegations at the pleading stage of litigation– wherein a relator may have knowledge of a method of fraud, but may not be in possession of detailed records outlining how the alleged fraud was executed. Courts have ruled that plaintiffs must provide, for example, alleged false invoices or phony billing documentation – documents that are generally not available to anyone outside a company's billing department – often without having the opportunity of discovery.

H.R. 4854 - CORRECTIONS AND CLARIFICATIONS OF THE FALSE
CLAIMS ACT

Recently, an Arkansas federal court invited Congress to take legislative action to clarify the many varying judicial interpretations of the False Claims Act, saying: "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." H.R. 4854, the "False Claims Act Correction Act of 2007," seeks to clarify several provisions of the False Claims Act in the wake of many of these judicial decisions. It is bipartisan legislation sponsored by Representative Howard L. Berman and cosponsored by Representative F. James Sensenbrenner, Jr. A related bill, S. 2041, the False Claims Act Correction Act of 2007, was introduced by Senator Charles Grassley, and is cosponsored by Senators Durbin,

Leahy, Specter, and Whitehouse.

Specifically, H.R. 4854:

1. Ensures that all Federal funds and funds used to further Government programs, purposes or interests are protected under the False Claims Act, and removes ambiguous language from the Act, by redefining the term "claim" to ensure that liability under the Act will attach to false claims that are submitted to government contractors and grantees, when the contractor or grantee pays the claim with Government funds or will be reimbursed with Government funds;

2. Makes clear that the Act imposes liability on those who conspire to violate any of its provisions;

3. Clarifies that False Claims Act complaints must allege sufficient facts to: (1) put the Government on notice of the claims being asserted, so that an effective

investigation can be conducted; and (2) put defendants on notice of the claims against them so that they can prepare a defense. Complaints do not necessarily need to attach specific claims alleged to be false; as long as the allegations in a complaint, if proven true, provide a reasonable indication that a violation of the False Claims Act occurred, the complaint will not be deemed deficient;

4. Specifies that any material evidence, information, and or attorney work product submitted by a relator to the Government in anticipation of the Government joining a false claims action, is protected from discovery;

5. Establishes that those who discover an overpayment by the Government and decide to keep those funds, are subject to False Claims Act liability;

6. Authorizes only the Government to move to dismiss a qui tam relator from a False Claims Act case upon a showing that the essential elements of the relator's case are based exclusively upon information disclosed in the public record or broadly disseminated to the general public, including information contained in a federal criminal, civil, or administrative hearing; upon information contained in a ongressional, federal administrative, or Government Accounting Office report, hearing, audit or investigation; or upon information from the news media;

7. Gives the Government a specific period of time to move to dismiss from a False Claims Act case any Government employee who has become a qui tam relator without first following prescribed steps necessary to ensure the United States has

been provided a fair opportunity to investigate and pursue the claims on its own behalf. If the Government has been provided such opportunity and has failed or refused to act, Government employees may pursue the matter as qui tam plaintiffs with or without the Government's ultimate intervention.

The bill also authorizes the Attorney General to move to dismiss any qui tam lawsuit filed by a Government employee in which all the necessary and specific allegations contained in the action were derived from an open and active fraud investigation by the Government;

8. Strengthens the Act's anti-retaliation measures by extending protections to not only employees, but to any person and their associates – including government

contractors and government agents – who is retaliated against or discriminated against in their current or future employment endeavors, as a result of lawful conduct in furtherance of a False Claims Act case;

9. Voids any contract, private agreement, or private term or condition of employment that limits or prevents a person from taking otherwise lawful steps to initiate, prosecute, or support an action under the False Claims Act;

10. Revises the statute of limitations provisions by creating a uniform ten year statute of limitations period for all False Claims Act cases and clarifies that if the Government elects to intervene in a relator's case, then all pleadings relate back to the date of the relator's original filing to the same extent that they would had the Government filed the original complaint itself; and

11. Encourages the use of civil investigative demands by clarifying that the Attorney General may delegate authority to issue civil investigative demands and allowing the Attorney General to share any information obtained through a civil investigative demand with federal, state, and local government agencies, as well as with a relator, if the Attorney General determines that doing so is necessary to the Government's investigation of the relator's case.

Mr. Chairman, I welcome today's witnesses and I look forward to their testimony. I yield the balance of my time.

VOGEL, SLADE & GOLDSTEIN, LLP
Attorneys at Law
WWW.VOGELSLADEGOLDSTEIN.COM

Robert L. Vogel, Esq.
Shelley R. Slade, Esq.
Janet L. Goldstein, Esq.

5225 Wisconsin Ave., NW #502
Washington, DC 20015
Tel: 202-537-5900
Fax: 202-537-5905

Responses to Written Questions Concerning Testimony at the June 19, 2008, Hearing on H.R. 4854 the "False Claims Act Correction Act of 2007"

Submitted by Shelley R. Slade

1. H.R. 4854 creates a new liability for knowing retention of Government overpayments. Are overpayments a significant problem in the Medicare program or other government programs? Is the current statute not sufficient to permit recovery of knowingly retained overpayments?

Overpayments are a tremendous problem in government health programs and government procurements. Although current law requires disclosure of overpayments to the Government in many settings, the penalties for nondisclosure are insufficient to motivate those who have received overpayments to disclose them to the government.

The Office of Inspector General of the Department of Health & Human Services (HHS-OIG) on several occasions has looked at the level of overpayments in fee-for-service Medicare. Just several years ago, HHS-OIG determined that 6.3% of fee-for-service Medicare payments constituted overpayments due to fraud, waste or abuse.[1] With Medicare now spending about $370 billion per year,[2] applying this percentage to all Medicare outlays means that overpayments likely exceed $23 billion per year. Guarding the solvency of Medicare from such fraud, waste and abuse is critical to our nation's fiscal well-being. According to the Director of the Congressional Budget Office, "[f]uture health care spending is the single most important

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[1] *Improper Fiscal Year 2002 Medicare Fee-for-Service Payments*, No. A-17-02-02202, Dep't of Health & Human Services, Office of Inspector General.

[2] http://www.gpoaccess.gov/usbudget/fy09/pdf/budget/hhs.pdf.

factor determining the nation's long-term fiscal condition."[3]

Overpayments are also a very serious problem in Department of Defense, Department of Homeland Security and other government procurement activities, particularly those being performed overseas in connection with military and reconstruction efforts in Iraq and Afghanistan (as widely reported in the press, and confirmed by government officials in testimony before the Senate.) Indeed, to address this problem, the Congress recently required the executive branch to amend the Federal Acquisition Regulation:

> [T]o include provisions that require timely notification by Federal contractors of violations of Federal criminal law or overpayments in connection with the award or performance of covered contracts or subcontracts, including those performed outside the United States.[4]

H.R. 4854 amends the False Claims Act so the law may be used to reduce health care and procurement spending through the recovery of some of the billions of dollars in overpayments that are knowingly retained by providers and government contractors without required disclosure to the Government. Given the staggering level of overpayments, H.R. 4854 consequently gives the Government a tool to reduce its spending by hundreds of millions, if not billions of dollars each year.

In answer to your second question, the False Claims Act does not currently impose liability either for the knowing retention of overpayments or the failure to disclose a known overpayment. Under the present law, liability extends only to those providers who receive an overpayment through their knowing submission of a false claim or who knowingly make a false statement to be able to hold on to an overpayment they have received. In the Medicare context, only health care facilities that participate in Medicare Part A (e.g., hospitals, skilled nursing homes and rehabilitation facilities) are required to submit a quarterly statement to Medicare disclosing any known overpayments; Medicare Part B suppliers and physicians are not required to submit a statement

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[3] "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.

[4] Pub L. 110-252, Supplemental Appropriations Act, 2008, H.R. 2642, enacted June 30, 2008.

(although the law requires them to disclose overpayments.). In the government procurement context, while contractors now have a legal duty to report overpayments, they do not uniformly have to file statements disclosing whether or not they have identified any overpayments.

H.R. 4854 closes this loophole, and thereby permits the Government to use the strong remedies in the False Claims Act against those who receive an overpayment by mistake, identify it, but then illegally and improperly decide to retain the overpayment for their own use without disclosure to the Government.

2. Since the time the Senate Judiciary Committee unanimously voted S.2041 out of committee, the Supreme Court ruled that the False Claims Act cannot be used unless the "Government itself" is involved in the payment of funds. H.R. 4854 would clarify that the FCA may be used whenever there is a fraud on federal funds, even if the federal funds are being disbursed on the Government's behalf by an agent or contractor. In your opinion, would this change permit the FCA to be used to pursue a significant number of cases that cannot be pursued under the current law? What are examples of the type of cases that could be pursued under the proposed amendments that arguably could not be pursued current law or where there is ambiguity in current law? How would you calculate the potential savings to the federal government of enacting HR 4854?

H.R. 4854's clarification that the False Claims Act covers false claims on federal contractors and federal grantees would permit the False Claims Act to be used to pursue a significant number of cases that cannot be pursued under the current law. According to the enclosed report by renowned economist Jack Meyer, over a $1 billion dollars of additional stolen funds would be collected over the next five years if this aspect of H.R. 4854 is signed into law.

Earlier this year, in *Allison Engine Co. v. United States ex rel. Sanders*, 2008 LEXIS 4704 (U.S. June 8, 2008), the U.S. Supreme Court held that False Claims Act liability cannot attach unless the "Government itself" is potentially involved in the payment or approval of the fraudulent claims. With the federal government relying on private contractors to make payment decisions for everything from the Medicare system to hurricane relief efforts to the war in Iraq, billions of federal dollars are now potentially exposed to fraud. Indeed, just days after the *Allison Engine* decision, a district court derailed the Government's prosecution of a substantial crop subsidy fraud scheme. *United States v. Hawley*, 2008 WL 2600144 (N.D. Iowa June 27, 2008). 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. Similar arguments are being raised in courts throughout the country.

H.R. 4854 closes this gaping loophole by extending False Claims Act protection to *all* federal funds, including those paid by private entities on behalf of the federal government. H.R. 4854 clarifies that the Government can pursue fraudfeasors targeting federal funds disbursed by grantees or contractors regardless of whether or not a government employee personally reviewed the fraudulent claim or inked the check. In short, H.R. 4854 will empower the Government to pursue and collect from various fraud schemes that are currently draining the U.S. Treasury with impunity.

In the attached report, economist Jack Meyer calculated the potential savings that this amendment would bring the federal government. In reaching his conclusion, Dr. Meyer determined the amount of *additional* federal dollars that would be protected under the amended False Claims Act. Then, based on earlier, extensive studies on the fiscal impact of False Claims Act enforcement, Dr. Meyer calculated the additional recoveries that would be possible under the amended Act. Consistent with his reputation for providing conservative projections, Dr. Meyer then *lowered* the expected savings to reach his final calculation that H.R. 4854 would generate nearly $1.25 billion in savings for the federal government over the next five years.

3. H.R. 4854 would bolster the ability of the Department of Justice to investigate cases by giving them a stronger subpoena power. In your view, is this change needed, and, if so, why? How significant an impact on the Government's fraud enforcement efforts do you expect these changes to have?

The Department of Justice needs stronger subpoena power in order to bolster its ability to investigate fraud cases. H.R. 4854 amends the False Claims Act's Civil Investigative Demand (CID) provisions, providing, in essence, a new investigative tool that will greatly enhance the Justice Department's ability to investigate and prosecute fraud cases. Currently, only the Attorney General is permitted to issue CIDs, which are a form of administrative subpoena that may be used to obtain documents, testimony and interrogatory responses. Because of this limitation and others addressed by H.R. 4854, this investigative tool is rarely utilized by the Department of Justice. H.R. 4854 makes CIDs a viable tool for the Department of Justice by delegating CID authority and defining appropriate uses of CID material.

H.R. 4854's amendments to the CID provisions will have a *significant* impact on the Government's fraud enforcement efforts. Currently, the Justice Department has a sizeable backlog of False Claims Act cases, in large part, because it does not have the necessary investigative tools to process these complex fraud cases. H.R. 4854 provides the Justice Department with these tools in the form of clear CID powers, which will permit the Government to effectively and efficiently investigate fraud allegations. The resulting savings will allow the Government to drastically reduce the mounting backlog of cases.

4. The Justice Department argues that requiring *qui tam* whistleblowers to plead specific false claims at the pleading stage of litigation is a "formulistic and rigid interpretation of Rule 9(b) which distorts the purpose of the Rule."[5] HR 4854, unlike S.2041, addresses this concern by relieving *qui tam* relators of the burden. The opponents of the bill argue that the bill exempts qui tam relators from the requirements of Fed. R. Civ. P. 9(b). Is this true? Will the provision in H.R. 4854 that relieves qui tam relators of the burden of pleading specific, identifiable false claims generate revenue for the United States?

Contrary to the suggestions of those who represent False Claims Act defendants, H.R. 4854 would not exempt qui tam plaintiffs from the requirements of Fed. R. Civ. P. 9(b). All that the bill would do is adopt the rulings of those courts that have applied Rule 9(b) in a manner designed to take into account the realities in whistle blower cases -- which is that witnesses to fraud on the operational side of a large business are unlikely to have ready access to the invoices kept in the files of the billing department. For example, one Court of Appeals had ruled that a relator without ready access to the billing documentation need not allege the details of particular claims so long as "the complaint as a whole is sufficiently particular to pass muster under the FCA."[6] These judicial rulings, which H.R. 4854 is modeled upon, allow False Claims Act cases to proceed so long as the overarching scheme is

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[5] *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).

[6] *U.S. ex rel. Rost v. Pfizer, Inc.*, 507 F. 3d 720, 732 (1st Cir. 2007); *see also United States v. R&F Props. of Lake County, Inc.*, 433 F.3d 1349, 1360 (11th Cir. 2005).

alleged with sufficient particularity to permit the defendant to prepare its defense. As explained by the Solicitor General, "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."[7]

This change most certainly would generate more revenue for the Government. First, large dollar value and potentially meritorious cases that are now being dismissed would be permitted to proceed. For example, both the 8th and 11th Circuit Courts of Appeals have affirmed district court dismissals of cases under Rule 9(b) because the qui tam plaintiffs "did not work in the billing department."[8] In one case against a hospital and a doctor, the Court of Appeals even acknowledged that the qui tam plaintiff, Dr. Joshi, had alleged the specifics as to the doctor, the type of medical billings, the billing rule, the time period involved in the alleged misconduct, and the reason why the claims were false.[9] The Court went on to state 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." Nonetheless, it dismissed Dr. Joshi's case because he lacked access to the billing department's files.[10] These cases, and others dismissed on similar grounds, have involved large amounts of Medicare and Medicaid money alleged to have been paid out on false claims.

Second, this change would encourage qui tam filings by whistle blowers who are unwilling to take the risk of even filing suit under the current law, let alone pursuing one into litigation. Fearing likely dismissal of their allegations under the case law discussed above, many potential whistle blowers are remaining silent rather than placing their careers at risk. When potential informants are chilled in this manner, the Government is denied the opportunity to seek recoveries for the fraudulent scams witnessed by these individuals.

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[7] Brief for the United States at 28, n.12, *Rockwell Int'l Corp. v. United States*, No. 05-1272 (Nov. 20, 2006).

[8] *See, e.g, United States ex rel. Joshi v. St. Luke's Hospital*, 441 F.3d 552, 557 (8th Cir.), *cert. denied*, 127 S.Ct. 189 (2006); *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1013-14 (11th Cir.), *cert. denied*, 127 S.Ct. 42 (2006).

[9] *Joshi* at 554.

[10] *Joshi* at 557.

5. Do you agree that the False Claims Act seeks to avoid "parasitic" lawsuits? Would H. 4854's transfer of the ability to seek dismissal of cases based on publicly-disclosed information from the contractors to the Department of Justice have any impact on the likelihood of recovering damages from contractors in cases where the Government decides not to intervene?

Yes, I agree that the False Claims Act seeks to avoid "parasitic lawsuits." The False Claims Act bars qui tam cases based on public disclosures such as criminal indictments. Congress included this so-called "public disclosure" bar in order to prevent individuals from just copying a government pleading or report and filing it as a qui tam case. Congress' goal was to protect the Attorney General's interests in the control of criminal and civil proceedings in situations in which the Attorney General already was prosecuting the matter covered in the qui tam complaint. H.R. 4854 continues this policy by allowing for dismissal of qui tam cases that are derived from public sources of information.

H.R. 4854 makes one important change to current law, however, that will allow meritorious cases to proceed more quickly to judgment so that the Government can recover stolen funds at an earlier date. The change involves amending the law so that only the Government can move to dismiss qui tam cases on the ground that they are based on public disclosures. This change makes sense because it is the Government, not the defendant, whose interests Congress intended to protect through the public disclosure bar.

The change will increase recoveries in declined cases. At present, either the defendant or the Government can move to dismiss a case based on a public disclosure since, under the current law, courts lack jurisdiction over qui tam cases that are based on public disclosures. Because the defendant has a financial interest in delaying or avoiding adjudication of the merits, however, defendants routinely move to dismiss cases based on public disclosures even when the case is not truly "parasitic" of a preexisting government investigation. The defendants will comb the internet and media and government records to find the most tenuous links to the allegations in the complaint. They will then argue that relator's complaint is based on that public information because the relator's complaint is "similar" to the public information and the relator did not provide the information to the entity that made the disclosure. Ambiguities in the wording of the public disclosure provision have allowed defendants to create confusing and conflicting case law that they exploit for their own benefit to mount these challenges, and delay cases at the expense of the public fisc.

By taking this weapon out of the hands of the defendants, defendants will be forced to address the merits of each complaint earlier in the process. If they wish, they can seek to dismiss the case for failure to state a claim or for non-compliance with the rules requiring pleading fraud with particularity. They can also seek judgment on the merits at any point in the proceeding. The one thing they won't be able to do, however, is delay a decision on the merits by fabricating a public disclosure problem with the complaint.

6. **As noted on the editorial page of the New York Times: "[i]nvestigators say that current war fraud runs into untold billions, including faulty ammunition and vehicles and not-so-bullet-proof vests."[11] The Inspector General for the U.S. Department of Defense, the Special Inspector General for Iraq Reconstruction, and the Deputy Assistant Attorney General for the Criminal Division of the U.S. Department of Justice have all testified before the Senate that the difficulties of investigating fraud allegations in the midst of an armed conflict means that it will be more difficult and take longer than usual for the United States to apprehend and prosecute those that have defrauded the military and reconstruction operations in Iraq.[12] Moreover, as recently reported by the Washington Post, and confirmed by the statistics published by the Department of Justice, the Government is sitting on a backlog of more than 900 cases in which whistle-blowers have accused government contractors and claimants of billions of dollars in fraud, in both military and domestic spending.[13]**

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[11] The Imprecise Meaning of War." Editorial. *The New York Times.* 3 July 2008.

[12] *Combating War Profiteering: Are We Doing Enough to Investigate and Prosecute Contracting Fraud and Abuse in Iraq.* Hearing Before the United States Senate Committee on the Judiciary, 20 Mar 2007, Testimony of Stuart Bowen, Special Inspector General for Iraq Reconstruction, Testimony of Thomas Gimble, Acting Inspector General, U.S. Department of Defense, Testimony of Barry Sabin, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice.

[13] See Johnson, Carrie. "A Backlog of Cases Alleging Fraud". *The Washington Post.* 2 July 2008: A1; Fraud Statistics/Qui Tam Intervention Decisions & Case Status, As of September 30, 2007, Civil Division, U.S. Department of Justice, available at www.taf.org/STATS-FY-2007.pdf, accessed on July 3, 2008.

To what extent will our proposal to amend the bill to include a straightforward 10 year statute of limitations help the Government pursue those who have defrauded the United States' operations in Iraq?

H.R. 4854's amendment to the statute of limitations will have a very sizeable impact on the Government's ability to pursue fraud by contractors providing goods and services in Iraq. The current law contains a confusingly-worded statute of limitations that has been subject to conflicting judicial interpretations. Some of these interpretations effectively require the plaintiff - - whether the United States or a relator - - - to file suit within six years of the date when the defendant violated the False Claims Act. Six years is 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. See 31 U.S.C. § 3716(e). When fraud 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 longer 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. By next year, the United States will be entering its seventh year in Iraq. Under the current FCA statute of limitations, sometime next year the United States will 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.

With the recent Manager's amendment, H.R. 4854 will permit the United States to bring suit at any time within eight years of the date of the FCA violation. This amendment is critical to preserve the ability of the Department of Justice to effectively pursue and obtain recoveries for such fraudulent activities.

Assessing the Impact of Proposed Legislation to Modernize the False Claims Act

By Jack A. Meyer, Principal, Health Management Associates and Adjunct Professor at the University of Maryland

The False Claims Act Corrections Act of 2007 (H.R. 4854) will yield both direct and indirect savings to the federal government. The direct savings will emerge from the substantial additional recoveries that will be returned to the U.S. government. The indirect savings will flow from the important deterrent effect. In other words, more fraud perpetrators will be snagged and the judgments or settlements won will redound to the federal government. Over and above this money, large numbers of entities doing business with the government who might consider cheating in one way or another will think twice when the False Claims Act is solidified and modernized to meet ever-more sophisticated ways of fleecing the taxpayers.

The proposed law modernizes the False Claims Act, originally enacted during the Civil War and strengthened in important 1986 amendments, to fit today's government operations. The proposed legislation would:

1. Assure that the government can pursue recoveries when there is alleged fraud against government contractors and grantees;
2. Make clear that the Act imposes liability on those who conspire to violate any of its provisions;
3. Enable the government to recover from those who knowingly fail to disclose overpayments in violation of a statutory or contractual obligation or divert government funds to unauthorized uses;

4. Authorize only the government to dismiss a *qui tam* relator's False Claims Act case if the essential elements of the case are based exclusively upon publicly disclosed information;
5. Clarify that complaints do not necessarily need to plead the details of specific claims alleged to be false, but will satisfy Federal Rule of Civil Procedure 9(b) as long as the allegations in a complaint, if proven true, provide a reasonable indication that a violation of the False Claims Act occurred;
6. Strengthen the Act's anti-retaliation measures; and
7. Remove impediments to the government's investigative powers.
8. Replace the current statute of limitations (later of six years from the date of the violation or three years from discovery) with a uniform eight year statute of limitations.

Remedies, Revenues, and Deterrence

Many government agencies, including very large Cabinet-level entities such as the U.S. Department of Defense and the U.S. Department of Health and Human Services, use a large number of government contractors to assist in their work. This was not the case during the Civil War, when virtually the whole federal government was housed in the Old Executive Office Building. Today's contractors must not be placed beyond the reach of the False Claims Act. To do so could have dire implications for accountability and honest handling of hundreds of billions of dollars per year associated with military expenditures, Medicare, Medicaid, and with other federal programs.

H.R. 4854 will yield positive savings to the federal government that should be scored in evaluations of the proposed law's impact. Here are some key areas where savings should emerge:

The "*Totten/Allison Engine* Fix": Government Contractors and Grantees

H.R. 4854 would enable the U.S. government to pursue the recovery of funds when there is alleged fraud against government contractors and government grantees. The decision in *United States ex rel. Totten v. Bombardier Corp.*, 380 F. 3d 488 (D.C. Cir. 2004) led to a number of courts holding that the False Claims Act does not reach false claims that are presented to government grantees or contractors and are paid with government grant or contract funds. This has led to the dismissal of meritorious actions that include alleged fraud against Medicaid, the operation of the war in Iraq, and hurricane relief efforts. In one case, a court overturned a $10 million jury verdict on these grounds. *See United States, ex rel., DRC, Inc. v. Custer Battles, LLC,* 444 F. Supp. 2d 678 (E.D. Va. 2006). In that case, the jury verdict was against a contractor who carried satchels of cash from the Baghdad airport. The situation is only going to get worse. In *Allison Engine v. United States ex rel. Sanders*, the U.S. Supreme Court recently validated the reasoning of the D.C. Court of Appeals in the *Totten* case, holding that it was "insufficient" for the plaintiff in the FCA case before it to show merely that "government money was used to pay the false or fraudulent claim." 76 U.S.L.W. 4387 (U.S. June 9, 2008). According to the Court, the term "paid or approved by the Government" in the statute must be interpreted literally to mean paid or approved by a federal official.

Perhaps most importantly, the current baselines used by the Congressional Budget Office are based on the assumption that all federal funds, including those paid by private entities, are covered by the False Claims Act. To fully appreciate the discrepancy between the old baseline and the current landscape, one only needs to look at the war in Iraq. Disturbing reports of funds allocated to the Iraq war but unaccounted for have emerged, and suggest that the "*Totten/Allison Engine* Fix" provided for in H.R. 4854 may yield enormous dividends as most of our military contractors subcontract multiple aspects of their contractual duties. For examples, a Pentagon audit of a $5.2 billion fund used to train and equip Iraqi security forces found that U.S. commanders used sloppy accounting and could not always show that equipment, services, and

construction were delivered properly, according to a report by the Inspector General at DOD. The IG audited equipment purchases valued at nearly $1.1 billion for armored vehicles, weapons, ammunition and other items. Of $643.1 million in purchases from one set of suppliers, the inspector general was able to follow a paper trail *for just 12.9 percent of the total,* or $82.9 million. Of $438.2 million from the second set, an audit trail was available *for only 1 percent of the total.* The command could not account for 18 of 31 recovery vehicles valued at $10.2 million.[1]

With the Iraq war costing hundreds of billions of dollars, and widespread allegations of fraud, it seems possible -- indeed probable -- that the government is missing opportunities to recover substantial amounts of money.

Of course, the "*Totten/Allison Engine* Fix" will not only work to help recover money stolen by defense subcontractors in Iraq.

A wide, and growing, amount of inherently governmental functions, such as military contracting and administration of government health programs, are now performed by contractors and their subcontractors, and court rulings giving subcontractors "safe harbor" to commit fraud do not fit with the modern way that government departments and agencies do business.

For example Medicare uses private insurers serving as "fiscal intermediaries" to make payments. The Defense Department uses large numbers of contractors who, in turn, hire large numbers of subcontractors. Thus, on matters as vital as getting Medicare claims paid for our nation's elderly and disabled citizens and providing supplies to our military personnel in harm's way, we cannot afford to let antiquated interpretations of the statute effectively exempt large chunks of the government's business from the prosecution of fraudfeasors. Some interpretations of False Claims Act could actually completely remove Medicaid from the reach of the law. Yet, Medicaid is a federal-state program with outlays in the current fiscal year projected to reach $360 billion. Numerous health care fraud

[1] Associated Press. "Pentagon Cites Poor Controls for Iraq Fund." December 7, 2007.

cases have involved Medicaid. Surely Congress did not mean to exempt one of the largest entitlement programs from the investigation and prosecution of fraud.

Nor would Congress wish to exclude government grant programs—including grants from the National Institutes of Health and the federal highway trust fund—from the reach of the False Claims Act (and this could happen without this corrective legislation). The substantial federal tax dollars invested in such grant programs (e.g. the budget for NIH now totals at least $28 billion a year) must receive the same protection as afforded under programs operated directly by agencies and bureaus of the federal government. Grantees doing business with these agencies should be treated as extensions of the federal government and their business dealings with service providers and contractors should be subject to the same oversight and scrutiny as direct transactions between contractors and the government.

Knowing Failure to Disclose Overpayments in Violation of a Statutory or Contractual Obligation and Diversion of U.S. Funds

Another problem area addressed by H.R. 4854 involves government contractors and grantees who knowingly retain overpayments from the Government despite an obligation to disclose them or divert government money to unauthorized purposes. Every year the Medicare and Medicaid programs mistakenly pay out billions of dollars in overpayments, often with the full knowledge of the provider. Malcolm Sparrow of the Kennedy School of Government estimates that the level of overpayments in the Medicare System exceeds thirty percent (30%).[2] In the mid-1990's, the Office of Inspector General of the Department of Health & Human Services (HHS-OIG) looked into the level of overpayments in the Medicare fee-for-service program, and concluded that 14% of total

[2] Malcolm K. Sparrow, LICENSE TO STEAL: HOW FRAUD BLEEDS AMERICA'S HEALTH CARE SYSTEM (Denver: Westview Press 2000) (containing a detailed analysis of the vulnerabilities of the U.S. health system to fraud, waste and abuse).

program costs were lost each year due to fraud, waste and abuse.[3] Just several years ago, HHS-OIG determined that 6.3% of fee-for-service Medicare payments constituted overpayments due to fraud, waste or abuse.[4] If we use the latter more conservative number for the current level of overpayments (6.3%), apply it to the current level of Medicare spending which exceeds $370 billion per year, [5] and then assume conservatively that just 10% of that amount represents overpayments that are based on mistakes that providers identify after payment and then fail to disclose to the government, then this amendment would provide the Government with a new remedy to recover as much as $2.3 billion in a single year, not including the trebling of damages and statutory penalties permitted by the Act.

Guarding the solvency of Medicare from such fraud, waste and abuse is critical to our nation's fiscal well-being. According to the Director of the Congressional Budget Office, "[f]uture health care spending is the single most important factor determining the nation's long-term fiscal condition."[6]

Overpayments are also a very serious problem in Department of Defense, Department of Homeland Security and other government procurement activities, particularly those being performed overseas in connection with military and reconstruction efforts in Iraq and Afghanistan. As noted on the editorial page of the New York Times: "[i]nvestigators say that current war fraud runs into untold billions, including faulty ammunition and vehicles

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[3] *HCFA's FY 1996 Medicare Audit, 1997: Hearing before the Subcomm. On Health of the House Comm. On Ways and Means*, 105th Cong., 1st Sess. (1997) (statement by June Gibbs Brown, Inspector General, Dep't of Health & Human Services.)

[4] *Improper Fiscal Year 2002 Medicare Fee-for-Service Payments*, No. A-17-02-02202, Dep't of Health & Human Services, Office of Inspector General.

[5] http://www.gpoaccess.gov/usbudget/fy09/pdf/budget/hhs.pdf.

[6] "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.

and not-so-bullet-proof vests."[7] The Inspector General for the U.S. Department of Defense, the Special Inspector General for Iraq Reconstruction, and the Deputy Assistant Attorney General for the Criminal Division of the U.S. Department of Justice have all testified before the Senate on the significant extent of the problem, as well as the difficulties inherent in recovering the ill-gotten funds from those that have defrauded the military and reconstruction operations in Iraq.[8] Indeed, to address this problem, the Congress recently required the executive branch to amend the Federal Acquisition Regulation:

> [T]o include provisions that require timely notification by Federal contractors of violations of Federal criminal law or overpayments in connection with the award or performance of covered contracts or subcontracts, including those performed outside the United States.[9]

Importantly, a single case based on knowing retention of overpayments can involve hundreds of millions of dollars. For example, hospitals at times are overpaid hundreds of millions of dollars in Disproportionate Share Hospital (DSH) funds under Medicaid. These funds are used to compensate hospitals for serving indigent patients. For example, the Illinois Medicaid program overpaid $280.6 million in DSH payments to the University of Illinois at Chicago Hospital (UIC) between 1997 and 2000, as reported by

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[7] The Imprecise Meaning of War." Editorial. *The New York Times.* 3 July 2008.

[8] *Combating War Profiteering: Are We Doing Enough to Investigate and Prosecute Contracting Fraud and Abuse in Iraq.* Hearing Before the United States Senate Committee on the Judiciary, 20 Mar 2007, Testimony of Stuart Bowen, Special Inspector General for Iraq Reconstruction, Testimony of Thomas Gimble, Acting Inspector General, U.S. Department of Defense, Testimony of Barry Sabin, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice.

[9] Pub L. 110-252, Supplemental Appropriations Act, 2008, H.R. 2642, enacted June 30, 2008.

the Office of the Inspector General at HHS.[10] This is not to suggest that UIC knowingly failed to disclose these particular overpayments to the Government, in other situations, hospitals do identify and knowingly fail to disclose government overpayments of similar magnitude.

H.R. 4854 amends the False Claims Act so the law may be used to reduce health care and procurement spending through the recovery of some of the billions of dollars in overpayments that are knowingly retained by providers and government contractors without required disclosure. Given the staggering level of overpayments, H.R. 4854 consequently gives the Government a tool to reduce its spending by hundreds of millions, if not billions of dollars each year.

Federal Rule of Civil Procedure 9(b)

Federal Rule of Civil Procedure 9(b) requires that if a complaint alleges fraud or mistake, then those allegations must be pled with particularity. Since the False Claims Act has been deemed an anti-fraud statute, courts have generally determined that Rule 9(b) applies to all complaints alleging a violation of the False Claims Act. A recent trend has developed, however, resulting in courts interpreting Rule 9(b) too restrictively in False Claims Act cases, and dismissing meritorious cases merely because the relator could not identify or produce the actual false claim(s) that were submitted to the government. These courts have erroneously decided that, even though a relator has direct knowledge of fraud against the government and can describe the fraud in detail, his/her complaint cannot satisfy Rule 9(b) unless the he/she can provide the particulars of an actual false claim before discovery begins. Such a requirement does not apply to any other category of cases that deal with allegations of fraud. As a result of these court rulings, relators who witness fraud, but who are not privy to the defendant's accounting files, have been

[10] Audit Report. "Review of Illinois Medicaid Disproportionate Share Hospital Payments to the University of Illinois at Chicago Hospital." (A-05-01-00099). http://www.oig.hhs.gov/oas/reports/region5/50100099.pdf.

prevented from exposing fraud against the government and recovering funds for the United States.

H.R. clarifies that False Claims Act complaints will be deemed sufficient if they allege the fraudulent scheme with particularity and that it is possible to do so without producing actual false claims at the pleading stage.

As a result of this clarification, fewer meritorious cases will be dismissed on the grounds that Rule 9(b) was not satisfied. Moreover, relators who may have otherwise been dissuaded from coming forward, because they did not have access to billing records, will be encouraged to file their False Claims Act cases. Consequently, the United States will recover substantially more funds than it would have without H.R.4854.

Impediments to the Government's Investigative Powers

A further provision of H.R. 4854 would block defendants from misusing the "public disclosure" provision of False Claims Act to bar cases with new and important information. The proposed legislation would replace the current public disclosure bar which may take whistle-blowers out of a case based on some public disclosure of information that is not central to the case and where the whistle-blower still has information that is original and germane to the case. The clarifying public disclosure bar language of H.R. 4854 ensures that the public disclosure bar will only be raised in cases of truly parasitic claims, when the government has already initiated a False Claims Act investigation in the same matter based on information from an independent source.

H.R. 4854 also clarifies and strengthens the protection of whistle-blowers from retaliation by employers, for example by extending protection to employees even if an action ends up not getting filed, and to employees who refuse to participate in wrongdoing.

These and other features of H.R. 4854 are designed to assure that the spirit and intentions of Congress when they strengthened the False Claims Act in 1986 are honored. Congress also wanted to empower and protect whistle-blowers because of a clear understanding of the growing complexity of the modern business corporation and its financial relationships with government.

Providing the United States Additional Time to Bring Suit

H.R. 4854 amends the False Claims Act's statute of limitations so that the Government may file suit within eight years of the violation of the Act. This amendment would have a very sizeable impact on the Government's ability to pursue fraud by contractors providing goods and services in Iraq. The current law contains a confusingly-worded statute of limitations that has been subject to conflicting judicial interpretations. Some of these interpretations effectively require the plaintiff - - whether the United States or a relator - - to file suit within six years of the date when the defendant violated the False Claims Act. Six years is 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. *See* 31 U.S.C. § 3716(e).

The current law is less clear with respect to relators. Some Courts of Appeals have barred whistleblowers from pursuing *qui tam* lawsuits alleging fraud that occurred more than six years before the lawsuit was filed, either under the theory that no tolling of the limitations period is permitted if the whistleblower knew, or should have known, about the fraud more than three years before filing the lawsuit, *see, e.g., United States ex rel. Hyatt v. Northrup Corp.*, 91 F.3d 1211, 1217 (9th Cir. 1996), or under the theory that the three-year tolling provision was intended to benefit the United States alone and thus *never* applies to cases being litigated by *qui tam* relators. *See United States ex rel Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 725-26 (10th Cir. 2006). A uniform 8-year statute of limitations provides two additional years for a person with knowledge of prior fraud against the government to file a *qui tam* action and share in

any recovery. Without this change in the law, potential whistleblowers who learn, more than six years after a fraud has occurred, about the fraud and/or their right to file a *qui tam* claim on behalf of the United States under the False Claims Act, will have little incentive to assume the personal risk of reporting such frauds to the government. When such misconduct thus goes unreported, the United States ultimately bears the loss.

Moreover, an eight 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. By next year, the United States will be entering its seventh year in Iraq. Under the current FCA statute of limitations, sometime next year the United States will 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 Department of Justice to effectively pursue and obtain recoveries for such fraudulent activities. In light of this amendment, the United States will be able to pursue many more of the fraudulent scams in Iraq than it could under the current statute of limitations.

How Economists View the Importance of Deterring Crime

A few economists have tackled the issue of criminal activity and how best to deter it. These research studies and published articles are not limited to fraud, of course, but they provide interesting lessons for the False Claims Act. The clear guidance from this small but important literature: *raise the probability of getting caught.* This is important because H.R. 4854 can help do just that.

Nobel laureate Gary Becker demonstrates that the "optimum amount of law enforcement" depends on "the cost of catching and convicting offenders, the nature of punishments—

for example, whether they are fines or prison terms—*and the responses of offenders to changes in enforcement.*"[11]

Becker's model stipulates that the number of offenses that a person engages in is related to the probability of conviction, the punishment if convicted, and a range of other variables including the income available to the person in legal or other illegal activities. Thus, the more likely a person is to get caught and be convicted when caught, and the stiffer the punishment, the less crime will occur. *Becker argues that raising the probability of apprehension and conviction is far more important than the size of the penalty. In this framework, what the criminal doesn't want to do is get caught.* If he thinks the odds of getting caught are small, he may be undeterred by even a severe punishment.[12]

Another economist, Isaac Erlich, puts it this way: "A person's decision to participate in illegal activity...can be viewed as motivated by the costs and gains from such activity. These include the expected illegitimate payoff (loot) per offense, the direct costs incurred by offenders in acquiring the loot (including the costs of self-protection to escape punishment), the wage rate in an alternative legitimate activity, the probability of apprehension and conviction, the prospective penalty if convicted, and finally, one's taste (or distaste) for crime—a combination of moral values, proclivity for violence, and preference for risk."[13] According to Erlich, the net payoff must exceed some threshold level before an individual engages in crime.

Erlich shows that the incidence of crime rose significantly over the 1960-1991 period. The All Crimes Index, including seven categories of crime, more than tripled from 1960 to 1991. At the same time, the percentage of offenses known to the authorities fell from

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[11] Gary Becker. "Crime and Punishment: An Economic Approach." *The Journal of Political Economy.* Vol. 76. No. 2 (March/April 1968) 169-217(italics added).

[12] Ibid. p. 178.

[13] Isaac Ehrlich. "Crime, Punishment, and the Market for Offenses." *The Journal of Economic Perspectives.* Vol. 10. No. 1 (Winter 1996). 43-67.

31% to 21% over this period, and the probability of imprisonment fell from 2.8% to 0.8%. Erlich states that "both the probability and severity of punishment for specific crimes have generally been falling over the last three decades....The growth in the prison population, substantial as it is, has not kept up with the even larger growth in criminal behavior."[14] His advice: if you want to reduce crime, increase the "fear factor" among potential criminals and make them think that getting caught is now more likely than before.

Erlich cites studies indicating that the authorities get more "bang for the buck" by raising the probability of getting caught, as opposed to increasing the severity of the punishment. Both can have a deterrent effect, and neither Becker nor Erlich suggest lowering fines and other penalties. But they place greatest emphasis on raising the stakes for cheaters through changing their perception about getting caught.

H.R. 4854 is consistent with the spirit of this advice. It would assure that fraud will be actively pursued, punished, and deterred, irrespective of whether it occurs *directly* against the government or *indirectly* via contractors or grantees. Taxpayers don't care whether a disreputable con artist picks the pocket of a government agency or empties the wallet of a firm receiving federal funds that has a fiduciary responsibility to safeguard those funds. Either way, the taxpayer is fleeced. By ending such meaningless distinctions, H.R. 4854 raises the stakes for more criminals, and thereby deters more crime. This is consistent with Professor Becker's conclusions and recommendations.

Similarly, the taxpayers could be forgiven if they see the parsing of words that says that sending in a fake invoice is a crime but paying the government less than it is due is not. To the public, this is surely a distinction without a difference. H.R. 4854, by removing such artificial distinctions, makes more crime detectable, and this will also lead to greater recoveries and add to deterrence.

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[14] Erlich. P. 44.

Additional Research Findings

There is a growing body of evidence showing that the False Claims Act is one of the most cost-effective, anti-fraud tools in government, and its efficiency is growing, not declining. The author of this paper has conducted a series of studies of the budgetary impact of civil fraud enforcement in the Medicare program under the False Claims Act. The first study, published in September 2001, was a 115-page report containing the results of both quantitative and qualitative research conducted by Jack Meyer and Stephanie Anthony. This study found that the federal government is getting a direct monetary return of at least $8 for every $1 it invests in health-related False Claims Act enforcement activities. In addition, the authors' conducted both a literature search and a round of interviews with federal government officials (DOJ, OIG), lawyers for the plaintiff's bar and defense attorneys, and industry experts. Our qualitative research showed that there was definitely a "deterrence effect" of tighter enforcement of the law on the various actors and players in the health care industry. We also concluded that whistle-blowers play a critically important role in fighting health care fraud.[15]

The first follow-up study published in June 2003 showed an increase in the "rate of return" on funds expended in federal anti-fraud activities to 8.7 to 1.[16] A later study in 2006 found that this return on investment rose to 15.6 to 1.[17] All of these figures count only the direct savings in the form of recoveries, not the deterrent effect.

Thus, the trend is clearly toward a greater impact of False Claims Act enforcement on recoveries in health care fraud cases.

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[15] Jack A. Meyer and Stephanie E. Anthony. "Reducing Health Care Fraud: An Assessment of the Impact of the False Claims Act." Prepared for Taxpayers Against Fraud Education Fund. September 2001.

[16] Jack A. Meyer. "Fighting Medicare Fraud: More Bang for the Federal Buck." Taxpayers Against Fraud Education Fund. June 2003.

[17] Jack A. Meyer. "Fighting Medicare Fraud: More Bang for the Federal Buck." Taxpayers Against Fraud Education Fund. April 2006.

Additional recent research shows that effective enforcement of our laws related to fraud in the health care field yield measurable savings. Authors David Becker, Daniel Kessler, and former CMS Director Mark McClellan note that research comparing fee-for-service claims to actual patient medical record reviews have found improper payments-- which include payments for non-covered services, services billed without documentation, coding errors, and medically unnecessary services—to be as high as $23.2 billion as far back as 1996. Of course, not all of these improper payments represent fraud, but there is much fraud imbedded in these measures. In fact, CMS estimates that when an error in payment is discovered, *it is twenty times more likely to be an over-payment than an under-payment.*[18] This suggests that fraud is often at work here, not just random billing errors.

The authors' review of the literature also notes that "fraudulent and abusive heart failure [billing] alone cost Medicare as much as $933 million in 1993."[19]

Becker, Kessler, and McClellan use variation in state-level Medicaid enforcement to identify the responsiveness of Medicare abuse to enforcement because of extensive administrative overlap between the agencies responsible for policing the Medicare and Medicaid programs. State Medicaid agencies must report all suspected incidences of provider fraud to their states' Medicaid Fraud Control Units (MFCUs) through a unified surveillance system related to their Medicaid Management Information Systems (MMIS). The Office of the Inspector General (OIG) at HHS oversees the state MFCUs as well as Medicare fraud enforcement.

The authors construct measures of the strength of enforcement by dividing total fraud control expenditures paid by the federal government by the number of general medical,

[18] FY 2004 Improper Medicare Fee-For-Service Payment Report, Centers for Medicare and Medicaid Services. December 2004.

[19] David Becker, Daniel Kessler, and Mark McClellan. "Detecting Medicare Abuse." National Bureau of Economic Research. Working Paper 10677. August 2004. p. 8.

non-federal hospitals and by the number of Medicare beneficiaries in the state. They examine outlays related to six serious illnesses: respiratory infections and pneumonia, COPD and general respiratory disorders, circulatory system disorders, kidney disorders/renal failure, diabetes and nutritional/metabolic disorders, and cerebrovascular disorders/strokes.

Becker and his colleagues find that a 1 percent increase in enforcement leads to a decrease of 0.92 percent in the *acute* inpatient expenditures for younger Medicare patients (age 65-80) without a prior year hospitalization and a 5.55 percent reduction in *non-acute* inpatient expenditures for the same population. Moreover, they find that these significant spending reductions occur without leading to adverse health outcomes from the enforcement-related reductions in care.[20] The bottom line: *tighter enforcement saves money!*

[20] Becker et al. Supra. p. 19

The Impact of H.R. 4854

If this proposed legislation is enacted, it will lead to measurable savings for several reasons.

1. First, more whistle-blowers will come forward, and as a result, more cases will be initiated. As the law is clarified, and a wide reach rather than an arbitrarily limited scope is codified, people who detect fraud from the inside of companies will come forward with evidence that the government needs to prosecute cases.

2. Clarification and extension of the statute of limitations will enable more cases to be brought and these cases will be settled or adjudicated for significantly larger sums in many instances.

3. Clarification that a knowing retention of an overpayments is to be treated as a False Claims Act violation, which will discourage companies from "stealing through silence."

4. Clarifying that federal block grants, subcontractors working for federal contractors, and all money under control or authority of U.S. Government officials is subject to False Claims Act legislation will discourage fraud in federal programs and will increase the size of recoveries when False Claims Act cases are prosecuted.

5. If this law is not enacted, the courts may continue to chip away at the FCA and industry pressure may continuously weaken the law. The *status quo* may mean not a plateau, but rather a continuous decline in the reach and bite of this law. As the economists' logic noted above implies, this will increase fraud by lowering the chance of getting caught. Nothing would be worse for the integrity of government programs.

Estimating the Savings

In FY 2007, total settlements and judgments for all cases yielded recoveries of $2.0 billion for the federal government. The figure for the previous year was $3.2 billion. While the recovery totals have varied from year-to-year, it seems that over the past seven years, the typical annual recovery was about $2 billion. If there is no growth in this trend over the next five years, recoveries could be expected to total about $10 billion over the period from 2009 through 2013. If recoveries under current law edge up to about $2.5 billion a year during this period, the five-year baseline would be about $12.5 billion.

A very conservative estimate of the cumulative impact of all of the provisions of H.R. 4854 presented above is that they would add something like 4 percent to this total. (Recall that many of the larger individual cases can involve settlements or judgments of hundreds of millions of dollars). A more robust estimate of the impact of H.R. 4854 is that it would add up to 10 percent to recoveries. Under the base case assumption that $10 billion is recovered over five years, the range of added recoveries from this legislation is from $400 million over five years to $1 billion over five years. If the higher estimate of $12.5 billion is used for total recoveries over five years, the range of added recoveries attributed to H.R. 4854 rises to $500 million to $1.25 billion.

Recoveries from Health Care Civil Fraud Enforcement, FY 2009-FY 2013
(billions of dollars)

	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	Total
Base Case	2.0	2.0	2.0	2.0	2.0	10.0
Optimistic	2.5	2.5	2.5	2.5	2.5	12.5

Estimated Five-Year Savings from H.R. 4854
(billions of dollars)

	4% Savings	10% Savings
Base Case	0.400	1.000
Optimistic	0.500	1.250

It is worth reiterating that these savings to the federal government are only the direct effects in terms of added recoveries. To the extent that H.R. 4854 deters more fraud in the first place, the total savings will be much greater.

June 18, 2008

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Lamar Smith
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Conyers and Ranking Member Smith:

The undersigned associations and organizations write to express our strong opposition to H.R. 4854, which proposes extensive amendments to the civil False Claims Act, 31 U.S.C. 3729-3733 ("FCA"). These revisions would dramatically expand the scope of liability under the statute, increase its financial penalties, and remove safeguards against unfounded *qui tam* lawsuits. We believe these amendments are unnecessary and will impose enormous burdens on non-profits, universities, hospitals, and businesses of all sizes. If enacted, these provisions will also have adverse impacts on Department of Defense and Department of Homeland Security programs, federally funded construction projects, and other key programs.

The existing False Claims Act already contains powerful mechanisms to achieve the government's goals. The U.S. Government has recovered more than $20 billion in cases brought under the Act for false claims against the Government and continues enforcement actions today. Even the Department of Justice has expressed the opinion that the FCA works well and is not in need of change. By contrast, the expanded liability and damages provisions of H.R. 4854 would raise companies' costs of doing business, increase the Government's procurement costs, and interfere with its ability to manage its programs. It will also discourage non-profits and small businesses from participating in Government programs and competing for Government business. Some of our specific concerns with H.R. 4854 are outlined below.

First, H.R. 4854 would include a new definition of "Government money or property" that would lead to a dramatic expansion of the scope of FCA liability. Under H.R. 4854, any person submitting claims to a grantee or other recipient of federal funds could be liable under the statute. Given the broad reach of federal funding, this would effectively displace state contract and tort laws, imposing treble damages and penalties on garden variety contract or fraud claims between small businesses and other private entities that are currently addressed by state contract and fraud laws.

Second, H.R. 4854 would dramatically expand the calculation of treble damages under the FCA. Instead of looking solely to the Government's losses, as is done now, the bill would also allow the recovery of treble the damages sustained by third party "administrative beneficiaries." The bill would also improperly protect the interest of relators at the expense of the harmed third party by providing that the relator's share is to be paid before amounts are returned to the injured third party.

Third, H.R. 4854 would unfairly exempt *qui tam* plaintiffs (but not DOJ) from the requirement of Federal Rule of Civil Procedure 9(b) that all persons asserting fraud actions in federal court must plead the elements of fraud with particularity. The sensible purpose of Rule 9(b) is to prevent abusive plaintiffs from using conclusory allegations of fraud to embroil defendants in litigation and to give defendants sufficient information to prepare a defense. There is no basis for holding relators to a lower standard than all other litigants in federal court, and certainly no basis for holding relators to a lower standard than DOJ in FCA actions.

Fourth, the legislation would impose liability for retaining overpayments, giving employees who discover overpayments the incentive to file a whistleblower lawsuit first and inform their employers later, if ever. This change will pose significant disruption to Government programs. Many contracts and grants have provisional payment provisions with a periodic settlement feature. This approach is critical to efficient functioning of the program and audits occur regularly to assure that settlements are made. This proposal would eliminate the Government's ability to manage these programs and require absolute certainty with every payment.

Fifth, H.R. 4854 extends the statute of limitations from six to ten years, far longer than almost all other federal limitations periods. The bill would subject defendants to claims involving ten-year-old events, after recollections have dimmed and evidence may no longer be available. The bill would unfairly allow the Government to revive stale claims by adding otherwise time-barred claims to *qui tam* cases, including breach of contract claims and other claims that otherwise would have been barred for years.

Sixth, H.R. 4854 would strip defendants of the ability to challenge unfounded *qui tam* lawsuits that are based on publicly available information. The purpose of the current bar on such suits is to reward the original whistleblowers who are genuinely responsible for bringing fraud to light, and to prevent "parasitic" litigants who are not themselves responsible for exposing fraud. H.R. 4854 would prevent defendants from policing this distinction. Under H.R. 4854, only the Government could challenge whistleblowers – imposing substantial burdens on Government agencies in non-intervened *qui tam* lawsuits. These non-intervened cases already are a huge burden to federal agencies, and H.R. 4854 would add substantially to that burden. Moreover, these non-intervened cases are ones that the DOJ has already decided are non-meritorious and lead to extremely low levels of recoveries – less than two percent of the total amount recovered under the FCA. The best mechanism for getting rid of these non-meritorious cases is the existing public disclosure provision, which deputizes defendants to seek dismissal of parasitic *qui tam* lawsuits.

Seventh, the legislation encourages U.S. Government employees to file *qui tam* suits. Allowing Government employees to benefit financially from information they discover on the job would create significant ethical concerns and conflict-of-interest problems, and undermine public trust in the Government. It would seriously disrupt the Government's ability to manage its programs, and turn every difference of opinion between managers and employees into a potential *qui tam* action.

Finally, H.R. 4854 provides for retroactive application, which creates serious due process and other constitutional concerns. Litigation over the constitutionality of the legislation would tie up the courts for years.

In conclusion, we believe that the current statute is sufficiently powerful to achieve the government's goals and any new legislation is unwarranted. H.R. 4854 is not needed to protect the federal fisc, and would amend the FCA in ways that do not serve the interests of the United States, its partners in the greater business community, those in the educational and non-profit sectors, or taxpayers. Accordingly, we oppose H.R. 4854 and urge you not to report it out of Committee.

Sincerely,

Aerospace Industries Association
American Council of Engineering Companies
American Health Care Association
American Hospital Association
American Insurance Association
American Petroleum Institute
American Tort Reform Association (ATRA)
Association of American Medical Colleges
BlueCross BlueShield Association
Federation of American Hospitals
Information Technology Association of America
Lawyers for Civil Justice
National Association of Mutual Insurance Companies (NAMIC)
National Association of Wholesaler-Distributors
National Federation of Independent Business
Professional Services Council
The Associated General Contractors of America
The Coalition for Government Procurement
U.S. Chamber of Commerce
U.S. Chamber Institute for Legal Reform

Cc: Members of the Committee on the Judiciary