PROPOSALS TO FIGHT FRAUD AND PROTECT TAXPAYERS

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

ON

H.R. 1748, H.R. 1292, H.R. 1667, H.R. 1788, H.R. 1779, H.R. 1793, and H.R. 78

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APRIL 1, 2009

PROPOSALS TO FIGHT FRAUD AND PROTECT TAXPAYERS

WEDNESDAY, APRIL 1, 2009

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:09 a.m., in room 2141, Rayburn House Office Building, the Honorable John Conyers, Jr. (Chairman of the Committee) presiding.

Present: Representatives Conyers, Berman, Scott, Jackson Lee, Delahunt, Johnson, Baldwin, Maffei, Smith, Sensenbrenner, Coble, Gallegly, Lungren, Issa, King, Franks, Jordan, and Chaffetz.

Staff present: (Majority) Perry Apelbaum, Staff Director and Chief Counsel; Robert Reed, Counsel; Brandon Johns, Staff Assistant; and (Minority) Sean McLaughlin, Chief of Staff and General Counsel.

Mr. CONYERS. Good morning, ladies and gentlemen. Today's hearing concerns itself with how best to fight fraud and protect taxpayers.

We have 7 bills in front of us and 13 different statutes already law that deal with the problem of when companies cross the line.

So what are we trying to do? We are trying to separate in this global economic crisis accidents, bad judgment, errors, huge mistakes that have been committed from those strategies, tactics or intentions to cross the line into the criminal code.

In this multitrillion-dollar meltdown, it is very hard, especially with as little regulation and inquiry that has gone on so far, to determine which is which. And so we are here to begin this discussion with the Committee that has this very enormous responsibility.

And so I am pleased to start this off. I will put the rest of my statement in the record. And I will yield to my friend from Texas, Mr. Smith, the Ranking Member of this Committee.

[The prepared statement of Chairman Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

Statement of the Honorable John Conyers Jr.
for the Hearing on
"Fighting Fraud and Protecting Taxpayers"
Before the Committee on the Judiciary

Wednesday, April 1, 2009, at 10:00 a.m.
2141 Rayburn House Office Building

As we convene this hearing, our country is in the midst of the worst economic crisis since the Great Depression. Over the past year or so, we have seen huge shocks to our financial and economic system. American citizens and taxpayers across the country have been the victims of outright fraud and irresponsible behavior. We also want to distinguish between bad mistakes and intentional misconduct. It is in this context that I want to make three important points.

First, this financial and economic crisis is replete with examples of reckless behavior and poor judgment. They include:

- AIG's irresponsible plan to insure securities that it knew it did not have the financial resources to cover.
- Recent reports of AIG paying $165 million in bonuses earlier this year to its employees with federal government funds.

- Companies luring consumers into buying homes by aggressive marketing of subprime loans with low teaser rates, only to see homeowners eventually lose their homes to foreclosure.
- The financial services industry skimming billions of dollars from the rising tide of real estate values by marketing mortgage backed securities to investors around the world. Once the real estate bubble collapsed, the mortgage backed securities became toxic.
- Bernie Madoff defrauding thousands of innocent investors through the use of a Ponzi scheme.

Second, in light of these abuses, we need tough responses and adequate solutions because those who engaged in wrongdoing must be held accountable. There are federal laws on the books that permit law enforcement to investigate and prosecute mortgage fraud or securities fraud. However, the recent crisis has exposed gaps in these laws that we should consider closing.

- For example, the crime of "securities fraud" in the United States Code does not encompass fraud in the marketing of commodities or futures contracts.

- The definition of financial institution in the bank fraud statute does not currently include a mortgage lending business.

- There are gaps in the False Claims Act that jeopardize federal contracts.

- It is unclear whether existing statutes which were written in the context of government contracting would adequately cover fraud in connection with the unique financial relationships that are contemplated by the stimulus and economic recovery programs.

We also must ensure therefore, going forward, the federal government is protected in its attempts to assist and fund recovery efforts, and that the laws are sufficient to ensure prosecution of those who commit fraud involving the theft of federally provided "stimulus" or "recovery" funds.

Third, we must ensure that investigative and prosecuting agencies have the adequate resources that they need to combat these fraudulent actions. Many of the legislative proposals we plan to explore in this hearing seek to do just that, by providing

additional funds to, among other agencies, the Department of Justice and the FBI.

I want to thank Representatives Smith, Scott, Berman, Lungren, Abercrombie, Biggert, and King for offering proposals for consideration at this hearing. All of your ideas are valuable as we try to assess the best ways to fight fraud and rescue our country and its citizens from a horrible economic crisis.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Chairman, I appreciate your holding this hearing today on legislative proposals to address mortgage fraud, securities fraud, and other financial crimes.

Congress cannot prevent all crime, but Congress can ensure that tough penalties are in place to punish offenders and deter future wrongdoers. And we can provide law enforcement officials and

prosecutors with the resources and tools they need to bring criminals to justice.

In times of crisis, crime often flourishes. Following the 9/11 terrorist attacks and Hurricane Katrina, unscrupulous people chose to exploit these tragedies to pad their pockets with funds intended to help the victims.

Bringing to bear the heavy hand of government in too heavy a manner can be counterproductive. This could lead to a long-term reduction in credit, fewer bidders for government contracts, and higher costs for taxpayers. We must strike an appropriate balance in advancing anti-fraud legislation.

Many of the bills on our agenda today strike that balance, though I am concerned with one or two others.

I am pleased to join you, Mr. Chairman, as a sponsor of H.R. 1948, the Fight Fraud Act of 2009. This legislation amends Federal criminal laws to include fraud committed by mortgage-lending businesses or other entities that provide mortgage loans. The Fight Fraud Act also authorizes additional funds for Federal law enforcement agencies and prosecutors charged with combating these fraud schemes.

I am also pleased to join my colleague from California, Mr. Lungren, as a sponsor of his legislation to address money-laundering, and Crime Subcommittee Chairman Scott, as a sponsor of his legislation to support the National White Collar Crime Center.

I wish to commend the gentlelady from Illinois, Judy Biggert, for her legislation to provide additional resources to the FBI for its mortgage loan fraud investigations. And I thank Mr. Abercrombie for joining us today to speak about his war profiteering legislation, which I also support.

Unfortunately, in addition to these bills that will help the government's effort to fight fraud, we are also considering the False Claims Corrections Act as part of the Committee's effort at addressing fraud. No one doubts the tremendous importance the False Claims Act has played in combating fraud in federally funded programs.

Since 1986, when it was last amended, the Federal Government has recovered over $21 billion under the False Claims Act. However, as the act's success demonstrates, it is not in need of the substantial overhaul that the False Claims Act Corrections Act proposes.

As currently drafted, this bill does not properly strike the balance between providing the government the tools it needs to fight fraud and ensuring that innocent recipients of Federal funds are not hauled into court to defend against lawsuits based on an overly broad law.

I suspect that the provisions of this legislation will subject non-fraudulent conduct of too many organizations, including hospitals, universities, and non-profits to costly False Claims Act litigation, while at the same time taking away defenses against frivolous cases.

Every Member of this Committee undoubtedly is concerned with combating fraudulent claims against the Federal Government. If there is identifiable fraud against the government that the False Claims Act is currently unable to address, we should amend the

law to close the gaps, but I believe that, as currently drafted, the False Claims Corrections Act does go too far. In our haste to fix a few problems, we must be careful not to create new ones.

Thank you, Mr. Chairman. I will yield back.

Mr. CONYERS. The Chairman of the Subcommittee on Crime, Bobby Scott of Virginia?

Mr. SCOTT. Thank you, Mr. Chairman, for holding this hearing on fighting fraud and protecting taxpayers.

As we explore ways to hold accountable unscrupulous mortgage brokers, Wall Street executives, government contractors, I hope this hearing will give us more insight on what is being done and particularly what is needed in the way of resources to investigate those suspected of serious crimes of fraud against the taxpayers.

The underpinnings of the financial crisis began as banks and private mortgage companies relaxed their standards for loans, approving riskier mortgages with less scrutiny. This created an environment that some took as an invitation to fraud.

In the last 3 years alone, the number of criminal mortgage fraud investigations opened by the FBI has more than doubled. The FBI has previously testified that it currently has more than 2,000 mortgage fraud investigations open, but only 250 agents specifically assigned to those cases.

I understand that, for the savings and loan debacle a few years ago, we had over 1,000 agents assigned to those cases. The amount of finances associated with this problem is approximately three times the size of the problem with the savings and loan debacle.

So I support more resources for the Department of Justice to assist the FBI and the States in enforcing the fraud laws to recover the billions lost.

I am not at this point persuaded that we need new criminal laws in this area. Many in this industry knew they were dealing with worthless paper. They even had names for the paper like "NINJA loans." That is "no income, no job or assets" loans. And they were laughing as they put these things together.

These loans were then passed off as AAA assets. And when somebody sells the garbage as AAA assets, somebody along the way has committed common law fraud. To suggest that we need new criminal laws may suggest that the behavior that got us into this mess was not already criminal.

And, furthermore, new laws and penalties could not be applied retroactively and therefore would not apply to those who committed crimes that has got us in the mess we are in today.

I believe that Federal mail and wire fraud statutes should be sufficient to address the problem on the Federal level. Penalties associated with these statues are substantial. Mail and wire fraud violations carry a maximum penalty of 20 years, and any mail or wire fraud that affects a financial institution increases the maximum sentence to 30 years.

It is not just mail and wire fraud that is at the disposal of Federal prosecutors. The FBI has already identified nine applicable Federal criminal statutes which may be charged in connection with mortgage fraud.

And in addition to the Federal criminal law, these financial crimes can be also prosecuted by State and local law enforcement

officials under aggressive and very punitive State criminal laws, as well.

So, Mr. Chairman, what we need to do is provide more resources to law enforcement to prosecute the fraud, whether it is consumer I.D. theft, contracting fraud in Iraq, or mortgage fraud that affects us all today.

In this regard, I have introduced H.R. 1779, the Financial Crimes Resources Act, that provides an authorization for additional funding to various government agencies responsible for enforcing financial fraud and identify theft laws. For example, the bill authorizes $100 million to the FBI for fiscal years 2010 through 2012 and $50 million to U.S. attorneys' offices to investigate and prosecute identify theft, financial fraud, financial crimes, and other fraud.

The bill also provides resources to cover the costs associated with providing Federal defense services for these fraud cases. More importantly, the bill addresses the lack of funding at the State level. We need to provide adequate resources to State authorities to battle fraud, and we need to ensure that Federal authorities are coordinating with their State counterparts to ensure an effective approach.

H.R. 1779 aims that achieving this task by allocating $250 million at the State and local level to attack the low-hanging fruit of identity theft and predatory lending practices that Federal prosecutors fail to go after today.

And, Mr. Chairman, I think it is appropriate to note that, if we spend this money on prosecution today, it will not only have a deterrent effect, but there is significant potential for fines and forfeiture that will offset most of the cost of prosecution.

I am supportive of other bills that have been introduced to provide more resources to combat fraud. This includes H.R. 1292, a bill that introduced with you, Mr. Chairman, and the Ranking Member of the full Committee, which would authorize funds for States to work with the information-sharing and training programs, such as the National White Collar Crime Center.

The center has over 30 years of experience, provides a nationwide support network for State and local enforcement agencies involved in prevention, investigation and prosecution of economic, high-tech, and terrorism-related crime.

In addition, both the Chairman's Fight Fraud Act and the bill introduced by the gentlelady from Illinois, Mrs. Biggert, the Stop Mortgage Fraud Act, contained provisions allowing for additional Federal resources to combat fraud, and I support these provisions, as well.

Now, Mr. Chairman, I look forward to hearing from our witnesses on the legislative approach that we are going to take in dealing with the mortgage fraud and other financial fraud, and look forward to their testimony and suggestions on what we need to do.

Thank you, and I yield back.

Mr. CONYERS. Former Chairman of Judiciary Committee for 6 years, Jim Sensenbrenner.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

The False Claims Act is the principal tool of law enforcement to combat fraud against Federal programs. Originally passed at the

behest of President Lincoln during the Civil War for combat fraud against the Union Army, it has been amended several times, since then the most recent change in 1986.

Under the act, private parties or whistleblowers may bring a civil qui tam action for violations of the act for themselves and the U.S. government. The government has the primary responsibility for prosecuting the action when it opts to proceed with the matter. Any damage awards may be trebled and are apportioned among the whistleblower and the Treasury.

I am sure no one here would argue that the False Claims Act has been anything but successful for the Federal Government. In the past 20-plus years, more than $20 billion in settlements and judgments have been achieved. A study found that the Federal Government is bringing back $15 for every dollar it spends pursuing FCA cases.

Although the False Claims Act has been successful, there is always room for improvement. Several Federal courts have applied and interpreted provisions of the FCA in ways that have substantially weakened the law. For example, the False Claims Act Correction Act closes the loopholes that permit fraudsters from stealing with impunity and from allowing the government to fully recover stolen funds.

Last year in Allison Engine, the courts stressed its hands were tied when it held that the Justice Department could only prosecute those who steal government funds from the government itself.

With the U.S. government relying on private contractors to disburse funds for everything from our Medicare prescription drug program to our war efforts in Iraq, billions of Federal dollars are now in jeopardy. The bailouts that Congress is approving left and right, without the proper transparency or accountability, only adds to the government funds in jeopardy from the fraudsters.

It is my hope that the House passes the proposed amendments this year and removes the debilitating qualification that fraud perpetrators use to hide behind judicially created qualifications and evade liability.

I yield back the balance of my time.

Mr. CONYERS. Mr. Lungren or Mr. Issa, are you so inclined?

Mr. Lungren?

Mr. LUNGREN. Thank you very much, Mr. Chairman.

As one who has supported the False Claims Act amendments in the past and voted basically for the restoration of this law or the effective restoration of this law during the Reagan administration, I might just mention that this does have a Republican heritage to it.

It was asked for in its concept by Abraham Lincoln. The Congress passed it. It was signed by Abraham Lincoln. It was effective, fell into disuse for a period after World War II. It was not until the 1980's when the Reagan administration asked it be resurrected in an effective mode that we passed it out of this Committee.

It was on the floor. It was passed in the House and the Senate, signed by President Reagan. Because of some court decisions which basically say, if you are not the direct contractor, you are a subcontractor, we cannot go after this, we need this change.

It also clarifies some things, streamlines some procedures both for dismissal and for people bringing this forward. And for those who would suggest that this is not the place for private action, I would just suggest that the gentleman from Wisconsin's statement that the Federal Government manages to recover $15 for every dollar it expends suggests that this is a very effective means by which we ride herd on those who would defraud our country.

This goes to the question of war profiteers. It also goes to the question of those who would receive the benefit of the humongous stimulus package that we have voted and other spending that appears to be on the horizon.

I thank the Chairman for the time.

Mr. CONYERS. Darrell Issa?

Mr. ISSA. I thank the Chairman for holding this hearing, and I look forward to voting for most, if not all, of these bills.

I do have some concern with the modifications in the False Claims Act, somewhat differently than my colleague. Although I appreciate the Republican nature of this, I believe that the inherent nature between a contractor and their subcontractors is an important one where, if the Federal Government using third-party specialists to sue receives money, in a sense, for the government, that is fine.

One of the challenges is that it ultimately runs up the cost for the general contractor. So although I accept the fact that whistleblowers through my Committee next door are essential, I am not sure that the bill as proposed really brings about the kind of cost-benefit that it could.

In a nutshell, it doesn't cost that much to get whistleblowers to blow the whistle on subcontractors either to the government to take action or, more properly, to the government to inform the general contractors so the general contractor can find better subcontractors and save the government more money overall.

But I do look forward to the hearing today and yield back.

Mr. CONYERS. Steve King? Okay.

Trent Franks? Okay.

Ladies and gentlemen, we are pleased to receive these comments of our Members who are here. Judy Biggert is a lawyer from Illinois, a Member of three Committees, Financial Services, Education and Labor, Science and Technology, has worked with this Committee in helping us set up discussions with—informal discussions with members of the Supreme Court over the years.

I am happy to have her with us. And we have your statements all that are in the record and allow you to proceed at this time.

TESTIMONY OF THE HONORABLE JUDY BIGGERT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mrs. BIGGERT. Thank you very much, Mr. Chairman and thank you and the Ranking Member, Smith, and the Members of the Committee for extending to me the opportunity to join you today. Given your agenda, I will be brief.

Some years ago, the Chicago Tribune published a series that revealed that gangs in the Chicago area increasingly were turning to mortgage fraud. They found it easier and more lucrative than sell-

ing drugs, believe it or not. But it turns out that the gangs were not alone. Everyone, it seems, was in on the act.

Just last week, the U.S. attorney in Chicago, Patrick Fitzgerald, brought mortgage fraud indictments against two dozen players. They are brokers, accountants, loan officials, and processors, and attorneys.

Mortgage fraud comes in all shapes and sizes. Scam artists inflate appraisals, flip properties, and lie about information, including income and identity, on loan applications. Some used the identity of deceased people to obtain mortgages, and other desperate thieves bilked out of their homes and home equity the most vulnerable homeowners and seniors in dire financial straits.

Let's face it: This is just the tip of the iceberg. And we in Congress, as we work to get the economy back on track and credit flowing again, we have to address what was at the root of the mortgage meltdown in the first place, and that is mortgage fraud.

Mortgage fraud continues to be on the rise in record numbers. The FBI has reported that, in 5 years, its mortgage fraud caseload increased by 237 percent and investigations more than doubled in 3 years.

During a 12-month period ending in 2008, mortgage fraud reports increased by 44 percent, reaching over 63,000 reports, with predictions of up to $25 billion in losses. On refinanced FHA loans, defaults have more than quadrupled.

For the fifth year in a row, my State of Illinois secured a spot on the Mortgage Asset Research Institute's top 10 list of States with the most severe and prevalent incidents of mortgage fraud. In 2009, the mortgage fraud case report, issued last week, Illinois ranked third in the Nation, behind Rhode Island and Florida.

As a former real estate attorney and Member of the House Committee on Financial Services, I have seen firsthand the devastating effects of mortgage fraud. It has plagued our financial system and economy.

Most tragically, it has cost millions of American families their homes and required taxpayers to commit trillions of dollars to prop up the financial industry. It is just not fair to the good actors in the industry and the 90 percent of homeowners who are paying their mortgages on time.

That is why I was pleased to join you, Mr. Chairman and Ranking Member Smith, in introducing H.R. 1748, the Fight Fraud Act, and I introduced H.R. 78, the Stop Mortgage Fraud Act. I look forward to working with you and the Members of this Committee on these important bills.

Last Congress, the House three times passed in some form my bill, the Stop Mortgage Fraud Act, only to see it removed or ignored by the Senate. But I haven't given up, and I won't give up.

This Congress, I reintroduced the Stop Mortgage Fraud Act to provide additional funds to the FBI and the Department of Justice to investigate and prosecute mortgage fraud.

By bolstering Federal law enforcement's efforts, Congress can help to inject certainty and fairness into the mortgage system to restore investor, homebuyer and public confidence in the American dream and our financial system.

As we work to modernize financial laws and regulations, it is our duty to supply Federal law enforcement with the tools and resources it needs to rapidly tackle fraud, particularly mortgage fraud. Fighting fraud must be a central role in solving the underlying problems that have undermined the economic recovery.

With that, I respectfully request that you support H.R. 78, and I offer my continued commitment to improve the bill and move it through the legislative process.

Thank you again for your time and dedication to this matter.

[The prepared statement of Mrs. Biggert follows:]

PREPARED STATEMENT OF THE HONORABLE JUDY BIGGERT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Chairman Conyers and Ranking Member Smith: thank you for extending to me the opportunity to join you today. Given your agenda, I'll be brief.

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For the 5th year in a row, Illinois secured a spot on the Mortgage Asset Research Institute's (MARI) top ten list of states with the most severe and prevalent incidents of mortgage fraud. In MARI's 2009 Mortgage Fraud Case Report—issued last week, Illinois ranked third in the nation, behind Rhode Island and Florida.

As a former real estate attorney and member of the House Committee on Financial Services, I've seen first-hand the devastating effects of mortgage fraud. It has plagued our financial system and economy. Most tragically, it has cost millions of American families their homes and required taxpayers to commit trillions of their hard-earned dollars to prop-up the financial industry. It's just not fair to the good actors in the industry and the 90 percent of homeowners who are paying their mortgage on time.

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But I haven't given up, and I won't give up. This Congress, I reintroduced the Stop Mortgage Fraud Act, now H.R. 78, to provide additional funds to the FBI and Department of Justice to investigate and prosecute mortgage fraud.

By bolstering federal law enforcement's efforts, Congress can help to inject certainty and fairness into the mortgage system—to restore investor, homebuyer, and public confidence in the American Dream and our financial system. As we work to modernize financial laws and regulations, it's also our duty to supply federal law enforcement with the tools and resources it needs to rapidly tackle fraud, particularly mortgage fraud. Fighting fraud must play a central role in solving the underlying problems that have undermined economic recovery.

With that, I respectfully request that you support H.R. 78, the Stop Mortgage Fraud Act. I offer my continued commitment to improve the bill and move it through the legislative process. Thank you, again, for your time and dedication to this matter.

Mr. CONYERS. Neil Abercrombie of Hawaii is a senior athlete, a jazz historian, and an unlicensed lawyer. So we are particularly happy to have him before us.

Welcome, Neil.

TESTIMONY OF THE HONORABLE NEIL ABERCROMBIE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF HAWAII

Mr. ABERCROMBIE. Ah, there we are.

Thank you very much, Mr. Chairman. Mahalo nui loa to you, and aloha to you and Mr. Smith and all the Members. Thank you very much for the opportunity to be with you.

Mr. Chairman, before I begin, I want to express to you what I know is a shared feeling, I am sure by all the Members and the staff, that you will be losing Mr. Luis de Baca to the State Department, but I want to say that the Nation is all the more gaining from it and the world.

He will be ambassador-at-large in the State Department in the area of trafficking in persons, particularly women and girls, throughout the world who are now suffering oppression, will find a great champion in Mr. de Baca. And I commend you and the Committee for having the foresight to have him with you. And I know we wish him all a bon voyage in his new role.

Mr. Chairman and Members, I am very grateful to the Committee your hearing on H.R. 1667, and I want to thank Mr. Smith for his mentioning it in his remarks. This is a bill I believe that does not have an ideological equation or philosophical equation, a partisan equation, but one which is particularly American, going back, as was indicated by Mr. Lungren and others, something which the Members of Congress have had a shared obligation and responsibility for and about for decades.

The War Profiteering Prevention Act of 2009 and other legislation which will begin to hold companies that accept and spend the public's money more accountable to the public.

Mr. Chairman, as you know, this bill is part of a larger package of legislation intended to deter waste and abuse of public funds. It is absolutely essential to strengthen Federal law so that private-sector contractors who enter agreements with the government to provide goods and services will know that the misuse of public funds is a crime and that violators will be prosecuted and punished.

It is also absolutely essential to strengthen Federal law so that the public knows that such behavior will no longer be tolerated.

It is unfortunate that a relatively few American companies have wreaked complete havoc on our country's economy and provoked national outrage with their singular focus on profits at the expense of market stability, the long-term benefit of their customers, and any sense of business ethic.

But it didn't just happen last year or just on Wall Street or just in our domestic housing and financial markets. The same corrupt

atmosphere followed our military forces overseas and is the particular object of my bill.

The last Administration privatized logistical support for combat and reconstruction operations in Iraq and Afghanistan to an extent unprecedented in our history.

Wars have always been huge and highly profitable business, but never have we seen the pursuit of profit practiced with more cavalier disregard for the health and safety of our troops, the ultimate success of our reconstruction efforts, or the continuing support of the American public.

In fact, some of our largest contractors have acted as if it was open season on the United States taxpayer. At least 10 companies eventually have paid more than $300 million in penalties to resolve allegations of bid-rigging, fraud, gross overcharging, delivery of faulty military parts, and environmental damage in Iraq alone.

Even more tragically, some of our soldiers have become casualties of shoddy work, simply because U.S. law has not fully brought these firms to account. There have been 16 reported deaths of American soldiers and 2 civilians, not from combat, but from electrocution, as a result of shoddy work.

Mr. Chairman, I wanted to add parenthetically that I am well aware of some of the commentary made about existing law with regard to fraud and misuse and abuse of public funds.

Our difficulty here and the reason for this bill appearing before you is there is now some question as to the legal reach of these laws outside the Nation in warzones and combat zones, such as in Iraq and Afghanistan, and that is the object of the bill, not to reiterate what is already on the books, but rather to see to it that no legal obstacles might exist to be able to bring such perpetrators account.

The United States has spent more than $50 billion to hire private contractors in Iraq to provide food, water, gasoline, and other supplies, guard bases, drive trucks, and many other activities in support of our troops or for reconstruction itself.

Today, with an additional 21,000 troops planned for deployment to Afghanistan, along with billions of reconstruction dollars, contract accountability is an urgent need.

Cleaning up this mess and preventing its recurrence has been hampered by the fact that anti-fraud laws that can protect against the waste or theft of U.S. tax dollars in the United States are not as clearly applicable overseas. There has been and is ambiguity in legal jurisdiction.

An abundance of well-documented cases of contract fraud and abuse led to the introduction of the War Profiteering Prevention Act in 2007, to that bill's markup and hearing before this Committee, and to its passage in the full House in October 2007 by an overwhelming vote of 375-3.

I am hoping that the three will re-read this bill and that we can prevail upon them to reconsider.

However, the Bush Administration, through its testimony against the bill before your Committee and on the floor of the House, viewed this legislation as an example of burdensome regulation over the free enterprise system. As a result, action in the Senate was blocked.

And as a result, we have worked the bill over in such a way as we hope and believe will meet the objections that existed previously.

That bill was H.R. 400, has now been reintroduced in new form, which, as I say, I hope will address such questions as existed in 2007, introduced in the 111th Congress as H.R. 1667, which received, as I said, the favorable commentary of Ranking Member Smith.

The War Profiteering Prevention Act of 2009, that is before you today. This measure is very brief and very direct. It defines contract fraud and specifies who will be covered by the law and where it will be in force. It does not have maybe some the general implications that found some objection previously.

It establishes jurisdiction very clearly for the enforcement of the law and the prosecution under it. And it specifies the penalties for violation of the law in fines and possible imprisonment.

It is profoundly distressing that such laws are necessary, but this bill is critical to our national security interests, both for the survival of our own economy and accountability to the taxpayer and the successful reconstruction in foreign nations gripped by extremism.

We have seen what can happen without proper government oversight. We would be derelict in our responsibility to the public we serve if we did not take every step available to us to discourage such behavior in the future and punish those who violate the public trust.

Therefore, Mr. Chairman and Mr. Smith, I appreciate today's hearing, certainly, and I appreciate the fact that you are having a hearing on the wider problems of fraud and corruption.

And I certainly look forward to this Committee's markup and other pieces of reform legislation and their full consideration by the House and will do all I can to aid and assist you, should anyone still have any questions after we have gone through the House—after the House has worked its will.

Thank you very much, Mr. Chairman. Mahalo nui loa.

[The prepared statement of Mr. Abercrombie follows:]

PREPARED STATEMENT OF THE HONORABLE NEIL ABERCROMBIE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF HAWAII

Chairman Conyers and Members of the Judiciary Committee:

I am grateful to the Committee for today's hearing on H.R. 1667, the War Profiteering Prevention Act of 2009, and other legislation which will begin to hold companies that accept and spend the public's money accountable to the public. I appreciate the opportunity to address the Committee on this matter.

Mr. Chairman, as you know, this bill is part of a larger package of legislation intended to deter the waste and abuse of public funds. It is absolutely essential to strengthen federal law so that private sector contractors who enter agreements with the government to provide goods and services will know that the misuse of public funds is a crime, and that violators will prosecuted and punished. It is also absolutely essential to strengthen federal law so the public knows that such behavior will no longer be tolerated.

It is unfortunate that a relative few American companies have wreaked complete havoc on our country's economy and provoked national outrage with their singular focus on profits at the expense of market stability, the long-term benefit of their customers and any sense of business ethic.

But it didn't just happen last year, or just on Wall Street, or just in our domestic housing and financial markets. The same corrupt atmosphere followed our military forces overseas. The last Administration privatized logistical support for combat and

reconstruction operations in Iraq and Afghanistan to an extent unprecedented in our history.

Wars have always been huge and highly profitable business, but never have we seen the pursuit of profit practiced with more cavalier disregard for the health and safety of our troops, the ultimate success of our reconstruction efforts or the continuing support the American public. In fact, some of our largest contactors have acted as if it was open season on the U.S. taxpayer.

At least ten companies eventually paid more than $300 million in penalties to resolve allegations of bid rigging, fraud, gross overcharging, delivery of faulty military parts and environmental damage in Iraq.

Even more tragically, some of our soldiers have become casualties of shoddy work, simply because U.S. law has not fully brought these firms to account. There have been 16 reported deaths of American soldiers and 2 civilians, not from combat, but from electrocution.

The U.S. has spent more than $50 billion to hire private contractors in Iraq to provide food, water, gasoline and other supplies, guard bases, drive trucks and many other activities in support of our troops and for reconstruction. Today, with an additional 21,000 troops planned for deployment to Afghanistan along with billions of reconstruction dollars, contractor accountability is an urgent need.

Cleaning up this mess and preventing its recurrence has been hampered by the fact that anti-fraud laws that can protect against the waste or theft of U.S. tax dollars in the United States are not as clearly applicable overseas. There has been ambiguity in legal jurisdiction.

An abundance of well-documented cases of contract fraud and abuse led to the introduction of the War Profiteering Prevention Act in 2007, to that bill's mark-up and hearing before this committee, and to its passage by the full House in October 2007 by a vote of 375–3.

However, the Bush Administration, through its testimony against the bill before your committee and on the floor of the House, viewed this legislation as an example of burdensome regulation over the free enterprise system. As a result, action in the Senate was blocked.

That bill—H.R. 400—has now been reintroduced in the 111th Congress as H.R. 1667, the War Profiteering Prevention Act of 2009, and it is before you today.

The measure is very brief and very direct. It defines contract fraud; it specifies who will be covered by the law and where it will be in force; it establishes jurisdiction for the enforcement of the law and prosecution under it; and it specifies the penalties for violation of the law, in fines and possible imprisonment.

It is profoundly distressing that such laws are necessary, but this bill is critical to our national security interests; both for the survival of our own economy and accountability to the taxpayer, and the successful reconstruction of foreign nations gripped by extremism. We have seen what can happen without proper government oversight. We would be derelict in our responsibility to the public we serve if we did not take every step available to us to discourage such behavior in the future, and to punish those who violate the public trust.

Mr. Chairman, I appreciate today's House Judiciary Committee hearing on HR 1667, the War Profiteering Prevention Act of 2009, and on the wider problems of fraud and corruption. I look forward to the Committee's mark-up of this and other pieces of reform legislation, and their consideration by the full House.

I am grateful for the opportunity to testify and will do anything I can to assist the Committee in its deliberations.

Mr. CONYERS. Elijah Cummings is the past Chairman of the Congressional Black Caucus, Member of the Transportation Committee, as well as the Armed Services Committee.

Welcome this morning, Elijah.

TESTIMONY OF THE HONORABLE ELIJAH E. CUMMINGS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mr. CUMMINGS. Thank you very much. Thank you very much, Mr. Chairman. I am also a Member of the Government Reform Committee also, where we have spent a lot of time looking at fraud and a lot of the fraud that Mr. Abercrombie just talked about with-

in the military. And, of course, looking at AIG and what is going on right now with regard to these TARP funds.

Chairman Conyers, I want to thank you and Mr. Smith for inviting us today. And I commend both of you and this entire Committee for your tireless efforts and your ongoing efforts to protect consumers and prevent fraud, and I also appreciate the work of this entire Committee in that regard.

I have worked closely with the administration of Governor Martin O'Malley in my home State of Maryland to make my constituents aware of the consumer protections available to them, and I am pleased to be here.

From the instant the decision was made to inject taxpayer dollars into the private capital markets, I have beaten a drum for the rights of our Nation's involuntary investors.

From for-profit loan-modification firms in the housing sector to corporate bonuses and retention payments on Wall Street, we have seen too many examples of our hard-working constituents getting taken advantage of at a time when many are very—are in desperate straits themselves.

At the State level, the Maryland General Assembly has passed the Maryland Mortgage Fraud Act, explicitly making mortgage fraud a specific crime, as well as creating an affirmative obligation for all mortgage brokers and lenders to report cases of fraud, theft or forgery.

More recently, we have all seen the emergence of the so-called foreclosure or loan modification consultants. These scam artists charge high upfront fees to vulnerable consumers to supposedly help them obtain modifications of their loans.

In reality, they are charging hard-working people for information that is available to them at no cost. Too often, these efforts result in both wasted money and wasted time. And that homebuyer is left with two bags in each hand, one bag says, "Zero," and the other one says, "Debt."

The bills to be considered by the Committee today would provide exactly the kind of tools we need to create stronger taxpayer protections. In the case of AIG, all taxpayers have been victimized.

We have seen a pattern of less-than-full disclosure of AIG's uses of the TARP funds. First, we found out that they were attending conferences at lavish resorts, having their manicures, pedicures, and massages done at taxpayers' expense, after getting significant bailout money.

Then we found out that they were issuing bonuses and retention payments even within the Financial Products division, whose actions brought AIG down and created the systemic turmoil that threatens our entire economy, not only of this country, but of the world.

Mr. Liddy, the head of AIG, and his team at AIG have not convinced me that these bailout funds are always being used in the best interests of the taxpayer. And it is simply unacceptable that the taxpayers who provided these funds should have any doubts.

I particularly commend you, Mr. Conyers, and Mr. Smith, Mrs. Biggert, Mr. Scott, Mr. Delahunt, and Ms. Jackson Lee for your sponsorship of this legislation, but let me say something else.

As I listen to Mr. Scott and I listen to Mr. Issa and some others, I was thinking about, how do you address these issues? And as, frankly, I haven't practiced law for many years, I think there are two things, and I think Mr. Scott hit on it very—did a good job of pointing it out.

You know, the question is, it is not just whether you have the laws on the books. The question is, is whether law enforcement make those laws a priority to prosecute and whether they have the resources to do it.

Now, Mr. Abercrombie makes a good point. There are some loopholes. And we need to fill those loopholes. But we also, Mr. Chairman—and just commentary—we need to make sure that the U.S. attorney and our attorneys throughout—and his assistants throughout the country and our State folks know that this is a priority of this Congress.

Now, I get tired of seeing my constituents after they have been defrauded and left with nothing. And the sad part about it, as I close, is that, you know, I have often said we have one life to live. This is no dress rehearsal, and this is that life.

And it is so sad when I see people like I saw this morning, Mr. Chairman, getting up at 5 o'clock in the morning, going out there, working their butts off, and now they stand to lose their houses, their homes, their savings, and their health care.

And then they see their tax dollars being used in a way that is to me fraudulent. And they also see something else happening: They also see that it becomes almost impossible for them to reclaim their dream and reclaim their hope.

So I encourage this Committee to do what I know you are going to do. And thank you for being so vigilant.

[The prepared statement of Mr. Cummings follows:]

PREPARED STATEMENT OF THE HONORABLE ELIJAH E. CUMMINGS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Thank you, Chairman Conyers, for inviting me to testify today.

I commend Chairman Conyers and Ranking Member Smith for their tireless leadership of our ongoing efforts to protect consumers and prevent fraud, and I also appreciate the hard work of all Judiciary committee members.

I have worked closely with the administration of Governor Martin O'Malley in my home state of Maryland to make my constituents aware of the consumer protections available to them, and I am pleased to be here.

From the instant the decision was made to inject taxpayer dollars into the private capital markets, I have beaten a drum for the rights of our nation's "involuntary investors."

From for-profit "loan modification" firms in the housing sector to corporate bonuses and retention payments on Wall Street, we've seen too many examples of our hard-working constituents getting taken advantage of at a time when many are truly desperate.

At the State level, the Maryland General Assembly has passed the Maryland Mortgage Fraud Act, explicitly making mortgage fraud a specific crime, as well as creating an affirmative obligation for all mortgage brokers and lenders to report cases of fraud, theft, or forgery.

More recently, we've all seen the emergence of these so-called foreclosure or loan modification consultants.

These scam artists charge high up-front fees to vulnerable consumers to supposedly help them obtain modifications of their loans.

In reality they are charging hard-working people for information that is available to them at no cost. Too often, these efforts result in both wasted money and wasted time.

The bills to be considered by the committee today would provide exactly the kind of tools we need to create stronger taxpayer protections.

In the case of AIG, all taxpayers have been victimized. We have seen a pattern of less-than-full disclosure of AIG's uses of the TARP money.

First, we found out they were attending conferences at lavish resorts.

Then we found out they were issuing bonuses and retention payments, even within the Financial Products division, whose actions brought AIG down and created the systemic turmoil that threatens our entire economy.

Mr. Liddy and his team at AIG have not convinced me that these bailout funds are always being used in the best interests of the taxpayer—and it is simply inacceptable that the taxpayers who provided this funding should have any doubts.

I particularly commend Chairman Conyers, Mr. Smith, Ms. Biggert, Mr. Delahunt, and Ms. Jackson Lee for their sponsorship of the Fight Fraud Act of 2009.

Including the Troubled Assets Relief Program in the definition of "major fraud against the government" should help create transparency and increase accountability from the recipients of these taxpayer funds.

Whether as a, quote, "involuntary investor" or as the holder of an underwater mortgage, the American taxpayer shouldn't have to keep absorbing these blows.

The Fight Fraud Act and today's hearing are the counterpunches they need. Mr. Chairman, I commend you and the committee again on your efforts to root out fraud and abuse.

Thank you for inviting me today, and with that, I yield back.

Mr. CONYERS. Well, we are indebted to all three of you and look forward to our continued working together on these bills, and laws like this, and how we enforce and supply the government with the resources to do what you have suggested.

I thank you all for your attendance this morning.

We will now call up our second panel of seven witnesses. And we are pleased to welcome the president and CEO of the Taxpayers Against Fraud, Jeb White; senior law partner Marcia Madsen; another law firm partner, Barry Pollack; the executive director and general counsel of the Association of Consumers, Ira Rheingold; the New York City commissioner for consumer affairs, Jonathan Mintz; the deputy director of the Federal Bureau of Investigation, John Pistole; and the acting assistant attorney general for the criminal division in the United States Department of Justice, Ms. Rita Glavin.

Ms. Glavin has done some very excellent work. She will be our first witness. All the statements will be in the record, so we welcome you to begin.

TESTIMONY OF RITA GLAVIN, ACTING ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Ms. GLAVIN. As you all know, the Nation's current economic crisis has had devastating effects on mortgage markets, credit markets, the banking system, and all of our Nation's citizens.

And while not all of the current economic ills are the result of criminal activity, the financial crisis has laid bare criminal activity, such as Ponzi schemes, that may have otherwise gone undetected for years.

The Department of Justice is committed during these difficult times to redoubling our efforts to uncover abuses involving financial fraud schemes, mortgage lending and securitization frauds, foreclosure rescue scams, government program fraud, bankruptcy schemes, and securities and commodities fraud.

Where there is evidence to criminal wrongdoing, including criminal activity that may have contributed to the current economic crisis or any attempt to criminally profit from the current crisis, the

department will prosecute the wrongdoers, seek to put them in jail when appropriate, and work tirelessly to recover assets and criminally derived proceeds, and strive to make the victims whole.

Historically, the department has had tremendous success in identifying, investigating and prosecuting massive financial fraud schemes. Last year, for example, the department obtained convictions of four executives, including a former AIG executive who engaged in corporate fraud by executing two false reinsurance transactions to conceal a $59 million decrease in the loss reserves of AIG.

Similarly, last year, the department secured the conviction of five former executives, including the owner and president of National Century Financial Enterprises, one of the largest health care finance companies in the United States, until its 2002 bankruptcy, on charges stemming from an investment fraud scheme resulting in $2.3 billion in investor losses.

Last week, the former president of that company was sentenced to 30 years in prison, and a co-owner was sentenced to 25 years in prison. The defendants were also ordered to pay restitution of $2.3 billion and forfeit $1.7 billion.

In just the last few weeks, the department has secured a guilty plea from Bernard Madoff for securities fraud and mail fraud violations. And we filed a criminal complaint against Laura Pendergest-Holt, the chief investment officer of Stanford Financial, alleging that she obstructed an SEC investigation into the activities of Stanford Financial.

The department has approached the current financial problem with three primary goals, first, coordination. The department has sought to aid in the coordination among law enforcement agencies by working with our partner agencies in forming a variety of national and regional working groups. The coordination is important to share information and share ideas.

Second, investigations and prosecutions. As always, the department focuses on those to investigate financial fraud and mortgage fraud. When people go to jail, when people incur stiff fines and have to pay restitution, we deter similar conduct by others.

The department has over the last several years aggressively prosecuted fraud cases. We have done nationwide sweeps, resulting in hundreds of convictions.

Third, in addition to coordination and investigating, prosecuting crimes, we look to fulfill our responsibilities to the victims, looking to make them whole, looking to identify them, looking to recover assets and provide the restitution to the victims.

In addition to continue our efforts to prosecute financial crimes, like Ponzi schemes, mortgage fraud, securities fraud, the department knows that we have to ensure that the funds that Congress has authorized to rejuvenate our economy are used as intended.

Where these taxpayer funds are used unlawfully and where misrepresentations are made in order to get those funds, we are committed to looking at the matter, investigating and prosecuting wrongdoers where we find them.

Our past experience, including many prosecutions relating to the Hurricane Katrina recovery funds and the funds used as part of the Iraq reconstruction efforts, show that we know when large in-

vestments of taxpayer money go out over a short period of time, people will try and exploit the system and criminally profit.

And we are aware of that. We are ready for that. And we are already starting to work with our other law enforcement agencies, including the SIGTARP, to prepare for what may come down the pike.

So looking forward, the department believes it has the tools it needs to continue to vigorously combat financial fraud. We support certain legislative steps that could be used to close existing gaps that might exist in the law and strengthen some of the statutes that we already use to prosecute these financial fraud crimes.

I appreciate the Committee's invitation to be here today, and I look forward to your questions.

[The prepared statement of Ms. Glavin follows:]

PREPARED STATEMENT OF RITA GLAVIN

Department of Justice

STATEMENT OF

RITA GLAVIN
ACTING ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

HEARING ENTITLED

"PROPOSALS TO FIGHT FRAUD AND PROTECT TAXPAYERS, INCLUDING: H.R. ___ , THE "FIGHT FRAUD ACT OF 2009"; H.R. 1292, TO AMEND TITLE I OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968; H.R. 1667, THE "WAR PROFITEERING PREVENTION ACT OF 2009"; H.R. ___ , THE "FALSE CLAIMS CORRECTIONS ACT"; H.R. ____ THE "FINANCIAL CRIMES RESOURCES ACT OF 2009"; H.R. ___, THE "MONEY LAUNDERING CORRECTION ACT OF 2009"; AND H.R. 78, THE "STOP MORTGAGE FRAUD ACT."

PRESENTED

APRIL 1, 2009

Good morning Mr. Chairman and members of the Committee. Thank you for your invitation to address the Committee concerning the Department of Justice's efforts to prevent and combat financial fraud. It is an honor to appear before you today. Since there are now seven bills that are part of this hearing, most of which have just been introduced, we would like to express our desire to work with the Committee on these bills before they move forward in the legislative process. Because of timing, we will not be addressing them in this testimony.

The Nation's current economic crisis has had devastating effects on mortgage markets, credit markets, the banking system, and all of our Nation's citizens. Although not all of our current economic ills are the result of criminal activity, the financial crisis has laid bare criminal activity – such as Ponzi schemes – that may have otherwise gone undetected for years. The Department of Justice (the Department) is committed, during these difficult times, to redoubling our efforts to uncover abuses involving financial fraud schemes, mortgage lending and securitization frauds, foreclosure rescue scams, government program fraud, bankruptcy schemes, and securities and commodities fraud. We are committed to adopting a proactive approach for better detecting and deterring fraud in the future. Put very simply, where there is evidence of criminal wrongdoing – including criminal activity that may have contributed to the current economic crisis or any attempt to criminally profit from the current crisis – the Department will prosecute the wrongdoers, seek to put them in jail, work tirelessly to recover assets and criminally derived proceeds, and strive to make whole the victims of such crimes.

Today, I want to address some of the steps the Department has taken to combat financial fraud and mortgage fraud and the actions the Department is taking to help protect taxpayers'

money. Further, I want to address some steps that could be taken to aid in the Department's enforcement activities.

Financial Fraud Enforcement

Historically, the Department has had tremendous success in identifying, investigating, and prosecuting massive financial fraud schemes. Last year, for example, the Department secured the convictions of five former executives, including the owner and president of National Century Financial Enterprises – one of the largest health care finance companies in the United States until its 2002 bankruptcy – on charges stemming from an investment fraud scheme resulting in $2.3 billion in investor losses. Similarly, last year, the Department obtained a conviction of a former AIG executive who engaged in corporate fraud by executing two false reinsurance transactions to conceal a $59 million decrease in the loss reserves of AIG. From the Department's prosecution of executives of Enron to Worldcom to Adelphia to AIG, to the prosecutions of mortgage fraudsters and architects of Ponzi schemes across the country, the Department has considerable institutional experience and knowledge upon which it can, and will, draw in fighting crimes that relate to the current crisis.

Indeed, in recent weeks, the Department has made clear that its commitment to prosecuting financial crimes will not abate. In the last few weeks, the Department has secured a guilty plea from Bernard Madoff for securities fraud and mail fraud violations, among other charges; filed a criminal complaint against Laura Pendergest-Holt, the chief investment officer of Stanford Financial, which alleges that she obstructed a Securities and Exchange Commission (SEC) investigation into the activities of Stanford Financial; and arrested Charles "Chuck" E.

Hays, who is alleged to have engaged in a large Ponzi scheme operation in Minnesota. These are but a few examples of the Department's ongoing, vigorous enforcement efforts.

Mortgage Fraud Enforcement

Although there are many causes and effects of the current financial crisis, one of the most often cited is mortgage fraud and, indeed, mortgage fraud continues to be an escalating problem across the country. The U.S. Department of the Treasury recently reported that depository institutions filed over 62,000 Suspicious Activity Reports (SARs) on mortgage fraud between June 2007 and June 2008. That is a 44 percent increase over the prior year. To address this growing problem, the Department has been waging an aggressive campaign. We have deployed a broad array of enforcement strategies to ensure the best use of our investigative and prosecutorial resources.

Mortgage Fraud Law Enforcement Coordination

Effectively combating mortgage fraud requires coordination among various law enforcement agencies and close cooperation between law enforcement and industry representatives. The Federal Bureau of Investigation (FBI), Department of Housing and Urban Development (HUD) Office of Inspector General, the Financial Crimes Enforcement Network (FinCEN), Internal Revenue Service (IRS) Criminal Investigative Division (CID), U.S. Postal Inspection Service, SEC, Federal Reserve Board, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, Office of Thrift Supervision, and other federal, State and local agencies are among the many agencies that monitor, investigate and pursue mortgage fraud. Prosecutions are then brought by both federal and State prosecutors. Because this problem

touches neighborhoods across the country, coordination and the sharing of intelligence and investigative resources are critical to our collective success in addressing mortgage fraud.

The Department is leading these coordination efforts through the Corporate Fraud Task Force and the Mortgage Fraud Working Group. Through these groups, law enforcement officers and regulators work to develop strategies to investigate and prosecute wrongdoers and their enterprises engaged in systemic mortgage fraud. In addition, there are 18 regional Mortgage Fraud Task Forces and 47 mortgage fraud working groups in which the FBI, and other federal, state, and local enforcement agencies are working together to address this problem. These efforts continue to grow. For example, within the last several weeks, the United States Attorney's Office in Maryland announced the formation of the Maryland Mortgage Fraud Task Force linking federal, state and local agencies in an effort to better coordinate civil and criminal enforcement actions relating to mortgage fraud, recover more money for victims, and more effectively communicate information to the public about common schemes in an effort to prevent them from becoming victims of mortgage fraud in the first place.

In addition, the FBI has established a National Mortgage Fraud Team at FBI Headquarters. This unit, working closely with the Department's Criminal Division, U.S. Attorneys' Offices and other law enforcement partners, encourages proactive investigations of mortgage fraud and related crimes and employs an intelligence-driven case targeting system to identify mortgage fraud "hot spots" around the country and to promote real-time enforcement operations. This model has achieved initial success in the Southern District of Florida with the Department's Health Care Fraud Strike Force, which is also based on intelligence-based

investigations. We hope to learn from these experiences and disseminate the lessons learned to other districts around the country.

The sharing of information and ideas is essential to a coordinated approach to the mortgage fraud problem. Accordingly, the Department has encouraged, and led by example, a comprehensive information sharing effort within the Department and among our partner agencies.

Investigation and Prosecution of Mortgage Fraud

When criminals go to jail, we deter similar conduct by others. The Department has, over the last several years, aggressively prosecuted mortgage fraud cases, and the Department's efforts have yielded nationwide sweeps, resulting in hundreds of convictions, and sending hundreds of criminals to jail. As just one example, in partnership with the FBI, the Department has conducted three nationwide mortgage fraud and other banking crime sweeps. In Operation "Malicious Mortgage", conducted last year, U.S. Attorneys' Offices brought charges against more than 400 defendants across the nation, largely as a result of the work of local and regional task forces and working groups currently targeting mortgage fraud. Operation "Malicious Mortgage" was the most recent coordinated sweep in an ongoing law enforcement effort to combat mortgage fraud, which also included Operation "Quick Flip" in 2005 and Operation "Continued Action" in 2004. These operations spanned the country and involved the participation of U.S. Attorneys' Offices and over forty of the FBI's 56 field offices.

Operation "Homewrecker" is yet another example of our aggressive enforcement efforts. Operation Homewrecker was a case brought last year by the United States Attorney's Office for the Eastern District of California and investigated by the FBI and the IRS CID, which resulted in the indictment of 19 individuals on mortgage fraud-related charges. The case stemmed from a scheme that targeted homeowners in dire financial straits, fraudulently obtaining title to more than 100 homes and stealing millions of dollars through fraudulently obtained loans and mortgages. *See United States v. Charles Head et al.*, 08-cr-116 (E.D. Cal. Feb. 2, 2008); *United States v. Charles Head et al.*, 08-cr-116 (E.D. Cal. Mar. 13, 2008). This is just an example of the hundreds of mortgage fraud cases prosecuted by the Department over the last several years.

In addition to criminal enforcement activities, the Department has addressed mortgage fraud through vigorous civil enforcement, including under the False Claims Act (FCA). The Department's recoveries under the FCA, with the assistance of private whistleblowers, have reached record levels. In eight of the last nine years, the Department's recoveries under the FCA have exceeded $1 billion and, since 1986, the Department's recoveries have exceeded $22 billion. The Department has used the FCA to protect a broad range of government programs and contracts, including matters relating to mortgage fraud. For example, the Department recently obtained a $10.7 million settlement from RBC Mortgage Company to resolve allegations that it sought FHA insurance for hundreds of ineligible loans. Additionally, the Department obtained two recent judgments, totaling $7.2 million, against a California real estate investor and a Chicago-based mortgage company, for defrauding HUD's direct endorsement program. *U.S. v. Eghbal*, 475 F.Supp. 2d 1008 (C.D. Cal. 2008), aff'd 548 F.3d 1281 (9th Cir. 2008); *U.S. v. Dolphin Mortgage Corp.*, 06-c-499, 2009 WL 153190 (N.D. Ill. 2009). The Department will

continue to vigorously utilize the FCA to hold accountable those who engage in all types of housing related fraud.

Oversight of Economic Stimulus Funding and Protecting Taxpayer Money

In addition to continuing our efforts to prosecute the types of fraudulent conduct described above, we must ensure that the funds that Congress has authorized to rejuvenate and stimulate the economy are used as intended. Where these taxpayer funds are not used appropriately or where misrepresentations are made in order to obtain such funds, we are committed to investigating and prosecuting the wrongdoers.

From past experience – including the many prosecutions we have brought relating to the Hurricane Katrina recovery funds and the funds used as part of the Iraq reconstruction efforts – the Department is well aware that when large investments of taxpayer money are doled out over a short period of time, people will try to exploit the system and criminally profit. In anticipation of the need to protect the moneys that have been and will be provided as a part of the Troubled Assets Relief Program (TARP) and other economic stimulus packages, the Department has forged a working relationship with the Special Inspector General for TARP and is working to help identify ways to prevent fraud and abuse. Furthermore, we are continuing to assess whether additional working groups or taskforces should be created or whether resources should be focused to augment the existing working groups.

Identifying and Helping Victims

In addition to detecting, deterring, and prosecuting crimes, the Department is always mindful of our obligation to help victims of all crimes and, to the extent possible, attempt to make them whole. To this end, the Department's prosecutors and law enforcement partners work to locate and recover assets from the criminals who perpetrate financial frauds and to provide restitution to their victims. Recovery of assets from criminals, however, is challenging and prosecutors have, in some instances, sought creative solutions. In one particularly egregious mortgage fraud case prosecuted in the North District of Georgia, for example, the court ordered the defendant to pay restitution of almost $6 million. To secure the restitution money for the victims, the government obtained a forfeiture judgment of $6 million, access to the defendant's book and movie rights, and the right to sell the defendant's paintings on eBay. The Department also effectively uses asset forfeiture as an important law enforcement tool and, last year alone, returned over $435 million to victims of financial crimes.

Because some financial frauds involve the victimization of hundreds of people, the Department also expends considerable resources finding the victims in the first instance. The Department's many victim-witness coordinators and law enforcement officials work tirelessly to help ensure that what money is recovered reaches the victims of the crimes. The Department uses traditional methods of investigation to identify victims but also is proactively trying to reach and alert potential victims. For example, in the Stanford Financial matter, the FBI recently issued a press release about the investigation and provided a telephone number for potential victims to call. Ultimately, identifying victims is a significant and time-consuming task

especially when, for example in the Bernard Madoff case, this undertaking can involve thousands of victims around the globe.

Potential Improvements for Law Enforcement Efforts in the Future

Although the Department believes it has the tools it needs to continue to vigorously combat financial fraud, there are legislative steps that can be taken to close existing gaps and strengthen the statutes that prosecutors use to bring these cases. The Fraud Enforcement and Recovery Act of 2009 (FERA), was introduced in the Senate on February 5, 2009 and approved by the Senate Judiciary Committee on March 5, 2009, and the Department supports this legislation. FERA contains a number of legislative modifications that would greatly benefit law enforcement.

For example, the legislation would amend the definition of "financial institution" to include "mortgage lending business" in Title 18, United States Code. At the height of the subprime lending era, independent mortgage companies made a significant proportion of the higher-priced, first-lien mortgages in America (some estimate nearly half). The loans originated by these private mortgage companies were not generally covered by current federal fraud statutes, such as bank fraud and bank bribery statutes. The new definition would ensure that private mortgage companies are both protected by, and held fully accountable under, federal fraud laws. The loans originated by these private mortgage companies were not generally covered by current federal fraud statutes, such as bank fraud and bank bribery statutes. For example, the bank fraud statute, 18 U.S.C. § 1344, prohibits defrauding "a financial institution,"

and the amendment to this definition would extend the bank fraud statute beyond traditional banks and financial institutions to private mortgage companies.

The legislation would also expand the prohibition regarding false statements to financial institutions under of Title 18, United States Code, to cover false statements made to mortgage lending businesses. Currently, section 1014 applies only to federal agencies, banks, and credit associations and does not extend to private mortgage lending businesses. This new provision would ensure that private mortgage companies are held fully accountable under this federal fraud provision by providing prosecutors with an important tool to charge those who make false applications and appraisals.

Another proposal under FERA would amend the federal major fraud statute (18 U.S.C. § 1031) to include "any grant, contract, subcontract, subsidy, loan, guarantee, insurance or other form of Federal assistance." This amendment will make sure that federal prosecutors have jurisdiction to use one of their most potent fraud statutes to protect the government assistance provided during this most recent economic crisis, including money from the TARP and circumstances where the government purchased preferred stock in companies to provide economic relief.

These are just a few of the provisions of the FERA legislation which the Department supports. In addition to the proposals in FERA, the Department respectfully submits there are additional areas that could be addressed through legislative action, and we welcome the opportunity to work with this Committee and others to develop such proposals. For example, a

law mandating that persons who provide real estate settlement services must maintain the settlement statements and related loan documents would give law enforcement an important tool to investigate mortgage fraud. Half of the top ten subprime mortgage originators in the second quarter of 2006 had either gone out of business or been sold by the second quarter of 2007 – only one year later. The Department has found that the records we need to investigate or prosecute mortgage fraud would have been in the possession of those providing settlement services (such as lenders, mortgage brokers, and title companies), but that they are frequently unavailable or difficult to obtain. All too often, such entities go out of business, and their records are either abandoned or destroyed. Requiring those who provide real estate settlement services to maintain appropriate records for ten years following the original date of a loan would significantly assist in the investigation of mortgage fraud.

The Department would welcome the opportunity to work with this Committee to provide additional information about proposed legislative modifications that would assist our prosecutors and investigators.

Resources

Our Nation faces an unprecedented financial crisis. The crisis requires a strategic response to prosecute those responsible for abusing the financial markets, to deter future similar conduct, and to prevent fraud and abuse relating to funds that have been and will be disbursed to help improve the current situation. The Department of Justice has a critical role to play. Federal prosecutors, including those in U.S. Attorneys' Offices around the country, and in the Criminal, Tax, and Civil Divisions of the Department will undoubtedly face an unprecedented demand on

their prosecutorial resources through referrals from the FBI, the U.S. Postal Inspection Service, the Special Inspector General for the Troubled Assets Relief Program, and other investigative agencies.

To meet these imminent demands and to effectively prosecute the crimes that have come to light as a result of to the current crisis, the Department requires concomitant resources. The Department has a successful track record in leading groundbreaking nationwide initiatives to target specific criminal activities and, ultimately, the Department's past experience reveals that an investment in a coordinated response and appropriate resources help ensure justice is served. Further, such an investment allows the government to recover funds that otherwise may be lost to criminals who may go unpunished.

Conclusion

The financial crisis demands an aggressive and comprehensive law enforcement response, including vigorous fraud investigations and prosecutions of individuals who have defrauded their customers and the American taxpayer and otherwise placed billions of dollars of private and public money at risk. The Department is committed to this effort and will ensure that we look at all allegations of fraud closely, follow the facts where they may lead, and bring our resources to bear to prosecute those who have committed crimes. Thank you for the opportunity to provide the Committee a brief overview of the Department's efforts to address the current financial crisis and we look forward to working with the Committee on legislation.

I would be happy to answer any questions from the Committee.

Mr. CONYERS. Deputy Director John Pistole, Federal Bureau of Investigation?

TESTIMONY OF JOHN PISTOLE,
FEDERAL BUREAU OF INVESTIGATION

Mr. PISTOLE. Thank you, Chairman Conyers and Ranking Member Smith, Members of the Committee. It is a pleasure to be here today.

I would like to give you just a very brief overview of the law enforcement challenges facing us and describe the FBI's current efforts to address the growing economic fraud.

First, in the area of mortgage fraud, our work focuses on schemes that rely on industry insiders, of course, those appraisers, accountants, mortgage brokers, and other professionals who override lender controls designed to prevent this type of crime from happening. To state the obvious, we have experienced a significant increase in mortgage-fraud-related cases since 2005.

And we expect that upward trend to continue. Also, mortgage rescue schemes designed to prey on individuals facing the dramatic loss of their homes and who are therefore very vulnerable are of great concern to us. And we are now beginning to see the growth of this crime problem, as well.

The FBI is also combating other types of economic crime, from securities fraud to health care fraud to frauds and corruption associated with our country's efforts to rebuild Iraq and Afghanistan, as we heard from the prior panel.

Finally, the numerous Ponzi schemes that we have heard about, such as Madoff, and other investment frauds have been uncovered, which we are actively pursuing, we are responding in a number of specific ways. We have shifted resources and now have additional FBI agents and national analysts, as well as intelligence analysts, assigned to mortgage fraud and related investigations.

We have another group of agents and analysts working corporate fraud and securities fraud matters. We augment our efforts with State and local law enforcement officers assigned to mortgage fraud task forces and working groups.

And we have established at our headquarters a national mortgage fraud to team to coordinate and prioritize our efforts across the country with our partners and to provide tools that identify the most egregious fraud perpetrators and work even more effectively with our counterparts in law enforcement, regulatory, and industry leaders.

For example, last June, we completed the initial phases of what we called Operation Malicious Mortgage, involving the arrest of more than 400 offenders nationwide believed to be responsible for over $1 billion in estimated losses. This initiative has focused on three types of mortgage fraud, that of lending, of course, mortgage rescue schemes, and mortgage-related bankruptcy schemes.

And we continue our strong efforts within the international contract corruption task force in which we, with our other Federal partners, address fraud and corruption in U.S.-funded Iraq and Afghanistan construction projects.

In closing, it is clear to us and the FBI and our law enforcement partners that more must be done to protect our country and our economy from those who tried to enrich themselves through illegal financial transactions. We are committed to doing so and very grateful for your support.

Thank you, Mr. Chairman.
[The prepared statement of Mr. Pistole follows:]

PREPARED STATEMENT OF JOHN PISTOLE

Department of Justice

STATEMENT OF

JOHN PISTOLE
DEPUTY DIRECTOR
FEDERAL BUREAU OF INVESTIGATION
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

HEARING ENTITLED

"PROPOSALS TO FIGHT FRAUD AND PROTECT TAXPAYERS, INCLUDING: H.R. ___ , THE "FIGHT FRAUD ACT OF 2009"; H.R. 1292, TO AMEND TITLE I OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968; H.R. 1667, THE "WAR PROFITEERING PREVENTION ACT OF 2009"; H.R. ___ , THE "FALSE CLAIMS CORRECTIONS ACT"; H.R. ____ THE "FINANCIAL CRIMES RESOURCES ACT OF 2009"; H.R. ___, THE "MONEY LAUNDERING CORRECTION ACT OF 2009"; AND H.R. 78, THE "STOP MORTGAGE FRAUD ACT."

PRESENTED

APRIL 1, 2009

Good morning Mr. Chairman, Ranking Member, and Members of the Committee. I want to thank you for the opportunity to testify before you today about the Federal Bureau of Investigation's (FBI) efforts to combat mortgage fraud and other financial frauds. Much the same as the Savings and Loan (S&L) Crisis of the 1980s crippled our economy, so too has the current financial crisis. Many of the lessons learned and best practices from our work during the past decade, such as the Enron investigation, will clearly help us navigate the expansive crime problem currently taxing law enforcement and regulatory authorities.

In the late 1980s and early 1990s, the United States experienced a similar financial crisis with the collapse of the savings and loans. The Department of Justice (DOJ), and more specifically the FBI, were provided a number of tools through the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) and Crime Control Act of 1990 (CCA) to combat the aforementioned crisis. As stated in Senate Bill 331 dated January 27, 2009, "in the wake of the Savings and Loan crisis of the 1980s, a series of strike forces based in 27 cities was staffed with 1000 FBI agents and forensic experts and dozens of federal prosecutors. That effort yielded more than 600 convictions and $130,000,000 in ordered restitution."

However, today's financial crisis dwarves the S&L crisis as financial institutions have reduced their assets by more than $1.2 trillion related to the current global financial crisis compared to the estimated $160 million lost during the S&L crisis. Mortgage and related corporate fraud were not the sole sources of the current financial crisis; however, it would be irresponsible to neglect mortgage fraud's impact on the U.S. housing and financial markets.

As the FBI's Assistant Director for the Criminal Division testified in 2004 before the House Financial Services Sub-Committee: "If fraudulent practices become systemic within the mortgage industry and mortgage fraud is allowed to become unrestrained, it will ultimately place financial institutions at risk and have adverse effects on the stock market. Investors may lose faith and require higher returns from mortgage backed securities. This may result in higher interest rates and fees paid by borrowers and limit the amount of investment funds available for mortgage loans."

He also noted that the FBI supported new approaches to address mortgage fraud and its effects on the U.S. financial system, to include:

- a mechanism to require the mortgage industry to report fraudulent activity, and
- the creation of "Safe Harbor" provisions to protect the mortgage industry under a mandatory reporting mechanism.

What has occurred has been far worse than predicted. Mortgage fraud and related financial industry corporate fraud have shaken the world's confidence in the U.S. financial system. The fraud schemes have adapted with the changing economy and now

individuals are preyed upon even as they are about to lose their homes. But what is mortgage fraud?

Although there is no specific statute that defines mortgage fraud, each mortgage fraud scheme contains some type of material misstatement, misrepresentation or omission relied upon by an underwriter or lender to fund, purchase or insure a loan.

The FBI delineates mortgage fraud in two distinct areas: 1) Fraud for Profit; and 2) Fraud for Housing. Fraud for Profit uses a scheme to remove equity, falsely inflate the value of the property or issue loans relating to fictitious property(ies). Many of the Fraud for Profit schemes rely on "industry insiders", who override lender controls. The FBI defines industry insiders as appraisers, accountants, attorneys, real estate brokers, mortgage underwriters and processors, settlement/title company employees, mortgage brokers, loan originators, and other mortgage professionals engaged in the mortgage industry.

Fraud for Housing represents illegal actions perpetrated by a borrower, typically with the assistance of real estate professionals. The simple motive behind this fraud is to acquire and maintain ownership of a house under false pretenses. This type of fraud is typified by a borrower who makes misrepresentations regarding the borrower's income or employment history to qualify for a loan.

The FBI compiles data on mortgage fraud through Suspicious Activity Reports (SARs) filed by financial institutions and through the Department of Housing and Urban Development (HUD) Office of Inspector General (OIG) reports. The FBI also receives complaints from the industry at large.

While a significant portion of the mortgage industry is void of any mandatory fraud reporting and there is presently no central repository to collect all mortgage fraud complaints, SARs from financial institutions have indicated a significant increase in mortgage fraud reporting. For example, during Fiscal Year (FY) 2008, mortgage fraud SARs increased more than 36 percent to 63,173. The total dollar loss attributed to mortgage fraud is unknown. However, 7 percent of SARs filed during FY 2008 indicated a specific dollar loss, which totaled more than $1.5 billion. Only 7 percent of SARs report dollar loss because of the time lag between identifying a suspicious loan and liquidating the property through foreclosure and then calculating the loss amount. As of February 28, 2009, there were 28,873 mortgage fraud SARs filed in fiscal year 2009.

Fraud Trends

The current financial crisis has produced one unexpected consequence: it has exposed prevalent fraud schemes that have been thriving in the global financial system. These fraud schemes are not new but they are coming to light as a result of market deterioration. For example, current market conditions have helped reveal numerous mortgage fraud, Ponzi schemes and investment frauds, such as the Bernard Madoff scam. These schemes highlight the need for law enforcement and regulatory agencies to be ever vigilant of White Collar Crime both in boom and bust years.

The FBI has experienced and continues to experience an exponential rise in mortgage fraud investigations. The number of open FBI mortgage fraud investigations has risen from 881 in FY 2006 to more than 2,000. In addition, the FBI has 566 open corporate fraud investigations, including matters directly related to the current financial crisis. These corporate and financial institution failure investigations involve financial statement manipulation, accounting fraud and insider trading. The increasing mortgage, corporate fraud, and financial institution failure case inventory is straining the FBI's limited White Collar Crime resources.

Although there are many mortgage fraud schemes, the FBI is focusing its efforts on those perpetrated by industry insiders who are part of organized enterprises engaged in Mortgage Fraud for Profit. Industry insiders are of priority concern as they are, in many instances, the facilitators that permit the fraud to occur. The FBI utilizes SAR data to help identify fraud schemes perpetrated by insiders. However, SAR data does not capture suspicious activity identified by the entire mortgage industry. Requiring the entire industry to report suspicious activity would give us a more complete data set to exploit. The FBI is engaged with the mortgage industry in identifying fraud trends and educating the public. Some of the current rising mortgage fraud trends include: equity skimming, property flipping, mortgage identity related theft, and foreclosure rescue scams.

Equity skimming is a tried and true method of committing mortgage fraud and criminals continue to devise new schemes. Today's common equity skimming schemes involve the use of corporate shell companies, corporate identity theft and the use or threat of bankruptcy/foreclosure to dupe homeowners and investors.

Property flipping is nothing new; however, once again law enforcement is faced with an educated criminal element that is using identity theft, straw borrowers and shell companies, along with industry insiders to conceal their methods and override lender controls.

Identity theft in its many forms is a growing problem and is manifested in many ways, including mortgage documents. The mortgage industry has indicated that personal, corporate, and professional identity theft in the mortgage industry is on the rise. Computer technology advances and the use of online sources have also assisted the criminal in committing mortgage fraud. However, the FBI is working with its law enforcement and industry partners to identify trends and develop techniques to thwart illegal activities in this arena.

Foreclosure rescue scams are particularly egregious in that fraudsters take advantage and illegally profit from other individuals' misfortunes. As foreclosures continue to rise across the country, so too have the number of foreclosure rescue scams that target unsuspecting victims. These scams include victims losing their home equity or paying thousands of dollars in fees, and then receiving little or no services, and ultimately losing their home to foreclosure. The FBI is again working with our law enforcement and regulatory partners along with industry partners to target, disrupt and dismantle the individuals and/or companies engaging in these fraud schemes.

Proactive Approach to Financial Frauds

The FBI has implemented new and innovative methods to detect and combat mortgage fraud. One of these proactive approaches was the development of a property flipping analytical computer application, first developed by the Washington Field Office, to effectively identify property flipping in the Baltimore and Washington areas. The original concept has evolved into a national FBI initiative which employs statistical correlations and other advanced computer technology to search for companies and persons with patterns of property flipping. As potential targets are analyzed and flagged, the information is provided to the respective FBI field office for further investigation. Property flipping is best described as purchasing properties and artificially inflating their value through false appraisals. The artificially valued properties are then sold at a higher price to an associate of the "flipper" at a substantially inflated price. Often flipped properties go into foreclosure and are ultimately repurchased for a fraction of their original value.

Other methods employed by the FBI include sophisticated investigative techniques, such as undercover operations and wiretaps. These investigative measures not only result in the collection of valuable evidence, they also provide an opportunity to apprehend criminals in the commission of their crimes, thus reducing loss to individuals and financial institutions. By pursuing these proactive methods in conjunction with historical investigations, the FBI is able to realize operational efficiencies in large scale investigations.

In December 2008, the FBI dedicated resources to create the National Mortgage Fraud Team at FBI headquarters in Washington, D.C. The Team has the specific responsibility for all management of the mortgage fraud program at both the origination and corporate level. This Team will be assisting the field offices in addressing the mortgage fraud problem at all levels. The current financial crisis, however, has required the FBI to move resources from other white collar crime and criminal programs in order to appropriately address the crime problem. Since January 2007, the FBI has increased its agent and analyst manpower working mortgage fraud investigations. The Team provides tools to identify the most egregious mortgage fraud perpetrators, prioritize pending investigations, and provide information to evaluate where additional manpower is needed.

Partnerships

One of the best tools the FBI has in its arsenal for combating mortgage fraud is its long-standing partnerships with other federal, state and local law enforcement. This is not a new tool employed by the FBI. Collaboration, communication, and information-sharing have long been a proven solution to the nation's most difficult crimes. In response to a growing gang problem, for example, the FBI stood up Safe Streets Task Forces across the country. In response to crimes in Indian Country, the FBI developed the Safe Trails Task Force Program. In response to this new threat, the FBI stood up Mortgage Fraud Task Forces across the country.

Presently, there are 18 mortgage fraud task forces and 47 working groups in the country. With representatives of federal, state, and local law enforcement, these task forces are strategically placed in areas identified as high threat areas for mortgage fraud. Partners are varied but typically include representatives of HUD-OIG, the U.S. Postal Inspection Service, the Internal Revenue Service, FinCEN, the Federal Deposit Insurance Corporation, as well as State and local law enforcement officers across the country.

While the FBI has increased the number of agents around the country who investigate mortgage fraud cases from 120 Special Agents in FY 2007 to currently over 250 Special Agents as of February 28, 2009, this multi-agency model serves as a force-multiplier, providing an array of resources to adequately identify the source of the fraud, as well as finding the most effective way to prosecute each case, particularly in active markets where fraud is widespread. We are pleased to report that the model is working.

Last June, for example, we worked closely with our partners on "Operation Malicious Mortgage" – a massive multiagency takedown of mortgage fraud schemes involving more than 400 defendants nationwide. That operation focused primarily on three types of mortgage fraud: lending fraud, foreclosure rescue schemes, and mortgage-related bankruptcy schemes. Among the 400-plus subjects of "Operation Malicious Mortgage", there have been 164 convictions and 81 sentencings so far for crimes that have accounted for more than $1 billion in estimated losses. Forty-six of our 56 field offices around the country took part in the operation, which has resulted in the forfeiture and/or seizure of more than $60 million in assets.

In addition to the effort placed in standing up mortgage fraud task forces, the FBI is one of the DOJ participants in the national Mortgage Fraud Working Group (MFWG), which DOJ chairs. The MFWG represents the collaborative effort of multiple Federal agencies and facilitates the information sharing process across the aforementioned agencies, as well as private organizations. Together, we are building on existing FBI intelligence databases to identify large industry insiders and criminal enterprises conducting systemic mortgage fraud.

The FBI is also a member of the President's Corporate Fraud Task Force which is comprised of investigators from the Securities and Exchange Commission, the Internal Revenue Service, the U.S. Postal Inspection Service, the Commodity Futures Trading Commission, and the FinCEN. The purpose of the Corporate Fraud Task Force is to maximize intelligence sharing between membership agencies and to ensure the violations related to corporate fraud are appropriately addressed. The FBI also participates in the Securities and Commodities Fraud Working Group, a national interagency coordinating body established by DOJ to provide a forum for exchanging information and discussing violation trends, law enforcement issues and techniques. In addition, since April 2007, FBI headquarters personnel have met with representatives from the Securities and Exchange Commission once a month to coordinate the respective Corporate Fraud inventories focused on the current financial crisis and to share intelligence.

Industry Liaison

In addition to its partners in law enforcement and regulatory areas, the FBI also continues to foster relationships with representatives of the mortgage industry to promote mortgage fraud awareness. The FBI has spoken at and participated in various mortgage industry conferences and seminars, including those sponsored by the Mortgage Bankers Association (MBA).

To raise awareness of this issue and provide easy accessibility to investigative personnel, the FBI has provided contact information for all FBI Mortgage Fraud Supervisors to relevant groups including the MBA, Mortgage Asset Research Institute, Fannie Mae, Freddie Mac and others. Additionally, the FBI is collaborating with industry to develop a more efficient mortgage fraud reporting mechanism for those not mandated to report such activity. The FBI supports providing a "safe harbor" for lending institutions, appraisers, brokers and other mortgage professionals similar to the provisions afforded to financial institutions providing SAR information. The "Safe Harbor" provision would provide necessary protections to the mortgage industry under a mandatory reporting mechanism. This will also better enable the FBI to provide reliable mortgage fraud information based on a more representative population in the mortgage industry.

Lenders are painfully aware that fraud is affecting their bottom line. Through routine interaction with FBI personnel, industry representatives are aware of our commitment to address this crime problem. The FBI frequently participates in industry sponsored fraud deterrence seminars, conferences and meetings which include topics such as quality control and industry best practices to detect, deter, and prevent mortgage fraud. These meetings play a significant role in training and educating industry professionals. Companies share current and common fraud trends, loan underwriting weaknesses and best practices for fraud avoidance. These meetings also increase the interaction between industry and FBI personnel.

Additionally, the FBI continues to train its personnel and conduct joint training with HUD-OIG and industry on mortgage fraud. As a training model, the FBI seeks industry experts to assist in its internal training programs. For example, industry has assisted training FBI personnel on mortgage industry practices, documentation, laws and regulations. Industry partners have offered to assist the FBI in developing advanced mortgage fraud investigative training material and fraud detection tools.

Conclusion

Mr. Chairman, the FBI remains committed to its responsibility to aggressively investigate significant financial crimes which include mortgage fraud. We will continue to work with the Office of Management and Budget, and the Congress to ensure that adequate resources are available to address these threats. To maximize our current resources, we are relying on intelligence collection and analysis to identify emerging trends to target the greatest threats. We also will continue to rely heavily on the strong relationships we have with both our law enforcement and regulatory agency partners.

The FBI looks forward to working with you and other members of this committee on solving this serious threat to our nation's economy. Thank you for allowing me the opportunity to testify before you today. I look forward to taking your questions.

Mr. CONYERS. New York City Commissioner for Consumer Affairs Jonathan Mintz, welcome.

TESTIMONY OF JONATHAN MINTZ, NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS

Mr. MINTZ. Good morning. Thank you, Chairman Conyers, Ranking Member Smith, for the opportunity to testify on behalf of New York City Mayor Michael Bloomberg.

Given the urgent nature of these hearings, I will skip the extensive background on my department's 40-year history of enforcing and litigating against deceptive and misleading practices in New York City. And I will also forego the in-depth stories about the damage that is inflicted on consumers by foreclosure scams.

My brief testimony will diagnose from an on-the-ground, municipal, anti-fraud perspective why these scams are so virulent and suggest practical, immediate Federal outreach and enforcement interventions that must occur in the coming days and weeks.

A combination of enforcement and education is just what is needed to disrupt the tide of foreclosure prevention and loan modification scams sweeping across our cities. The numbers are alarming: Nearly 5,000 homes in New York City were auctioned off last year, and nearly 14,000 homeowners had lis pendens filings.

The national foreclosure crisis has created a formidable demand for rescue and refinancing. Unfortunately, a shadow industry aimed at profiteering from both the enormity of the crisis and the Federal resources is moving aggressively to respond to that demand.

This shadow industry thrives for three reasons all too familiar to consumer protection agencies. First, the intense demand for loan modifications; second, a captive, vulnerable, and often unsophisticated population; and, third, the lack of a single, trustworthy and tamperproof source to which people can be directed for help.

Many of the same people who were deceived by the marketing tactics used for subprime loans—people with limited experience with financial services—are the targets now. Adding fuel to this fire is that these easy targets can be precisely identified.

Lis pendens lists are readily available for purchase online. Scam artists can access critical information, like servicers and payment histories, in order to employ disarming familiarity.

The public hears daily about the Federal Government's efforts to help distressed mortgage holders, but information is channeled through multiple conduits, from every level of government and from nonprofit sector partners. It is this diffuse messaging and the multiple doorways which facilitates the swindles.

Loan modifiers pose as messengers from government agencies, lenders or services. Advertisements take on official veneer, for example, using FHA seals or including legal citations.

We believe that there are three feasible steps which can effectively intervene to protect people in foreclosure and get them to the right help.

While so-called loan modifiers are located throughout the country, their targeting and their marketing is local in nature. In New York City, the neighborhoods that are most dramatically impacted by the foreclosure crisis are papered with flyers offering rescue.

To combat this flood of marketing, the national response needs to be clear and simple in messaging, but local in delivery. Simplifying the conduit to well-trusted and tamperproof 311 or 211 information hotlines is an ideal intervening fix.

More than 60 cities across the U.S., which cover close to 80 percent of the American population, have these information hotlines. These referral systems available 24 hours a day, 7 days a week, and in dozens and dozens of languages. Local governments have invested millions of dollars to popularize these free hotlines, and we stand ready to utilize them for the present emergency.

The Federal Government has the unique power to mobilize civil leaders and community partners to carry a unified message: Don't talk to anyone about helping you avoid foreclosure unless you got to them through 311 or 211.

Now let's talk about strengthening enforcement. We applaud the Chairman's proposed Fight Fraud Act and the additional resources intended to be directed to Federal law enforcement agencies.

But given the local nature of these scams and the accompanying wealth of local information and leads, these Federal agencies will be most effective when they are meaningfully partnering with local enforcement and consumer protection agencies who have inspectors on the ground. We have the information; we just need to be able to get it into the right hands.

We propose, therefore, the establishment of a national task force, which will coordinate this database and information.

Finally, we propose a Federal ban on fee-for-service mortgage relief advocacy. There is no reason for distressed homeowners to pay unqualified, for-profit actors to negotiate with their lenders when instead they could work with qualified, not-for-profit HUD counselors.

Just like banning fee-based debt counseling, as we have in New York, Congress has the power to enact a simple ban on fee-for-service foreclosure prevention businesses. Moreover, State and local governments must be empowered to enforce such legislation.

Thank you.

[The prepared statement of Mr. Mintz follows:]

PREPARED STATEMENT OF JONATHAN MINTZ

Testimony of Jonathan Mintz
Commissioner
New York City Department of Consumer Affairs

Before the House Judiciary Committee

Hearing on:
Proposals to Fight Fraud and Protect Taxpayers

April 1, 2009

Good morning. Thank you, Chairman Conyers and Ranking Member Smith, for the opportunity to testify today on behalf of Mayor Michael Bloomberg and for shining a spotlight on a national crisis.

Given your full schedule and the urgent nature of these hearings, I'll skip the extensive background on DCA's 40-year history of enforcing and litigating against deceptive and misleading practices in NYC. And I'll forego the in-depth stories about the damage inflicted on consumers by foreclosure and mortgage scams. This matter necessitates cutting to the chase. Put simply, mortgage restructuring scams not only prey upon vulnerable people already in crisis, they also undermine critical federal efforts to prevent foreclosures and avoid further destabilization of our neighborhoods and our economy. This malignant industry warrants a systematic and overarching response at the federal, state and local level.

I'd like to use my brief testimony to give you a ground-level view of the anatomy of the scam, diagnose from a consumer affairs perspective why these scams are so virulent, and finally suggest some practical, immediate outreach and enforcement interventions that must occur in the coming days and weeks.

The New York City Department of Consumer Affairs (DCA) enforces the City's aggressive Consumer Protection Law and other business regulations.[1] DCA regularly prosecutes businesses engaged in illegal and misleading conduct, from cell phone companies engaged in deceptive advertising, to tax preparers, process servers, employment agencies, and dozens of other

[1] Chapter 64, Section 2203(a)

To learn more about the work of the New York City Department of Consumer Affairs, visit www.nyc.gov/consumers. To learn more about DCA's Office of Financial Empowerment, visit www.nyc.gov/ofe. To learn more about the City's 311 services including foreclosure-prevention referrals, visit www.nyc.gov.

industries. We stop illegal practices, garner millions of dollars in fines, and recover millions more in consumer monies owed.

Through targeted outreach, partnerships with community and trade organizations, informational materials, and large-scale public awareness campaigns, DCA also educates consumers and businesses about their rights and responsibilities. Through the Department's Office of Financial Empowerment, we also coordinate Mayor Bloomberg's efforts to help New Yorkers grow and protect their assets. Our many large-scale initiatives include our leadership, for the past seven years, of Mayor Bloomberg's extensive Earned Income Tax Credit outreach campaign, more than doubling the number of people receiving free tax preparation over that time period and making a significant dent in the number of New Yorkers who had yet to claim their EITC and other credits. Last year, nearly 40,000 people called the City's 3-1-1 information and referral line to seek tax preparation help alone.

This combination of enforcement and education is exactly what is needed to intervene and disrupt the tide of foreclosure prevention and loan modification scams sweeping across our cities and stripping those who can least afford it of their last chance to save their homes and keep their family finances stable. The numbers are alarming: nearly 5,000 homes in New York City were auctioned off last year and nearly 14,000 homeowners had official, public notices, or *lis pendens* filings.

The national foreclosure crisis has created a formidable demand for rescue and refinancing. Unfortunately, the shadow industry aimed at profiteering from both the enormity of the crisis and the federal resources is moving very aggressively.

This shadow industry – referred to as loan modification companies, mortgage modification assistance or, more aptly, foreclosure rescue scams – varies widely. At their most outrageous, these are outright criminals who engage in deed theft. Others are con artists who offer homeowners assistance in negotiating with lenders or help refinancing, collect an upfront fee and then simply disappear. While the financial impact of these swindles is, of course, devastating for homeowners (we've seen upfront fees of $1,500 to $5,000), the more pernicious component of these scams is that these businesses dissuade homeowners from contacting their own lenders or servicers, thereby wasting opportunities for homeowners to negotiate directly with their lenders. By the time the homeowner realizes the swindle, generally too much time has elapsed for the lender or servicer to modify the loan.

The less fraudulent companies, which are just as costly and dangerous, convince struggling homeowners to pay for a service that ultimately has no value. With millions of dollars streaming into HUD-certified housing counseling organizations and free legal services providers throughout the country, there is simply no reason for a homeowner behind on mortgage payments also to pay someone precious dollars to contact the lender on his or her behalf.

Regardless of the particular type, these scams are undermining the admirable emergency efforts of this Administration as well as states and local governments to restore stability to our economy. States such as New York for example, have given homeowners additional time to pay lenders and even require conferencing before a foreclosure can take place. But such rescue efforts are worthless if time is consumed by ineffective or non-existent third party-negotiations, or if funds owed to lenders end up in the hands of shadow players. These scams leave homeowners right where they started before any of our interventions.

This shadow industry thrives for three reasons all too familiar to consumer protection agencies: first, the intense demand for loan modifications; second, a captive, vulnerable, and often unsophisticated population; and third, the lack of a single, clear, trustworthy, and tamper-proof source to which people can be directed as their sole source of help. I've said enough about the intense demand. Exploration of the second and third factors, however, reveals clear, feasible steps the federal government can take to turn the tide.

The second factor: a vulnerable population. Many of the same people who were deceived by the marketing tactics used for subprime loans – people with limited experience with financial services, without legal representation or good advice from friends and family – are the targets now. Adding fuel to this fire is that these "easy targets" can be easily and precisely identified. *Lis pendens* lists – readily available for purchase online – make it simple to get the names, addresses, and phone numbers of consumers in mortgage distress. Scam artists can also access critical information on the loans, like servicers and payment histories, so they can employ a disarming familiarity.

And the third factor: lots of attention, but no tamper-proof conduit. The public hears daily about the Federal government's determination and efforts to help distressed mortgage holders. The media is abuzz with terms like "Economic Stimulus Plan"; "foreclosure prevention"; "HUD"; "FHA"; and the like. But homeowners in foreclosure don't know what that means for them individually or where they can turn. Information is channeled through multiple conduits – from every level of government and from non-profit sector partners. Simply put, it is this diffuse messaging and multiple doorways which facilitate swindles.

Foreclosure rescue scams take advantage of our failure to provide a clear path to good options for loan modification. Modifiers pose as "messengers" from government agencies, lenders and services. Advertisements take on an official veneer for example, stating, "Your loan is eligible for a special conversion by the Governmental Economic Stimulus Act of 2008" or, "The Federal Government has ordered a mandate stating that all toxic loans *MUST* be modified". Others use FHA seals or include legal citations to provisions of the Community Reinvestment Act. Some companies imply that they are already working on the homeowner's behalf by referencing the mortgage broker that originated the loan or the servicer, or including official-sounding titles such as "National Financial Benefits Advisor."

Given this diagnosis, let's zero in on solutions. We believe that three feasible steps can effectively intervene to protect people in foreclosure from these scams and get them to the right help:

1. First, a targeted, multi-media messaging campaign that directs the public to official municipal "311" and "211" call centers, tamper-proof conduits that could then directly link consumers to legitimate resources;
2. Second, coordinated investigation and a centralized information repository through a national enforcement task force; and
3. Third, a federal statutory ban on fee-based foreclosure rescue activities.

1. Use municipal 311 and 211 systems as the single, tamper-proof number to which consumers are directed to legitimate rescue resources through a national outreach campaign.

While so-called "loan modifiers" are located throughout the country, their targeting and marketing is usually local in nature. In New York City, the neighborhoods most dramatically impacted by the foreclosure crisis are papered with flyers offering rescue from foreclosure – on lampposts, on trees, at grocery stores, and at local businesses. In the last three months alone, NYC's Sanitation Department removed 64 different illegally-posted foreclosure rescue posters in just two of the highly-affected neighborhoods. The scam artists are even inside homes, with robo-calls and dozens of letters showered on the doorstep of every person on the *lis pendens* list.

And so to combat this flood of marketing, the national response needs to be clear and simple in messaging, yet local in delivery. Scammers take advantage of the public's inability to distinguish one hopeful sounding phone number or web site from another, the legitimate from the one that only looks or sounds legitimate. Simplifying the conduit to well-trusted and tamper-proof "311's" or "211's" is an ideal intervening fix.

More than 60 cities across the U.S. – covering 78% of the American population – have "311" or "211" information and referral systems, generally available 24 hours a day, seven days a week, in dozens of languages. These systems are well-known and appropriately trusted resources. Local governments have invested millions of dollars to popularize these free and multi-purpose hotlines as safe, reliable information sources – and we stand ready to utilize this incredible resource for the present emergency.

In New York City, residents who call 311 regarding foreclosure are directed to the specially-trained call-takers who triage and assess their needs at the Center for New York City Neighborhoods (CNYCN), a non-profit created by Mayor Bloomberg, in partnership with the New York City Council and private sector funders. The Center coordinates and expands services

to New York City residents at risk of losing their homes to foreclosure and funds a network of more than 19 non-profit legal service and housing counseling organizations to which it refers thousands of New Yorkers. More than 90% of people contacting the Center come through the City's 311 system.

The federal government has the unique power to mobilize tens, if not hundreds, of thousands of civic leaders and community partners to carry a unified message. Loan servicers, lenders, mortgage brokers and real estate agents should all be required to include references to 311 or 211 in their communications to homeowners. All federally-funded social and housing programs, federal benefits offices, the Postal Service, and others should all carry the same simple message: "don't talk to anyone about helping you avoid foreclosure unless you got to them through 311 or 211."

2. Coordinate and streamline information sharing and enforcement

We applaud Chairman Conyers' proposed "Fight Fraud Act," and the additional resources he intends to direct to federal law enforcement agencies such as the FBI and the Postal Service. Given the local nature of the marketing of these scams and the accompanying wealth of local information and leads, these federal agencies will be most effective when meaningfully partnering with local enforcement and consumer protection agencies. We have the information – we just need to get it into the right hands.

We propose the establishment of a national task force which includes local, state and federal enforcement and investigation agencies. Coordination among enforcement agencies is critical to identifying egregious scams and tracking down perpetrators who take the money and run –

usually without respect for geographical boundaries. Local enforcement is often thwarted by our inability to pursue bad actors across state borders. A comprehensive database and tips-line would allow local enforcement agencies immediately to relay critical data to help federal agents track down elusive businesses that too easily shut down and reincorporate.

3. Enact a federal ban on fee-for-service mortgage relief advocacy.

There is no reason for distressed homeowners to pay unqualified, for-profit actors to negotiate with their servicers or their lenders on their behalf. No for-profit enterprise is better positioned than a qualified, not-for-profit HUD counselor, or an attorney acting in a legal capacity, or an individual homeowner, to work with mortgage servicers. This includes mortgage brokers, some of whom have reshaped their businesses from subprime mortgage swindles to foreclosure rescue scams. Akin to the banning of fee-based debt counseling services in New York, Congress has the power to curb abusive scams immediately, with the enactment of a simple ban on fee-for-service foreclosure prevention businesses. Moreover, state and local governments must be empowered to enforce such legislation. Congress has the ability to eliminate these practices now by enlisting the army of local and state enforcement agencies.

We applaud this Committee's recognition of the critical importance of this problem. We must act immediately: marshal a clear message with an unmistakable phone number, coordinate enforcement with local data-rich agents, and enact aggressive legislation to outlaw the for-profit industry within which scammers hide.

Thank you. I would be pleased to answer your questions.

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Mr. CONYERS. Thank you very much.
We now have a consumer representative, Ira Rheingold.

TESTIMONY OF IRA J. RHEINGOLD, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES

Mr. RHEINGOLD. Good morning, Mr. Chairman.

And thank you, Ranking Member Smith and Members of this Committee.

I thought I would use my time to talk a little bit about my background, what I have seen over the course of a dozen years, and take a look at how, if we are going to stop fraud in this country, who we need to really target when we begin to tackle the gigantic problem that we have today in terms of our foreclosure crisis and the mortgage fraud that permeates our economic system.

I was a legal services attorney since the mid-1990's working on foreclosure issues in Chicago. From the mid-1990's through around 2001, I worked in low-and moderate-income communities in Chicago and worked with others around the country who face the same issues.

And what we saw in those communities was the mortgage fraud that we are seeing today across this whole country, in Atlanta, in Boston, in Hampton Roads, in California. And what we saw was a mortgage system that was system, a mortgage system that was broken that attracted people who were committed to committed crime.

The tin men of the 1950's and 1960's, the home repair scam artists of the 1970's and 1980's became mortgage brokers and got engaged in the mortgage-lending industry. And what we saw in those communities were an enormous loss of wealth.

In poor communities across this country, we have seen a redistribution of wealth that is shocking. Poor communities in my city, in other cities have lost enormous wealth, had that wealth stolen from them, stolen by Wall Street companies and by big mortgage-lenders who built a system that really encouraged fraud. And I think that is the important thing that we need to look at.

When we talk about securitization and the complex mess that allowed these mortgage things to occur, we need to look at what those lenders did. In 1997, 1998, I worked with the Chicago attorney general's office when they pursued a company called FAMCO. They were joined by a number of attorneys general pursuing FAMCO.

And the biggest funder of FAMCO was Lehman Brothers. So when Lehman Brothers failed last year because they were engaged in all sorts of nefarious practices, those of us who had been working on mortgage fraud since the mid-1990's knew that Lehman Brothers was a bad actor.

In fact, a court in California found them liable for the behavior of FAMCO because they knew that mortgage fraud was occurring, they encouraged it, they funded it. They did nothing about it because profits were great. Profits were great.

The mortgage lending industry, the investment banking industry made money when loans were closed, and they didn't care where they came from, they didn't care about who they came from.

As investigators begin to look at the mortgage problem, when they start to talk to mortgage brokers and the scam people who they will be charging, what they will hear from them—and I can promise you they will hear this—is that, "When we made a loan

that was a no-doc loan that we knew was permeated with fraud, we knew what lender to sell it to. We knew that if we went to Countrywide, we knew that if we went to Ameriquest, we knew if we want to IndyMac or Option One, they would not look."

They didn't care, because we had a system that, when those mortgage lenders bought those loans, they turned it around, and turned them, and chopped them up, and spindled them, and mutated them, and turned them and sold them to investors, and they knew credit-rating agencies didn't care and weren't going to look at it and didn't do due diligence, and then investors were the same victims of the fraud that that homeowner was.

So if we are going to look at fraud, if we are going to challenge—if we are actually going to stop the practices that have led us to this economic crisis that we sit in today, then we need to look carefully at investments. We need to look at our banks. We need to look at mortgage lending, look at Ameriquest and Countrywide, Angelo Mozilo.

Instead of honoring somebody like Roland Arnall by making him the ambassador to the Netherlands, his company caused more harm to our Nation's community than anyone could have imagined. We need to look at those companies. We need to look at the investment banks, like that—that are still left. But in Bear Stearns, in Lehman Brothers, they enabled the fraud that is occurring today.

We talk about—so investment banks. We need to look at the credit-rating agencies. Where were there? Did they not see that these loans were going to fail? Did they not look at all these things and rated these things as AAA and sold them to investors as good vehicles, that things were going to—that people's money was going to be safe? Did they, in fact, enable the fraud by their bad behavior?

Finally, when we talk about mortgage rescue scams, and that is happening every single day—I talk to consumers across this country every single day. And they are being inundated by claims of people who are going to help them solve their foreclosure problem. There are scared and desperate people out there.

We need to go after them, and we need to prosecute those people. But we also need to recognize that the reason those people are succeeding, the reason why they have such a successful business model is because the mortgage servicing system is broken.

No normal human being in this country who has a mortgage and wants to get it fixed can find who their lender is, who their servicer is, contact that person, and actually get a decent loan modification.

And until we fix the problem of people being able to independently handle their matters and solve those foreclosure problems by themselves, the scam artists and the mortgage rescue schemes are going to be out there. We can't stop it until we solve the problem of mortgage servicers not being accountable to the American people.

Thank you.

[The prepared statement of Mr. Rheingold follows:]

PREPARED STATEMENT OF IRA J. RHEINGOLD

Mr. Chairman, Ranking Member Smith, and members of the Subcommittee, thank you for inviting me to testify before you today about the breakdown of the

American home mortgage market and how we can better protect our nation's homeowners and communities.

My name is Ira Rheingold, and I have been a public interest attorney for my entire adult career. I have worked in some of our nation's poorest urban and rural communities and I've witnessed the incredible resilience and optimism that mark the great strength of our nation's people. I have also seen the incredible fear and despair of Americans faced with the loss of their long-term home and its devastating impact on their families and on their communities.

In the mid-1990's through 2001, I lived and worked in Chicago, where I ran the Legal Assistance Foundation's Homeownership Preservation Project. During those years, I watched (and worked against) the unfair and deceptive practices of all the actors in the mortgage industry, that slowly, but inexorably stripped away the wealth of my city's low and moderate income minority communities. Today, I am the Executive Director of the National Association of Consumer Advocates (NACA), an organization of attorneys and other advocates who represent those very same consumers and communities all across America. At NACA, I also manage the Institute for Foreclosure Legal Assistance, a project that provides funding and training to non-profit legal organizations that help homeowners negotiate alternatives to foreclosure. In my current roles, I speak to and assist our nation's consumer advocates who, on a daily basis, meet with and represent the consumers victimized by predatory and unsound lending practices and see the very real-life consequences of an out of control mortgage lending marketplace. What I see from them are the same unfair and deceptive practices that I personally witnessed in Chicago, except now, those behaviors have moved across all of our nation's communities. What I hear from their clients is the same fear and despair that I heard all too often on the streets of Chicago. At today's hearing, I hope that you will hear these voices through me, and that you will begin to see what we all need to do to build a rational, robust and well-regulated mortgage market that actually serves the needs and demands of consumers and communities across our nation.

INTRODUCTION

To understand what it has been like to be a consumer attempting to buy their first home, a homeowner attempting to refinance their home for necessary home repairs or to help pay for their children's education or to lower their payment so they could remain in their life-long home on a fixed income, we must first understand how the mortgage market has been working. The mortgage market of the late 1990s and early 21st century, in no way resembled what most of us thought we understood about buying a home or getting a loan. I have talked to literally thousands of consumers, who, until recently, believed (or were led to believe) that the mortgage entity that originated their loan, would only profit when they timely made their monthly mortgage payment. While this may have been the case when our parents or even our grandparents bought their homes, this has not been the truth for over the past dozen years. Instead, because of the growth of securitization as the tool to fund both prime and subprime mortgages, with all its confusing layers, multiple actors and often perverse incentives, the nature of the consumer-mortgage originator relationship (unbeknownst to the consumer) had fundamentally changed. These changed relationships and backwards incentives have led us to the precipice that we stand at today.

SECURITIZATION AND THE CONSUMER

For my purpose today, I'm going to keep this very simple.[1] At its most basic level, securitization is a process, which involves the pooling and repackaging of cash-flow producing financial assets into securities that are then sold to investors. As securitization grew to be the dominant way that mortgage loans were funded, the role and purpose of mortgage originators (and all the other actors in the mortgage market) fundamentally changed. No longer were mortgage originators, "lenders" who expected (or really cared) about mortgage repayments. Instead, these originators became manufacturers of a commodity, the American mortgage borrower. This commodity was then sold to the capital markets, which in turn, chopped, spindled and mutated this new commodity into something that could be purchased by investors from around the world.

While advocates of securitization have argued that the process produced additional capital and greater access to homeownership for some consumers, they fail to recognize the fundamental shift and potential dangers it created in the consumer

[1] For a much greater detailed discussion, please see Peterson, Christopher Lewis, "Predatory Structured Finance." Cardozo Law Review, Vol. 28, No. 5, 2007

marketplace. No longer was the borrower's best interest (or even their ability to repay the loan) part of the mortgage transaction calculation. Instead, the real transaction was between the mortgage originator and the investment bank, which not only set the standards for the borrower/product they wanted to buy (and then turn around and sell), but also provided the money for the originators' loans.

Under these set of circumstances, what American consumers needed was the vigorous enforcement of existing consumer protections as well a new set of consumer protections to correspond with the very different mortgage world that had now been created. Unfortunately, what the federal government gave us was the exact opposite, not only diminishing its regulation and enforcement of the mortgage marketplace, but providing interference and protection (under the guise of preemption) for mortgage market players when states, recognizing the fundamental flaws in the system, attempted to protect their own citizens.

THE MORTGAGE MARKET, UNFAIRNESS, DECEPTION AND THE CONSUMER

Understanding what originators and all of the actors in the mortgage process were attempting to do (creating commodities to sell) when they made a home loan helps us understand all the unfair and deceptive practices that have flourished in the mortgage marketplace over the last decade. I'd like to talk about some of those practices now, and explain why they were not caused by a few rogue actors, but were instead a product of the fundamentally flawed marketplace that securitization created and the federal government passively permitted to flourish.

A. The Predatory Pitch

As the demand for product to sell to Wall Street investment banks grew (ultimately exponentially), the pitch to vulnerable homeowners (and prospective homeowners) became more targeted and more predatory. Armed with financial and personal data and carefully conducted research, mortgage brokers and lenders (and their "bird dogs") used TV and radio advertising, mailings, telephone calls, and even home visits to reel in consumers who otherwise had no real reason to get a new home mortgage. With promises too good to be true ("refinance your home, fix your roof and lower your monthly payment") consumers were later bait and switched to loans far more expensive than they thought they were promised. Because the mortgage "originators" received their full compensation when they manufactured the "product/borrower" to sell onward and upward, there was little concern whether the loan was best for the consumer or even affordable. As many of us knew, and most of us have now learned, many of those loans were completely unsustainable.

B. The Over-Inflated Appraisal

In a rational world, a consumer would not want to pay (or borrow) more for a home than what it was worth. In the securitization created "bizarro" mortgage world, an over-inflated house made perfect sense to the parties involved in the transaction (except for the unsuspecting consumer, of course, and maybe the ultimate investors left holding the bag). Let's look at the parties to the transaction. We have the mortgage originator (the broker or the lender or sometimes both) whose incentive is quite obvious. Simply put, the greater the house price, the larger the loan, the greater the fee they will receive from the transaction (the same can be said for the investment bank). Sometimes the incentives were a little more complicated. Take for instance a homeowner whose existing mortgage is already 100% of the actual value of the home. If the real house value was used, no loan could be made, no product could be created. So the house value was increased to meet the loan purchasing parameters (the underwriting guidelines) set by the investment bank and the loan gets made and everyone is happy (including the allegedly "unknowing" investment bank who had another product to slice and dice and sell to someone else).

As for the appraiser who creates the fraudulent value for the home, we've seen time and again why they go along with this fraud. Simply, if they actually want to stay in business and continuing doing appraisals, they'll create the value the mortgage originator wants. What we have left, is a consumer who has a mortgage that is too often worth more than the real value of their home.

C. Yield Spread Premiums and Prepayment Penalties

Unfortunately (for me), I have been around long enough to hear multiple and ever-shifting explanations as to why yield-spread premiums (YSPs) are an acceptable practice and why they are "good" for consumers. I can safely state, that none of those arguments are true in the mortgage marketplace that actually exists in our country. I do however, fully understand why they work for every mortgage market actor except, again—of course—for the consumer.

Here's how it works. Mortgage brokers get paid more if they produce mortgages with an interest rate higher than what a borrower qualifies for (that, in short is a YSP). Unless a mortgage broker actually lives up too their off-stated (but never written) commitment to serve in the best interest of their consumer client, their incentive—a more expensive loan means a bigger paycheck—is clear. This perverse incentive system also plays out with the mortgage lender and investment bank (irrespective of a borrower's ability to pay) because they too have a loan with a bigger interest rate to sell to investors.

To make matters worse, almost any loan with a YSP is sure to have a prepayment penalty. In English, a prepayment penalty is a charge to a consumer who repays their loan "too soon," typically during the first few years of the loan's existence. What makes this product so cynical, and so closely intertwined with a YSP, is that the very existence of the YSP means that the consumer has an interest rate that is higher than they actually qualify for. Therefore, if the consumer acts rationally and shops for a lower interest and enters into a new mortgage, they will be punished with a steep prepayment penalty.

In all my years talking, interviewing, and representing consumers, I have yet to meet that one consumer who actually understood that they were charged a YSP or that the YSP led to a higher interest rate than they were otherwise qualified for. I simply cannot imagine how this practice is not deceptive or just plain unfair. Yet none of our nation's federal regulators have ever really done anything about it (except to find ways to allow its widespread use).

D. The Disappearance of Escrow Accounts

Because the borrower has become the product to be created and sold, mortgage originators have become experts at getting borrowers to take out loans that make little or no economic sense. A classic and pervasive practice in the mortgage market is the "promise" that a new loan will allow the borrower to pay a lower monthly mortgage payment. What the borrower is not told is that their new payment does not include their taxes and insurance (for escrow), so that their lower payment really is just a mathematical fiction (otherwise known as a lie). While the Federal Reserve now finally appears ready to take some action on this practice, it is ridiculous that this blatantly unfair and deceptive practice (which had been standard operating practice in the mortgage marketplace for over a decade), had never been outlawed or prosecuted by federal regulators.

E. Reckless Underwriting and the Rise of Community Endangering Loan Products

In place of an efficient market that provides real consumer choice and rewards consumers for smart credit decisions and rational aspirations, we have seen, in the past few years, a mortgage market that has recklessly created and sold ridiculously risky mortgage products that have excessively benefited all of the market players at the expense of the American consumer and our nation's communities. In a rational marketplace these loans made no sense. Looking at them however through the lens of our fundamentally flawed and unregulated mortgage marketplace, they unfortunately made perfect sense (at least at the time they were originated).

In order to meet the product demand of voracious Wall Street investors, originators ignored basic, common-sense underwriting principles in order to boost their loan volume. No-doc or "stated-income" loans were great because loan originators made more money (it was less work and they could charge borrowers a higher interest rate) and they fed the beast that wanted high-risk products that would produce a higher return for investors. Underwriting adjustable rate mortgages only at the initial interest rate, without considering how homeowners would be able to pay their loans once the payment adjusted upward, was also quite profitable for mortgage originators and the investment banks that were fed by them. These fundamentally unsustainable loan products, in all their derivations (including 2–28s and option ARMs) were destined for failure and we are all now living with the consequences.

CONCLUSION

The present foreclosure tsunami didn't have to happen. Many of us saw the current disaster coming, but our voices were ignored. Federal regulators and Congress could have chosen to protect consumers, but instead it sat on the sidelines as our mortgage market came to a predictable crash. My only hope is that we have all learned the right lessons from this current and ongoing crisis, and we move together to build a well-regulated mortgage market that meets the needs of all our nation's homeowners.

Mr. CONYERS. Attorney Barry Pollack is a lead official in the National Association of Criminal Defense Lawyers, works on white-collar crime issues.

Welcome.

TESTIMONY OF BARRY J. POLLACK, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Mr. POLLACK. Thank you, Mr. Chairman. And thank you for inviting me to testify on behalf of the National Association of Criminal Defense Lawyers on the important issues before the Committee today.

NACDL is a professional bar association founded in 1958. It has 12,500 direct members and 80 State, local and international affiliate organizations with 35,000 members, including private criminal defense lawyers, public defenders, active-duty U.S. military defense counsel, law professors, and judges committing to preserving fairness within the American criminal justice system.

As this Committee considers the various pieces of legislation before it, we ask it to consider the following. There are presently over 4,000 offenses that carry criminal penalties in the United States code. In addition, there are literally tens of thousands, if not hundreds of thousands, of regulations, Federal regulations that can be enforced criminally.

The Federal arsenal to stop and punish financial fraud in every permutation already exists. Federal criminal laws that can be used to address criminal conduct in the financial and housing markets include among many others mail fraud, wire fraud, major fraud, securities fraud, bank fraud, and conspiracy to defraud.

Bearing these facts in mind, NACDL opposes a knee-jerk response to the present financial crisis of creating more and more duplicative Federal criminal laws.

Mr. Chairman, while the National Association of Criminal Defense Lawyers appreciates this Committee's efforts to make sure that our membership is fully and gainfully employed, as Ms. Glavin's comments have ably demonstrated, she already has the tools to do just that and has been prosecuting vigorously and meting out very stiff sentences to white-collar criminal offenders.

Federal criminal laws are rightly reserved for egregious, intentional wrongdoing that falls well outside the mainstream of ordinary business conduct. If large members of honest businesspersons took advantage of an unregulated environment in making risky and ill-advised, but not illegal decisions, they should not now be treated as criminals.

For those who went beyond that and engaged in intentional fraudulent conduct, there are ample criminal laws on the books already that will allow for them to be prosecuted, as they should be.

Accordingly, NACDL does not oppose the various measures to fund the hiring of additional prosecutors, FBI agents, and other law enforcement personnel, many of whom have been pulled away to investigate and prosecute national security cases, to investigate and, where appropriate, prosecute white-collar criminal offenses.

However, Congress must understand it cannot fund half of the equation. Current criminal forfeiture statutes allow for assets to be restrained from criminal defendants upon indictment. As a result,

increasing numbers of defendants in white-collar cases cannot pay for their own defense.

The defense in this case is paid for by taxpayers. This happens either through public defenders' offices or through court appointments under the Criminal Justice Act.

Federal public defender offices are already overburdened, and many lack the resources and the expertise to defend complex white-collar criminal cases. If we are to expand such prosecutions, we must not only fund their investigation and prosecution, but we must also adequately fund the defense of these cases.

Accordingly, if additional funding is to be included in the new legislation, NACDL applauds the Financial Crimes Resources Act as a provision of funding not just for the investigation and prosecution of these offenses, but also for the defense.

Mr. Scott, I note the $50 million to U.S. attorneys' offices, the $100 million to the FBI, and $20 million to defense function. While we applaud the effort to fund the defense function, we believe that that more than 7-to-1 disparity between two prosecutorial agencies alone is still out of balance.

And as my time is limited, I would like to refer to my written statement with respect to NACDL's position regarding each of the various unnecessary measures presently contemplated to create new Federal statutes, such as mortgage lending fraud, derivatives fraud, and TARP fraud, to address conduct that can easily be prosecuted under existing law.

I would like to speak, however, on what we believe is the proposed ill-advised effort to expand the reach of the money laundering statute and effectively reverse the recent Supreme Court decision in the Santos case.

In that case, the Supreme Court held that the crime of money laundering is confined to transactions and the proceeds of unlawful criminal activity that is engaging in transactions involving illegal criminal profits. That decision is appropriate.

The proposed legislative change would frequently, as it would have in the Santos case itself, provide an enhanced penalty based solely on the underlying conduct that is already unlawful. In essence, it allows the very same conduct to be punished twice, first as the underlying crime, and then again and more severely as money laundering.

Thank you again, Mr. Chairman, for allowing NACDL the opportunity to be heard on these very important issues.

[The prepared statement of Mr. Pollack follows:]

PREPARED STATEMENT OF BARRY J. POLLACK

Written Statement of
Barry J. Pollack, Esq.
Member, Board of Directors
National Association of Criminal Defense Lawyers

on behalf of the
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

before the
House Committee on the Judiciary

Re: "Proposals to Fight Fraud and Protect Taxpayers"
April 1, 2009

Mr. Chairman, Mr. Smith and distinguished Members of the Committee:

Thank you for inviting me to testify on behalf of the National Association of Criminal Defense Lawyers on the important and timely issue of fraud and our financial system. NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's 12,500 direct members -- and 80 state, local and international affiliate organizations with another 35,000 members -- include private criminal defense lawyers, public defenders, active-duty U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

I. Introduction

As the American Bar Association's Task Force on the Federalization of Crime observed in 1998, "So large is the present body of federal criminal law that there is no conveniently accessible, complete list of federal crimes." As of 2003, there were over 4,000 offenses that carried criminal penalties in the United States Code. In addition, it is estimated that there are at least 10,000, and possibly as many as 300,000, federal regulations that can be enforced criminally. The race to expand criminal laws exponentially does not serve any useful purpose, and we cannot continue to race indefinitely.

Further expanding the scope of the criminal law logically requires a presumption that what got us in the present economic and financial mess was the absence on the books of the necessary law enforcement tools to prevent it from occurring. That, however, is simply not the case. The federal arsenal to stop and to punish financial fraud in every permutation already exists. Federal criminal laws that can be used to address criminal conduct in the financial and housing markets include among many others: mail fraud, wire fraud, major fraud, securities fraud, and bank fraud.

To the extent that there are new of changed financial instruments that have grown over the past few years that have not previously been anticipated in our regulatory schemes, the answer is to update regulations to reflect these financial innovations and ensure that large segments of financial activity will not remain unregulated. The answer is not, however, to judge previously unregulated conduct through the lens of 20-20 hindsight and treat previously unregulated transactions as criminal. Further, new criminal laws cannot be applied retroactively, so any new criminal laws passed now by Congress cannot be used to address the conduct that has led to our current financial and economic turmoil.

The criminal laws are rightly reserved for egregious, intentional wrongdoing that falls well outside the mainstream of ordinary business conduct. If large numbers of honest business persons took advantage of an unregulated environment in making risky and ill-advised, but not clearly illegal, decisions, they should not now be treated as criminals. For those who went beyond that, and engaged in intentional fraudulent conduct, there are ample criminal laws on the books already that will allow for them to be prosecuted.

II. Measures to increase law enforcement funding must be balanced with indigent defense funding.

NACDL does not oppose the various measures to fund the hiring of additional prosecutors, FBI agents, or other law enforcement personnel -- many of whom have been pulled away to investigate and prosecute terrorism and national security cases -- to investigate and, where appropriate, prosecute white collar criminal offenses. However, Congress must understand it cannot simply fund half of the equation.

If there are to be more white collar criminal prosecutions, there will necessarily be the need to fund the defense of such cases. Current forfeiture statutes allow, and are routinely used, to restrain assets of criminal defendants upon indictment. As a result, increasing numbers of defendants in white collar cases cannot pay for their defense. The defense in these cases is paid by taxpayers. This happens either through public defender offices or through court appointments under the Criminal Justice Act.

Federal public defender offices are already over burdened and many lack resources and expertise to defend complex white collar criminal cases. If we are to expand such prosecutions, we must not only fund their investigation and prosecution, but we must also adequately fund the defense of these cases. These cases require intensive investigation, the review and understanding of extraordinarily voluminous documents, and, often, the use of expert witnesses. If we do not fund the defense of these cases adequately to allow for a defense team thoroughly to engage in each of these endeavors, innocent business persons who lack the resources to mount a proper defense will be convicted along with those who are guilty. This is a result that undermines true justice and cannot be tolerated.

III. NACDL opposes the Money Laundering Correction Act and supports exclusion of money laundering provisions from the Fight Fraud Act (H.R. 1748).

The past fifteen years have witnessed an alarming expansion of the money laundering statutes — principally 18 U.S.C. §§ 1956 and 1957 — by the courts, the Department of Justice and the Congress. Once a tool for drug or racketeering cases, these laws are now applied to a wide range of activities, including routine business transactions.[1] As former Deputy Attorney General Larry Thompson has observed,

> The Anti-Money Laundering Statutes are overly broad because they potentially reach many legitimate business transactions. The result is that businesses are subject to overreaching investigations

[1] An argument can be made that Congress did not intend that the money laundering statutes be used to combat offenses other than those associated with drug trafficking and organized crime. Teresa E. Adams, Tacking on Money Laundering Charges to White Collar Crimes: What Did Congress Intend, and What Are the Courts Doing?, 17 Ga. St. U. L. Rev. 531, 549-58 (2000). Nonetheless, the underlying crimes that serve as predicates for money laundering offenses, called "specified unlawful activities," include virtually all alleged white collar crimes, including federal environmental crimes and copyright infringement. See 18 U.S.C. § 1956(c)(7). See Money Laundering Campaign Hits New Targets, 3 No. 3 DOJ Alert 4, March 1993 (describing increased money laundering exposure of otherwise legitimate businesses, especially leasing companies, real estate brokers, and retailers).

> and prosecutions for conduct unrelated to drug trafficking or organized crime. These investigations and prosecutions are extremely disruptive for business and expensive to defend.

Elizabeth Johnson & Larry Thompson, Money Laundering: Business Beware, 44 Ala. L. Rev. 703, 719 (1993). As interpreted and applied, the current law is a trap for unwary individuals and businesses that inflicts felony convictions, overly harsh prison sentences, [2] and ruinous asset forfeiture.[3]

Individuals and businesses who handle dirty money with no actual knowledge of the underlying offense are nonetheless vulnerable to money laundering charges.[4] This is because courts have interpreted the knowledge requirement to include the concept of "willful blindness" or "conscious avoidance." Some courts have gone so far as to hold that willful blindness is shown where the defendant has suspicions and does not take action to confirm or disprove their truth.[5]

Compounding the statutes' over-breadth is the prosecutorial practice of piling on money laundering charges that are incidental to or virtually indistinguishable from the underlying offense. For example, prosecutors have charged money laundering where the defendant has done no more than deposit the proceeds of some "specified unlawful activity" into his bank account, even though the bank account is clearly identifiable as belonging to him.[6] Spending illegal proceeds, even without any attempt to obfuscate their source, likewise may trigger money laundering charges — against the drug dealer and the merchant who knowingly accepts his money.

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[2] Section 1956 provides for a sentence of up to twenty years, and a fine of the greater of $500,000 or twice the value of the property involved in the transaction. Section 1957 provides for a sentence of up to ten years, and includes the potential imposition of substantial fines as well. Both sections trigger severe sentences under the United States Sentencing Guidelines.

[3] Money laundering offenses trigger the broad forfeiture provisions of 18 U.S.C. § 982, which gives prosecutors the authority to seize any property "involved in" or "traceable" to the alleged offense. This means that prosecutors can seize an entire business, bank account or other asset with little regard for the nature or magnitude of the money laundering activity. A money laundering prosecution also gives prosecutors the power to use seizure warrants, seek protective orders, and confiscate substitute assets.

[4] Federal law permits juries to infer guilty knowledge from a combination of suspicion and indifference to the truth. See, e.g., United States v. Campbell, 977 F.2d 854, 856-59 (4th Cir. 1992) (reinstating the money laundering conviction of a real estate agent based upon the agent's "willful blindness" that her client was a drug dealer attempting to conceal proceeds by buying a house, when the client drove a Porsche, used a cellular telephone, and paid $60,000 in cash under the table).

[5] See United States v. Kaufman, 985 F.2d 884 (7th Cir. 1993) (upholding car dealer's money laundering conviction based on willful blindness theory, even though the undercover agents in the sting operation never told the defendant that the car purchase money was drug proceeds).

[6] Such "receipt and deposit" cases may be prosecuted under 18 U.S.C. § 1956 based on the theory that the defendant "concealed" the proceeds. See, e.g., United States v. Sutera, 933 F.2d 641 (8th Cir. 1991) (holding that deposit of three checks identified as gambling proceeds into business bank account, which bore the name of its owner, constituted concealment).

Piling on money laundering charges to an alleged crime often results in a sentence longer than what would ordinarily be incurred.[7] In white collar criminal cases, in particular, this allows prosecutors to obtain easy plea bargains and forfeitures that may not be in the interest of justice. This is despite the fact that, in many cases, the alleged "laundering" adds no additional harm and does not remotely resemble "laundering" as that term is commonly understood (i.e., creating the appearance of legitimate wealth).

These concerns militate strongly in favor of legislation to limit the money laundering statutes' scope. In August 2001, NACDL's Money Laundering Task Force issued its *Proposals to Reform the Federal Money Laundering Statutes*.[8] NACDL recommended the following statutory amendments: (1) The promotion prong of 18 U.S.C. § 1956, which has been subject to absurd application and conflicting interpretations, serves no purpose and should be repealed; (2) The concealment prong of 18 U.S.C. § 1956 should be expressly limited to financial transactions designed by the defendant with the intent to create the appearance of legitimate wealth; and (3) Congress should amend 18 U.S.C. § 1957, which broadly prohibits transactions involving illegal proceeds of a value greater than $10,000, to focus on professional money launderers, rather than one-time offenders. The report explains, "The proposals in this report are not only necessary to bring rationality and fairness to the laws but are consistent with the aims of legitimate law enforcement. The proposed amendments would simplify and clarify current law, facilitate compliance efforts by individuals and businesses, and focus federal law enforcement on serious misconduct."

Section 2 of the Money Laundering Correction Act: This provision would reverse the Supreme Court's unanimous decision in *Cuellar v. United States*, 128 S. Ct. 1994 (2008). At issue is the money laundering provision that prohibits international transportation of money designed to conceal the nature, location or ownership of criminal proceeds (18 U.S.C. § 1956(a)(2)(B)(i)). In *Cuellar*, the defendant was caught hiding drug proceeds in his vehicle while en route to Mexico. The Court held that secretive transportation is insufficient for conviction; the government must prove that the *purpose* of the transportation was to conceal the nature, location or ownership of criminal proceeds.

Section 2 of the Money Laundering Correction Act would reverse *Cuellar* so that a money laundering conviction could rest solely on evidence that the defendant concealed ill-gotten money during international transportation. NACDL believes that increasing the statute's scope to encompass mere money hiding casts the net far too wide by capturing conduct that was not intended to create the appearance of legitimate wealth. Given that the government can charge the underlying conduct and perhaps one of the numerous other money laundering, cash-reporting or anti-smuggling statutes, there is simply no justification for this.[9]

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[7] Teresa E. Adams, Tacking on Money Laundering Charges to White Collar Crimes: What Did Congress Intend, and What Are the Courts Doing?, 17 Ga. St. U. L. Rev. 531, 558-59 (2000).

[8] Available at: http://www.nacdl.org/public.nsf/whitecollar/moneylaundering

[9] For example, defendant Cuellar might have been charged with bulk cash smuggling, 31 U.S.C. § 5332, because he intended to transport cash in excess of $10,000 across an international border without reporting it.

Section 3 of the Money Laundering Correction Act: This provision would reverse *United States v. Santos*, 128 S. Ct. 2020 (2008). In *Santos*, the Supreme Court correctly limited the term "proceeds," as used in the principal money laundering statute, to the profits of a crime, not its gross receipts. While the *Santos* decision was based on the rule of lenity, which requires that statutory ambiguity be resolved in the defendant's favor, Justice Scalia's opinion takes into account many of the above-stated concerns with the money laundering statute.

In *Santos*, the defendants were convicted of operating an illegal gambling business (*i.e.*, a lottery that was illegal under state law) and money laundering. Justice Scalia points out that under the "receipts" definition of proceeds, every illegal lottery offense will trigger money laundering charges when the winning bettor is paid; in the words of the Court, the alleged money laundering "merges" with the gambling offense. Allowing the government to charge both the underlying offense *and* money laundering for the gross receipts of the underlying offense is, as Justice Stevens wrote in his concurring opinion, "tantamount to double jeopardy."

This "merger" problem is exacerbated by the fact that the sentence for money laundering almost invariably exceeds the sentence for the underlying offense. In *Santos*, for example, the district court sentenced defendant Santos to 60 months for the two gambling counts and 210 months for the three money laundering counts. As Justice Scalia notes, "Congress evidently decided that lottery operators ordinarily deserve up to 5 years of imprisonment, § 1955(a), but as a result of merger they would face an additional 20 years, §1956(1)(1)." When the so-called money laundering is virtually indistinguishable from the underlying offense – as with many of the more than 250 money laundering predicates -- this huge sentencing disparity makes no sense.

Finally, in other factual contexts, using the "receipts" rather than the "proceeds" or profits from unlawful activity will often vastly overstate the culpability of certain defendants, while understating the culpability of others. Where receipts are used to defray the expenses of an illegal scheme, the gross receipts are neither a true measure of the benefit to the defendant, nor the harm to the victims. Rather, the use of gross receipts is simply a mechanism artificially to inflate the penalties imposed on some individuals convicted of money laundering, but not others, with no relational relationship to the respective culpability of the defendants.

IV. Prosecutors have the tools they need to police financial markets.

General federal fraud statutes, such as the mail and wire fraud statutes, are available to address ***any*** crimes related to the subprime market and market crisis regardless of whether the crimes took place on Wall Street or Main Street. The federal courts' expansive reading of the mail fraud statute "has made it possible for the federal government to attack a remarkable range of criminal activity even though some of the underlying wrongdoing does not rest comfortably within traditional notions of fraud."[10] Leading commentators agree that "scheme to defraud," the key phrase of the mail fraud and wire fraud statutes, "has long served . . . as a charter of authority for courts to decide, retroactively, what forms of unfair or questionable conduct in commercial, public, and even private life, should be deemed criminal. In so doing, this phrase has provided

[10] Julie O'Sullivan, FEDERAL WHITE COLLAR CRIME: CASE AND MATERIALS 483 (2d ed. 2003).

more expansive interpretations from prosecutors and judges than probably any other phrase in the federal criminal law."[11]

Beyond conduct specific to Wall Street, federal prosecutors have a multitude of methods for addressing whatever "retail-level" mortgage fraud schemes that have been conducted on Main Street. In fact, the largest area of mortgage fraud activity seems to be on the local level and may be characterized as "white-collar street crime," in that it consists of traditional white collar crime – mail fraud and wire fraud – on an individual and personal level. Thus, prosecutors can use the same tools to prosecute white-collar street crime that they use to prosecute any alleged criminal conduct taking place on Wall Street. The FBI itself recently acknowledged the applicability of the same provisions used for Wall Street – including Chapters 47 (fraud and false statements), 63 (mail fraud), and 73 (obstruction) of Title 18 of the United States Code – to mortgage fraud. It specifically identified nine "applicable Federal criminal statutes which may be charged in connect with mortgage fraud."[12]

Regardless of which federal fraud statute a prosecutor uses to charge a defendant, the law currently provides a substantial potential penalty. For example, mail and wire fraud violations already carry a maximum penalty of 20 years imprisonment. In addition, any fraud that "affects" a financial institution carries an increased possible penalty of a $1,000,000 fine, 30 years imprisonment, or both. Unlike the elements of the bank fraud statute, conduct qualifying for the enhanced penalty need not be perpetrated *against* a financial institution in order to draw the increased penalties. Thus, even if a fraud perpetrated against a "mortgage lending business" could not be characterized as bank fraud, the fraud inevitably "affects" a financial institution such that the 30-year maximum sentence under the mail and wire fraud statutes would apply. By comparison, the maximum federal penalty for attempted murder is 20 years and the maximum for voluntary manslaughter is 15 years.[13]

Furthermore, criminal conduct need not go unpunished even if there is no federal statute reaching it. If, for some reason, certain conduct is beyond the jurisdiction of federal prosecutors, it can always be prosecuted on the state and local level. Indeed, the case is strong for increased state-level activity, in some instances as an alternative to federal prosecutions. At both the state and local levels, prosecutors have been aggressively battling retail-level fraud perpetrated by individual brokers, real-estate agents, lenders, buyers, and borrowers.[14] Like the federal

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[11] John C. Coffee, Jr. & Charles K. Whitehead, *The Federalization of Fraud: Mail and Wire Fraud Statutes*, in 1 Otto G. Obermaier & Robert G. Morvillo, WHITE COLLAR CRIME, Business and regulatory offense § 9.01 (2002).

[12] Federal Bureau of Investigation, *Press Release: FBI Issues Mortgage Fraud Notice In Conjunction With Mortgage Bankers Association* (Mar. 8, 2007), *available at* http://www.fbi.gov/pressrel/pressrel07/mortgagefraud030807.htm (last viewed Feb. 10, 2009). The list includes the following statutes: (1) 18 U.S.C. § 1001 – Statements or entries generally, (2) 18 U.S.C. § 1010 – HUD and Federal Housing Administration Transactions, (3) 18 U.S.C. § 1014 – Loan and credit applications generally, (4) 18 U.S.C. § 1028 – Fraud and related activity in connection with identification documents, (5) 18 U.S.C. § 1341 – Frauds and swindles by Mail, (6) 18 U.S.C. 1342 – Fictitious name or address, (7) 18 U.S.C. § 1343 – Fraud by wire, (8) 18 U.S.C. § 1344 – Bank Fraud, and (9) 42 U.S.C. § 408(a) – False Social Security Number.

[13] 18 U.S.C. §§ 1112 (manslaughter), 1113 (attempted murder).

[14] Coffee and Whitehead, *supra* note 3.

government, the states have ample legal authority to prosecute fraud. In addition, states – and ***not*** the federal government – are the primary regulators of mortgage brokers and the insurance industry. Thus, conduct that takes place entirely on the state or local level and that is within the state's expertise should be investigated and prosecuted by state and local officials.

While the purpose of the Fight Fraud Act is laudable, that purpose is achieved through the substance of existing federal and state statutory authorities, as well as whatever increased funding and related resources is warranted under Section 3 based on the evidence available to date, with adequate resources devoted both to the prosecution and defense functions.

Once again, thank you for inviting NACDL to share its views. We stand ready to assist the Committee and its staff as it seeks to address these important issues.

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Mr. CONYERS. Attorney Marcia Madsen is with the Institute for Legal Reform, which is an affiliate of the United States Chamber of Commerce.

TESTIMONY OF MARCIA G. MADSEN, INSTITUTE OF LEGAL REFORM, CHAMBER OF COMMERCE

Ms. MADSEN. Good morning, Mr. Chairman, Ranking Member Smith, Members of the Committee.

My name is Marcia Madsen. I am a partner in Mayer Brown, and I am here today representing the United States Chamber of Commerce and its Institute for Legal Reform.

I noticed you referred to me as a senior partner, Mr. Chairman. I have—ladies always wonder when someone uses that expression—but since 1985, I have practiced in the area of public contract litigation and, among other things, have defended companies and individuals in connection with the False Claims Act, which is the subject of my testimony today, and working in the public procurement area.

So on behalf of the Chamber, I am really here today to talk about H.R. 1788, the legislation that was introduced yesterday to amend the civil False Claims Act.

As an initial matter, I want to emphasize that the Chamber supports the Department of Justice and the agency inspector general in their efforts and role to identify and eliminate fraud involving taxpayer funds. The Chamber recognizes that the False Claims Act is an important tool to fight fraud in Federal contracts and Federal programs.

The $21.6 billion recovered since 1986 evidences that the statute is working, particularly when it is deployed by the government. The Chamber believes very strongly the proposed amendments to the statute, which largely are directed at encouraging qui tam plaintiffs to file and maintain meritless actions are unnecessary. Further, those amendments may actually disrupt the government's efforts to pursue fraud, waste and abuse in Federal contracts and programs and unjustly—plaintiffs who have—who do not deserve to be rewarded.

Since this Committee last looked at the False Claims Act amendments last summer, there have been some pretty dramatic changes in the government's investigative and oversight mechanisms and resources. There are just a couple of points that I would like to summarize from my written testimony.

The first is, I would like to draw in particular the Committee's attention to the new mandatory disclosure rule that became effective in December 2008 at the behest of the Department of Justice. This new regulation, which was described by the government itself as a sea change, requires Federal contractors to disclose potential violations of the False Claims Act, certain criminal laws related to procurement, and significant overpayment.

While this rule was initially exhausted, an amendment to the Federal Acquisition Regulation, which I will undoubtedly refer to as the FAR here and confuse everyone, that amendment became applicable to other programs very quickly, as it is sort of become—mandatory disclosure has kind of become the latest thing in government programs.

It was quickly picked up by the implementing guidance in the American Recovery and Reinvestment Act for grants and assistance agreements and in the TARP legislation for financial agreements under the TARP, as well as contracts.

But the point I want to emphasize to the Committee today about this regulation is that, because the government's investigators have direct access to obtain information from contractors and grantees, there is really no need to enact changes to the False Claims Act to further encourage relaters.

Just in summary, the rule has two main features. First, contractors with larger contracts as required to have a code of business ethics and conduct, a government-approved internal control system, and that control system has to be designed to detect improper conduct.

The system is required to include timely, mandatory disclosure whenever the contractor has credible evidence of a potential violation of the False Claims Act.

Subcontractors also are required to have such a program and to make disclosures. And I heard the comments and the questions of the Members of the Committee today about concerns about subcontractors. They are covered by the rule.

Importantly, contractors and subcontractors must provide full cooperation with government investigators, which includes providing access to employees who have information about the potential violation.

The second point I would like to note is that a contractor of any size is subject to debarment for a knowing failure to timely disclose credible evidence of a violation of the False Claims Act under designated criminal laws or significant overpayment.

This obligation does not end until 3 years after final payment, and it requires a look-back at the time of final payment, even if contract performance has long been completed.

When you consider that only 2 percent of False Claims Act recoveries come from—it is pretty obvious, I think, that the government investigators' access under the mandatory disclosure rule is going to be a more effective means for determining whether there is a meritorious case or a violation at an earlier stage.

And, Mr. Chairman, you commented earlier, what is the best way to get at fraud? And I would submit to you that the mandatory disclosure rule is a better solution than using third-party relaters.

I would like to comment just briefly about some of the problems that arise in the legislation—really, in the proposed legislation, as a result of the advent of the mandatory disclosure rule.

The first relates to the public disclosure provision. With the change to the amendment proposed in the bill, a relater would actually be able to proceed with an action involving the same transaction or facts that have already been mandatorily disclosed.

Just a couple of examples. Because of the exclusivity standard in the bill, a relater who has any additional information, no matter how small, would be able to proceed, because it would be new information.

Also, the definition of public is not clear, and it is not clear with that definition whether a mandatory disclosure would qualify as an audit or an investigation sufficient to have these actions dismissed.

So unless this language is revised, it is possible that a relater would be able to obtain a recovery, even though the proper government authorities had the information and were pursuing it.

A similar problem exists with respect to the bill's 9(b) provision. If a relater is subject to a lower pleading standard, the relater will be allowed to proceed to obtain discovery and potentially to obtain a mandatory—or is able to obtain a recovery even though the mandatory disclosure has already been made to the government and the government already had the information.

We have the same concern about sharing information under civil investigative demands.

The second point I just wanted to make very briefly—and it is made at length in my written testimony—is that the government in—really, in the last few months has tremendous new assets and resources and capabilities to pursue fraud.

The recovery act created a new Accountability and Transparency Board, the ability to use the I.G. powers, and additional authority to compel documents and to have hearings and compel testimony. It also authorized the Recovery Independent Advisory Panel, which also can take evidence and hold hearings.

The recovery act added new powers for the I.G.s and the GAO to investigate and to subpoena testimony from recipients of recovery act funds. And that is new authority for them.

The recovery act contains a separate whistleblower provision authorizing damages and a right of action in Federal court. And it contains a lot of money for the inspector general, over $220 million for new resources.

The TARP also gets a special I.G., extensive audit rights, extensive supervision by the GAO, and there is mandatory disclosure for TARP.

So, in sum, I would just like to note that there really is no need to give relaters and their lawyers more tools to pursue fraud. When you think about the best way, the best way here is if the government steps in to the get the information and where is the value—value for the government is to use its resources and the information, rather than basically outsourcing that function to the relaters.

I would be happy to respond to any questions.

[The prepared statement of Ms. Madsen follows:]

PREPARED STATEMENT OF MARCIA G. MADSEN

Statement on Behalf of
The U.S. Chamber of Commerce
And the U.S. Chamber Institute for Legal Reform
On H.R. 1788
The False Claims Act Correction Act of 2009

By

Marcia G. Madsen
Partner, Mayer Brown LLP
Washington, D.C.

April 1, 2009

Thank you for the opportunity to present the views of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform today. I have been asked to testify with respect to the False Claims Correction Act of 2009.[1]

In my private practice, I am a partner in a law firm where, among other things, I defend companies involved in civil False Claims Act ("FCA") actions, assist companies and other entities to develop and implement compliance programs with respect to their government contracts and programs, and assist companies and other entities in audits and internal investigations. I am a past chair of the American Bar Association Section of Public Contract Law. From 2005 – 2007, I chaired the Acquisition Advisory Panel (sometimes known as the SARA Panel), a federal advisory commission created by Congress and appointed by OMB. Our Panel studied the vulnerabilities in the Federal acquisition system and made over 100 findings and 80 recommendations to improve the system – many of which have been either enacted into law or implemented in regulation during the past two years.

At the outset, let me emphasize that the Chamber is very cognizant and supportive of the ongoing role of the Department of Justice and the agency Inspectors General to detect, investigate, and prosecute fraud involving taxpayer funds. The Chamber agrees that the False Claims Act is an important tool to fight fraud involving Federal contracts and programs. The recovery of more than $21.6 billion since 1986 is evidence that the existing statute is working. The Chamber believes, however, that the proposed amendments to the statute are not needed, and recent developments have reinforced that view. Furthermore, with regard to the other pieces of legislation being considered by the Committee today, the Chamber believes that the Congress needs to carefully assess any unintended consequences that those bills may have before adding more criminal laws in this area.

The question before the Committee is whether more incentives to encourage private *qui tam* plaintiffs (known as "relators") to file additional cases are necessary, either to enhance the

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[1] The text of H.R. 1788 was not yet available at the time this testimony was prepared, however, the reported version of H.R. 4854 from the 110th Congress was available.

existing law or to clarify its original intent. Importantly, numerous changes in the Government's oversight capabilities and resources, including the enactment of other legislation as well as the promulgation of new regulations since the 2008 version of the legislation was reported out of this Committee, raise serious questions about whether further incentives to *qui tam* plaintiffs (i) are warranted, (ii) would impede the Government's ability to investigate fraud, waste, and abuse in its programs, and (iii) would inappropriately siphon off recoveries which should accrue to the Government. While the FCA – *when deployed by the Government* – has been effective in targeting fraud, the use of *qui tam* actions to detect and deter fraud has not. The DOJ's own numbers tell the story. According to DOJ's most recent statistics, of the more than $21.6 billion recovered since the 1986 amendments became effective, only 2 percent was recovered in cases where DOJ did not intervene. *See* Fraud Statistics – Overview, October 1, 1986 – September 30, 2008, Civil Division, U.S. Department of Justice, *available at* http://www.taf.org/statistics.htm (copy attached).

The Chamber provided detailed testimony to the Committee last year concerning H.R. 4854 – The False Claims Correction Act of 2007. You have that testimony and analysis, and the Chamber stands by that testimony. Thus, it is not my intention to repeat those points at this time. However, since the Committee reported its bill last year, there have been several developments that should impact the Committee's consideration of the proposed legislation. Those include promulgation of the Mandatory Disclosure Rule under the Federal Acquisition Regulation ("FAR"), and the adoption of similar rules for assistance instruments under the guidance issued to implement the American Recovery and Reinvestment Act of 2009 (the "Recovery Act"), as well as for transactions under the Emergency Economic Stabilization Act of 2008 for the Troubled Asset Relief Program ("TARP"). In addition, Congress has provided new investigative authorities and tools for the Inspectors General and the Government Accountability Office, and created entire new organizations to detect and deter fraud – including the appropriation of hundreds of millions of dollars for these new efforts. In light of these new rules and new capabilities, the federal Government is in a position to uncover and investigate potential frauds and false claims on its own, without creating yet more generous provisions to benefit *qui tam* plaintiffs.

Congress also should take into account the further alienation of commercial companies. Many commercial firms, particularly technology firms, give a wide berth to the high risk Federal market. Accordingly, the Government loses the benefits of affordable goods and services that have been vetted and refined through private competition. The Government recognizes the value such firms have to offer, and has periodically attempted to refine the regulatory scheme (as it did in the mid 90's with the Federal Acquisition Streamlining Act and the Federal Acquisition Reform Act) to reduce the risks to commercial companies. *See* FAR Part 12. However, uncertainties associated with potential FCA actions are a significant deterrent to commercial companies.

I. The Proposed Amendments Expand Liability Dramatically To Include Matters Far Outside The Federal Purview

Under the existing statute, the basic term "claim" is defined 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 contractors, grantee, or other recipient for any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(c).

Section 2 of H.R. 4854, as reported, includes sweeping new definitions that will expand the reach of FCA liability into matters well beyond what is customarily understood to be the reasonable interest of the Government. The reported legislation includes a new extremely broad definition of "Government money or property" 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 term "administrative beneficiary" introduces a wholly new concept. It 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."

These new definitions disconnect a fundamental linkage underlying the statute since its inception – the act of seeking funds from the Government. The existing law creates liability for actions aimed at obtaining Government funds for which the defendant is not eligible or entitled. Without that linkage, the FCA potentially will reach many persons and transactions who have only a loose connection to the purpose for which the funds were provided.

This redefinition is unnecessary given the Supreme Court's decision in *Allison Engine*. At the time this legislation was drafted and considered in 2007 and 2008, the apparent purpose was to overcome the D.C. Circuit's holding in *Totten* requiring presentment to the Government based on a concern that the FCA could be avoided by having false claims submitted to a grantee. However, the decision in *Allison Engine* addressed this concern by removing any requirement for direct presentment under 31 U.S.C. § 3729(a)(2) and (a)(3). The analysis of the statute by the Supreme Court preserves the linkage between a false claim and payment by the Government in its holding that the defendants must have the intent "to get" their claims paid by the Government. Without this connection, the Court noted that federal funds are in everything and any other interpretation would make the FCA "boundless" and turn it into an "all-purpose" fraud statute. While it may take time for the Court's ruling to be implemented in further cases, the decision establishes the basic principles and there is no need for a wholesale revision of the statute.

II. The New Government Approach To Protecting Federal Contracts And Programs Renders the Proposed Changes Unnecessary

A. A "Sea Change" – Mandatory Disclosure

In a highly significant regulatory development in late 2008, the Council that administers the FAR responded to urging by the DOJ and Congress (P.L. No. 110-252, Title VI, Chapter 1) and promulgated a new rule that requires Federal contractors to disclose *potential* violations of

certain Federal criminal laws related to procurement (violations involving fraud, conflict of interest, bribery or gratuity statutes under Title 18) and violations of the False Claims Act, as well as the existence of "significant" overpayments. 73 Fed. Reg. 67074 (Nov. 12, 2008). This approach was quickly adopted for new initiatives. Similar mandatory disclosure provisions were made applicable to grants and cooperative agreements, as well as to subgrants funded under the Recovery Act, by OMB's February 18, 2009 implementing guidance. The Treasury Department also adopted a mandatory disclosure provision that is similar to the FAR rule when it promulgated its TARP Conflicts of Interest rule on January 21, 2009. 74 Fed. Reg. 3431, 3435 (31 C.F.R. 31.31.213(d)).

The Preamble to the FAR rule characterized mandatory disclosure as a "sea change." 73 Fed. Reg. at 67070. The mandatory disclosure rule has two parts. First, companies (other than small businesses and commercial item contractors) with contracts or subcontracts valued at over $5 million and a performance period of 120 days or more are required to have a written "Contractor Code of Business Ethics and Conduct." Such companies also are required to have an ongoing business ethics awareness and compliance program, and an internal control system. FAR 52.203-13. Although many of the major defense contractors have had such programs for 20 years or more, many mid-size companies and smaller businesses previously did not have elaborate ethics and compliance programs.

The rule creates a new mandatory contract clause which requires, among other things, timely written disclosure to the agency IG (with a copy to the Contracting Officer) whenever, in connection with the award, performance or closeout of the contract or any subcontract thereunder, the contractor has "credible evidence" that a "principal," employee, agent or subcontractor has committed a violation of the specified criminal laws or the False Claims Act. The contractor's internal control system is required to provide for timely disclosure. The internal control system also is required to provide for "[f]ull cooperation with any Government agencies responsible for audits, investigations, or corrective actions," and "full cooperation" includes providing access to employees with information. 73 Fed. Reg. at 67901-92. This clause is required to be flowed down to subcontractors that meet the thresholds.

Second, under the new rule, a contractor can be suspended or debarred for a "knowing failure" by a "principal" to timely disclose to the Government credible evidence of the specified criminal violations, or violations of the False Claims Act, or a "significant" overpayment. FAR 9.406-2 and 9.407-2. The disclosure obligations exist until three years after final payment on any government contract awarded to the contractor. For purposes of suspension or debarment, the disclosure obligations apply to subcontractors, small businesses, and commercial item contractors.

This new mandatory disclosure regime imposed on contractors and grant recipients is a "sea change" that should have a significant effect on the Committee's consideration of the False Claims Act Correction Act. As a result of the mandatory disclosure requirements imposed over the last three months, the Government has a dramatically increased capability to identify and investigate potential fraud – and this Committee is considering legislation today that would provide even more resources.

The problem driving the *qui tam* provisions of the False Claims Act was described in 1986 as follows: "perhaps the most serious problem plaguing effective enforcement is the lack of resources on the part of Federal enforcement agencies." S. Rep. No. 99-562 at 7 (1986) (*reprinted in* 1986 U.S.C.A.A.N. 5272). In other words, the Government lacked resources to pursue fraud given the amount of dollars and the number of government programs. It also was viewed as necessary to have the assistance of insiders – "private individuals who could break the current 'conspiracy of silence' among Government contractor employees." S. Rep. No. 99-562 at 14 (1986) (*reprinted in* 1986 U.S.C.A.A.N. 5279).

With the new *mandatory* requirement that contractors and grantees adopt and maintain internal control systems designed to identify abusive practices and fraud *within their own organizations* early and the *mandatory* requirement that contractors timely report *potential* violations to the IG, the Government has enlisted the contractors, subcontractors, grantees, and other recipients of Federal funds as its agents to identify and report potential fraud and abuse in contracts and other Federally funded programs. The additional requirements that reports be "timely" and that "full cooperation" be afforded assure that the contractor or grantee will work to assist and support the investigative authorities. Because the penalty for nondisclosure is suspension or debarment from all government contracting, contractors and subcontractors will have a tremendous incentive to disclose credible evidence of any False Claims Act violations. The concern for resources has been substantially mitigated by relying on those who know the contractor or grantee's operations best – their own people.

In addition, the concern that insiders be encouraged to come forward to break the perceived 1986 "conspiracy of silence" is directly addressed by the rule's specific requirements for business ethics and awareness compliance programs and controls – with detailed requirements set out in the regulations. The specific obligations to timely disclose when the contractor or grantee has credible evidence assures that reporting will be prompt and that internal investigations will be diligently pursued. Failure will result in suspension or debarment. The rule requires contractors and grantees to function as the agents of the IGs to identify and root out fraud and abuse early.

The provisions of the proposed legislation designed to make it easier for *qui tam* relators to bring and maintain *qui tam* actions, *i.e.*, weakening the public disclosure bar, relaxing the standard of Federal Rule of Civil Procedure 9(b), extending the statute of limitations to 8 years, expanding the anti-retaliation provisions, and permitting DOJ to share information obtained from Civil Investigative Demands (CID) with relators, become highly questionable in light of the Government's ability under the regulations to obtain information directly. The existing FCA is sufficient – perhaps even more than sufficient – to pick up any possible failures in the mandatory disclosure net.

B. The Public Disclosure Bar

1. The Existing Statute Strikes The Right Balance

In the 1986 amendments, Congress sought to resolve the tension between the circumstance where a plaintiff brought no new information in an action (as in *United States ex rel Marcus v. Hess*, 317, U.S. 537 (1943)), but was allowed to recover, and the circumstance

where a relator was the original source of information used in his action. S. Rep. No. 99-562 at 10-13 (*reprinted in* U.S.C.A.A.N. 5275-5278). Current law bars a court from jurisdiction over actions "based upon the public disclosure of allegations or transactions [as defined]" unless "the person bringing the action is an original source of the information." 31 U.S.C. 3730(e)(4)(A). The existing statute defines the term "original source" to mean "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action . . . ." *Id.* § 3730(e)(4)(B). Congress' 1986 solution weeds out parasitic cases where the person bringing the action does not contribute new information. "The goals of the 1986 Amendments Act were (1) to encourage those with information about fraud against the government to bring it into the public domain; (2) to discourage parasitic *qui tam* actions by persons simply taking advantage of information already in the public domain; and (3) to assist and prod the government into taking action on information that it was being defrauded." *Minnesota Ass'n of Nurse Anesthetists v. Allina Health System Corp.*, 276 F.3d 1032 (8th Cir. 2002).

Currently, either the United States or a defendant may seek dismissal of a *qui tam* action on the basis that it fails to meet the requirements of the public disclosure bar. Also, because the requirement is jurisdictional, a court may determine for itself that a case should be dismissed on public disclosure grounds.

2. Eliminating Or Diluting The Jurisdictional Public Disclosure Bar Is Inconsistent With The Government's Interest

The proposed legislation in several versions has removed the ability of defendants to raise the public disclosure bar and provides instead that only the DOJ may move for dismissal. Such an approach precludes both defendants and the courts from raising the public disclosure bar, which as a practical matter will permit many *qui tam* lawsuits to go forward that are based on public disclosures of information. This is inconsistent with the Government's interest in ensuring that the rewards of a *qui tam* suit only go to those relators who provide new information to the Government.

In addition, other versions of the legislation would require the DOJ to meet a much higher standard. For example, under H.R. 4854, as previously reported, the DOJ would have to demonstrate that the relator's "allegations relating to *all essential elements of liability* of the action or claim are based exclusively on a public disclosure," and that the relator "derived his knowledge of *all essential elements of liability*" from the public disclosure. The legislation also narrowed the definition of what is "public" to mean only information revealed in Federal proceedings, hearings, audits or investigations – state proceedings would be excluded. Further, a "public disclosure" is defined by that legislation to include only disclosures that are made on the "public record" or otherwise "disseminated broadly to the general public." This redefinition of what constitutes "public disclosure" is unduly narrow and highly ambiguous. The proposed changes obviously did not anticipate the advent of mandatory disclosure requirements and create particular problems in light of that approach.

3. Intersection With Mandatory Disclosure Requirements

Contractors and grantees that make a disclosure to the IG and the Government face the possibility that the disclosure will become the source of a *qui tam* action. The preamble to the rule recognized that even under current law the disclosure of a potential FCA violation presents the risk that a *qui tam* action will follow. 73 Red. Reg. at 67082. This possibility exists even though the disclosure has been made to the Government authority responsible for investigating fraud and even though the party making the disclosure is required to "cooperate fully" in the investigation.

Under the proposed legislation, there is a significant risk that a relator will be able to file an action and intrude upon the Government's review and investigation of the disclosure. Because of the "exclusivity" standard, a relator who has any additional information, regardless of its materiality, will be able to proceed. The relator would be able to go forward with the *qui tam* action and discovery even as the IG and agency Suspension and Debarment Officials are attempting to determine whether a disclosure requires further action. This poses the real possibility that the relator will interfere with or otherwise impede the Government's ability to investigate the matter and determine the appropriate course of action. Of course, such overlapping and duplicative activities also pose additional costs on the defendants, and upon the Government.

Furthermore, the definition of what constitutes a "public disclosure" is opaque and it is unclear whether an IG's review of a mandatory disclosure under the rule would qualify as an "audit" or "investigation" sufficient to have the action dismissed. The language suggests that it may be insufficient even if conduct has been reported to and is known by Federal officials with responsibility for investigating it directly – a result that would be perversely at odds with the announced purpose of the legislation to detect fraud early. Resolution of this question is likely to require an answer from the courts – an answer that will take years of litigation to obtain. Such an approach thus creates the real prospect that a relator may use the Government's own mandatory disclosure program to obtain a share in any recovery – even though the Government is aware of the violation and is reviewing, investigating, prosecuting, or negotiating a resolution. Indeed, one could read the definition in the proposed legislation as creating a preference to have the relator bring an action, rather than investigation by the appropriate Federal authorities.

The Committee should consider carefully whether it is in the Government's interest to allow a relator to disrupt the Government's own efforts to obtain early disclosure of violations and its ability to pursue or timely resolve such violations. Moreover, it seems particularly at odds with the basic purpose of the statute and the Government's interests to allow a relator to claim a share of any recovery when it was the Government's regulation that required the disclosure for the purpose of allowing the Government to address the violation at an early stage.

C. Exempting Relators From Compliance With Rule 9(b) Will Interfere With The Government's Ability To Investigate

The proposed legislation also relaxes the pleading standard under Rule 9(b) only for relators – as in last Congress' H.R. 4854. This cannot possibly be justified as assisting DOJ in pursuing fraud. Given the mandatory disclosure rule, relators would be encouraged to plead

shallow speculative claims, knowing that the potential exists to obtain more information if the case can survive to the discovery stage. As a practical matter, at the same time the Government is attempting to investigate and assess whether a case should be pursued, the relator may well be interfering by using the discovery process in a manner that disrupts the Government's investigation of the case. Once a disclosure is made by a contractor or grantee, the Government should determine whether a case exists and whether to pursue the case. Relators should not be encouraged to fish for the disclosure reports with a relaxed 9(b) standard and disrupt the Government's investigation process.

D. Sharing Government-Obtained Information Improperly Rewards Relators Contrary To The Purposes Of The FCA

Under current law, the Attorney General is given authority to issue CIDs in advance of commencing an FCA action to obtain documents, answers to interrogatories, and testimony concerning potential FCA violations. 31 U.S.C. § 3733(a). The Attorney General may not delegate this authority. *Id.* Furthermore, the current statute precludes anyone other than an authorized DOJ employee/attorney or a false claims investigator from access to information obtained under a CID. This extends to other Federal agencies, who may obtain such information only upon a request by the Attorney General to a U.S. district court. 31 U.S.C. § 3733(i)(2)(C).

The proposed legislation would expand the use of CIDs and would permit DOJ (the Attorney General or a designee) to share the results of this pre-discovery material with other governmental personnel, including state officials, and relators.

Because this information is for the purpose of allowing the Attorney General to determine whether to file an FCA action, it is appropriately restricted to DOJ. This information should not be shared with relators. A fundamental purpose of the *qui tam* provisions is to reward whistleblowers who bring information to the Government. If relators are provided with *Government-developed information* before a *qui tam* complaint is unsealed, such relators will no doubt amend their complaints in non-intervened cases to take advantage of the Government's material.

However, in addition to the above concerns, the establishment of mandatory disclosure requirements adds a further concern about sharing of information with relators. Pursuant to the requirements for mandatory disclosure, IGs and Government officials will have early notice of potential FCA violations based upon timely disclosures of credible evidence. Government investigators and agency officials will then need to determine whether to pursue a false claims action. These officials will have information at an earlier stage than previously. The regulations also require "full cooperation" with the Government's investigation. The regulations thus may, as a practical matter, result in Federal agencies bringing information to the attention of DOJ. It is possible that the need for CIDs may decrease, but even where they are used, there is a greater likelihood that they will be used to follow up on information already disclosed by the contractor, grantee, subcontractor or subgrantee.

Relators should not be provided the information that the Government already has obtained through a mandatory disclosure of credible evidence or that the Government is developing with CIDs as a result of such a disclosure. If the proposed legislation is enacted, it

likely will expose information obtained by the Government through mandatory disclosures. It is fundamentally inconsistent with the purposes of the FCA to allow a purported whistleblower to obtain a bounty based upon such information, thereby profiting from the fact that the Government's rule required disclosure of the information in the first place.

E. The "Relation Back" Feature In The Proposed Change To The Statute Of Limitations Will Impose Unjustifiable Burdens On Defendants And Will Unjustly Enrich Relators

In addition to extending the statute of limitations for filing *qui tam* cases from 6 to 8 years, the proposed legislation contains a "relation back" feature that allows the Government to intervene and raise new claims. This provision allows the Government, at the time it intervenes in a *qui tam* case, to assert additional claims arising out of the same "conduct, transactions, or occurrences" and such additional claims relate back to the date of the original *qui tam* complaint, even if they would otherwise have been time barred.

This relation back will impose unreasonable burdens in the context of a provision of the mandatory disclosure rule. The mandatory disclosure rule added a "look-back" requirement to the suspension and debarment regulations (FAR 9.406-2 and 9.407-2). The new regulation creates a new cause for suspension or debarment based on "knowing failure" by a principal to timely disclose credible evidence of procurement-related criminal violations, FCA violations, or "significant" overpayments under existing contracts. This obligation exists until three years after final payment on "any Government contract awarded to the contractor" and is in connection with "the award, performance, or closeout of the contract or a subcontract thereunder." FAR 9.406-2(b)(i)(vi) and 9.407-2(a)(8). The Government's contract closeout process after performance is complete is lengthy and typically involves a final audit. Such audits may take several years to even schedule, let alone resolve. As a practical matter, contracts for which performance has been completed for years may still be awaiting closeout and final payment. The rule then extends the period for potential disclosure to three years after the final payment.

In light of this provision, the relation back aspect change to the statute of limitations will create a huge and unfair burden on all contractors, including small businesses and non-profits, to maintain records and gather information from employees who have left or are retired. If a contractor discovers a potential violation in a final review of a contract for closeout and discloses it out of an abundance of caution, the Government may use that information to add claims to a *qui tam* action regarding that contract ("transaction") that are many years past the 8 year statute of limitations. For example, there are many contracts under which performance has been completed for 5 years and for which final payment has not been made. Given the three year post-final-payment disclosure requirement, it may be more than a decade after the completion of performance before such contracts are closed out and disclosure requirements have lapsed.

It should be noted here that a Federal agency whose contract is at issue also will bear part of this burden. Such an agency will be required to produce documents and personnel who are familiar with the contract and the issues raised. If the agency cannot locate its documents or its personnel have moved or retired, the Government may have difficulty ascertaining the validity of its own claim.

Contractors and subcontractors who knowingly fail to make a timely disclosure of credible evidence in connection with a contract are subject to suspension or debarment. That remedy should be sufficient for the Government's purposes.

III. New And Powerful Government Resources Render the Proposed Changes Unnecessary

A. Important Additions To The Government's Investigative Resources

A number of very recent enactments have added provisions and significant resources to the Government's own anti-fraud machinery. In light of these provisions, it is questionable whether further changes to the FCA that encourage relators make sense.

Arguments have been raised that the large sums provided by Congress pursuant to the Recovery Act and the TARP warrant the proposed FCA amendments. Given the additional resources and authorities provided by both statutes and the adoption of mandatory disclosure requirements for both programs, such arguments are questionable.

First, the Recovery Act created a new Recovery Accountability and Transparency Board ("Board") "to coordinate and conduct oversight of covered funds to prevent fraud, waste, and abuse." Pub. L. No. 111-5 § 1521. The Board is comprised of 10 IGs, who already have existing authority and responsibility to detect and prevent fraud, waste, and abuse. The Recovery Act states specifically that the Board has the authorities provided under section 6 of the Inspector General Act of 1978 and that the Board may use the IG subpoena powers. *Id.* § 1524(c). In addition, the Board may hold public hearings and compel testimony from non-Federal (contractors, subcontractors, grantees, subgrantees -- including units of local government) individuals at such hearings. *Id.* § 1524(d). Significantly, while $84 million is provided for the Board itself, over $220 million more in appropriations is provided to increase IG staffing levels at the agencies with Recovery Act responsibilities. Large agencies such as DOT, HHS, Agriculture, EPA and others are receiving substantial sums.

Adding more oversight, the Recovery Act also created a "Recovery Independent Advisory Panel" ("Panel") to recommend actions that the Board could take to prevent fraud, waste, and abuse relating to Recovery Act funds. The Panel has separate authority to hold hearings, take testimony, and receive evidence. *Id.* § 1543. Both the Board and the Panel are authorized to obtain information from Federal agencies. *See id.* §§ 1525(b)(1), 1543(b).

Second, and importantly, with respect to audits and investigations involving Recovery Act funds, the IGs and the Comptroller General both are given new authority to interview, *i.e.*, take testimony from, any officer or employee of contractors, subcontractors, grantees and subgrantees. *Id.* §§ 902(a) and 1515(a). This is another "sea change" in the powers of the Government's auditors and investigators. Such authority to take testimony has been on the IGs' wish list since the IG statute was enacted.

In addition to the Recovery Act, the Emergency Economic Stabilization Act of 2008, which authorized the TARP, includes a number of special measures directed at identifying and addressing possible fraud, waste, and abuse in the Program. For example, Section 121 of the Act establishes a Special Inspector General just for the Program, who has the investigative authorities

provided in the Inspector General Act of 1978. Section 104 of the Act calls for establishment of a Financial Stability Oversight Board. The Board's responsibilities include "reporting any suspected fraud, misrepresentation, or malfeasance" to the Special Inspector General. Section 116(c) of the Act requires establishment of an internal control system for the Program. Section 116(a) directs that GAO provide oversight of "the activities and performance of the TARP and of any agents and representatives of the" Program as related to activities on behalf of or under the authority of the Program. The oversight encompasses the internal controls of the Program, efficiency of operations of the Program in the use of appropriated funds, compliance with all applicable laws and regulations by the Program and its agents and representatives, and the efficacy of contracting procedures, among other matters. The Act specifies a broad right of access by GAO to financial and other records related to the Program. As noted above, the TARP regulations have adopted a mandatory disclosure requirement.

B. Anti-Retaliation Provisions Overlap With New Whistleblower Provisions, And Will Add Unnecessary Costs To Companies And Local Governments

It is not clear why current law is considered inadequate to protect whistleblowers who have real information about violations. The proposed changes appear only loosely connected to uncovering and pursuing fraud, and they are so vague that they will result in a protracted period of litigation to sort them out. The cost/benefit analysis of these provisions appears especially weak.

The legislation proposes to change the definition of protected parties who may be a plaintiff from "employees" to include "any person." This would appear potentially to include consultants, independent contractors, third-party agents, or other non-employees who periodically are involved with the contractor. This appears unnecessary since such individuals have protections for breach of contract or tortious interference.

The legislation also proposes to change the definition of "employer" to "any person" that discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against the plaintiff. This language is so broad that it could potentially encompass a number of persons or entities who have only a very casual or even no relationship to the employer. In either of these instances, it is not clear what the value is in terms of identifying fraud or having useful potential information if the individual plaintiff or potential defendant is only tangentially connected or wholly unconnected to the employer.

Current law requires that the plaintiff's efforts have been "in furtherance" of a *qui tam* action. The proposed change would potentially allow actions for retaliation if the plaintiff claimed that he or she was attempting to "stop" an FCA violation, even though the person never intended to file a *qui tam* action.

The vagueness and lack of direct benefit of the proposed legislative changes is of special concern due to recent enactment of other whistleblower provisions – creating redundancy and unnecessary potential confusion.

The Recovery Act contains a new provision for state and local, as well as contractor whistleblowers. It provides that an employee of any "non-Federal" employer receiving

Recovery Act funds may not be discriminated against as reprisal for disclosing information that the employee reasonably believes is evidence of "a gross waste of covered funds," or "a violation of law, rule, or regulations related to an agency contract . . . or grant awarded or issued relating to covered funds." *Id.*§1553(a). A person who believes that he or she has been subjected to reprisal may complain to the IG who, subject to certain exceptions, must investigate and submit a report. Within 30 days of receiving such a report, the agency head must determine if relief is warranted and, if so, may order reinstatement and compensatory damages. *Id.*§ 1553(b) and (c). Additionally, complainants are authorized to bring an action in U.S. district court against the non-federal employer (after exhaustion of administrative remedies) seeking damages. Such actions are authorized without regard to the amount in controversy and are subject to jury trial under a *de novo* standard of review.

Other whistleblower protections have been authorized recently as well. In language similar to that contained in the Recovery Act, section 846 of the FY 2008 National Defense Authorization Act increased whistleblower protections under 10 U.S.C. § 2409. This section provides that contractor employees may not be discriminated against as reprisal for disclosing information that the employee believes is evidence of "gross mismanagement of a Department of Defense contract or grant, a gross waste of Department of Defense funds, a substantial and specific danger to public health or safety, or a violation of law related to a Department of Defense contract or grant." *National Defense Authorization Act for Fiscal Year 2008,* Pub. L. No. 110-181, 122 Stat. 3 (2008). A whistleblower may complain to the IG who must investigate and determine either that the complaint is frivolous or submit a report. Within 30 days after receiving the report, the agency head must determine if relief is warranted, and if so, may order reinstatement and compensatory damages. *Id.* Complainants are authorized to bring an action in US district court after exhaustion of administrative remedies without regard to the amount in controversy and obtain a jury trial under a *de novo* standard of review. *Id.*

It is not clear why any new legislation is necessary to address the same conduct. When Congress creates redundant laws directed at the same conduct, it imposes unnecessary burdens and costs on companies, local governments, agencies, and the courts.

CONCLUSION

Although the stated objective of the legislation is to enhance the FCA as a tool in the fight against fraud, waste, and abuse, the amendments are not focused on how the Government's abilities to fight fraud, waste, and abuse can be improved, but rather appear directed toward the questionable objective of making it easier for *qui tam* relators to bring and maintain FCA actions to enrich themselves and their lawyers. Such aims are quite visible in the proposed changes to the public disclosure bar, rule 9(b), the proposed requirement to provide CID information to relators, the change in the statute of limitations, and the vague adjustments to the anti-retaliation provisions.

However, there has been a dramatic change in the Government's own initiatives to detect and correct potential fraud, waste, and abuse at an earlier stage. The inescapable data regarding the low success rate of non-intervened *qui tam* cases, the promulgation of mandatory disclosure requirements, and the increase in the Government's own authorities and financial resources raise

serious questions about any further delegation of a function as inherently governmental as investigating and correcting the misuse of the Government's own funds.

Thank you again for allowing me to testify and I am happy to answer any questions that the Committee may have.

Mr. CONYERS. Jeb White, president of a couple of organizations that deal with the public interests and in dedicating their attention to combating fraud through promotion of the False Claims Act and other provisions.

TESTIMONY OF JOSEPH E.B. WHITE,
TAXPAYERS AGAINST FRAUD

Mr. WHITE. Chairman Conyers, Ranking Member Smith, and Members of the Committee, thank you for inviting me to speak here today. I am here on behalf of Taxpayers Against Fraud to voice our strong support for this commonsense law enforcement legislation, the False Claims Act corrections act of 2009.

Since 1986, over $20 billion stolen dollars have been recovered under the False Claims Act, which includes over $12 billion from qui tam whistleblowers' suits. And it is now widely considered the government's primary fraud-fighting weapon.

However, over the course of time, liability loopholes have been ripped into the act, and judge-created procedural roadblocks have emerged, greatly undermining the Justice Department's effort and permitting fraudsters to steal our tax dollars with impunity.

Late last congressional term, you sought to correct these problems by passing this very legislation. Unfortunately, time was short, and the bill ran out of time. However, with our country in the midst of an economic crisis and nearly $1 trillion stimulus dollars now vulnerable to fraud, it is now more important than ever to fix the problems that are holding back the False Claims Act.

We fully support every provision of this bill, but I wanted to highlight four problems that this legislation would fix. Number one, the bill clarifies that the act protects government money disbursed by government contractors. This clarification is badly needed to ensure that the act remains fully effective in an era in which so many government functions are outsourced to government contractors.

As we all know, we now rely largely on this outsourced government to award and oversee contracts, to disburse government funds, and to detect fraud in our government contracting system.

However, after a recent Supreme Court decision, false claims submitted to this outsourced government are now largely out of the reach of the False Claims Act. In this decision, the court read the act to apply only to false claims that are potentially reviewable by "the government itself."

This bill closes that loophole by focusing not on who actually inks the check, but on the nature of the funding.

Number two, the bill attaches liability when someone wrongfully retains an overpayment of government funds. This "finder's keepers" scheme is perhaps the most pervasive fraud attacking our American tax dollar, but the act remarkably does not reach these funds.

For example, the act currently does not apply when health care providers identify overpayment brought to them through mistaken billing and then makes the deliberate decision to keep those funds. This blatant dishonesty would run afoul to criminal law and, as Ms. Madsen said, would run afoul of the mandatory disclosure rule, but it would not violate the Federal False Claims Act.

Number three, the bill clarifies that a qui tam whistleblower with detailed knowledge of fraudulent schemes may proceed with his case, even if he can't get his hands on the actual invoices. This provision, which explicitly defines how Federal Rule of Civil Procedure 9(b) applies to qui tam suits. It is needed to remove the judi-

cial confusion that is currently undermining the country's fraud-fighting efforts.

The simple fact is that our Justice Department needs whistleblowers to provide the inside information about fraudulent schemes. They already have the invoices. They can access those through their files. They need the whistleblowers to point out the fraudulent schemes.

This is precisely why the Justice Department has repeatedly and consistently argued for the very standard codified in today's bill.

Number four, the bill vests solely with the government the power to dismiss cases that are based on public allegations. The act's so-called public disclosure bar is designed specifically to protect the government's interest from qui tam pleadings that merely copy public allegations of fraud.

Other provisions in the act are designed to protect the defendant's interests. But when it comes to the public disclosure bar, it is the government who should properly assess whether or not the whistleblower's pleading are parasitic on what is out in the public domain.

Yet, time and time again, defendants have improperly filed these motions under this provision and, time and time again, have delayed adjudication on the merit to wear down their opposition.

In many cases in which the defendants have filed these motions, there is no government investigation involving the public disclosure. If the government was concerned about it, they would and can and do file motions to dismiss these cases.

The opponents of this corrective legislation argue that the False Claims Act is working "well enough." They argue that we don't need the inside information of fraud provided by whistleblowers. They argue that the country should somehow be satisfied with recovering a portion of its stolen funds.

They offer up the recent regulatory life preserver as somehow plugging the gaping liability loopholes imparting upon the fraud-fighting vessel of the False Claims Act. The problem, of course, is that the False Claims Act relies upon inside information to uncover fraud.

I encourage you to recognize the realities of fraud, the realities of fraud prosecution, detection, and support this legislation to rectify the deficiencies of this act. For when it comes to fighting fraud, particularly in today's economic environment, it is not a matter about settling for well enough.

Thank you so much.

[The prepared statement of Mr. White follows:]

PREPARED STATEMENT OF JOSEPH E.B. WHITE

Testimony of

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

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

COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

April 1, 2009, 10 a.m.

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

Introduction

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

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

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

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

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

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

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

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

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

States."[1]

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

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

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

[2] *Allison Engine Co. v. United States ex rel. Sanders*, 128 S.Ct. 2123 (2008).

[3] 31 U.S.C. § 3729(c).

[4] *United States v. Hawley*, 566 F.Supp.2d 918 (N.D. Iowa 2008).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[12] *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).

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

[14] *Id.*

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

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

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

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

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

[15] *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617, 636-641

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

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

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

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

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

(E.D. Va. 2006).

[16] *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).

[17] "The Imprecise Meaning of War." Editorial. *The New York Times.* July 3, 2008.

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

members of Congress.

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

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

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[19] 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.

[20] 42 U.S.C. § 1320a-7b(a)(3).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[27] *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).

[28] *Id.*

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

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

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

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

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

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

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

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

[32] *Joshi* at 557.

[33] *Joshi* at 554.

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

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

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

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

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

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[34] *Joshi* at 557.

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

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

In an attempt to decipher the application of the FCA public disclosure bar, 31 U.S.C. 3730(e)(4), a court recently summarized the current sentiment: "The Court sympathizes with anyone litigating under the False Claims Act. Perhaps Congress will elect at some point to give legislative attention to the FCA to resolve some of the still unresolved questions about the Act's application."[35] This confusion is reflected in the 200+ published and unpublished rulings in well over 100 separate cases concerning the meaning of the "public disclosure" bar. The seemingly simple act of flow charting the steps in the public disclosure bar provision quickly produces a maze of diverging roads leading to confusion. The myriad of conflicting court decisions has facilitated the ability of defendants to evade liability, greatly undermining the Government's fraud-fighting efforts.

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

[35] *United States ex rel. Montgomery v. St. Edward Mercy Medical Center*, 2008 WL 110858 (E.D. Ark. 2008).

[36] H. R. Rep. No. 660, 99th Cong., 2d Sess. 22-23 (1986).

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

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

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

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

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

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

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[38] *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).

[39] *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).

[40] *Rockwell Int'l Corp. v. United States*, 127 S. Ct. 1397 (2007).

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

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

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

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

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

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

C. Setting Uniform Statute of Limitations Period

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

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

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

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

[42] *See* 31 U.S.C. § 3716(e).

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

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

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

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

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

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

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

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

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

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

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

A. Protecting Efforts to Stop Violations of the FCA

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

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

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

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

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

B. Extending Statute of Limitations for Anti-Retaliation Actions

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

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

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

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

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

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

[46] 545 U.S. at 419, n. 3.

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

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

Mr. CONYERS. Crime Subcommittee Chairman Bobby Scott?

Mr. SCOTT. Thank you. Thank you, Mr. Chairman.

Mr. Pistole, could you remind me how many agents that you had on board during the savings and loan crisis?

Mr. PISTOLE. Yes, Congressman. We had approximately 1,000 FBI agents who were dedicated to the savings and loan crisis.

Mr. SCOTT. And is this crisis significantly more complicated than the savings and loan crisis?

Mr. PISTOLE. Absolutely.

Mr. SCOTT. I remember the savings and loan crisis, a lot of the crisis was caused by just the fluctuation in interest rates or the long-term rates just put a lot of banks out of business, and it wasn't the fraud and the schemes.

Is more crime involved in these cases today than back then?

Mr. PISTOLE. We believe so. And, obviously, we are still assessing it on a case-by-case basis, in terms of the dollar losses. But based on the suspicious activity reports that have been filed and our ongoing investigations, yes, the losses here appear to be much more significant than in the S&L crisis.

Mr. SCOTT. And you had 1,000 then. How many do you have dedicated to the problem today?

Mr. PISTOLE. We have approximately 250 FBI agents dedicated to the mortgage fraud issue.

Mr. SCOTT. Okay. We have heard discussions of some of these loans and people looking the other way. If somebody packages up a bunch of worthless documents and passes them off as mortgages—worthy securities, where are the crimes?

Mr. PISTOLE. Well, clearly, there could be false statements that are made. There could be wire fraud, mail fraud, as you mentioned earlier, in the securitization of those—the packaging of those mortgages and other financial instruments.

So there is any number of fraud that may have been committed just depending on the actual fact of the investigation.

Mr. SCOTT. Ms. Glavin, you indicated that there are hundreds of convictions. Can you give us an idea of the disposition of some of those cases, including the fines and forfeitures that you were able to get?

Ms. GLAVIN. There have been hundreds of convictions since—between 2004 up until now for the many nationwide sweeps that the Justice Department has been involved in, in mortgage fraud cases.

I can get you, you know, some more specifics on the exact sentences, but what I can say is, during the hundreds of people that have been arrested, convicted and sentenced, people have gotten jail time. There is restitution that is required to be ordered by statute in those cases, and I would refer you also to some of the specific examples I gave in my testimony on some of the sentences and the fines.

Mr. SCOTT. Forfeitures?

Ms. GLAVIN. Forfeitures, as well, yes.

Mr. SCOTT. If billions and trillions of dollars have been lost in this mess, then trillions—billions and trillions have been made by somebody. Are we anywhere close to recovering a lot of what has been stolen?

Ms. GLAVIN. I probably should separate out the two concepts. Millions of dollars can be lost, but, speaking from the perspective of the criminal division, we can't necessarily go after that unless it is related to a crime.

So to the extent there is a crime involved, the criminal division and U.S. attorney's office will go after it, prosecute it, and we will seek restitution and forfeiture to the extent we can.

Separately, if there is not a crime and money lost, you can certainly look at that from the department's civil division and see what civil enforcement remedies are available and if it meets the statute.

But there is no question that the department will look, when appropriate, and seek restitution, forfeiture, and action, whether it be civil or criminal, to retain lost funding.

Mr. SCOTT. Are you using RICO and conspiracy statutes?

Ms. GLAVIN. I don't want to address this specifically using the RICO and conspiracy statutes unless they are appropriate and unless—I don't want to get out of—speak hypothetically, but we used what tools we have statutorily in fraud cases to go after—to go after these crimes.

Mr. SCOTT. Do you know whether or not your forfeitures are more or less than the cost of the prosecutions?

Ms. GLAVIN. I don't know that. I know, though, that each year—forfeitures in the last couple of years totaled hundreds of millions of dollars. I can't make an assessment based on what the cost would be of prosecuting a comparison to forfeitures.

Mr. SCOTT. Iraqi contractor fraud, do we have a problem with jurisdiction?

Ms. GLAVIN. We have been able to prosecute procurement fraud with respect to reconstruction in Iraq and Afghanistan. We have a procurement fraud task force that has been focusing on that. And there have been dozens of convictions as a result of our efforts.

So I know that we are able to have jurisdiction in a number of instances, and we have had successful prosecutions. As to the specifics of whether there have been problems encountered on jurisdiction, I am happy to speak with my people about that and get back to you. But I know we have had success in that area.

Mr. CONYERS. Lamar Smith?

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Chairman, my first question is to Mr. Pistole. This follows up just a little bit on the first question that Mr. Scott asked you, about the number of agents, but I want to bring it current. Would you go into a little bit more detail about the FBI's agents that combat mortgage fraud, number of agents assigned to mortgage fraud, number of task forces that exist that combat it, as well, maybe something about law, local and State law enforcement efforts, and then any other initiatives that the FBI is taking?

Mr. PISTOLE. Gladly, Congressman Smith. Thank you.

Going from 2005, just to put it in context, we had about 720 mortgage fraud investigations. We now have over 2,000 investigations. And then in fiscal year 2007, we had about 120 agents working. And as you have heard, we have more than doubled that to 250.

We also have approximately 50 financial analysts, intelligence analysts who help work—just from the FBI—who work on this. And then there is an additional approximately 250 State and local and other Federal agents and officers who work on the mortgage fraud matter.

So that is a broad brush on it. We also have people working securities fraud and in corporate fraud.

But in terms of the working groups and task forces, we have 18 regional mortgage fraud task forces and 47 working groups, so a total of 65 regional task forces or working groups addressed to mortgage fraud. The other corporate and securities fraud address things such as the Ponzi schemes, such as Madoff, and then other issues. But that is just a brief overview on the mortgage fraud.

Mr. SMITH. Thank you, Mr. Pistole.

Ms. Glavin, if I could ask you in regard to Federal criminal laws whether there are any gaps or whether there are any changes that you would like for us to make that will enhance the prosecution of mortgage fraud?

Ms. GLAVIN. Yes, Congressman, the department has already expressed its support for the bill—the Fraud Enforcement and Recovery Act, which just passed—came out of Senate Judiciary Committee, and it contains what we would call enhancements to some of our fraud statutes. Some of the enhancements in those statutes mirror a piece of legislation I know is in draft form here in the House, the Fight Fraud Act.

Those enhancements would be that we would support expanding the definition of financial institutions——

Mr. SMITH. Okay.

Ms. GLAVIN [continuing]. In fraud crimes, such that they would include mortgage-lending businesses. That would make it easier for us to bring prosecutions.

In addition, we would propose amending the major fraud statute, 18 USC 1031, it is focused on procurement fraud right now. And we would ask that it be amended such that it would include funds relating to TARP or economic stimulus.

So those are some of the revision that we would support.

Mr. SMITH. Those are good suggestions. Thank you. And I hope we take them under advisement, as well.

Ms. Madsen, let direct my next and final question to you. And let me mention some statistics in regard to the False Claims Act and ask you to respond.

More than 90 percent of the amounts recovered in the false claims cases brought by private plaintiffs have come from the 20 percent of the cases in which the Federal Government has intervened. That means that only 10 percent of recoveries have come from the 80 percent of the cases where the Justice Department has declined to pursue them.

Could these numbers be evidence of the lack of merit to the majority of the False Claims Act cases brought by private plaintiffs?

Ms. MADSEN. Congressman Smith, I think there is probably some truth in that statement. I don't know that it is an absolute truth.

Mr. SMITH. I am just looking at it for a possibility here.

Ms. MADSEN. Possibility. I think—I mean, we know that the——

Mr. SMITH. Absolute truths are hard to find.

Ms. MADSEN. Right, right, especially—never mind. [Laughter.]

The Justice Department reviews qui tam complaints very carefully, investigates them, and makes very thoughtful decisions typically about whether to intervene or not intervene. So I think you can safely say that, when the Justice Department decides not to intervene, they have made a conclusion that the case isn't probably worth—doesn't have the merit to be worth their time.

Mr. SMITH. And it seems that that is the case most of the time, is the point.

Ms. MADSEN. My friend, Mr. White, here would say, but, you know, in those additional cases, the relater should be allowed to proceed because there may be another in there somewhere and the Justice Department might get back in and there might be a recovery.

I think the point here really is that, is that the most efficient really way to do this? Is that the right way to expend funds, particularly now that we have this mandatory disclosure rule, where the information is available to the government at an early stage to make its decisions about whether to proceed? Is that really the most efficient way to spend the money?

Mr. SMITH. Okay. Thank you, Ms. Madsen.

I yield back, Mr. Chairman.

Mr. CONYERS. Hank Johnson?

Mr. JOHNSON. Thank you, Mr. Chairman.

You know, we live in a country where most of us are proud of the system that we live under. And we make certain assumptions about our system. And one the aspects of the criminal justice system is that, you know, it is an adversary system, both civilly and criminally. You have two sides. You have a judge to rule on the law. You have a jury on occasion or—and you have a right to a jury trial.

And citizens, or peers, make the decisions on the substance of the allegations against you. And both—in order for that adversary system to work, one of those parties should not have their hands tied behind their back and the other one is free and big and healthy.

And, you know, it is predictable what is going to happen in that kind of a situation. And regardless of whether or not the accused is innocent or guilty, the fact is that justice in this country comes when there is a fair trial.

And so I support all measures that get at criminal misconduct. And also, you know, not to be left out of the consideration is the criminal defense bar.

I know a lot of—under these measures that are being proposed, they bulk up the prosecution's ability to get at various crime, but I see nothing that would actually assist the criminal defense bar in terms of having the resources to defend these cases for people who will need public defenders.

Of course, there is a group of—we certainly need to change our focus and concentrate more on the white-collar—I mean, upper echelon of the fraudulent activity, while at the same time dealing with those who perhaps may not have the funds to have an attorney, so they need a public defender.

Would Ms. Glavin and Mr. Pistole, would you all support additional funding for the public defender's office federally, as well as

grants, Federal grants to States to beef up their public defender programs?

Ms. GLAVIN. I have not seen any type of proposed legislation on this. And I am sure that the department would be happy to take a look at this.

Certainly, the department agrees that, in every case in which you have a vigorous prosecution, you are entitled to very competent defense counsel to defend against the prosecution. So I am sure that the department would be happy to look at any proposal that you might have.

I am just not as familiar with what the funding levels are, so I can't speak to that.

Mr. PISTOLE. Yes, Congressman, obviously, fundamental fairness and the rule of law assume that there is an adequate defense. And that is critically important to our system.

I would be glad to work, obviously, with the department and the Committee to further explore that.

Mr. JOHNSON. Okay, Mr. Pollack—Pollack or Pollack?

Mr. POLLACK. Pollack, Congressman.

Mr. JOHNSON. I am sorry. Can you comment on that specific issue, as well?

Mr. POLLACK. Yes, Congressman. I think you have hit on a vitally important issue, and that is, as we beef up the Federal prosecution and investigation of these cases, we equally have to beef up the defense function. It is the only way that you are going to make sure that innocent people are not convicted along with the guilty.

I talked with Congressman Scott about the vast disparity between the resources that are being allocated to the prosecution function and the defense function. And I think that disparity has to be lessened.

I would also note that your point about public defenders is an apt one. And that line in terms of where the higher echelon is that can still afford the private bar versus the increasing numbers that are turning to public defenders keeps moving, and that is largely a function of the forfeiture laws that allow, at the time that a person is charged, while they are still presumed innocent and have been found guilty of no wrongdoing, to have their assets restrained and not available even for the use of their own defense, so that individuals who had had substantial resources nonetheless are turning to the taxpayer to fund their defense.

And as long as that continues to be true, it is all the more important there are public resources available to defend these cases, which are necessarily complex cases that require a lot of resources to defend.

Mr. JOHNSON. Anyone else want to comment?

If I may, Mr. Chairman—okay, all right, thank you all very much.

Mr. CONYERS. Dan Lungren?

Mr. LUNGREN. Thank you very much, Mr. Chairman.

Mrs. Madsen, thank you for your testimony. I appreciate the fact that you have stated that Chamber's traditional position in supporting DOJ and the inspectors general, working to detect, investigate and prosecute fraud involving taxpayer funds.

However, as one of the sponsors of the False Claims Act amendment, I am a little disappointed in the Chamber's position here. And I am trying to find out exactly what the position is, because you said two things. They both may be true and compatible, or they may be neither/or.

You said, number one, I thought, that the False Claims Act has not been effective. And you gave the numbers of the relatively small amount of recoveries. And then, on the other hand, you said you don't support strengthening it.

So what I am trying to find out is, are you saying the Chamber's position is you don't support the false—an effective False Claims Act or are you saying that you would support it if it were effective?

Ms. MADSEN. Mr. Lungren, you may have misconstrued my testimony. The statistics that the Department of Justice publishes show that in the cases in which the Department of Justice chooses to intervene, which is about 20 percent of the cases, are responsible for the lion's share——

Mr. LUNGREN. I understand that. I heard that. You said that. What I would like to know is, do you support strengthening the False Claims Act to make it effective? Or do you believe it is inherently ineffective?

Ms. MADSEN. We believe the False Claims Act is effective as it sits and does not need these changes.

Mr. LUNGREN. Okay, so it is effective, even though you have said that the results are paltry. I mean, that is what I can't quite understand.

Again, I am biased in favor of it. People should know that it was originally called Lincoln's Law. It wasn't just Abraham Lincoln signed it, he thought it was so important. You read the language of the original act, it says it is to reward to the informer who comes into court and betrays his co-conspirator, indicating that there was a specific purpose to try and attract individuals who had knowledge to come forward.

The second observation I have is that we have heard that the Department of Justice has a lot of work to do, has a lot of other things to do. Perhaps they can't get everything.

And perhaps even if a smaller amount is gotten by these individual relaters, as opposed to the—as opposed to the Justice Department, the fact that they recovery means that that money was falsely obtained by the people against whom it was directed.

The other question I would have is that, in 1986, we revived this law under President Reagan. As a matter of fact, the Reagan administration at that time sent us letters talking about how it was necessary for us to strengthen it. And as I recall at that time, some business groups supported the strengthening of the act so that it could be utilized.

And do you know—I don't think you were there in 1986. I happened to be here in 1986. But do you know what the Chamber's position was back in 1986 when we improved the law?

Ms. MADSEN. You are correct that I was not here. But my recollection is that there were concerns about it. I think what has become visible, though, in the 20, what, 22 years since the law has been effective——

Mr. LUNGREN. I was a mere child when I was here. I just——

Ms. MADSEN. Yes, I would have been a mere child, as well. The—is that when—when the statute is used by the Justice Department and when the Justice Department gets involved in a case that is—the law is very effective.

The question is, for those non-intervening cases, whether that really is the best use of the government's money for those very, very small number of recoveries.

And the reason I mentioned the mandatory disclosure rule is because the way the rule operates is that the contractors and grantees—and the rule also applies to Medicare intermediaries—has to disclose.

Mr. LUNGREN. Right, no, I understand what you are saying.

Ms. MADSEN. They have to disclose.

Mr. LUNGREN. You are supportive of those new improvements on those laws. I guess the question would be whether we need a multiplicity of laws to go against the fraud that might be there.

I would just say that in 1986, the Business Executives for National Security, which is a group of executives basically in the "military industrial complex," came forward testifying, saying they supported strengthening the law at that time, because, and these are their words, "It is supportive of improved integrity to military contracting. The bill adds no new layers of bureaucracy, new regulations, or new Federal police powers. Instead, the bill takes a sensible approach of increasing penalties for wrongdoing and rewarding those private individuals who take significant personal risk to bring such wrongdoing to light."

And all I would say is, I think that testimony of that business organization, Business Executives for National Security, in 1986 is as valid today as it was then.

Mr. BERMAN. Would the gentleman yield? I would ask for unanimous consent for one additional minute.

Mr. LUNGREN. Of course I would be happy to yield to the gentleman who is going to agree with me.

Mr. BERMAN. It is the only reason I asked.

The gentlelady raises this issue, which I will pursue on my own time, of cases where the qui tam plaintiff brings the case, the Justice Department decides not to join in, but isn't it—but I would just—this bill has nothing to do with changing that particular issue.

This is a bill that strengthens the law and deals with some unfortunate court decisions that apply whether it is a qui tam plaintiff without Justice Department intervention or the Justice Department taking over the lead role in pursuing the case brought by the qui tam plaintiff.

In other words, the testimony regarding non-intervention by the Justice Department and the merits of those suits really has nothing to do with the bill that is now in front of us. That is the only point I wanted to make.

The bill we are dealing with deals with the substantive law, not the issue of what happens to a case where the Justice Department decides not to intervene.

Mr. LUNGREN. I thank the gentleman. And before returning to my time, I would just say, Mr. Chairman, we went through a period of time in World War II where Secretary Biddle at that time

thought that, for some reason, the approach that underlies the essence of the False Claims Act somehow interfered with the government's opportunity to investigate and the government's opportunity to contract for needed services.

And that led to the emasculation, essentially, of the law. And it was—again, I would just reiterate, during the Reagan administration, that there was a reconsideration of the question of whether or not you could just rely on the Justice Department to utilize its resources in these circumstances where we needed again to resurrect this law.

And all I would say is that what we are attempting to do with our amendments is to correct some specific legal decisions that seem to call into question whether or not you can go after subcontractors for fraud. And we also facilitate the ease with which the plaintiff's case can be dismissed by the plaintiff and the interaction of the Justice Department and the original bringer of the action.

So it really goes to the question of whether you are going to continue to have an effective False Claims Act.

And thank you very much, Mr. Chairman, for the time.

Mr. CONYERS. Howard Berman?

Mr. BERMAN. Thank you, Mr. Chairman. I just wanted to make a couple of comments and then ask a couple of questions.

It has already been mentioned that this law has brought in $22 billion to the taxpayers of recoveries from fraudulent actors, by people who have contracted with the government. In recent months, we have taken extraordinary steps to revive our economy. We have used government funds to shore up private entities. We have made a massive investment of taxpayer dollars to stimulate the economy.

We can have a debate about the merits of any of those bills and policies, but the one thing we know is that, in the context of all these different programs, there will be some bad actors who will try to defraud the government through these programs. And that makes it even more important that we at this point strengthen what has proven to be an enormously successful tool against fraud.

So there is a particular logic to the timing of doing this now, given what we have done in terms of public investments and private sector or the use of contractors, these kinds of things.

I was amused to hear the opponents' primary argument against a bill which seemed to be that the False Claims Act doesn't need any fixing because it worked well enough or, as Ms. Madsen, said it is even more than sufficient. I don't agree with that conclusion.

And, by the way, I do have a vivid memory of 1986, because—as young as I was—that and the Chamber—had more than concerns about the bill. They were in outright opposition to the bill and spent the next several years after the bill passed—the bill that was signed by President Reagan—trying to repeal or dilute a variety of its provisions. That was the Chamber's position at that time.

What we have here is several judicial decisions that have weakened key provisions of the False Claims Act, narrowed its application, misconstrued congressional intent, and I think, in many cases, the clear language in the law and the legislative history, leaving entire categories of fraud outside the reach of the law.

Mr. White has talked about a number of those issues in his testimony, but I would like to ask Mr. White two questions.

First, the Chamber asserts that only 2 percent of the recoveries under the False Claims Act have come from qui tam suits that the government declined to join, putting aside that a huge amount of the $22 billion comes from cases that, because qui tam plaintiffs filed them, the Justice Department had to go through a process, which in many cases caused them to join that lawsuit and doesn't speak to those monies.

But that 2 percent figure, it seems low to me. And does that accurately reflect the contributions of these cases? Give us some examples of why that number doesn't tell the whole story.

Mr. WHITE. Mr. Berman, first off, I wanted to thank you for having the foreclosure back in 1986 to resurrect this bill.

The second thing is, you know, during my tenure at Taxpayers Against Fraud, I have worked with a lot of good Federal and State government attorneys who are as zealous advocates of protecting the public—but I can assure you—and they would tell you firsthand—that they need the help of whistleblowers to uncover what is going on inside of that company. Putting aside the mandatory disclosure rule, where the company gives you what they say is going on, that inside information from whistleblowers is key.

To provide you one example of why that number isn't accurate and doesn't reflect truly what happens, in 1989, a case was filed by two Northrop Grumman employees against the contractors involving radar-jamming devices. And what the employees were saying was that they were ripping off the government, the fact that they were over-billing, they were doing a whole host of fraud that happened.

The government looked at the case and, 3 years later, decided to decline to intervene in that case. The relaters and their counsel, convinced that there was something wrong going on, proceeding forward for the next 9 years on their own, investigating, spending hundreds of thousands of dollars, investigating what was going on there.

Finally, in 2002, 12 years after initially filing that case, the government intervened and the case settled in 2006 for over $160 million. That case, in the Department of Justice statistics, is listed as an intervening case, but I posit that, for 9 years, the government wasn't there. It was because of the efforts of that relater's counsel.

So that 2 percent number doesn't reflect the billions—and the number is well into the billions, and I can give you a more accurate count—of the times where the government declined, the relaters and their counsel moved forward, and the government subsequently intervened. Those cases happen time and time again to the tune of well over $1 billion.

Mr. CONYERS. Bob Goodlatte?

Mr. GOODLATTE. Well, thank you, Mr. Chairman.

And I thank all these panelists for their contribution today.

I would like to start by asking a question of Acting Assistant Attorney General Glavin.

Welcome. You mentioned that the Department of Justice is working with the inspector general of the TARP to find ways to avoid fraud and abuse of the stimulus package fund. And I wondered if

you could tell us in what ways you are acting together to accomplish this.

And do you plan on harnessing technological tools, like tracking software, to track where the funds from TARP and the stimulus bill are going and how they are being used?

I recently introduced legislation along with Congresswoman Maloney from New York that would require the use of software to aggregate all the government reports to get a full picture of how the recipients of the TARP money are using it. And I wonder if you are familiar with that technology and if you are planning on deploying it.

Ms. GLAVIN. I am not as familiar with the technology just mentioned. What I can say about the department's relationship with the TARP is that, one, it is a natural relationship, because the TARP is going to be doing investigations. And, of course, the department would handle prosecutions or referrals. And we have already, you know, had discussions with the office of the SIGTARP about anticipating that and about how to do it.

Secondly, I know there is coordination with the SIGTARP, in terms of I know that they are—that office has met a number of times with the FBI to sort of talk about coordinating and leveraging resources.

I know the SIGTARP has also formed a task force with a number of different investigative agencies to talk about how to share information, leverage resources, do the necessary training, with a bill that includes a lot of sub-provisions to it and can sometimes be complex to understand how the monies go out and what to look for in terms of fraud.

I know that the department also has had discussions with the SIGTARP, specifically about our experience with the False Claims Act and whistleblowers. SIGTARP has a hotline, and there would be a natural partnership there.

So it is—we have an ongoing dialogue with the SIGTARP, as well as we do with most of the inspector general community.

Mr. GOODLATTE. In your communication with them, would you look into this technology, as well, and have conversations with them about the possibility of utilizing it?

Ms. GLAVIN. I would be happy to follow up on that once I get a little more familiarity with it, sir.

Mr. GOODLATTE. Great. Thank you.

And a follow-up question on a separate subject. What statutes is the department using in bringing charges against those who engage in predatory lending or mortgage companies that defrauded their customers?

Ms. GLAVIN. I mean, the department uses its traditional statutes, such as the mail fraud, wire fraud statute. The amendments to the major fraud statutes, as well as the bank fraud statutes, that would expand the definition of a financial institution to include mortgage-lending businesses would give us another tool in which to prosecute people who defrauded mortgage-lending businesses, such that we don't always have to look for mails and wires and see that they are further into the scheme.

One of the reasons that we support the amendments in the FERA legislation is because it would certainly make some of the

crimes easier to explain and present, in terms of our grand juries and to juries.

Mr. GOODLATTE. Thank you.

Mr. Pistole, it is my understanding the FBI has currently 18 regional mortgage fraud task forces. And I wonder if you could explain that to us. Why were these task forces set up on a regional basis like that?

Mr. PISTOLE. Yes, Congressman. The idea was to leverage the resources beyond the FBI with the other—both Federal, State and local investigators to approach the issue from a broader perspective.

So in addition to those 18 task forces, we had the 47 working groups. And we also have the national mortgage fraud team at headquarters to try to use intelligence, such as you were talking about with software, to drive those investigations, rather than sitting back and waiting for referrals, whether it is from SIGTARP or somebody else.

So we have members from other, for example, HUD or Federal Reserve or State or local police, perhaps, that receive referrals trying to work in a unified way to bring a broader perspective, rather than just this specific, discrete area that would limit our information.

The whole idea is to push as much information as we can to our partners, obviously, while protecting privacy and all those issues, but making sure that we have the best available information across the country. And we believe these regional task forces and working groups are the best way to accomplish that.

Mr. GOODLATTE. Are you getting results?

Mr. PISTOLE. We are. We have had a number of successful matters. You heard about one earlier in Chicago, dealing with a recent takedown of an undercover operation, where we had some very good successes. And that is all part of this effort to leverage our resources with other agencies.

Mr. GOODLATTE. One more question, if I might, Mr. Chairman, to Mr. Mintz. Are you seeing results from your public awareness campaign to educate consumers about these various fraud schemes?

Mr. MINTZ. Thank you for asking.

Frankly, no. And the reason is, as I said in my testimony, I think that there are so many multiple conduits from which people are hearing about help and so many multiple conduits to which they would go for help that the ability of swindlers to step in and interpose themselves as part of the help is very difficult to stem on a local level.

It is why I have suggested that this Committee should consider using the 311 systems and the 211 systems across the country as the one tamperproof, already-trusted source through which people would be able to get information.

From a local perspective, when I step up in front of a camera and tell the public, "Be careful of X," you need to tell them where to go and where it is safe. And so if you all could leverage the resources and the regulations to make sure that, for example, only through 311s and 211s could you access HUD-certified counselors and add in a ban on the fee-for-service in this industry, you would

effectively shift the tide, and people would be able to turn to the one number that they already know, the one number that nobody can pretend is them, and access those services.

Without that, the truth is, it is a very complicated message, and it is much easier to be swayed by the swindling messages.

Mr. GOODLATTE. Thank you.

And thank you for your forbearance, Mr. Chairman.

Mr. CONYERS. Sheila Jackson Lee?

Ms. JACKSON LEE. Mr. Chairman, thank you for holding this hearing. And it is both needed and maybe sad, a sad commentary on where we are with respect to the basic commitment to legal structures that will protect consumers.

We have seen an enormous amount of challenges to the system. And I would suggest to my good friend, who is representing the criminal defense lawyers, that it is not expanded as much as it is fixing and restructuring, because apparently we have some glaring loopholes that large trucks have been able to go through both in the metaphoric manner, as well as literally.

And I go to you, Assistant Attorney General Glavin, on why we are where we are. Let me just pose to you the fact that we have seen AIG prosecution, at least some malfeasance. We have seen it from a former hometown company of mine that had great respect previously, Enron. We have seen it from WorldCom, Adelphia. We have seen it from another native Texan, Stanford.

We have seen these actions. We have seen a proliferation of major corporate fraud cases when we have also seen over the years, as our good friend from the criminal defense lawyers have indicated, maybe increase in penalties.

Can you tell us what we are doing wrong that we are still seemingly having the atmosphere that creates or seems to grow these failures?

Ms. GLAVIN. Congresswoman, where there is a lot of money involved—and this is an age-old problem—when money goes out the door, lots of money involved, greed is involved. It is not something that you could probably ever stop to the end of time.

And what we do at the department is, when we see problems form, such as we saw with big corporate fraud in the last 10 years, we put something out there to address the problem, like the corporate fraud task force, do what we can to get in front of it and prosecute those crimes, educate prosecutors as to the new schemes that develop.

We see it again. The Hurricane Katrina fraud task force formed a few years ago. As soon as we recognized there would be a big outlay of funds in connection with that, we knew there would be fraud.

Ms. JACKSON LEE. So you are saying that the climate generates bad behavior in many instances sometimes. Let me just ask—give me one major new legal tool that you would want as part of the DOJ.

Ms. GLAVIN. I have to pick one?

Ms. JACKSON LEE. Just one.

Ms. GLAVIN. We support the passing of the Fraud Enforcement Recovery Act, so I would say that is one, even though it is got several legal tools in it. But at this time, we would support the passage of that, and it went through Senate Judiciary Committee.

Ms. JACKSON LEE. All right.

Let me move quickly to Mr. Rheingold and ask the question, do you think we should add language in—either through legislation, a freestanding bill, and otherwise? There are some fine lines between how the CEO of corporations seems to emerge undercover.

We know that our good friend from Countrywide is still moving about and certainly has quite a bit of freedom here in the United States. But we are trying to craft language that suggests that malfeasance, inappropriate behavior bars you from ever doing business with the United States, whether you come back as a turtle or you come back as a dove, which is what many of the corporations do.

What do you think about that added enhancement, though, you know, barring doing business, obviously, means that if Countrywide, for example, had Freddie Mac and Fannie Mae loans and tragically so many people were hurt, that they just can't be in the business, no matter how they come back? What do you think about that?

Mr. RHEINGOLD. I think fundamentally it is a good idea. I think one of the questions, when we turn about all this money out there, we had all this money that wasn't being regulated. We had all of this money that was being pushed out there, and it was the wild, wild west. All sorts of bad behavior could go on because nobody was being responsible for it and nobody was being held accountable.

So if you begin to hold the CEOs of these major companies accountable for the culture and the behavior of their companies, maybe that cost-benefit analysis will work in the future.

So that next time lots of money is out there and lots of money can be made, they might think twice about creating a corporate culture that engages in systematic fraud.

Ms. JACKSON LEE. And let me quickly ask—and I would like to ask the FBI director if he would follow up on a question that I am going to ask, in terms of any tools that you need, and particularly on these whistleblower cases, which I think are very crucial. People need protection in the workplace.

But, again, Mr. Rheingold, if, for example, you suffer—this is your consumer hat now, not necessarily your legal hat—suffered in your credit score because you were a victim to predatory lending, should you have an ability to seek an appeal or reprieve on a score that went down because of your victimizing through that predatory lending process?

Mr. RHEINGOLD. That is a whole other issue, but, yes, there are significant issues around consumers' ability to fix their credit score. Credit reporting and people's financial information is being ruined on a daily basis based on loans they should not have gotten, loans they didn't get.

And, in fact, one of the things that we need to do to improve the Fair Credit Reporting Act is that people have more control over their financial information and correct errors in that. And right now, we have a fair credit reporting system that simply doesn't work properly to protect consumers.

Ms. JACKSON LEE. But if you would conclude—I just need you to tell me about the two that you may need on the whistleblower aspect. The FBI usually is investigating on the basis of whistleblower claims under some of the bills that have been here, but what do

you need further to provide an enhancement and protection of that process?

Mr. PISTOLE. Well, I agree with Ms. Glavin's comments. Our issue is more simply the number of resources, rather than the legal tools, other than what she has mentioned. So where the Committee and the Congress can be most helpful for the FBI and others is—are in the amount of resources that we have to address this critical issue.

Ms. JACKSON LEE. And you investigate both Federal employees and outside people who are whistleblowers?

Mr. PISTOLE. Sure.

Ms. JACKSON LEE. All right.

I yield back. Thank you.

Mr. CONYERS. Bill Delahunt?

Mr. DELAHUNT. Thank you, Mr. Chairman. I want to pose a question.

I mean, the economic crisis that we are in the midst of, the cause, if you will, of that crisis is not necessarily fraud, but it is the lack of a regulatory scheme—as I think you suggested, it was the wild west.

If we had the tools and the resources had been allocated, would it have prevented the economic—or the financial crisis that we are experiencing?

Mr. RHEINGOLD. I think the answer is absolutely yes. I talked——

Mr. DELAHUNT. It would have?

Mr. RHEINGOLD. It absolutely would have. I talked about what we saw——

Mr. DELAHUNT. Without having a regulatory regime that——

Mr. RHEINGOLD. Oh, no. No, we need an—absolutely, we need to have a restructured regulatory market where accountability is in place.

What we saw in the 1990's in communities like Roxbury, and Jamaica Plain, and Mattapan, and communities in Chicago and Atlanta, were the same fraud that now permeates the whole country. And we knew it was going to happen because there was no accountability and there was no regulatory structure that actually protected the consumer from the bad behavior of banks.

And when States attempted to address those problems, most notably Georgia, the Federal regulators not only stopped those consumer—they not only did not support those consumer protections, but they pre-empted those consumer——

Mr. DELAHUNT. Right. And I understand that. But I guess what I am saying is, is that—was there violations of a criminal statutory scheme that led to the crisis that we find ourselves in now?

Mr. RHEINGOLD. I am——

Mr. DELAHUNT. Or is it lack of regulation?

Mr. RHEINGOLD. I am not a criminal attorney.

Mr. DELAHUNT. Okay.

Mr. RHEINGOLD. But do I think that fraud permeated the mortgage lending industry for the last dozen years? Absolutely.

Mr. DELAHUNT. But your understanding of fraud and my understanding of fraud might very well be the same, but it might be a behavior that currently is not criminalized.

Mr. RHEINGOLD. That could quite be possible. Again—yes.

Mr. DELAHUNT. Let me ask the acting—the assistant attorney general, Ms. Glavin, her opinion on that.

Ms. GLAVIN. I am not in a position to say what caused the current economic crisis.

Mr. DELAHUNT. Okay.

Ms. GLAVIN. What I do know is, looking back in retrospect, we have now seen a lot of schemes, such as Ponzi schemes, that could have gone on otherwise undetected that were exposed because people wanted to get their money out, it wasn't there——

Mr. DELAHUNT. The collapse itself——

Ms. GLAVIN. Yes.

Mr. DELAHUNT [continuing]. You know, revealed what was going on.

Ms. GLAVIN. Yes.

Mr. DELAHUNT. But we don't know or it is subject to debate—my own opinion is it did not precipitate the collapse, but the lack of regulation and a lack of transparency. And I am not suggesting that we don't need more resources and we don't need to review and provide more tools.

If it comes down to tools or resources—and I will direct this to the government witnesses, what is more important?

Mr. PISTOLE. If I could start off with that, Congressman, going back to your first part of your question, the issue is partially—from an audit standpoint, for example, you look at fraud, waste or abuse, obviously.

Mr. DELAHUNT. Right.

Mr. PISTOLE. Some of the activity may have been fraud, obviously was fraud. Some may have been waste or abuse, which may not be—rise to a level of criminal violation.

Again, from our perspective, we are looking at resources, because we are trying to do a lot of different things and trying to be proactive, rather than just reactive. We wouldn't need additional resources to do that. So that is our—from the FBI's perspective, it is a resource issue as much it is legal regimen issue.

Mr. DELAHUNT. Ms. Glavin?

Ms. GLAVIN. They are both pretty important.

Mr. DELAHUNT. Okay.

You referenced the TARP and I think it was the inspector general. And yet what I found particularly disturbing recently was a comment by the chair of the congressional oversight panel expressing frustration in the—with the Treasury Department not providing answers to the oversight panel.

You are seeing—at least from what I am hearing, you represent that you are working in a collaborative way with Treasury? And if so, what is your secret, that somehow you are doing a—you seem to be getting more cooperation than Congress.

Ms. GLAVIN. Speaking from the criminal division, as a criminal prosecutor——

Mr. DELAHUNT. Right.

Ms. GLAVIN [continuing]. We are working with the SIGTARP.

Mr. DELAHUNT. Give me—what does that mean, that acronym?

Ms. GLAVIN. Well, I mean, when it happens is what we do when we work with any inspector general's office.

Mr. DELAHUNT. So it is the inspector general's office?

Ms. GLAVIN. Yes, when I refer to the SIGTARP, I am referring to Mr. Barofsky, Neil Barofsky.

Mr. DELAHUNT. And his team?

Ms. GLAVIN. Yes.

Mr. DELAHUNT. And does he have the resources?

Ms. GLAVIN. You are going to have to ask him a little bit more. But what I can say is that there have been—I know he has had discussions with other investigative entities about how to leverage the resources.

He has a certain amount of money in his budget. He wants to see if he is doing things that may perhaps overlap or he can work with FBI on so that they can pool their resources.

Mr. DELAHUNT. I would hope that you and the FBI would coordinate with the inspector general and provide answers to the congressional oversight panel when they are proffered.

Mr. PISTOLE. Right. We are, Congressman. And he is building his staff—I think he is up to 50 now—from where he was a couple months ago when he had just a handful.

We actually had a meeting with him and his staff in New York yesterday. We meet regularly here. We have agents and analysts embedded with him to make sure that we can de-conflict and use those resources in the best possible way. And I would defer to him on the response to the oversight.

Mr. DELAHUNT. That is all I have, Mr. Chairman.

Mr. CONYERS. Thank you.

Mr. DELAHUNT. I thank the panel.

Mr. CONYERS. I thank them, too.

This has been an extremely polite discussion about some matters that I don't think have been covered adequately. To be honest with you, the failures of the Federal justice system are so enormous that to rationalize them with a few bills that will be taken up, and everybody will agree with, does not uncover the failure to anticipate.

You know, we all have talked about—we know that when huge amounts of money go out that there are going to be problems that follow it. But there is nothing in the Department of Justice annals that show that anybody did anything about what they already know would happen.

It is always after the fact. And this hearing only sets a predicate for us to begin to try to get in front of the curve and not come rushing in with these homilies about the—we know people do wrong, will do wrong when the large amounts of money are flowing around. So if I don't feel happy about what I have heard, it is because it is correct.

So I thank you very much. And the Committee is adjourned.

[Whereupon, at 12:22 p.m., the Committee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

I

111TH CONGRESS
1ST SESSION

H. R. 1748

To amend title 18, United States Code, to enhance the investigation and prosecution of mortgage fraud and financial institution fraud, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 26, 2009

Mr. CONYERS (for himself, Mr. SMITH of Texas, Mr. DELAHUNT, Ms. JACKSON-LEE of Texas, and Mrs. BIGGERT) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committees on Oversight and Government Reform and Financial Services, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To amend title 18, United States Code, to enhance the investigation and prosecution of mortgage fraud and financial institution fraud, 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 ''Fight Fraud Act of 2009''.

SEC. 2. AMENDMENTS TO IMPROVE MORTGAGE, SECURITIES, AND FINANCIAL FRAUD RECOVERY AND ENFORCEMENT.

(a) DEFINITION OF FINANCIAL INSTITUTION AMENDED TO INCLUDE MORTGAGE LENDING BUSINESS.—Section 20 of title 18, United States Code, is amended—

(1) in paragraph (8), by striking "or" after the semicolon;

(2) in paragraph (9), by striking the period and inserting "; or"; and

(3) by inserting at the end the following:

"(10) a mortgage lending business or any person or entity that makes in whole or in part a federally related mortgage loan as defined in section 3 of the Real Estate Settlement Procedures Act of 1974.".

(b) MORTGAGE LENDING BUSINESS DEFINED.—

(1) IN GENERAL.—Chapter 1 of title 18, United States Code, is amended by inserting after section 26 the following:

"§ 27. Mortgage lending business defined

"In this title, the term 'mortgage lending business' means an organization which finances or refinances any debt secured by an interest in real estate, including private mortgage companies and any subsidiaries of such organi-

zations, and whose activities affect interstate or foreign commerce.".

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 1 of title 18, United States Code, is amended by adding at the end the following:

"27. Mortgage lending business defined.".

(c) FALSE STATEMENTS IN MORTGAGE APPLICATIONS AMENDED TO INCLUDE FALSE STATEMENTS BY MORTGAGE BROKERS AND AGENTS OF MORTGAGE LENDING BUSINESSES.—Section 1014 of title 18, United States Code, is amended—

(1) by striking "or" after "the International Banking Act of 1978),"; and

(2) by inserting after "section 25(a) of the Federal Reserve Act" the following: "or a mortgage lending business, or any person or entity that makes in whole or in part a federally related mortgage loan as defined in section 3 of the Real Estate Settlement Procedures Act of 1974".

(d) MAJOR FRAUD AGAINST THE GOVERNMENT AMENDED TO INCLUDE ECONOMIC RELIEF AND TROUBLED ASSET RELIEF PROGRAM FUNDS.—Section 1031(a) of title 18, United States Code, is amended—

(1) by striking "in any procurement" and inserting "in any grant, contract, subcontract, sub-

sidy, loan, guarantee, insurance or other form of Federal assistance, including through the Troubled Assets Relief Program, an economic stimulus, recovery or rescue plan provided by the Government, or the Government's purchase of any preferred stock in a company, or any procurement"; and

(2) by striking "the contract, subcontract" and inserting "such grant, contract, subcontract, subsidy, loan, guarantee, insurance or other form of Federal assistance".

(e) SECURITIES FRAUD AMENDED TO INCLUDE FRAUD INVOLVING OPTIONS AND FUTURES IN COMMODITIES.—

(1) IN GENERAL.—Section 1348 of title 18, United States Code, is amended—

(A) in the caption, by inserting "**and commodities**" after "**Securities**";

(B) in paragraph (1), by inserting "any commodity for future delivery, or any option on a commodity for future delivery, or" after "any person in connection with"; and

(C) in paragraph (2), by inserting "any commodity for future delivery, or any option on a commodity for future delivery, or" after "in connection with the purchase or sale of".

(2) CLERICAL AMENDMENT.—The item relating to section 1348 in the table of sections at the beginning of chapter 63 of title 18, United States Code, is amended by inserting "and commodities" after "Securities".

SEC. 3. ADDITIONAL FUNDING FOR INVESTIGATORS AND PROSECUTORS FOR MORTGAGE FRAUD, SECURITIES FRAUD, AND OTHER CASES INVOLVING FEDERAL ECONOMIC ASSISTANCE.

(a) IN GENERAL.—

(1) AUTHORIZATION.—There is authorized to be appropriated to the Attorney General, to remain available until expended, $165,000,000 for each of the fiscal years 2010 and 2011, for the purposes of investigations, prosecutions, and civil proceedings involving Federal assistance programs and financial institutions, including financial institutions to which this Act and amendments made by this Act apply.

(2) ALLOCATIONS.—With respect to fiscal years 2010 and 2011, the amount authorized to be appropriated under paragraph (1) shall be allocated as follows:

(A) Federal Bureau of Investigation: $75,000,000 for fiscal year 2010 and $65,000,000 for fiscal year 2011.

(B) The offices of the United States Attorneys: $50,000,000.

(C) The criminal division of the Department of Justice: $20,000,000.

(D) The civil division of the Department of Justice: $15,000,000.

(E) The tax division of the Department of Justice: $5,000,000.

(b) ADDITIONAL APPROPRIATIONS FOR THE POSTAL INSPECTION SERVICE.—There is authorized to be appropriated to the Postal Inspection Service of the United States Postal Service, $30,000,000 for each of the fiscal years 2010 and 2011 for investigations involving Federal assistance programs and financial institutions, including financial institutions to which this Act and amendments made by this Act apply.

(c) ADDITIONAL APPROPRIATIONS FOR THE INSPECTOR GENERAL FOR THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT.—There is authorized to be appropriated to the Inspector General of the Department of Housing and Urban Development, $30,000,000 for each of the fiscal years 2010 and 2011 for investigations involving Federal assistance programs and financial institutions, including financial institutions to which this Act and amendments made by this Act apply.

(d) ADDITIONAL APPROPRIATIONS FOR THE UNITED STATES SECRET SERVICE.—There is authorized to be appropriated to the United States Secret Service of the Department of Homeland Security, $20,000,000 for each of the fiscal years 2010 and 2011 for investigations involving Federal assistance programs and financial institutions, including financial institutions to which this Act and amendments made by this Act apply.

(e) USE OF FUNDS.—The funds authorized to be appropriated under subsections (a), (b), (c), and (d) shall be limited to cover the costs of each listed agency or department for investigating possible criminal, civil, or administrative violations and for prosecuting criminal, civil, or administrative proceedings involving financial crimes and crimes against Federal assistance programs, including mortgage fraud, securities fraud, financial institution fraud, and other frauds related to Federal assistance and relief programs.

(f) REPORT TO CONGRESS.—Following the final expenditure of all funds appropriated under this section that were authorized by subsections (a), (b), (c), and (d) the Attorney General, in consultation with the United States Postal Inspection Service, the Inspector General for the Department of Housing and Urban Development, and the

Secretary of Homeland Security, shall submit a joint report to Congress identifying—

(1) the amounts expended under subsections (a), (b), (c), and (d) and a certification of compliance with the requirements listed in subsection (c); and

(2) the amounts recovered as a result of criminal or civil restitution, fines, penalties, and other monetary recoveries resulting from criminal, civil, or administrative proceedings and settlements undertaken with funds authorized by this Act.

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I

111TH CONGRESS
1ST SESSION

H. R. 1292

To amend title I of the Omnibus Crime Control and Safe Streets Act of 1968 to establish a National White Collar Crime Center grants program for purposes of improving the identification, investigation, and prosecution of certain criminal conspiracies and activities and terrorist conspiracies and activities.

IN THE HOUSE OF REPRESENTATIVES

MARCH 4, 2009

Mr. SCOTT of Virginia (for himself, Mr. CONYERS, Mr. SMITH of Texas, Mr. GOHMERT, Mr. FORBES, and Ms. JACKSON-LEE of Texas) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend title I of the Omnibus Crime Control and Safe Streets Act of 1968 to establish a National White Collar Crime Center grants program for purposes of improving the identification, investigation, and prosecution of certain criminal conspiracies and activities and terrorist conspiracies and activities.

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

SECTION 1. AUTHORIZATION AND EXPANSION OF NATIONAL WHITE COLLAR CRIME CENTER.

(a) IN GENERAL.—Title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3711 et seq.) is amended—

(1) by redesignating part JJ, as added by section 952 of Public Law 110–315 (relating to Loan Repayment for Prosecutors and Public Defenders), as part LL, and moving such part so that such part follows part KK;

(2) in part LL, as so redesignated and moved by paragraph (1), by redesignating section 3001 as section 3021; and

(3) by adding at the end the following new part:

"PART MM—NATIONAL WHITE COLLAR CRIME CENTER GRANTS

"SEC. 3031. ESTABLISHMENT OF GRANTS PROGRAM.

"(a) AUTHORIZATION.—The Director of the Bureau of Justice Assistance is authorized to make grants and enter into contracts with State and local criminal justice agencies and nonprofit organizations for the purpose of improving the identification, investigation, and prosecution of certain criminal activities.

"(b) CERTAIN CRIMINAL ACTIVITIES DEFINED.—For purposes of this part, the term 'certain criminal activity' means a criminal conspiracy or activity or a terrorist

conspiracy or activity that spans jurisdictional boundaries, including the following:

"(1) Terrorism.

"(2) Economic crime, including financial fraud and mortgage fraud.

"(3) High-tech crime, also known as cybercrime or computer crime, including internet-based crime against children and child pornography.

"(c) CRIMINAL JUSTICE AGENCY DEFINED.—For purposes of this part, the term 'criminal justice agency', with respect to a State or a unit of local government within such State, includes a law enforcement agency, a State regulatory body with criminal investigative authority, and a State or local prosecution office to the extent that such agency, body, or office, respectively, is involved in the prevention, investigation, and prosecution of certain criminal activities.

"SEC. 3032. AUTHORIZED PROGRAMS.

"Grants and contracts awarded under this part may be made only for the following programs, with respect to the prevention, investigation, and prosecution of certain criminal activities:

"(1) Programs to provide a nationwide support system for State and local criminal justice agencies.

"(2) Programs to assist State and local criminal justice agencies to develop, establish, and maintain intelligence-focused policing strategies and related information sharing.

"(3) Programs to provide training and investigative support services to State and local criminal justice agencies to provide such agencies with skills and resources needed to investigate and prosecute such criminal activities and related criminal activities.

"(4) Programs to provide research support, to establish partnerships, and to provide other resources to aid State and local criminal justice agencies to prevent, investigate, and prosecute such criminal activities and related problems.

"(5) Programs to provide information and research to the general public to facilitate the prevention of such criminal activities.

"(6) Programs to establish National training and research centers regionally, including within Virginia, Texas, and Michigan, to provide training and research services for State and local criminal justice agencies.

"(7) Any other programs specified by the Attorney General as furthering the purposes of this part.

"SEC. 3033. APPLICATION.

"To be eligible for an award of a grant or contract under this part, an entity shall submit to the Director of the Bureau of Justice Assistance an application in such form and manner, and containing such information, as required by the Director.

"SEC. 3034. RULES AND REGULATIONS.

"The Director of the Bureau of Justice Assistance shall promulgate such rules and regulations as are necessary to carry out this part, including rules and regulations for submitting and reviewing applications under section 3033.".

(b) AUTHORIZATION OF APPROPRIATION.—Section 1001(a) of such Act (42 U.S.C. 3793) is amended by adding at the end the following new paragraph:

"(26) There is authorized to be appropriated to carry out part MM—

"(A) $25,000,000 for fiscal year 2010;

"(B) $28,000,000 for fiscal year 2011;

"(C) $31,000,000 for fiscal year 2012;

"(D) $34,000,000 for fiscal year 2013;

"(E) $37,000,000 for fiscal year 2014; and

"(F) $40,000,000 for fiscal year 2015.".

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I

111TH CONGRESS
1ST SESSION

H. R. 1667

To prohibit profiteering and fraud relating to military action, relief, and reconstruction efforts, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 23, 2009

Mr. ABERCROMBIE introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To prohibit profiteering and fraud relating to military action, relief, and reconstruction efforts, 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 "War Profiteering Prevention Act of 2009".

SEC. 2. PROHIBITION OF PROFITEERING.

(a) PROHIBITION.—

(1) IN GENERAL.—Chapter 47 of title 18, United States Code, is amended by adding at the end the following:

"§ 1041. War profiteering and fraud

"(a) PROHIBITION.—Whoever, in any matter involving a contract with, or the provision of goods or services to, the United States or a provisional authority, in connection with a mission of the United States Government overseas, knowingly—

"(1)(A) executes or attempts to execute a scheme or artifice to defraud the United States or that authority; or

"(B) materially overvalues any good or service with the intent to defraud the United States or that authority;

shall be fined not more than $1,000,000 or imprisoned not more than 20 years, or both; or

"(2) in connection with the contract or the provision of those goods or services—

"(A) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

"(B) makes any materially false, fictitious, or fraudulent statements or representations; or

"(C) makes or uses any materially false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined not more than $1,000,000 or imprisoned not more than 10 years, or both.

"(b) EXTRATERRITORIAL JURISDICTION.—There is extraterritorial Federal jurisdiction over an offense under this section.

"(c) VENUE.—A prosecution for an offense under this section may be brought—

"(1) as authorized by chapter 211 of this title;

"(2) in any district where any act in furtherance of the offense took place; or

"(3) in any district where any party to the contract or provider of goods or services is located.".

(2) TABLE OF SECTIONS.—The table of sections for chapter 47 of title 18, United States Code, is amended by adding at the end the following:

"1041. War profiteering and fraud.".

(b) CRIMINAL FORFEITURE.—Section 982(a)(2)(B) of title 18, United States Code, is amended by striking "or 1030" and inserting "1030, or 1041".

(c) MONEY LAUNDERING.—Section 1956(c)(7)(D) of title 18, United States Code, is amended by inserting "section 1041 (relating to war profiteering and fraud)," after "liquidating agent of financial institution),".

(d) RICO.—Section 1961(1) of title 18, United States Code, is amended by inserting "section 1041 (relating to war profiteering and fraud)," after "in connection with access devices),".

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111TH CONGRESS
1ST SESSION

H. R. 1788

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

MARCH 30, 2009

Mr. BERMAN (for himself, Mr. SENSENBRENNER, Mr. DANIEL E. LUNGREN of California, Mr. CONYERS, and Mr. COHEN) 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 2009".

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 either—

"(i) fails to comply with a statutory or contractual obligation to disclose an overpayment about which the person is on actual notice, or

"(ii) intending to—

"(I) defraud the Government, or

"(II) 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, Government money or property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the money or 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 that 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 that 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 subsection (a).

"(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 next to 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.—Section 3730(e)(4) 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.—Section 3730(h) 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, from the person who has engaged in the discrimination, that is 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 LOSSES SUFFERED BY ADMINISTRATIVE BENEFICIARIES.—

"(1) IN GENERAL.—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 because of violations of section 3729.

"(2) ALTERNATIVE REMEDIES.—Nothing in section 3729 or this section precludes administrative beneficiaries from pursuing any alternate remedies available to them for losses or other harm suffered by them that are not pursued or recovered in an action under this section, except that if proceedings for such alternate remedies 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.—Section 3731(b) 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 8 years after the date on which the violation of section 3729 or 3730(h) (as the case may be) is committed.

"(2) INTERVENTION.—If the Government elects to intervene and proceed with an action brought under section 3730(b), the Government may file its own complaint, or amend the complaint of the 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 "(e) In" and inserting "(e) 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 other-

wise 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) of title 31, United States Code, is amended—

(1) in paragraph (1)—

(A) in the matter following subparagraph (D)—

(i) by striking "The Attorney General may not delegate" and all that follows through "subsection."; and

(ii) by striking ", the Deputy Attorney General, or an Assistant Attorney General"; and

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

(2) in paragraph (2)—

(A) in subparagraph (F), by striking "or an Assistant Attorney General designated by the Attorney General"; and

(B) in subparagraph (G), by striking the second sentence.

(b) PROCEDURES.—

(1) ORAL EXAMINATIONS.—Section 3733(h)(6) of title 31, United States Code, is amended by striking ", the Deputy Attorney General, or an Assistant Attorney General".

(2) CUSTODIANS.—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 that 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.".

(d) DELEGATION OF AUTHORITY.—Section 3733 of title 31, United States Code, is amended by adding at the end the following:

"(m) DELEGATION.—The Attorney General may delegate any authority that the Attorney General has under this section.".

SEC. 7. EFFECTIVE DATE.

(a) IN GENERAL.—The amendments made by this Act shall take effect on the date of the enactment of this Act and, except as provided in subsection (b), shall apply to any case pending on, or filed on or after, that date.

(b) EXCEPTIONS.—The following provisions of title 31, United States Code, as amended by this Act, shall apply only to cases filed on or after the date of the enactment of this Act:

(1) Section 3729(a)(1)(C)(i), relating to the failure to comply with a statutory or contractual obligation to disclose an overpayment.

(2) Section 3730(h), to the extent such section applies to discrimination against a person because of lawful acts done by others associated with that person.

(3) Section 3731(b)(1).

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111TH CONGRESS
1ST SESSION

H. R. 1779

To provide for resources for the investigation and prosecution of financial crimes, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 30, 2009

Mr. SCOTT of Virginia introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committees on Oversight and Government Reform and Financial Services, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To provide for resources for the investigation and prosecution of financial crimes, 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 "Financial Crimes Resources Act of 2009".

SEC. 2. ADDITIONAL FUNDING FOR RESOURCES TO INVESTIGATE AND PROSECUTE CRIMINAL ACTIVITY INVOLVING COMPUTERS, CRIMES OF FRAUD INVOLVING FEDERAL ECONOMIC ASSISTANCE AND RELIEF PROGRAMS, AND FINANCIAL CRIMES.

(a) ADDITIONAL FUNDING FOR RESOURCES.—

(1) AUTHORIZATION.—For the purposes described in subsection (b), there are authorized to be appropriated for each of the fiscal years 2010 through 2012—

(A) to the Director of the United States Secret Service, $20,000,000;

(B) to the Director of the Federal Bureau of Investigation, $100,000,000;

(C) to the Attorney General, for—

(i) the Criminal Division of the Department of Justice, $20,000,000;

(ii) the Civil Division of the Department of Justice, $15,000,000;

(iii) the Tax Division of the Department of Justice, $5,000,000; and

(iv) the offices of the United States Attorneys, $50,000,000;

(D) to the Inspector General of the Department of Housing and Urban Development, $30,000,000;

(E) to the Chief Postal Inspector of the United States Postal Inspection Service, $30,000,000; and

(F) to the Director of the Administrative Office of the United States Courts, $20,000,000.

(2) ADDITIONAL FUNDING AND AVAILABILITY.—The amounts authorized under paragraph (1) are in addition to amounts otherwise authorized in other Acts, and shall remain available until expended.

(b) USE OF ADDITIONAL FUNDING.—Funds made available under subsection (a)(1) shall be used—

(1) by the recipients described in subparagraphs (A) through (E) of such subsection, to provide for resources to investigate and prosecute criminal activity involving computers, crimes of fraud involving Federal economic assistance and relief programs, and financial crimes, including mortgage fraud, securities fraud, and financial institution fraud; and

(2) by the recipient described in subparagraph (F) of such subsection, for costs associated with providing defense services in cases in which a defendant is charged with criminal activity involving computers, crimes of fraud involving Federal economic assistance and relief programs, and financial crimes, including mortgage fraud, securities fraud, and financial institution fraud.

SEC. 3. GRANTS FOR STATE AND LOCAL LAW ENFORCEMENT.

(a) IN GENERAL.—Subject to the availability of amounts provided in advance in appropriations Acts, the Assistant Attorney General for the Office of Justice Programs of the Department of Justice may award grants to States to establish and develop programs to increase and enhance enforcement against criminal activity involving computers and financial crimes, including mortgage fraud, securities fraud, and financial institution fraud.

(b) APPLICATION.—To be eligible for a grant under subsection (a), a State shall submit an application to the Assistant Attorney General for the Office of Justice Programs of the Department of Justice at such time, in such manner, and containing such information, including as described in subsection (d), as the Assistant Attorney General may require.

(c) USE OF GRANT AMOUNTS.—A grant awarded to a State under subsection (a) shall be used by a State to establish and develop programs to—

(1) assist State and local law enforcement agencies in enforcing State and local criminal laws relating to criminal activity involving computers and financial crimes;

(2) assist State and local law enforcement agencies in educating the public to prevent and identify criminal activity involving computers and financial crimes;

(3) educate and train State and local law enforcement officers and prosecutors to conduct investigations, forensic analyses of evidence, and prosecutions of criminal activity involving computers and financial crimes;

(4) assist State and local law enforcement officers and prosecutors in acquiring computer and other equipment to conduct investigations and forensic analysis of evidence of criminal activity involving computers and financial crimes;

(5) assist public defenders with providing defense services to defendents in cases in which the defendant is charged with criminal activity involving computers or a financial crime, including mortgage

fraud, securities fraud, and financial institution fraud; and

(6) facilitate and promote communication between Federal, State, and local law enforcement to improve the sharing of Federal law enforcement expertise and information about the investigation, forensic analysis of evidence, and prosecution of criminal activity involving computers and financial crimes with State and local law enforcement officers and prosecutors, including the use of multi-jurisdictional task forces.

(d) ASSURANCES AND ELIGIBILITY.—To be eligible to receive a grant under subsection (a), a State shall provide assurances to the Assistant Attorney General for the Office of Justice Programs of the Department of Justice that the State—

(1) will provide an assessment of the resource needs of the State and units of local government within that State, including criminal justice resources being devoted to the investigation and enforcement of laws related to criminal activity involving computers and financial crimes;

(2) will develop a plan for coordinating the programs funded under this section with other federally

funded technical assistance and training programs; and

(3) will submit to the Assistant Attorney General for the Office of Justice Programs of the Department of Justice applicable reports in accordance with subsection (f).

(e) MATCHING FUNDS.—The Federal share of a grant received under this section may not exceed 90 percent of the total cost of a program or proposal funded under this section unless the Assistant Attorney General for the Office of Justice Programs of the Department of Justice waives, wholly or in part, the requirements of this subsection.

(f) REPORTS.—For each year that a State receives a grant under subsection (a) for a program, the State shall submit to the Assistant Attorney General for the Office of Justice Programs of the Department of Justice a report on the results, including the effectiveness, of such program during such year.

(g) AUTHORIZATION OF APPROPRIATIONS.—

(1) IN GENERAL.—There is authorized to be appropriated to carry out this section $250,000,000 for each of the fiscal years 2010 through 2012.

(2) LIMITATIONS.—Of the amount made available to carry out this section in any fiscal year, not

more than 3 percent may be used for salaries and administrative expenses for the Department of Justice.

(3) MINIMUM AMOUNT.—Each State submitting an application for, and eligible to receive, a grant under this section for a fiscal year shall be allocated under this section, in each such fiscal year, not less than 0.75 percent of the total amount appropriated in such fiscal year for grants pursuant to this section, except that not less than 0.25 percent of such total amount shall be allocated to the United States Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands, collectively.

(4) GRANTS TO INDIAN TRIBES.—Notwithstanding any other provision of this section, the Assistant Attorney General for the Office of Justice Programs of the Department of Justice may use amounts made available under this section to make grants to Indian tribes for use in accordance with this section.

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111TH CONGRESS
1ST SESSION

H. R. 1793

To amend title 18, United States Code, with respect to money laundering.

IN THE HOUSE OF REPRESENTATIVES

MARCH 30, 2009

Mr. DANIEL E. LUNGREN of California (for himself and Mr. SMITH of Texas) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend title 18, United States Code, with respect to money laundering.

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 "Money Laundering Correction Act of 2009".

SEC. 2. RESPONSE TO CUELLAR CASE.

Section 1956(a)(2)(B) of title 18, United States Code, is amended—

(1) by striking "is designed in whole or in part";

(2) in clause (i), by striking "to conceal or disguise" and inserting "conceals or disguises"; and

(3) in clause (ii), by striking "to avoid" and inserting "avoids".

SEC. 3. RESPONSE TO SANTOS CASE.

Section 1956(c) of title 18, United States Code, is amended—

(1) by striking the period at the end of paragraph (8) and inserting "; and"

(2) by adding at the end the following:

"(9) the term "proceeds" means any property derived from or obtained or retained, directly or indirectly, through the commission of a specified unlawful activity, including the gross proceeds of that specified unlawful activity.".

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111TH CONGRESS
1ST SESSION

H. R. 78

To authorize additional appropriations for the Federal Bureau of Investigation to enhance its ability to more effectively stop mortgage fraud, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 6, 2009

Mrs. BIGGERT introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To authorize additional appropriations for the Federal Bureau of Investigation to enhance its ability to more effectively stop mortgage fraud, 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 "Stop Mortgage Fraud Act".

SEC. 2. AUTHORIZATION OF APPROPRIATIONS.

For fiscal years 2009, 2010, 2011, 2012, and 2013, there are authorized to be appropriated to the Attorney General a total of—

(1) $31,250,000 to support the employment of 30 additional agents of the Federal Bureau of Investigation and 2 additional dedicated prosecutors at the Department of Justice to coordinate prosecution of mortgage fraud efforts with the offices of the United States Attorneys; and

(2) $750,000 to support the operations of interagency task forces of the Federal Bureau of Investigation in the areas with the 15 highest concentrations of mortgage fraud.

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