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**Recent Developments
Under the Federal False Claims Act**

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INTRODUCTION

In fiscal year 2012, the Department of Justice recovered more than \$4.9 billion under the civil False Claims Act (“FCA”), bringing total FCA recoveries to more than \$35 billion since 1986, the year that far reaching amendments to this Civil War era statute were passed.¹ Of the \$4.9 billion recovered in 2012, more than \$3 billion was from the health care industry (broadly defined to include pharmaceutical and medical device companies).² The Affordable Care Act strengthened the government’s focus on health care fraud and allocated an additional \$350 million to that effort over the next ten years, but the single most effective weapon in the government’s arsenal continues to be the civil False Claims Act.³

Assistant Attorney General Tony West noted that the largest recoveries in FCA enforcement actions over the past year were in the pharmaceutical and medical device industry:

Enforcement actions involving the pharmaceutical and medical device industry were the source of some of the largest recoveries this year. The department recovered nearly \$2 billion in cases alleging false claims for drugs and medical devices under federally insured health programs and, in addition, returned \$745 million to state Medicaid programs. These cases include recoveries from GlaxoSmithKline LLC (GSK) and Merck, Sharp & Dohme (Merck) – two of the three top settlements this year. These recoveries do not include a \$561 million False Claims Act settlement with Abbott Laboratories Inc., part of a \$1.5 billion global resolution (which will be reflected in FY 2013 numbers)t.⁴

Substantive and procedural FCA amendments enacted in 2009 and 2010—in the Fraud Enforcement and Recovery Act of 2009 (“FERA”), the Affordable Care Act (“ACA”), and the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”)—make it easier for the government and *qui tam* relators to conduct investigations and obtain recoveries under the FCA in the future.⁵ FCA recoveries are obtained almost exclusively by settlements, not judgments, and that trend continues with these amendments. Most of these amendments took effect upon their enactment and therefore apply to conduct on or after that date. However, several of FERA’s procedural amendments to the FCA specifically apply to “cases” pending when the amendments were enacted, and the amendments to liability in Section 3729(a)(1)(B)

¹ Although enacted in 1863 in response to allegations of fraud arising in the context of Civil War procurements, the FCA became a significant enforcement tool only after Congress enacted watershed amendments in 1986, including the provision of stiffer penalties and damages and the expansion of the rights of private citizens, known as *qui tam* relators, to bring such suits.

² See Press Release, Dep’t of Justice, *Justice Department Recovers Nearly \$5 Billion in False Claims Cases in Fiscal Year 2012* (Dec. 4, 2012) (“DOJ’s Dec. 4 Press Release”).

³ The government’s increased focus on health care fraud is reflected in the ongoing coordination of civil and criminal enforcement efforts by the Departments of Justice (“DOJ”) and Health and Human Services (“HHS”) under the interagency Health Care Fraud Prevention and Enforcement Action Team (“HEAT”). See DOJ’s Dec. 4 Press Release, at 1.

⁴ DOJ’s Dec. 4 Press Release, at 2.

⁵ See FERA, Pub. L. No. 111-21 (2009); ACA, Pub. L. No. 111-148, 124 Stat. 119 (2010); Dodd-Frank Act, Pub. L. No. 111-203, §3301, 124 Stat. 1376, 2079 (2010).

apply to “claims” pending as of June 7, 2008. Both the ACA and Dodd-Frank were silent as to the issue of retroactivity, and therefore should be limited to conduct occurring after their enactment. As a result, two different FCA statutes may be involved in pending cases brought under the FCA—the FCA as it existed prior to the amendments in 2009 and 2010, and the FCA after these amendments.

One area of particular concern to health care providers and those in the health care industry is FCA liability based on retaining an “overpayment” from a government health care program. The knowing non-payment of an “obligation” violates the False Claims Act, generating treble damages and penalties. In 2009, the FCA’s definition of “obligation” was amended to include liability for “knowingly and improperly” retaining an overpayment. In addition, in 2010, the Affordable Care Act defined as an “obligation” under the FCA an overpayment retained more than 60 days after it was “identified” or past the due date for the corresponding cost report. These provisions will almost certainly be used by relators and the Justice Department against those in the health care industry to attempt to recover overpayments prior to their effective dates. Indeed, in proposed rules defining the obligation to report and return an overpayment, the Centers for Medicare and Medicaid Services selected a look back period of 10 years from the date on which the overpayment was received. These and other provisions linking liability under the FCA to government health care program requirements ensure that the FCA’s role in health care fraud enforcement will only increase.

In addition to discussing key provisions in the 1986 law, the most important changes under FERA, the ACA, and Dodd-Frank are discussed, including:

- FERA’s amendments to FCA liability;
- FERA’s amendments to the FCA’s procedural provisions;
- FERA’s retroactive application to pending FCA cases;
- The ACA’s public disclosure and original source amendments; and
- Dodd-Frank’s amendments to the FCA’s whistleblower provisions.

A number of important concepts and recent developments under the FCA are also addressed, including:

- Liability based on false certifications;
- The materiality standard;
- Causation; and
- The FCA’s knowledge and intent standards.

For a full discussion of the FCA and decisional law under it, please refer to JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS (Wolters Kluwer Law & Business) (4th ed. & Supp. 2013-1) (“BOESE”). The current FCA, as amended, is attached as Appendix 1.

A. FCA Fundamentals

Some important features that are present in both versions of the FCA—before and after FERA—should be noted at the outset:

- Violations of the FCA give rise to potentially enormous economic liability. The law provides that all damages are trebled. Each false claim submitted is subject to a mandatory penalty of \$5,500 and \$11,000 per violation.
- The FCA can be enforced not only by the powerful resources of the federal government, but also through the use of private plaintiffs, referred to as *qui tam* relators. The term "*qui tam*" is derived from a Latin phrase, "*qui tam pro domino rege quam pro se ipso*," or "who pursues this action on our Lord the King's behalf as well as his own." As this phrase indicates, the *qui tam* action arose in early English common law as a device for permitting private individuals to litigate claims on the sovereign's behalf. Like relators in modern FCA actions, early *qui tam* litigants not only gained standing they otherwise would lack, but also a share of any recovery obtained on the sovereign's behalf as a result of the *qui tam* action. Significant amendments to the False Claims Act in 1986 strengthened the rights of relators, and increased the bounties that may be awarded to successful relators, thus dramatically increasing the incentives to filing suit. There are unique procedural steps involved when a *qui tam* relator initiates FCA litigation, including the requirement that the complaint must be filed under seal, and the United States may intervene and take over the action.
- Whether an FCA suit is initiated by the government or by a *qui tam* relator, the liability, damages and penalties provisions remain the same. Defendants are also liable for the attorneys' fees and costs of relators.
- A number of state and local governments have adopted their own versions of false claims acts, with *qui tam* enforcement. Although in the past these laws have varied considerably from the federal FCA, most of them no longer do because they must follow the federal model in order to receive an economic incentive under the Deficit Reduction Act of 2005.⁶

It is also important to note what the False Claims Act does not cover. Although false tax returns are almost certainly the most common false claim filed with the federal government, the False Claims Act expressly excludes such claims from the scope of its coverage.⁷ This FCA "tax bar" has been held to apply broadly whenever a false claim is made or a benefit is procured under the Internal Revenue Code, and is not limited to false income tax claims.⁸ Recently, New York amended its state FCA to allow *qui tam* enforcement of tax law violations, however.⁹

⁶ Pub. L. No. 109-171, §§ 6031-6033, 120 Stat. 4, 72-74 (2006) (to be codified at 42 U.S.C. §§ 1396a(a), 1396b(i), 1396h(a)).

⁷ 31 U.S.C. § 3729(e) provides that "This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1954."

⁸ *United States ex rel. Lissack v. Sakura Global Capital Mkts., Inc.*, 377 F.3d 145 (2d Cir. 2004). Congress has enacted a "tax *qui tam*" statute which provides a bounty to anyone who brings tax underpayments by certain corporations and high-income individuals to the attention of the IRS. See Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, §406, 120 Stat. 2922, 2958 (Dec. 20, 2006) (H.R. 6111). See also BOESE, §1.07[A][1].

⁹ See N.Y. State Fin. Law §189.4(a). See also FraudMail Alert No. 10-08-26, *New York State FCA: New York's False Claims Act Now Equals or Exceeds Federal Fraud Law—False State Tax Returns Are Now Privately Enforceable under State FCA*, available at <http://friedlive.icvmgroup.net/siteFiles/Publications/Fried%20Frank%20FraudMail%20Alert.pdf>.

B. The 1986 Law

Prior to the 2009 and 2010 amendments, liability under the civil False Claims Act has arisen primarily under the provisions of 31 U.S.C. §§ 3729(a)(1) - (7). The government (or the *qui tam* relator) bears the burden of proving each element of a False Claims Act violation, including damages, by the preponderance of the evidence.¹⁰ The four most commonly-invoked liability provisions of the 1986 FCA are:

- Section 3729(a)(1) establishes liability for so-called "direct" false claims to the government;
- Section 3729(a)(2) imposes liability for making false records or false statements to support a false claim;
- Section 3729(a)(3) involves conspiracy to get a false claim paid; and
- Section 3729(a)(7), the so-called "reverse false claims provision," imposes liability for false records or statements made to reduce or avoid an obligation to the government.

The remaining three subsections of Section 3729(a), subsections (a)(4), (a)(5) and (a)(6), tend to be either redundant or to apply to situations that occur infrequently under modern government contracting procedures. These sections of the FCA are seldom invoked, and therefore have not been the subject of significant case law analysis.¹¹

The 1986 amendments lowered the intent needed for an FCA violation to the "recklessness" standard, established the burden of proof at a preponderance of the evidence, and expanded the *qui tam* enforcement mechanism by:

- increasing the relators' share to up to 30 % of the government's recovery;
- removing the government knowledge bar and replacing it with public disclosure/original source provisions;
- adding a retaliation provision;
- allowing *qui tam* participation after U.S. intervention; and
- encouraging *qui tam* intervention if the U.S. declined to intervene.

C. The 2009 Amendments—FERA

Although Congress stated that its purpose in enacting FERA was to expand the FCA's liability provisions in order to reach frauds by financial institutions and other recipients of TARP and economic stimulus funds, the 2009 amendments were not needed for that purpose because financial institutions and stimulus funds were already covered by the existing FCA. FERA was simply the vehicle for FCA amendments that had been languishing in Congress since well before the financial crisis in 2008. The broader purpose of a general expansion of the FCA is reflected in the amendments: they are not limited to mortgage and financial fraud, they have nothing to do

¹⁰ 31 U.S.C. § 3731(c).

¹¹ For a review of the limited case law arising under subsections (a)(4), (a)(5), and (a)(6), see BOESE, §§ 2.01[D] - [F].

with financial markets, and they apply across the board to all recipients and payors of government money or property, including health care providers and the health care industry.

The amendments expand FCA liability beyond previous limits by revising all seven of the statute's liability provisions and redefining key terms such as "claim," "materiality," and "obligation." While the key liability provisions of the FCA remain those addressing false claims, false statements supporting false claims, conspiracy, and reverse false claims, FERA renumbered and expanded these provisions to cover additional conduct. The new Sections 3729(a)(1)(A), (a)(1)(B), (a)(1)(C), and (a)(1)(G), extend liability to any person who:

- (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
 - (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
 - (C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);
- [. . .] or
- (G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.

A red-line version of the False Claims act is attached as Appendix 1, and use of this red-line is critical to understanding the revisions. Many of the important details of the 2009 amendments are discussed in a contemporaneously issued FraudMail Alert (attached as Appendix 2). A few key illustrations of the expansion in FCA liability under FERA include the following:

- Section 3729(a)(1)(A) amended Section 3729(a)(1)—under which liability for false claims submitted directly to the federal government was established—so that it no longer requires presentment of a false claim to the federal government.
- Section 3729(a)(1)(B) amended Section 3729(a)(2) to remove the phrase "to get," on which the unanimous Supreme Court relied in *Allison Engine Co. v. United States ex rel. Sanders*¹² to limit FCA liability to false statements or claims made by defendants for the purpose of getting the government to pay the claim. FERA expressly applied this amendment retroactively to "claims" pending on or after June 7, 2008 (which was two days before the Supreme Court's decision in *Allison Engine*). This attempt to apply the amendment retroactively to prior conduct has been challenged, and courts are divided on its retroactive application in pending cases.¹³

¹² 128 S. Ct. 2123 (U.S. 2008).

¹³ Compare *Hopper v. Solvay Pharmaceuticals, Inc.*, 588 F.3d 1318, 1327 (11th Cir. 2009) (defining "claim" as a demand for payment as under Section 3729(b)(2)(A) and finding that no such claims were pending as of June 7, 2008), and *Allison Engine Co. v. United States ex rel. Sanders*, No. 1:95CV970, 2009 WL 3626773 (S.D. Ohio Oct. 27, 2009) (defining "claim" as a demand for payment, and finding that applying the amendment retroactively would violate the Ex Post Facto Clause), and *United States v. Science Applications Int'l Corp.*, No. 04-1543, 2009 WL 2929250 (D.D.C. Sept. 14, 2009), with *United States ex rel. Kirk v. Schindler Elevator Corp.*, 601 F.3d

- The language in Section 3729(a)(3) had been properly interpreted to limit liability for conspiracy to violations of then-Section 3729(a)(1). Section 3729(a)(1)(C) amended this provision to extend liability for conspiracy to commit a violation of any other substantive section of the FCA.
- Section 3729(a)(1)(G) expanded the scope of reverse false claims liability in the prior law under Section 3729(a)(7) to include retention of an overpayment.

More key changes to FCA liability are included in FERA's statutory definitions of "claim," "obligation," and "material" in Section 3729(b), which are discussed below.

FERA expanded the Department of Justice's power to issue civil investigative demands ("CIDs") and to use the information received in response to CIDs for an "official use."¹⁴ Under this expanded authority, the Attorney General's authority to issue CIDs was delegated to the Assistant Attorney General for the Civil Division,¹⁵ who then redelegated this authority to certain senior enforcement officials in the Civil Division as well as to U.S. Attorneys in certain cases.¹⁶ After this expansion, use of CIDs by both DOJ and U.S. Attorneys' Offices has increased. In the last FY (2011), DOJ authorized the issuance of 888 CIDs—more than ten times the number issued during the two years before re-delegation combined.¹⁷

FERA also amended the FCA to permit the government's complaint-in-intervention and amendments to the complaint to relate back to the original *qui tam* complaint for statute of limitations purposes.¹⁷ In addition, FERA revised the FCA's retaliation provision so that it protects contractors and agents in addition to employees. This means that an independent contractor is covered by the retaliation provision, although how far this provision's protections extend is as yet undetermined.¹⁸

Key FCA provisions unchanged by FERA include: (1) the FCA's standard of scienter, which is "knowing" or "knowingly," (2) the FCA's definition of damages, and (3) the public disclosure/original source jurisdictional bar provisions. In addition, FERA made no change in the law on the question of whether government employees can be *qui tam* relators, and on the application of Rule 9(b)'s pleading requirements to FCA complaints. However, as discussed below, the Affordable Care Act amended the FCA's public disclosure bar in 2010, and the Dodd-Frank Act further revised the FCA's retaliation provision.

94 (2d Cir. 2010) (applying amendment retroactively because relator's claim was pending as of June 7, 2008), and *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262 (5th Cir. 2010) (same).

¹⁴ See Appendix 2 at 5 (discussing CID amendment).

¹⁵ See Order No. 3134-2010 (Jan. 15, 2010).

¹⁶ See Dep't of Justice, Directive No. 1-10, Redelegation of Authority of Assistant Attorney General, Civil Division, to Branch Directors, Heads of Offices and United States Attorneys in Civil Division Cases (Mar. 8, 2010) (to be codified at 28 C.F.R. Part 0).

¹⁷ See Press Release, Dep't. of Justice, *Acting Assistant Attorney General Stuart F. Delery Speaks at the American Bar Association's Ninth National Institute on the Civil False Claims Act and Qui Tam Enforcement* (June 7, 2012), available at <http://www.justice.gov/iso/opa/civil/speeches/2012/civ-speech-1206071.html>.

¹⁷ See Appendix 2 at 5 (discussing relation-back amendment).

¹⁸ See *id.* at 4 (explaining FERA's retaliation amendments).

D. Recent Developments in FCA Liability, *Qui Tam* Enforcement, and Retaliation

Under the Affordable Care Act, Congress narrowed the FCA's public disclosure bar, defined health care claims that include kickbacks as "false claims" under the FCA, and specifically provided that retaining an overpayment after established deadlines was subject to FCA liability. More recent developments include an important new decision by the Seventh Circuit that reaffirms and implements the net trebling approach to damages—an approach that produces dramatically lower damages than the gross trebling approach urged by DOJ that was soundly rejected by the appellate court,²⁰ and the Sixth Circuit's questionable decision in *United States ex rel. Sanders v. Allison Engine Co.* that allows 2009 amendments in Section 3729(a)(1)(B) to apply to prior conduct and finds that this retroactivity does not violate the *Ex Post Facto* and Due Process clauses of the U.S. Constitution.²¹ Given the number of important developments this year, only a few of the most significant can be briefly touched upon in these pages. For a more exhaustive analysis of recent FCA developments, see JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS (Wolters Kluwer Law & Business) (4th ed. & Supp. 2013-1).

1. Claim

Prior to FERA, Section 3729(a)(2) had been interpreted to limit liability for false statements supporting false claims to money or property that the government "provides" or "will reimburse." While some courts read Section 3729(a)(2) to require the false claim to be subjected to a government payment or approval process, the circuits were split on that issue, and on the underlying question of whether "presentment" of the false claim to the government was required under that subsection. To resolve the split, the Supreme Court granted certiorari on the presentment question in *Allison Engine Co. v. United States ex rel. Sanders*.¹⁹ In a unanimous decision, the Court held that presentment was not required under Section 3729(a)(2), but that liability for false statements supporting false claims was limited to fraudulent statements that were designed "to get" false claims paid or approved "by the Government." The Court found that this limitation was necessary because, without a clear link between a false claim and payment or approval by the government, the FCA would be "boundless" and become an "all-purpose antifraud statute."

The FCA amendments in FERA eliminated both the "to get" language and the "by the Government" limitation in Section 3729(a)(2) as well as comparable language in Sections 3729(a)(3) and (a)(7). Instead, FCA liability is limited by a nexus to the government requirement in the new definition of "claim" in Section 3729(b)(2) that covers requests for funds to a contractor, grantee, or other recipient, if the money or property requested "is to be spent or used on the Government's behalf or to advance a Government program or interest." FERA does not define the key terms "used on the Government's behalf" or "to advance a Government program or interest," and therefore their meaning is left to the courts to determine on a case-by-case basis.

²⁰ *United States v. Anchor Mortgage Corp.*, No. 1-3122, slip op. (7th Cir. Mar. 21, 2013).

²¹ 703 F.3d 930 (6th Cir. 2012). *But see* *New Mexico ex rel. Foy v. Austin Capital Mgmt, Ltd.*, No. 31,421, slip op. (N.M. Ct. App. Dec. 26, 2012) (applying the same analysis as would apply under the federal FCA and holding that retroactive application of the equivalent provision in the state false claims law violates the *Ex Post Facto* clause). The reader should note that the author's firm represented one of the defendants in *Foy*.

¹⁹ 128 S. Ct. 2123 (2008).

2. Falsity and False Certification

Since the terms “false” and “fraudulent” are not specifically defined in the FCA, they have been construed and interpreted by the courts with reference to their construction and interpretation in other contexts, most notably in criminal cases brought under 18 U.S.C. §§ 287 and 1001. Establishing falsity under both the FCA and the criminal False Claims or False Statements Act requires proof of “actual falsity.”²⁰ In the FCA context, resolving disputed questions of falsity often involves the interpretation of a law, regulation, contract, or agreement.

Many FCA cases are based not on facially false or improper claims, but rather on allegedly false certifications of compliance with a law, regulation or contract provision. Some of the most significant FCA developments each year arise in false certifications cases that involve something quite different from direct overbilling or fraud allegations. FCA plaintiffs have used the statute to litigate alleged regulatory and statutory violations, most of which lack a private right of action, on the theory that the defendant falsely certified compliance with a regulatory scheme and the government would not have paid the claim had it known about the noncompliance.

FCA Liability based on implied false certifications has been rightly criticized and subjected to significant limitation in a number of jurisdictions because it imposes potentially enormous liability under the statute’s reckless disregard standard without the defendant’s making an express false claim or false statement supporting a false claim. Decisions in the First, Fourth, and Fifth Circuits have noted the false implied certification theory and have rejected it, questioned its validity, or simply refused to apply it to the facts before the court.²¹ Many courts have limited the application of this theory to situations in which the government has explicitly conditioned its payment upon compliance with the statute or regulation violated, and have refused to infer a false claim if the claimant was not expressly required to certify compliance in order to receive payment.²²

For example, in *United States ex rel. Chesbrough v. Visiting Physicians Ass’n*, relators alleged that the defendant billed Medicare and Medicaid for purportedly substandard and worthless radiology tests, and failed to preserve patients’ confidentiality as required by the Health Insurance Portability and Accountability Act (“HIPAA”).²³ The Sixth Circuit cited with approval the Second Circuit’s conclusion in *United States ex rel. Mikes v. Straus* that the FCA should not be interpreted to “enforce compliance with all medical regulations” such as those that require resolving medical issues that are not requirements for reimbursement.²⁴ The Sixth Circuit held that, in order to plead and prove “falsity” under the implied false certification

²⁰ See *United States v. Diogo*, 320 F.2d 898 (2d Cir. 1963); *United States v. Lange*, 528 F.2d 1280 (5th Cir. 1976).

²¹ See, e.g., *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262 (5th Cir. 2010) (noting that the Fifth Circuit had not recognized the false implied certification theory and the complaint did not provide a basis for implying a false certification); *United States ex rel. Graves v. ITT Educ. Servs., Inc.*, 11 Fed. Appx. 296, 297 n.2 (5th Cir. 2004); *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 787 n.8 (4th Cir. 1999); *In re Pharmaceutical Indus. Average Wholesale Price Litig.*, 491 F. Supp. 2d 12, 17-19 (D. Mass. 2007). See also BOESE, § 2.03 (citing cases by circuit).

²² See, e.g., *United States ex rel. Mikes v. Straus*, 84 F. Supp. 2d 427, 435 (S.D.N.Y. 1999) (The “implied false certification” theory applies “only in those exceptional circumstances where the claimant’s adherence to the relevant statutory or regulatory mandates lies at the core of its agreement with the Government, or . . . where the Government would have refused to pay had it been aware of the claimant’s non-compliance”); *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262 (5th Cir. 2010). See also BOESE, § 2.03 (citing cases by circuit).

²³ 655 F.3d 461 (6th Cir. 2011).

²⁴ *Id.* at 469 (quoting *Mikes*, 274, F.3d 687, 699).

theory, relators must establish that a statute or regulation conditioned payment on compliance. Finding that relators failed to allege any Medicare or Medicaid regulation that mentioned the purported objective, industry-wide radiology testing standards that they claimed were violated, the court rejected the substandard testing allegations for failure to allege that payment was conditioned on compliance with the standards. It also rejected relators' HIPAA allegations for the same failure, finding that the complaint made no mention of any statute or regulation that conditioned payment of a claim on compliance with HIPAA's patient confidentiality provisions.²⁵ While the court noted that billing for worthless or nondiagnostic testing could violate a condition for Medicare reimbursement requiring the services to be "reasonable and necessary" for diagnosis, it dismissed the nondiagnostic testing allegation because the complaint failed to identify any such false claim that was actually submitted.²⁶

Some courts have embraced the interpretation that allegations of kickback violations by a hospital's suppliers and physicians who used the hospital's facilities did not render the *hospital's* certifications of compliance with the Antikickback statute false.²⁷ Other courts have interpreted "falsity" more expansively.²⁸ For example, in *United States ex rel. Hutcheson v. Blackstone Medical, Inc.*, a *qui tam* case that recently was settled, the allegations were that the defendant, Blackstone, a medical device manufacturer, paid kickbacks to physicians who used the devices in surgeries performed at a hospital. The First Circuit held that, although the hospital was not a defendant and was presumed unaware of the kickbacks, the hospital's claims submitted to Medicare were false because the alleged kickbacks violated preconditions to Medicare's payment in the hospital's provider agreements and cost reports. The court also rejected the defendant's argument

that a submitting entity's representations about its own legal compliance cannot incorporate an implied representation concerning the behavior of non-submitting entities [W]e hold that Hutcheson's complaint, in alleging that the hospital and physician claims represented compliance with a material condition of payment that was not in fact met, states a claim under the FCA that the hospital and physician claims for payment at issue in this case were materially false or fraudulent.²⁹

Rather than determining whether the language and legislative history of the AKS or that of the ACA established that AKS compliance, without more, was a material precondition of Medicare payment, the First Circuit held that the hospital's provider agreement and cost reports were sufficient to support the FCA claim.

As the First Circuit observed in passing in *Hutcheson*, the Affordable Care Act amended the Antikickback statute to provide that a Medicare or Medicaid claim that includes "items or services resulting from a violation of" the AKS "constitutes a false or fraudulent claim for

²⁵ *Id.* at *5.

²⁶ *Id.* at *8-9.

²⁷ *See, e.g., United States ex rel. Thomas v. Bailey*, No. 4:06CV00465 JLH, 2008 WL 4853630 (E.D. Ark. Nov. 6, 2008).

²⁸ *See, e.g., New York ex rel. Westmoreland v. Amgen Inc.*, 562 F.3d 103 (1st Cir. 2011); *United States ex rel. Hutcheson v. Blackstone Med., Inc.*, 647 F.3d 377 (1st Cir. 2011). *Mason v. Medline Indus., Inc.*, No. 07CV5615, 2010 WL 653542 (N.D. Ill. Feb. 18, 2010) (finding that cost reports submitted by the hospital were claims, and that the FCA reached claims rendered false by kickbacks paid by a medical supply manufacturer and distributor).

²⁹ *Hutcheson*, 647 F.3d 377, 379.

purposes of” the FCA.³⁰ This amendment forecloses some issues, but not others, such as whether the items or services result from an AKS violation. The amendment does not foreclose the issue of intent in FCA cases,³¹ but a second ACA amendment to the Antikickback statute lowered the intent necessary to prove a kickback violation, providing that specific intent to violate that law or actual knowledge of a kickback violation is not required.³²

Other recent decisions discussing the false certification theory of liability and the related issue of intent include:

- ***United States ex rel. Wilkins v. United Health Group, Inc.***, 659 F.3d 295 (3d Cir. 2011) (ruling that compliance with Medicare marketing regulations was not a condition of government payment under federal health insurance programs, but that submitting claims to these programs while violating the AKS was actionable under the FCA).
- ***United States ex rel. Steury v. Cardinal Health, Inc.***, 625 F.3d 262 (5th Cir. 2010) (refusing to base FCA liability on the allegation that claims for payment for allegedly defective intravenous fluid pumps were “false” because they violated an implied warranty of merchantability).
- ***Science Applications Int’l Corp. v. United States***, 626 F.3d 1257 (D.C. Cir. 2010) (explicitly accepting the implied false certification theory and noting that liability under this theory could be based on plaintiff’s showing that the contractor “withheld information about its noncompliance with material contractual requirements”).
- ***Rodriguez v. Our Lady of Lourdes Med. Ctr.***, 552 F.3d 297, 304 (3d Cir. 2008) (finding that to state a claim under the false certification theory, “it is necessary to allege not only a receipt of federal funds and a failure to comply with applicable regulations, but also that payment of the federal funds was in some way conditioned on compliance with those regulations”).
- ***United States ex rel. Conner v. Salina Reg’l Health Ctr.***, 543 F.3d 1211 (10th Cir. 2008) (hospital’s certifications in annual cost reports to Medicare that it was in compliance with all applicable Medicare statutes and regulations were not false certifications that violated the FCA because they were sweeping, general certifications that did not violate specific conditions of payment).
- ***United States ex rel. Gonzalez v. Fresenius Med. Care N. Am.***, 689 F.3d 470 (5th Cir. 2012) (absent fraudulent inducement, clinic had no liability under Section 3729(a)(1) for “mere participation in a false billing scheme”).

³⁰ See *Hutcheson*, 647 F.3d at 392 n.17 (citing ACA, Pub. L. No. 111-148, 124 Stat. 119 (2010) (amending the Medicare and Medicaid Patient Protection Act of 1987, 42 U.S.C. §1320a-7b (g)). See also *United States ex rel. Rost v. Pfizer, Inc.*, 736 F. Supp. 2d 367 (D. Mass. 2010) (noting that the ACA amendment to the AKS would change the falsity analysis).

³¹ See, e.g., *Thomas*, 2008 WL 4853630, at *13 (dismissing complaint that did not allege hospitals knew of physicians’ kickback violations). See also *New York ex rel. Westmoreland v. Amgen Inc.*, 652 F.3d 103, 115 n.12 (1st Cir. 2011) (noting that plaintiffs alleged that providers acted with scienter in accepting alleged kickbacks).

³² ACA, § 6402(f)(1).

- ***United States ex rel. Williams v. Renal Care Group, Inc.***, 696 F.3d 518 (6th Cir. 2012) (citing *Southland, Wilkins, and Landers*, and holding that “[t]he False Claims Act is not a vehicle to police technical compliance with complex federal regulations”).
- ***United States ex rel. Jamison v. McKesson Corp.***, No. 2:08CV214-SA-JMV, 2012 WL 4499136 (N.D. Miss. Sept. 28, 2012) (noting that the Fifth Circuit had not recognized the implied certification theory but finding that the government’s allegations fell within the express certification theory).
- ***United States ex rel. Parato v. Unadilla Healthcare Center, Inc.***, 2010 WL 146877, at *7 (M.D.Ga. Jan. 11, 2010) (refusing to dismiss Parato’s false certification claim because grant funding was expressly conditioned on compliance with certain regulations, and finding that, “[i]n the context of a grant award, the distinction between participation in the program and a condition of payment collapses”).
- ***United States v. Rogan***, 459 F. Supp. 2d 692 (N.D. Ill. 2006) (finding defendant’s false certifications of compliance with the AKS and Stark Acts actionable under the FCA). This decision was affirmed by the Seventh Circuit in ***United States v. Rogan***, 517 F.3d 449 (7th Cir. 2008), but the district court’s false certification findings were not addressed on appeal.

As the cases discussed above illustrate, to determine the “falsity” element in FCA liability, often courts are faced with a dispute as to the meaning of the contractual or regulatory term allegedly violated. In cases where the relevant term is ambiguous, courts have determined whether the FCA defendant’s interpretation of the ambiguous term was reasonable, and if so, they have found that the FCA’s intent standard was not met.³³ Recently, a court applied the interpretive rule known as the doctrine of *contra proferentem* to an ambiguous contract provision in an FCA case. Under this interpretive rule, a latent ambiguity in a contract provision is construed against the party that drafted the provision. The rule is based on a principle of fundamental fairness: a party that drafts and imposes an ambiguous term should not benefit from that ambiguity. In *Chapman Law Firm v. United States*, the U.S. Court of Federal Claims found that both the defendant’s and the government’s interpretations of the ambiguous contract provision were reasonable.³⁴ The court applied the doctrine of *contra proferentem* to the ambiguous contract provision that was drafted by the government, which meant that it accepted the contractor’s interpretation. As a result, the court denied the government’s motion for partial summary judgment on the FCA claim. The rationale of the *contra proferentem* doctrine applies in areas outside of contracts, and FCA defendants should therefore be able to assert the doctrine as a defense in cases where the underlying theory of FCA liability rests on ambiguous contracts, grants, and regulations drafted by the government.

³³ See, e.g., *United States ex rel. K & R Ltd. P’ship v. Massachusetts Hous. Fin. Agency*, 530 F.3d 980 (D.C. Cir. 2008); *United States ex rel. Farmer v. City of Houston*, 523 F.3d 332 (5th Cir. 2008). But see *United States ex rel. Oliver v. Parsons*, 195 F.3d 457 (9th Cir. 1999) (ruling that “[a] contractor relying on a good faith interpretation of a regulation is not subject to liability, not because his or her interpretation was correct or reasonable, but because the good faith nature of his or her action forecloses the possibility that the scienter requirement is met”).

³⁴ No. 09-891C, 2012 WL 256090 (Fed. Cl. Jan. 18, 2012).

3. Materiality

In determining whether a claim or statement is false or fraudulent, most courts have required, either explicitly or implicitly, an additional factor commonly known as “materiality” in order to find liability under the False Claims Act. As they have been confronted with an increasing number of false certification cases, courts have sifted through regulatory, statutory, and/or contractual violations in order to decide whether they are material to the government's payment decisions or not. A conflict developed in the circuits over what the proper test for materiality should be, with decisions discussing the issue falling into two groups: those that required the government (or relator) to meet a higher standard of materiality (the “prerequisite to payment” test) and those that required a lower standard (the “capable of influencing” or “natural tendency to influence” test).

In *United States ex rel. Mikes v. Straus*,³⁵ the Second Circuit provided a very stringent test for materiality—ironically, while stating that it was not deciding whether materiality was an essential element of FCA liability—which was dependent on whether the claim “certifies compliance with a statute or regulation as a condition to governmental payment.” In *United States ex rel. Harrison v. Westinghouse Savannah River Co.*,³⁶ on the other hand, the Fourth Circuit applied a lower standard, which based materiality on the “potential effect of the false statement when it is made.” Recently, the Supreme Court strongly indicated in *Allison Engine Co. v. United States ex rel. Sanders*³⁷ that FCA liability under Section 3729(a)(2) required a showing of “materiality,” and that a false statement must be a “condition of payment” in order to satisfy this materiality requirement.

FERA adopted a statutory definition of “material” under the FCA, which is “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.”³⁸ In adopting this materiality standard, FERA made explicit what was previously an implicit requirement under the 1986 law. The standard itself is not new. Many courts have interpreted it as strongly limiting FCA liability to false statements that directly affect the government’s payment decision, and several courts have held that violations of “conditions of participation” in a federal health care program did not result in FCA violations.

For example, in *United States ex rel. Conner v. Salina Regional Health Center*,³⁹ the Tenth Circuit found that the defendant hospital's certifications in annual cost reports to Medicare that it was in compliance with all applicable Medicare statutes and regulations did not violate the FCA because they were sweeping, general certifications that were not specific conditions of payment. The court explained that the reach of the relator's theory of liability essentially contended that “any failure by [the hospital] to comply with any underlying Medicare statute or regulation during the provision of any Medicare-reimbursable service renders this certification false, and the resulting payments fraudulent,” and thus it suffered from overbreadth.

³⁵ 274 F.3d 687, 697 (2d Cir. 2001).

³⁶ 352 F.3d 908, 916 (4th Cir. 2003).

³⁷ 128 S. Ct. 2123, 2125-26 (2008).

³⁸ See Appendix 1 at 3 (referencing 31 U.S.C. § 3729(b)(4)).

³⁹ 543 F.3d 1211 (10th Cir. 2008).

Similarly, in *United States ex rel. Landers v. Baptist Memorial Health Care Corp.*,⁴⁰ the court noted that the defendants' alleged noncompliance with Medicare's conditions of participation could possibly lead to "corrective action or even termination," and found that there was no evidence showing it would make the defendants ineligible for Medicare payments or lead to nonpayment of the claims. Applying the Sixth Circuit's "natural tendency" test of materiality to the alleged false certifications of compliance with the conditions of participation, the court found that the test was not satisfied because

Conditions of Participation do not condition payment on certifications of compliance. Therefore, any alleged false certifications of compliance would not have a natural tendency to influence the Government's payment decisions.⁴¹

A recurring problem with the natural tendency test of materiality is that, in determining whether the government could have refused to pay or approve a claim, it is rarely deemed necessary under that standard to consider the government officials' actual responses to the alleged false claims. For example, in *United States v. Rogan*,⁴² the Seventh Circuit applied the "capable of influencing" test of materiality and found that testimony of a government official showing that it would not have paid was not a required component of materiality. The fundamental problem with this approach is that, whereas government officials involved in the transaction are the ones that have the public interest in mind when deciding whether or not to pay the claim, the relaxed natural tendency test of materiality can leave that key interest out when, under that test, their knowledge is not examined at all. For this reason, the author has proposed that courts will find a legal way to reinstate the "prerequisite to payment" requirement.⁴³ That result is precisely what happened in the *Steury* case mentioned above.

4. Causation

Section 3729(a)(1) of the FCA imposes liability on any person who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval." Liability under this provision specifically requires a causal link between the defendant and the false submission to the government, but the Act does not include a definition of causation. Principles of causation from tort law have been applied by some courts, but their application to FCA allegations can stretch these principles beyond their legal foundations. Since the provisions of the civil FCA and the criminal false claims statute were historically the same until relatively recently, and in view of the FCA's punitive nature, a strong argument can be made for strictly construing undefined or ambiguous provisions such as causation under the FCA as under criminal statutes. Although FERA changed the predicate of the "causes to be presented" language in Section 3729(a)(1)(A) to include claims to recipients of federal funds, it did not define or change the meaning of causation under the FCA.

⁴⁰ 525 F. Supp. 2d 972 (W.D. Tenn. 2007). The reader should note that the author was one of the attorneys representing the defendants in this case.

⁴¹ *Id.* at 979. See *United States ex rel. Williams v. Renal Care Group, Inc.*, 696 F.3d 518 (6th Cir. 2012) (ruling that durable medical equipment supplier standards were "conditions of participation" that, even if violated, did not render claims materially false).

⁴² 517 F.3d 449 (7th Cir. 2008).

⁴³ See John T. Boese, *The Past, Present, and Future of "Materiality" Under the False Claims Act*, 3 ST. LOUIS U. J. OF HEALTH L. & POL'Y 291 (2010).

Recently, in *United States v. Caronia*, the Second Circuit derailed the government’s criminal prosecution of a pharmaceutical sales representative for conspiracy to promote a “misbranded” drug in violation of the Food, Drug, and Cosmetics Act’s (“FDCA”) misbranding provisions.⁴⁷ The court vacated the defendant’s conviction based on finding that the government’s construction and application of the FDCA’s misbranding provisions to the sales representative’s truthful speech in promoting the drug for off-label use violated the representative’s right to freedom of speech under the First Amendment. Although the government argued that it was not penalizing the representative’s speech, the court found that the misbranding provisions imposed content-based and speaker-based restrictions on truthful commercial speech that triggered heightened scrutiny of the restrictions. The court concluded that the government’s construction of the FDCA provisions could not withstand scrutiny because it criminalized truthful promotion of off-label drug applications by this particular group of speakers without directly advancing the government’s interest in the drug approval process, and there were less restrictive ways of meeting that goal—such as providing guidance to physicians and patients. The *Caronia* decision provides a basis for challenging similar misbranding claims in civil suits because it makes no difference for First Amendment purposes whether the context is criminal or civil. As a result, in the future, the government may examine the truthfulness issue more carefully in off-label promotion claims that are based on speech (because there is no First Amendment protection for untruthful commercial speech), and it may also focus on other off-label promotional activities by pharmaceutical companies—such as employee training programs—to show intent to misbrand.

Recent cases applying causation in FCA cases include the following:

- ***United States ex rel. Hutcheson v. Blackstone Med., Inc.***, 647 F.3d 377, 391 (1st Cir. 2011) (noting that “[o]nly persons who knowingly submit or cause the submission of a false or fraudulent claim can be held liable for violating the FCA,” that “[t]he term ‘causes’ is hardly boundless,” and that “it has been richly developed as a constraint in various areas of the law”).
- ***United States ex rel. Tessitore v. Infomedics, Inc.***, 847 F. Supp. 2d 256 (D. Mass. 2012) (rejecting relator’s theory—that drug manufacturer’s failure to report adverse events kept FDA from requiring warnings sooner, causing more prescriptions for Paxil to be written by physicians and more claims for reimbursement to the government—as an unsupported hypothetical that called for inferences that went against the evidence).
- ***United States ex rel. Freedman v. Suarez-Hoyos, MD***, No. 8:04CV933-T-24 EAJ, 2012 WL 4344199 (M.D. Fla. Sept. 21, 2012) (citing *Parke-Davis* and ruling that liability could attach to a kickback arrangement that was a substantial factor in causing presentment of a false claim).
- ***Massachusetts v. Shering-Plough Corp.***, No. 03-11865-PBS, 2011 WL 4436969, at *3 (D. Mass. Sept. 23, 2011) (finding that pharmacists’ claims were factually false but that defendants had “no role in causing that independent falsehood”).
- ***United States ex rel. Carpenter v. Abbott Labs., Inc.***, 723 F. Supp. 2d 395 (D. Mass. 2010) (finding allegations that defendant’s literature compared its drug favorably with other drugs approved for off-label outpatient use and failed to reflect unfavorable

⁴⁷ 703 F.3d 149 (2d Cir. 2012).

information about the drug were sufficient to pass the “substantial factor” test for causation of claims to Medicare for off-label use).

- ***United States ex rel. DeCesare v. Americare In Home Nursing***, No. 1:05CV696, 2010 WL 5313315, at *13 (E.D. Va. Dec. 16, 2010) (finding that it was a “necessary, foreseeable, and obvious consequence of VNSN's referrals that Medicare and Medicaid claims would be filed,” and therefore that the complaint alleged that VNSN caused false claims to be submitted under the “substantial factor” test).
- ***United States ex rel. Strom v. Scios, Inc.***, 676 F. Supp. 2d 884, 891 (N.D. Cal. 2009) (finding that the causation requirement of Rule 9(b) had been met by the allegation that “Defendants' marketing activities created the market for the outpatient use of [the drug], and . . . encouraged such a use even though they had no credible evidence that [the drug] was effective in that context”).
- ***United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah***, 472 F.3d 702 (10th Cir. 2006) (applying tort standard of proximate cause to determine that Utah Medicare carrier's acceptance of a disputed code assisted providers in continuing to file false claims to Medicare). In a concurring opinion, Judge Hartz agreed that the complaint encompassed an allegation that the carrier caused the providers to submit false claims, but he would not apply tort principles to judge FCA causation because of the punitive nature of the FCA and its long-term congruence with the criminal false claims statute. *Id.* at 733-34.
- ***United States ex rel. Schmidt v. Zimmer, Inc.***, 386 F.3d 235 (3d Cir. 2004) (noting that, under causation principles of negligence law, jury could find that Zimmer caused false filing if it was a "normal consequence of the situation created by" Zimmer's marketing scheme).
- ***United States ex rel. Drescher v. Highmark, Inc.***, 305 F. Supp. 2d 451 (E.D. Pa. 2004) (cautioning the government that basing causation on medical insurers' incorrect denial or incorrect payment of claims and subsequent submission of false claims by secondary insurer was "novel" theory that would require evidence of direction and control on medical insurer's part and few options on the part of secondary insurers).

5. Knowledge and Intent

Under Section 3729(b) of the FCA, "knowing" and "knowingly" are defined as:

- (1) has actual knowledge of the information;
- (2) acts in deliberate ignorance of the truth or falsity of the information; or
- (3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

FERA made no substantive change in this definition.

a. Allison Engine Intent

In *Allison Engine Co. v. United States ex rel. Sanders*, the Supreme Court found that Section 3729(a)(2) liability was not limited by the “presentment” requirement that applied under Section 3729(a)(1), but the Court imposed an additional intent requirement beyond the FCA’s “knowing” standard in order to prevent the FCA from being used as an “all-purpose antifraud statute.”⁴⁴ The Court found that specific statutory language of intent limited a defendant’s liability under Sections 3729(a)(2) and (a)(3) to the “natural, ordinary, and reasonable consequences of his conduct”: Section 3729(a)(2) required that the purpose of the false statement must be “to get” a false claim paid or approved by the government; Section 3729(a)(3) required that the conspiracy to defraud must be for the purpose of “getting” a false claim allowed or paid. FERA’s FCA amendments removed all of these references to purpose, substituting a materiality requirement for the “to get” language in Section 3729(a)(1)(B) that the Supreme Court in *Allison Engine* relied upon in imposing the additional intent requirement. FERA replaced comparable language of intent in Section 3729(a)(7) with a materiality requirement as well. FERA did not alter the statutory intent standard in Section 3729(b)(1), however, which is discussed below.

b. The “Reckless Disregard” Standard

The FCA’s actual knowledge and deliberate ignorance standards are rarely used by the government to prove intent because the defendant’s specific state of mind is the determining factor under them. Reckless disregard, on the other hand, has been described as aggravated gross negligence, gross negligence-plus, or conduct that runs an unjustifiable risk of harm.⁴⁵ The government has also argued that the FCA’s knowledge standard can be met with “collective knowledge,” but that argument was soundly rejected by the D.C. Circuit in a recent decision, as discussed below.

In *Safeco Insurance Co. of America v. Burr*, the Supreme Court held that the reckless disregard standard was an objective one in a case interpreting a similar standard in the Fair Credit Reporting Act (“FCRA”).⁴⁶ Under this objective standard, the Court found that a defendant’s incorrect interpretation of an ambiguous statutory provision, if reasonable, does not provide a basis for liability unless there was an unjustifiably high risk of violating the statute. In *United States ex rel. K & R Ltd. Partnership v. Massachusetts Housing Finance Agency*, the D.C. Circuit applied the definition of reckless disregard from the Supreme Court’s *Safeco* decision to an FCA case.⁴⁷ *Safeco* and *K & R Ltd.* make examinations of subjective intent unnecessary in FCA cases involving reasonable interpretations of ambiguous requirements where the government has not provided guidance.⁴⁸

⁴⁴ 553 U.S. 662, 672 (2008).

⁴⁵ See *United States v. Krizek*, 859 F. Supp. 5 (D.D.C. 1994), *aff’d*, 111 F.3d 934 (D.C. Cir. 1997).

⁴⁶ 551 U.S. 47 (2007).

⁴⁷ 530 F.3d 980 (D.C. Cir. 2008). See also *United States ex rel. Farmer v. City of Houston*, 523 F.3d 333 (5th Cir. 2008) (finding that relator could not show that the defendants “knew” of the falsity of the claims because the regulations governing the program were unclear); *United States ex rel. Walker v. R & F Props., Inc.*, 433 F.3d 1349 (11th Cir. 2005), *cert. denied*, 549 U.S. 1027 (2006) (finding that the regulation was ambiguous, but ruling that the question of falsity was improperly decided on summary judgment by the court below). The reader should note that the author’s firm represented the defendant in the *R & F Properties* case.

⁴⁸ See also *United States ex rel. Lockyer v. Hawaii Pacific Health Group Plan*, 343 Fed. Appx. 279 (9th Cir. 2009) (good faith interpretation of “incident to” regulations foreclosed FCA liability); *United States ex rel. Bott v. Silicon Valley Colls.*, 262 Fed. Appx. 810 (9th Cir. 2008) (relators could not show scienter where

The government has argued that corporate “collective knowledge” is appropriate under the False Claims Act because the Act is remedial rather than penal in nature. This fundamentally misconstrues the nature of the statute, particularly in light of rulings characterizing FCA damages and penalties as punitive. In *United States v. Science Applications International Corp.*, the D.C. Circuit forcefully and definitively rejected the government’s argument that collective knowledge can be used to prove intent under the False Claims Act.⁴⁹ Exhibiting a clear grasp of the high stakes involved in FCA liability, the panel unanimously held that collective knowledge was “an inappropriate basis for [FCA] scienter” because

it effectively imposes liability, complete with treble damage and substantial civil penalties, for a type of loose constructive knowledge that is inconsistent with the Act’s language, structure, and purpose.⁵⁰

As a result, the court found that the FCA’s scienter standard must be strictly enforced, and it interpreted this standard to allow liability based on constructive knowledge only when defendants act with “reckless disregard” or “deliberate ignorance,” noting that innocent mistakes or negligence remain defenses to liability. Collective knowledge conflicts with this statutory standard, the court concluded, because it lacks balance and precision, noting that it would allow

“a plaintiff to prove scienter by piecing together scraps of ‘innocent’ knowledge held by various corporate officials, even if those officials never had contact with each other or knew what others were doing in connection with a claim seeking government funds.” *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 452 F.2d 908, 918 n.9 (4th Cir. 2003). In other words, even absent proof that corporate officials acted with deliberate ignorance or reckless disregard for the truth by submitting a false claim as the result of, for instance, a communication failure, the fact-finder could determine that the corporation knowingly submitted a false claim.⁵¹

The court held that the proper standard for knowledge under the FCA excludes collective knowledge. Because the district court’s instruction to the jury allowed it to find that SAIC submitted false claims “knowingly” where no individual at SAIC had all of the knowledge necessary for FCA liability, the court found that the district court’s instruction was erroneous and prejudicial, and ordered a new trial.

The *SAIC* case includes one more element that is critical to the “knowledge” requirement in FCA cases based on implied certifications that are alleged to be false. While deciding that the D.C. Circuit would accept this basis for FCA liability, the court placed an important limit on its use:

Establishing knowledge under this provision on the basis of implied certification requires the plaintiff to prove that the defendant knows (1) that it violated a contractual obligation, and (2) that its compliance with that

defendants complied with facially valid safe harbor regulation on recruiters’ pay); *United States ex rel. Lee v. Corinthian Colls.*, No. CV07-1984 PSG, 2009 WL 4730890 (C.D. Cal. Dec. 4, 2009) (finding that Colleges reasonably relied on safe harbor provision and therefore could not have acted with scienter).

⁴⁹ 626 F.3d 1257 (D.C. Cir. 2010).

⁵⁰ *Id.* at 1274.

⁵¹ *Id.* at 1275.

obligation was material to the government's decision to pay.⁵²

This new knowledge requirement is a critical limit on the use of the implied certification theory of liability because it means that the government or the relator will have to prove the defendant knew that the government's paying agent considered the violation to be material. Only time will tell if this rational limitation on false certification cases will be adopted by other circuits.

6. Reverse False Claims

Under Section 3729(a)(7), liability for a "reverse false claim" is triggered only when a person

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.

This requires the person to take an affirmative step to avoid an obligation to pay the government. In *United States ex rel. Bahrani v. ConAgra, Inc.* ("*Bahrani II*") the Tenth Circuit agreed with the defendants that *Allison Engine's* intent requirement was equally applicable to claims brought under Section 3729(a)(7), even though the Supreme Court had not specifically resolved the issue.⁵³ Thus, in order to prove liability under this section, in addition to taking an affirmative step, the relator must also "establish that the defendant 'made a false record or statement for the purpose of' concealing, avoiding, or decreasing an obligation to pay or transmit money or property to the Government."⁵⁴ In ruling that Section 3729(a)(7) liability required proof of this intent element and concluding that the jury specifically determined that the relator had not proved the required *Allison Engine* intent element, the Tenth Circuit reversed the judgment below in favor of the relator on the reverse false claims allegations in *Bahrani II*. The Tenth Circuit also rejected the government's argument that the five claims should be remanded, and declined to order a new trial, concluding that:

[i]f every defendant who knows or should know about an obligation to pay money is automatically deemed to have acted with the purpose of decreasing the obligation, there is no purpose or intent standard left.⁵⁵

FERA, however, eliminates the key words denoting purpose in Section 3729(a)(7)—"to conceal, avoid, or decrease"—instead, basing liability under Section 3729(a)(1)(G) on making, using, or causing a false record or statement that is "material" to an "obligation" to pay money to the government. In addition, FERA provides an alternative basis for liability which requires simply concealing, avoiding, or decreasing an "obligation" to pay the government without the necessity of making any false statement.⁵⁶ "Obligation" is defined as an established duty, whether or not fixed, arising from a contract, grant, license, fee-based, or similar relationship, or from retention of an overpayment. Precisely how a duty arises from retention of an overpayment

⁵² *Id.* at 1271.

⁵³ 624 F.3d 1275, 1302 (10th Cir. 2010). The reader should note that the author was an expert witness for the defense on the issue of attorneys' fees in the *Bahrani* case.

⁵⁴ *Id.* at 1303 (quoting *Allison Engine*, 553 U.S. at 671).

⁵⁵ *Id.*

⁵⁶ See *United States ex rel. Yannacopoulos v. General Dynamics*, 652 F.3d 818 (7th Cir. 2011) (noting that Section 3729(a)(1)(G) makes it unlawful to conceal, avoid or decrease an obligation to pay the government, "apparently regardless of whether such actions involve . . . a falsehood") *Id.* at *14 n. 16.

and when it becomes “established” is not clear under this statutory language. The Senate Report explained that this language was not intended “to create liability for a simple retention of an overpayment that is permitted by a statutory or regulatory process for reconciliation,” such as those under a state-administered Medicaid program.⁵⁷ In addition, the term “improperly” in Section 3729(a)(1)(G) seems to limit this liability to a bad faith retention of an overpayment.⁵⁸

While FERA imposed liability for retention of an overpayment under the FCA in the general terms outlined above, the Affordable Care Act of 2010 directly linked retention of an overpayment under Medicare or Medicaid to FCA liability. It defined an “overpayment” as any Medicare or Medicaid funds “that a person receives or retains . . . to which the person, after applicable reconciliation, is not entitled,” and established the deadline for reporting and returning an overpayment as the later of either 60 days after an overpayment has been “identified” or the date of a corresponding cost report.⁵⁹ The ACA did not define the term “identified,” however, nor did it use the FCA’s terms “knowing” or “knowingly.” Although overpayments returned within the deadline are excluded from FCA liability, the ACA stated that an overpayment retained after reconciliation is an “obligation” under Section 3729(b)(3) of the FCA. The ACA provided no lookback period for this FCA liability.

The Centers for Medicare and Medicaid Services (“CMS”) recently proposed rules that address a number of these issues.⁶⁰ First, the proposed rules adopt the FCA’s definition of “knowing” or “knowingly” as the definition of the term “identified”:

[W]e propose that a person has identified an overpayment if the person has actual knowledge of the existence of the overpayment or acts in reckless disregard or deliberate ignorance of the overpayment.⁶¹

The proposed rules provide that the 60-day reporting requirement would run from the date on which the overpayment was identified. For example, this period would begin when a provider or supplier receives information that raises “an obligation to make a reasonable inquiry” as to whether an overpayment exists.⁶² The information could come from such sources as a government agency audit, an internal audit, or an anonymous compliance hotline complaint. CMS further proposed that the obligation to report or return an overpayment should extend to overpayments identified within 10 years of the date the overpayment was received.⁶³ Various factual disputes will undoubtedly arise if these standards are adopted, including: whether the information provided was sufficient to raise a duty to inquire; whether a “reasonable inquiry” was made; whether an overpayment actually existed; and whether a decision not to report and return the payment was in reckless disregard of an obligation to do so. The potential responsibility for making inquiries going back ten years and the 60-day deadline for making the repayments raise additional concerns. Comments on the proposed rules were due in April 2012. CMS has not issued a final rule.

⁵⁷ S.Rep. No. 111-10, at 15 (2009).

⁵⁸ In a contemporaneous statement about the amendment, Senator Kyl explained that the definition of “improperly” under state law was inherently tortious, illegal, or *malum in se*, and thus it required either improper motive or inherently improper means. 155 Cong. Rec. S. 4540 (daily ed. Apr. 22, 2009) (statement of Sen. Kyl).

⁵⁹ ACA, Pub. L. No. 111-148, 124 Stat. 119, § 6402 (2010).

⁶⁰ Medicare Program; Reporting and Returning of Overpayments, 77 Fed. Reg. 9179 (proposed Feb. 16, 2012) (to be codified at 42 C.F.R. pts 401 and 405).

⁶¹ 77 Fed. Reg. 9182.

⁶² *Id.*

⁶³ *Id.* at 9184.

7. Public Disclosure and Original Source

In 2010, Congress amended the FCA's public disclosure bar as part of the comprehensive health care reform initiative in the Affordable Care Act,⁶⁴ adding new limitations to the public disclosure provision in Section 3730(e)(4)(A) and expanding the original source exception in Section 3730(e)(4)(B). Section 3730(e)(4) now provides:

(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

- (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;
- (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or
- (iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, “original source” means an individual who has either—

- (i) prior to a public disclosure under subsection (e)(4)(A), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or
- (ii) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

Under the 2010 bar, if “substantially the same” allegations or transactions were publicly disclosed, then the *qui tam* relator must be an “original source,” unless the government opposes dismissal. While the 1986 public disclosure bar was considered a threshold *jurisdictional* determination,⁶⁵ the 2010 amendments eliminate the word “jurisdiction,” and replace it with the requirement that “the court shall dismiss . . . an action or claim.” Thus, instead of statutorily withdrawing jurisdiction if the relator is not an original source of allegations that were publicly disclosed, the new language directs the court to dismiss the *qui tam* action or claim, “unless opposed by the Government.” It is not clear what action the government must take in order to oppose dismissal under this new provision, and to date, there has been no published case in which DOJ has exercised this power.⁶⁶

In addition, the amendments narrow the definition of public disclosures to disclosures in *federal* sources—that is, disclosures in federal criminal, civil, or administrative hearings under Section 3730(e)(4)(A)(i), and in federal hearings, reports, audits, or investigations under Section 3730(e)(4)(A)(ii). These revisions effectively overrule the Supreme Court's ruling in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, (“*Graham County*

⁶⁴ ACA, Pub. L. No. 111- 148, 124 Stat. 119, 901-02 (2010) (amending 31 U.S.C. § 3730(e)(4)). See FraudMail Alert No. 10-03-24, *Here They Go Again—Newly Enacted Comprehensive Health Care Reform Law Contains More FCA Amendments* (attached as Appendix 3).

⁶⁵ See *Rockwell Int'l Corp. v. United States ex rel. Stone*, 127 S. Ct. 1397, 1406 (U.S. 2007).

⁶⁶ Cf. 31 U.S.C. § 3730(b)(4)(B) (clearly setting forth procedures for the government to notify the court of its decision not to take over a *qui tam* action)

II’)⁶⁷ that *qui tam* allegations could be publicly disclosed by state and local sources, and eliminate defenses based on disclosures from state and local government sources unless the information is also disclosed in the news media or otherwise publicly disclosed. The defense to public disclosures in federal hearings is further narrowed to hearings in which the government or its agent is a party, thus excluding disclosures made in purely private litigation such as retaliation or negligence actions.

The amendments also revise the original source exception. Rather than requiring the original source to have both “direct” and “independent” knowledge of the alleged fraud, the original source exception is met by knowledge that is “independent” of and “materially adds” to the publicly disclosed allegations, which must be voluntarily disclosed to the government before filing suit. The “materially adds” requirement is not specifically defined in the statute, but to the extent that it could be met by someone other than an insider, it would represent a significant change in the law. The first prong of the exception is met by voluntarily disclosing the information underlying the allegations to the government prior to the public disclosure.

Because of the ACA’s silence on the issue of an effective date for these *qui tam* amendments, the Supreme Court applied the presumption against retroactivity in *Graham County II*, limiting the impact of the ACA’s public disclosure amendments in cases pending at the time of enactment and leaving open the question of whether the amendments apply retroactively to prior conduct where no *qui tam* case was pending.⁶⁸

8. Whistleblower Retaliation

The FCA as amended in 1986 contained a whistleblower’s cause of action for retaliation which provided that an employee who was discharged or otherwise discriminated against in the terms or conditions of employment by an “employer” because of lawful acts done by the “employee” in furtherance of an action under Section 3730 “shall be entitled to all relief necessary to make the employee whole.” FERA revised the definition of both protected persons and protected conduct in Section 3730(h). It removed the specific reference to the “employer” (and thus the requirement of an employee-employer relationship) so that independent contractors could bring retaliation actions under Section 3730(h).⁶⁹ However, FERA’s revised definition of protected conduct, under which lawful acts “in furtherance of an action under this section” was replaced by the phrase “in furtherance of other efforts to stop 1 or more violations,” did not make sense. This seemed to require the person to actually try to stop the fraud itself rather than simply take steps toward filing a *qui tam* action.

The year after FERA’s FCA amendments were enacted, Congress once again revised the definition of “protected conduct” under Section 3730(h) in the Dodd-Frank Wall Street Reform and Consumer Protection Act.⁷⁰ This revision restored the original definition of protected

⁶⁷ 130 S. Ct. 1396 (U.S. 2010). The reader should note that the author filed an amicus brief on behalf of the Washington Legal Foundation and the Allied Educational Foundation in support of Petitioners in *Graham County II*.

⁶⁸ See *Graham County II*, 130 S. Ct. 1396, 1400 n.1 (2010). To the extent that it is not effectively foreclosed under *Schumer*, this will be a disputed issue, with defendants arguing, as they did in *Schumer*, that the *qui tam* amendments should not be given retroactive effect because they would enlarge liability and eliminate defenses in *qui tam* suits, and relators arguing in favor of retroactivity. See *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 948 (1997).

⁶⁹ See BOESE, § 4.11[B][2][b] (discussing the term “employer” and the independent contractor issue).

⁷⁰ Pub. L. No. 111-203, § 3301, 124 Stat. 1376 (2010). See FraudMail Alert No. 10-06-29, *Here They Go Again, Round III: Financial Reform Bill Contains More FCA Amendments* (Attached as Appendix 4).

conduct that covered lawful acts in furtherance of a *qui tam* suit, but also retained FERA's "other efforts to stop 1 or more violations." Section 3730(h) now provides:

Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, or agent on behalf of the employee, contractor or agent, or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

In addition, for the first time, Section 3730(h) was revised to provide a statute of limitations for retaliation that requires the action to be brought within three years of the date when the retaliation occurred.

III. State False Claims Acts

As a result of the Medicaid fraud provisions in the Deficit Reduction Act of 2005 ("DRA") and an economic incentive in the DRA that encourages every state without a state false claims act with *qui tam* provisions to adopt one, state legislatures have enacted state false claims laws with provisions that mirror, or exceed, the federal FCA.⁷¹ There are now 28 of these state laws, and they are increasing false claims visibility, enforcement actions, and recoveries.⁷² The states that have *qui tam* false claims statutes are: California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Virginia, and Wisconsin. The District of Columbia, New York City, Philadelphia, and Chicago also have false claims laws with *qui tam* enforcement. Many states have begun the process of amending their state false claims laws to include the far more onerous provisions in the FERA, ACA, and Dodd-Frank amendments in order to qualify for the DRA incentive.

⁷¹ See Deficit Reduction Act of 2005, Pub. L. 109-171, § 6031 (2006).

⁷² See BOESE, Chapter 6 (discussing individual state and municipal false claims laws).

Appendix 1

THE FEDERAL FALSE CLAIMS ACT

31 U.S.C. §§ 3729-3733

As amended by:

The Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4, 123 Stat. 1617, 1621 (2009) (signed by the President on May 20, 2009)

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1303, 124 Stat. 119, 168 (2010) (signed by the President on Mar. 23, 2010)

The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1079A, 124 Stat. 1376, 2077 (2010) (signed by the President on July 21, 2010).

§ 3729. False claims

(a) LIABILITY FOR CERTAIN ACTS.—~~Any~~

(1) IN GENERAL.—Subject to paragraph (2), any person who—

- (1A) knowingly presents, or causes to be presented, ~~to an officer or employee of the United States Government or a member of the Armed Forces of the United States~~ a false or fraudulent claim for payment or approval;
- (2B) knowingly makes, uses, or causes to be made or used, a false record or statement material to ~~get~~ a false or fraudulent claim ~~paid or approved by the Government~~;
- (3C) conspires to ~~defraud the Government by getting a false or fraudulent claim allowed or paid~~ commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);
- (4D) has possession, custody, or control of property or money used, or to be used, by the Government and, ~~intending to defraud the Government or willfully to conceal the property,~~ knowingly delivers, or causes to be delivered, less ~~property than the amount for which the person receives a certificate or receipt~~ than all of that money or property;
- (5E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to

defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

- (6F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge ~~the~~ property; or
- (7G) knowingly makes, uses, or causes to be made or used, a false record or statement material to ~~conceal, avoid, or decrease~~ an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.

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

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

- (A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;
- (B) such person fully cooperated with any Government investigation of such violation; and
- (C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of ~~the~~that person.

(3) COSTS OF CIVIL ACTIONS.—A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

- (b) ~~KNOWING AND KNOWINGLY DEFINED~~ DEFINITIONS.—For purposes of this section;

(1) the ~~terms~~ terms “knowing” and “knowingly”

(A) mean that a person, with respect to information—

(~~1~~i) has actual knowledge of the information;

(~~2~~ii) acts in deliberate ignorance of the truth or falsity of the information; or

(~~3~~iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud~~is required.~~

~~(e) CLAIM DEFINED. For purposes of this section,~~ (2) the term “claim” includes

(A) means any request or demand, whether under a contract or otherwise, for money or property ~~which and whether or not the United States has title to the money or property, that—~~

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

(ii) is made to a contractor, grantee, or other recipient, ~~if the money or property is to be spent or used on the Government’s behalf or to advance a Government program or interest, and~~ if the United States Government

(I) provides ~~or has provided~~ any portion of the money or property ~~which is requested or demanded;~~ or ~~if the Government~~

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

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

(3) the term “obligation” means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term “material” means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

~~(d)~~ EXEMPTION FROM DISCLOSURE.—Any information furnished 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.

§ 3730. Civil actions for false claims

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

(b) ACTIONS BY PRIVATE PERSONS.—

- (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.
- (2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.
- (3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.
- (4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—
 - (A) proceed with the action, in which case the action shall be conducted by the Government; or

- (B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.
 - (5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.
- (c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—
- (1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).
 - (2)
 - (A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.
 - (B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.
 - (C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—
 - (i) limiting the number of witnesses the person may call;
 - (ii) limiting the length of the testimony of such witnesses;
 - (iii) limiting the person's cross-examination of witnesses; or
 - (iv) otherwise limiting the participation by the person in the litigation.
 - (D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the

defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

- (3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.
- (4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.
- (5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.—

- (1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or

transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

- (2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.
- (3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.
- (4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.—

- (1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.
- (2) (A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.
- (B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).
- (3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) ~~No~~The court shall ~~have jurisdiction over~~dismiss an action or claim under this section ~~based upon the public disclosure of,~~ unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed--

(i) in a Federal criminal, civil, or administrative hearing; in which the Government or its agent is a party;

(ii) in a congressional, administrative, or Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who ~~has direct and independent knowledge of~~either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which ~~the allegations are based~~allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section ~~which is based on the information.~~

- (f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.—The Government is not liable for expenses which a person incurs in bringing an action under this section.
- (g) FEES AND EXPENSES TO PREVAILING DEFENDANT.—In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

~~(h) —Any employee who~~ (h) Relief From Retaliatory Actions. —

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

(2) RELIEF. —Relief under paragraph (1) shall include reinstatement with the same seniority status such that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

(3) LIMITATION ON BRINGING CIVIL ACTION. —A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.

§ 3731. False claims procedure

- (a) A subpoena [subpoena] requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.
- (b) A civil action under section 3730 may not be brought—
 - (1) more than 6 years after the date on which the violation of section 3729 is committed, or
 - (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but

in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(c) If the Government elects to intervene and proceed with an action brought under 3730(b), the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

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

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

§ 3732. False claims jurisdiction

(a) ACTIONS UNDER SECTION 3730.—Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) CLAIMS UNDER STATE LAW.—The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

(c) SERVICE ON STATE OF 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, except that such seal applies to the law enforcement authorities so served to the same extent as the seal applies to other parties in the action.

§ 3733. Civil investigative demands

(a) IN GENERAL.—

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

- (A) to produce such documentary material for inspection and copying,
- (B) to answer in writing written interrogatories with respect to such documentary material or information,
- (C) to give oral testimony concerning such documentary material or information, or
- (D) to furnish any combination of such material, answers, or testimony.

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

(2) CONTENTS AND DEADLINES.—

- (A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.
- (B) If such demand is for the production of documentary material, the demand shall—
 - (i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

- (ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and
 - (iii) identify the false claims law investigator to whom such material shall be made available.
- (C) If such demand is for answers to written interrogatories, the demand shall—
 - (i) set forth with specificity the written interrogatories to be answered;
 - (ii) prescribe dates at which time answers to written interrogatories shall be submitted; and
 - (iii) identify the false claims law investigator to whom such answers shall be submitted.
- (D) If such demand is for the giving of oral testimony, the demand shall—
 - (i) prescribe a date, time, and place at which oral testimony shall be commenced;
 - (ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;
 - (iii) specify that such attendance and testimony are necessary to the conduct of the investigation;
 - (iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and
 - (v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.
- (E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

- (F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.
- (G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary. ~~The Attorney General may not, notwithstanding section 510 of title 28, authorize the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph.~~

(b) PROTECTED MATERIAL OR INFORMATION.—

- (1) IN GENERAL.—A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under—
 - (A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or
 - (B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.
- (2) EFFECT ON OTHER ORDERS, RULES, AND LAWS.—Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) SERVICE; JURISDICTION.—

- (1) BY WHOM SERVED.—Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.
 - (2) SERVICE IN FOREIGN COUNTRIES.—Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by any such person that such court would have if such person were personally within the jurisdiction of such court.
- (d) SERVICE UPON LEGAL ENTITIES AND NATURAL PERSONS.—
- (1) LEGAL ENTITIES.—Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by—
 - (A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;
 - (B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or
 - (C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.
 - (2) NATURAL PERSONS.—Service of any such demand or petition may be made upon any natural person by—
 - (A) delivering an executed copy of such demand or petition to the person; or
 - (B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(e) PROOF OF SERVICE.—A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) DOCUMENTARY MATERIAL.—

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

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

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

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

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

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

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

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

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

(h) ORAL EXAMINATIONS.—

- (1) PROCEDURES.—The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.
- (2) PERSONS PRESENT.—The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.
- (3) WHERE TESTIMONY TAKEN.—The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.
- (4) TRANSCRIPT OF TESTIMONY.—When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness,

unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

- (5) CERTIFICATION AND DELIVERY TO CUSTODIAN.—The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.
- (6) FURNISHING OR INSPECTION OF TRANSCRIPT BY WITNESS.—Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.
- (7) CONDUCT OF ORAL TESTIMONY.—
 - (A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.
 - (B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18 [18 USCS §§ 6001 et seq.].

- (8) WITNESS FEES AND ALLOWANCES.—Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.
- (i) CUSTODIANS OF DOCUMENTS, ANSWERS, AND TRANSCRIPTS.—
- (1) DESIGNATION.—The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.
- (2) RESPONSIBILITY FOR MATERIALS; DISCLOSURE.—
- (A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).
- (B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice, ~~who is authorized for such use under regulations which the Attorney General shall issue~~. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.
- (C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the

Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities. ~~Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.~~

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

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

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

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

- (A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or
- (B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the

examination and analysis of all documentary material and other information assembled in the course of such investigation,

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

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

- (A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and
- (B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated.

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

- (j) JUDICIAL PROCEEDINGS.—

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

- (2) PETITION TO MODIFY OR SET ASIDE DEMAND.—

- (A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is

found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed—

- (i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or
- (ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

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

(3) PETITION TO MODIFY OR SET ASIDE DEMAND FOR PRODUCT OF DISCOVERY.—

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

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

- (ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.
- (B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.
- (4) PETITION TO REQUIRE PERFORMANCE BY CUSTODIAN OF DUTIES.—At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.
- (5) JURISDICTION.—Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.
- (6) APPLICABILITY OF FEDERAL RULES OF CIVIL PROCEDURE.—The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.
- (k) DISCLOSURE EXEMPTION.—Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.
- (l) DEFINITIONS.—For purposes of this section—
 - (1) the term “false claims law” means—
 - (A) this section and sections 3729 through 3732; and

- (B) any Act of Congress enacted after the date of the enactment of this section [enacted Oct. 27, 1986] which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;
- (2) the term “false claims law investigation” means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;
- (3) the term “false claims law investigator” means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;
- (4) the term “person” means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;
- (5) the term “documentary material” includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;
- (6) the term “custodian” means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1); ~~and~~
- (7) the term “product of discovery” includes—
 - (A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;
 - (B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and
 - (C) any index or other manner of access to any item listed in subparagraph (A); and
- (8) the term “official use” means any use that is consistent with the law, and the regulations and policies of the Department of Justice, including use in connection with internal Department of Justice memoranda and reports;

communications between the Department of Justice and a Federal, State, or local government agency, or a contractor of a Federal, State, or local government agency, undertaken in furtherance of a Department of Justice investigation or prosecution of a case; interviews of any qui tam relator or other witness; oral examinations; depositions; preparation for and response to civil discovery requests; introduction into the record of a case or proceeding; applications, motions, memoranda and briefs submitted to a court or other tribunal; and communications with Government investigators, auditors, consultants and experts, the counsel of other parties, arbitrators and mediators, concerning an investigation, case or proceeding.

* * *

S. 386 Section 4(f):

EFFECTIVE DATE AND APPLICATION.—The amendments made by this section shall take effect on the date of enactment of the Act and shall apply to conduct on or after the date of enactment, except that—

(1) subparagraph (B) of section 3729(a)(1) of title 31, United States Code, as added by subsection (a)(1), shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after that date; and

(2) section 3731(b) of title 31, as amended by subsection (b); section 3733, of title 31, as amended by subsection (c); and section 3732 of title 31, as amended by subsection (e); shall apply to cases pending on the date of enactment.

Appendix 2

FraudMail Alert®



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CIVIL FALSE CLAIMS ACT: The False Claims Act is Amended for the First Time in More Than Twenty Years as the President Signs the Fraud Enforcement and Recovery Act of 2009

Last night, the Fraud Enforcement and Recovery Act of 2009 ("FERA") was signed into law by the President, marking only the second time in the history of the civil False Claims Act ("FCA") that all-embracing amendments have been made to this 1863 law. After its first large-scale revision in 1986, the FCA became the government's most successful weapon in its fight against suspected fraud on the United States, but it also became a weapon that competitors, disappointed bidders, disgruntled employees, and antagonistic agencies could use to punish and destroy those who opposed them. Congress's stated purpose in passing the FERA was to expand the FCA's liability provisions to reach frauds by financial institutions and other recipients of TARP and economic stimulus funds, but those funds were already covered by the FCA. The real purpose of these amendments is to overturn many decisions—like the unanimous Supreme Court decision last year in *Allison Engine Co. v. United States ex rel. Sanders*—which set logical and reasonable limits on the scope of the FCA, a punitive statute that has the power to destroy any individual, institution, municipal entity, or company subject to its provisions.

The new amendments will adversely affect everyone—all government contractors and subcontractors, all healthcare providers, every public and private grantee and sub-grantee, and every other person, company, and entity that pays money to the government or receives Federal funds—by making it far easier to conduct FCA investigations and to win FCA recoveries. Quite simply, many logical defenses have been eliminated, and those who deal in any way with the Federal government are entering a whole new world in which FCA liability is much broader and easier to prove.

Prior FraudMail Alerts have commented on the FCA amendments in the FERA throughout the legislative process. See FraudMail Alert Nos. [09-05-19](#); [09-05-15](#); [09-05-13](#); [09-05-06](#); [09-04-30](#). Here is a comprehensive look at these FCA amendments. A red-line version of the changes that have now become final is available [here](#). Attached is the [final version of the FCA](#) that is effective as of May 20, 2009.

Major FCA Amendments Expanding Liability

Under the FERA, the key liability sections of the FCA remain the provisions addressing false claims, false statements supporting false claims, conspiracy, and the reverse false claims and obligation provisions. These provisions have been renumbered as well as expanded to cover additional conduct. The new sections 3729(a)(1)(A), (B), (C), and (G) extend liability to any person who:

- (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
- (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
- (C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);
- [. . .] or
- (G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.

Many of the key changes are in the definitions, found in section 3729(b).

Elimination of *Allison Engine's* Intent Requirement: Under the Supreme Court's unanimous decision in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008), FCA liability was limited to fraudulent statements that were designed "to get" false claims paid or approved "by the Government." See [FraudMail Alert No. 08-06-09](#). See also John. T. Boese, Civil False Claims and Qui Tam Actions §2.06[G] (3d ed. 2006 & Supp. 2009-1). The Supreme Court's interpretation in *Allison Engine* no longer applies after the FERA because the new law removes both the "to get" language and the "by the Government" limitation in section 3729(a)(2)—as well as comparable language in sections 3729(a)(3) and (a)(7). Further, it attempts to make those changes in section 3729(a)(1)(B) effective as of June 7, 2008—the date *Allison Engine* was decided.

The Court in *Allison Engine* found that, without a clear link between a false claim and payment or approval by the government, the FCA would be "boundless" and become an "all-purpose antifraud statute." 128 S. Ct. at 2128, 2130. To replace this rational limitation, the FERA adds a new definition of "claim," and FCA liability will be limited only by requiring some sort of nexus to the government. The FCA now covers requests for funds to a contractor, grantee, or other recipient, if the money or property requested "is to be spent or used on the Government's behalf or to advance a Government program or interest." The legislation does not define the key terms "used on the Government's behalf" or "to advance a Government program or interest," and presumably courts will have to decide their meaning on a case by case basis. No one knows the scope. Are government funds invested in GM or AIG "advanc[ing] a Government program" so that a false

claim to those entities will violate the FCA and be enforced by *qui tam* relators? Recognizing that this new language is not very clear, Senator Kyle attempted to limit its scope:

[p]revious understanding, as well as commons sense, dictate that a particular transaction does not “advance a Government program or interest” unless it is predominantly federal in character—something that at least would require . . . that the claim ultimately results in a loss to the government . . . [rather than] any garden-variety dispute between a general contractor and a subcontractor simply because the general receives some federal money.

155 Cong. Rec. S4540 (daily ed. Apr. 22, 2009) (statement of Sen. Kyl). One hopes that Senator Kyle’s interpretation is accepted. Future FCA case law will determine whether and to what extent Congress succeeded in overturning *Allison Engine* through the FERA.

Materiality Requirement: In addition to the nexus to the government requirement, the FERA, at long last, specifically incorporates a materiality requirement in the False Claims Act (a position the government and relators fought, without success, for over 15 years), but it defines “material” as “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property,” which is the “weaker” materiality standard that has been applied in some FCA cases. See John T. Boese, *Civil False Claims and Qui Tam Actions* §2.04 (Aspen Publishers) (3d ed. & Supp. 2009-2). How much of a difference will this make? That depends entirely on how literally courts will read this provision. Almost every violation or mistake is arguably “capable of influencing” a payment decision by the government, but many courts in the past have read this test as strongly limiting the application of the FCA. For example, despite applying this “weaker” materiality standard, at least two courts have held that violations of “conditions of participation” in a Federal healthcare program do not result in FCA violations. See *United States ex rel. Conner v. Salina Reg’l Health Ctr.*, 543 F.3d 1211 (10th Cir. 2008); *United States ex rel. Landers v. Baptist Mem’l Health Care Corp.* 525 F. Supp. 2d 972 (W.D. Tenn. 2007).

Conspiracy: Under the prior FCA, the conspiracy section was drafted to cover only a conspiracy “to get a false claim paid or approved.” Courts had properly interpreted this language to limit the conspiracy section to apply only to violations of then-subsection 3729(a)(1), and not to violations of the reverse false claim provision. Moreover, the conspiracy section required that the government pay the false claim. The new conspiracy section, 31 U.S.C. § 3729(a)(1)(C), expands the conspiracy section to include a conspiracy to commit a violation of any other substantive section of the FCA. The amendment also eliminates the need for the false claim to be paid or approved, and assesses liability for conspiring to commit the violation. Importantly, the word “knowingly” still does not appear in the language of the new conspiracy section, so the argument remains that a common law liability, including specific intent, is still required to prove a conspiracy under the FCA.

Liability for Overpayments: The amended reverse false claims liability provision in section 3729(a)(1)(G) quoted above extends new liability to “knowingly and improperly avoid[ing] or decreas[ing] an obligation to pay or transmit money or property to the Government.” Under this provision, there is no need for a person to have taken an affirmative act—a false statement or record—in order to conceal, avoid, or decrease the obligation to the government. This new

provision is even more dangerous because an “obligation” is specifically defined to include within the scope of FCA liability the retention of an overpayment from the government. The term “improperly” is intended to limit this liability, and would presumably exclude overpayments such as those under Medicaid that undergo a reconciliation process. Practitioners will be required, almost immediately after passage, to begin to advise clients whether they have received “overpayments” and the potential liability that could result from retention of such overpayments. Moreover, even though this provision is not retroactive, an overpayment is an overpayment, whether it occurred before or after May 20, 2009. The government and relators are almost certain to argue that this provision applies to overpayments made before the date of the legislation.

Expanded Definition of “Obligation”: The definition of “obligation” that triggers reverse false claims liability is expanded to encompass “an established duty, whether or not fixed” that arises from a contractual, grantee, licensee, or fee-based relationship, from a statute or regulation, or from the retention of any overpayment. According to government statements, this is intended to overturn, among other cases, the Sixth Circuit’s decision 10 years ago in *United States ex rel. American Textile Manufacturers Institute, Inc. v. The Limited, Inc.*, 190 F.3d 729 (6th Cir. 1999) (“ATMI”), which defined “obligation” to include only established obligations to pay money to the government. In addition to extending new liability to the retention of overpayments, this expanded definition seeks to extend liability to duties to pay fees that were not covered previously because they were not fixed in all particulars. Whether much of an expansion is actually achieved under this provision remains to be seen because even the DOJ concedes that the new language is not intended to extend FCA liability to penalties or fines. (The reader should note that the author represented many of the defendants in the ATMI case.)

Effective Date: Under the effective date provision in the FERA, the FCA liability amendments would apply prospectively, with one important exception. The amendment to section 3729(a)(2) takes effect on the date that *Allison Engine* was decided—June 7, 2008—making that amendment retroactive. The retroactivity of this amendment will raise a host of practical problems in pending cases, and is almost certain to be challenged as unconstitutional because conduct which the Supreme Court defined as outside the scope of FCA liability is, retroactively, now a violation. Were this a normal civil statute, such retroactivity would be allowable. But the Supreme Court has already defined the FCA as an “essentially punitive” statute. *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000). Whether a clearly punitive statute can be applied retroactively is a completely different question.

Additional FCA Amendments

In addition to amending the FCA’s liability provisions, the FERA includes four other amendments that make recoveries and investigations under the FCA easier. These amendments are as follows:

Retaliation: The prohibition against retaliation is expanded to include a “contractor, or agent,” in addition to an employee—without requiring prohibited retaliatory acts to be taken by an “employer.” Under this unusually broad definition, a retaliation action could be based on many different types of relationships that do not involve an employment contract, which could lead to unintended consequences.

Civil Investigative Demands: Under the FCA as passed in 1986, the Attorney General had to personally approve a CID, which can require deposition testimony under oath, clearly a power and a potentially abusive power. Under FERA, the Attorney General is now authorized to appoint a designee to approve a civil investigative demand, and the Attorney General or designee may share the information obtained with "any *qui tam* relator if the Attorney General or designee determine it is necessary as part of any false claims act investigation." In addition, "official use" is broadly defined, allowing the Justice Department to use the information in communications with government personnel, consultants, and counsel for other parties in matters concerning an investigation, case, or proceeding. The expanded use and sharing of CID responses with any *qui tam* relator, consultant, and counsel is potentially harmful to businesses and individuals, and in recognition of this, one hopes it will be narrowly and carefully circumscribed by the Justice Department to curb abuses.

Relation Back: The government's complaint in intervention or amendment to a relator's complaint relates back to the date of the original complaint. Under this amendment, the government could delay its intervention in ways that could dramatically undermine a defendant's ability to defend itself. See, e.g., *United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263 (2d Cir. 2006); *United States ex rel. Health Outcomes Techs. v. Hallmark Health Sys., Inc.*, 409 F. Supp. 2d 43 (D. Mass. 2006).

Service on State or Local Authorities: The seal provision would not prevent the government or relator from serving the written disclosure, a *qui tam* complaint, or other pleading on state and local law enforcement authorities that investigate the case.

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Appendix 3

CIVIL FALSE CLAIMS ACT: Here They Go Again--Newly Enacted Comprehensive Health Care Reform Law Contains More FCA Amendments

In May of last year, Congress enacted a dramatic revision to the substantive provisions of the civil False Claims Act, but left alone the key jurisdictional “public disclosure / original source” bar put in place by Congress in 1986 to avoid parasitic *qui tam* suits. See [FraudMail Alert No. 09-05-21](#) (discussing FCA amendments in the Fraud Recovery and Enforcement Act of 2009 (“FERA”)). In the FCA amendments in FERA, Congress refused to weaken the public disclosure bar, but that restraint did not last a full year.

The Patient Protection and Affordable Care Act, signed into law by the President on March 23, 2010, directly amends the FCA’s public disclosure bar and original source exception to expand private enforcement of *qui tam* actions beyond these long-established boundaries. The FCA-related amendments are not limited to FCA actions against health care companies, but instead apply to all individuals and organizations covered by the FCA. The new law also contains confusing provisions that attempt to bootstrap FCA definitions such as “knowingly” and “obligation” to enforcement actions against participants in health care programs without amending the FCA. Similarly, it defines certain conditions of eligibility as “material” conditions of entitlement to receive payment, a designation that does not necessarily accord with FCA case law on conditions of eligibility. There is no substantive legislative history on these FCA-related provisions and amendments, which is unfortunate for those trying to understand and abide by them. As with past FCA amendments, these changes will trigger extensive litigation, and courts will be forced to grapple with how to apply them in the years to come.

A red-line version of the new public disclosure provision can be found [here](#).

The FCA’s Public Disclosure Bar is Amended

The FCA’s public disclosure bar is amended in major ways. The new law provides:

(4)(A) The court shall dismiss an action or claim under this section, *unless opposed by the Government*, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed--

(i) in a *Federal* criminal, civil, or administrative hearing *in which the Government or its agent is a party*;

(ii) in a congressional, Government Accountability Office, or other *Federal* report, hearing, audit, or investigation; or

(iii) from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, “original source” means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and *materially adds to* the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

H.R. 3590, § 10104(j), 111th Cong. (2009) (emphasis added).

The new public disclosure bar maintains the essential structure of the prior bar by requiring a court to dismiss a whistleblower’s *qui tam* suit if the allegations were “publicly disclosed,” unless the relator is an “original source” of the information underlying the allegations. However, the reach of the new public disclosure provision is limited by the following revisions:

- Dismissal is not required if the government opposes it;
- Only federal hearings in which the government “or its agent” is a party are considered public disclosures of *qui tam* allegations;
- Only a federal report, hearing, audit or investigation qualifies as a public disclosure.

While the word “jurisdiction” has been removed, the use of the words “shall dismiss” means that the provision is similar to jurisdiction in that this issue should be resolved before the substantive case goes forward. Because the public disclosure bar is limited to federal hearings, however, fewer proceedings will be considered “public” and trigger the bar; fewer reports, audits, or investigations will trigger it for the same reason. Thus, although the question of whether a state report qualifies as a public disclosure is currently pending before the Supreme Court in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, No. 08-304, that issue would be moot in future cases to which the amendment applies. See [FraudMail Alert No. 09-11-30](#) Importantly, the “news media” prong of the public disclosure bar is unchanged.

The new “original source” amendments also expand the exception to the public disclosure bar by eliminating the requirement that a person must have “direct” knowledge of the information underlying the allegations. This revision, however, does not eliminate the need for some firsthand knowledge, which is the very essence of a true whistleblower; otherwise, it would allow anyone who acquired information secondhand from public sources to bring a *qui tam* suit and share in any recovery. With the new changes, a person with such “independent” knowledge must “materially add” to the publicly disclosed allegations to qualify as an original source. It is not clear exactly what is intended by the language “materially add,” which is not defined in the law. There does

not appear to be any intent by Congress, however, to overturn the result in *Rockwell International Corp. v. United States ex rel. Stone*, 549 U.S. 457 (2007), where the Supreme Court required the relator's knowledge to encompass the allegations of fraud that were actually tried in the case, rather than simply to predict the ineffectiveness of a planned method of waste disposal that was never used. See [FraudMail Alert Nos. 07-04-11](#) and [07-03-27](#). More importantly, the dual purposes of the bar--encouraging whistleblowers to alert the government to fraud while preventing parasitic suits--which date back to the statute's origins, appear to remain intact after this revision.

Nothing in the new amendments to the FCA appears to express congressional intent for any of these changes to apply retroactively. Under the teaching of *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), that should mean that this new language would apply only to conduct occurring after March 23, 2010.

Attempts to Apply FCA Liability and Definitions in New Health Care Contexts

The other FCA "amendments" in the new health law are truly bizarre. The new law attempts to apply several of the FCA's definitions to various health care transactions without amending the FCA's liability provisions to cover these transactions. For example, a program integrity provision governing enforcement of retained overpayments states that an overpayment retained beyond the deadline for reporting and returning it is an "obligation" as defined in the FCA. See H.R. 3590, § 6402(a). The provision also states that "knowingly" is defined as it is defined for purposes of the FCA, but the term "knowingly" does not appear in the provision on overpayments. Rather, the new provision requires reporting or return of an overpayment within 60 days after it was "identified"--a term that the provision does not define.

Despite this attempt to attach FCA liability using the definitions (or lack thereof) provided in the new enforcement provisions, the FCA itself governs liability based on "knowingly" avoiding or decreasing an "obligation." Under the FCA, "obligation" is defined to include retention of an overpayment, but the FCA's reverse false claims liability is limited to "knowingly and improperly" avoiding or decreasing an obligation, which requires the element of bad faith rather than the "identification"--however that term is defined--of an overpayment. See John T. Boese, *Civil False Claims and Qui Tam Actions* § 2.01[L] (Aspen Law & Business) (3d ed. 2006 & Supp. 2010-1).

The amendments provide a sense of the Congress relating to false claims and "payments made by, through, or in connection with an Exchange." For example, the law's tax credit and cost-sharing reduction provisions, which apply to health insurance exchanges, contain the statement that any payment in connection with an exchange that includes federal funds is subject to the FCA. The amendments contain language that would raise the FCA damages for such false claims to exchanges to an amount "not less than 3 times and not more than 6 times the amount of damages which the Government sustains," but in another amendment, that language is declared null and void. See H.R. 3590, § 10104(j)(1).

Finally, the amendments provide:

Compliance with the requirements of this Act concerning eligibility for a health insurance issuer to participate in the Exchange shall be a material condition of an issuer's entitlement to receive payments, including payments of premium tax credits and cost-sharing reductions, through the Exchange.

H.R. 3590, § 1313(a)(6). This provision equates requirements for eligibility--whether important, unimportant, general, or specific--with a material condition of entitlement to payment. But, under the FCA, conditions of eligibility are not necessarily conditions of payment without a strong showing of materiality. See, e.g., *United States ex rel. Conner v. Salina Reg'l Health Ctr.*, 543 F.3d 1211 (10th Cir. 2008); *United States ex rel. Landers v. Baptist Mem'l Health Care Corp.*, 525 F. Supp. 2d 972 (W.D. Tenn. 2007). While these conditions of eligibility--many of which are yet to be established--may indeed be material under the FCA, a general statement that includes all of them does not necessarily suffice under the FCA. See John T. Boese, Civil False Claims and *Qui Tam* Actions, § 2.04 & n. 637 (citing cases). Also, the new law does not explain whether or how improper tax credit claims could be subject to FCA liability in light of the FCA's tax exception. See 31 U.S.C. § 3729(d).

* * *

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Appendix 4

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CIVIL FALSE CLAIMS ACT: Here They Go Again, Round III: Financial Reform Bill Contains More FCA Amendments

It seems that Congress cannot let any opportunity to amend the False Claims Act go to waste, and this month's legislative frenzy brings with it yet another amendment to the FCA, the third amendment in a little over a year. The House-Senate Conference Committee for the financial reform bill has approved two amendments to the so-called "whistleblower protection" provision of the FCA, 31 U.S.C. § 3730(h). See H.R. 4173, 111th Cong. (2010). After Congress completely botched the amendment of this section in the FERA amendments in 2009, see [FraudMail Alert No. 09-05-21](#), the Committee has approved amendments that will (1) once again revise the definition of "protected conduct," and (2) provide, for the first time, a three-year statute of limitations for actions brought under Section 3730(h), resolving the issue the Supreme Court addressed in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409 (2005) ("*Graham County I*"). See [FraudMail Alert No. 05-06-20](#). A [redline comparison](#) of the Committee's and FERA's retaliation amendments is attached.

Because the Committee's amendments redefining "protected conduct" would remove defenses to retaliation suits, if enacted, these amendments should only apply prospectively to conduct occurring after their date of enactment. Even applying the amendments prospectively introduces new terms and issues for interpretation that will add to the thicket of alternatives already facing litigants and judges in this fast-changing area of the law.

"Protected Conduct" Amendments

Prior to the FCA amendments in the Fraud Enforcement and Recovery Act of 2009 ("FERA"), a retaliation claim under Section 3730(h) required three basic elements: (1) the employee engaged in "protected conduct," defined as lawful acts in furtherance of an FCA action, (2) the employer knew about the protected conduct, and (3) the employer retaliated against the employee because of the protected conduct. See John T. Boese, *Civil False Claims and Qui Tam Actions* §4.11[B] (Aspen Publishers, Wolters Kluwer Law & Business) (3d ed. 2006 & Supp. 2010-1). FERA expanded the group of protected persons to "any employee, contractor, or agent," and it removed the reference to discrimination by an "employer." The reason for these changes was to eliminate the requirement that an employee-employer relationship was necessary for a retaliation violation—a requirement that excluded independent contractors from bringing retaliation actions. See *id.* at §4.11[B][2][b].

FERA also changed the conduct required for protection—from lawful acts “in furtherance of an action under this section,” to “other efforts to stop 1 or more violations.” Thus, to prove retaliation under FERA, rather than investigating the fraud in order to file a *qui tam* suit, the person must actually try to stop the fraud itself. This narrowed, rather than enlarged, the retaliation cause of action. The Committee’s amendment restores the original scope of protected conduct so that lawful acts in furtherance of a *qui tam* suit as well as “other efforts to stop 1 or more violations” are both covered. However, the Committee amendment also broadens the definition of conduct beyond the new boundaries established under FERA by expanding the group of actors who may engage in the conduct to include “associated others.” This ambiguous terminology undoubtedly will be used to support whistleblower retaliation claims based on the conduct of persons and businesses that are not in any relationship with employers, and therefore would apply in circumstances well beyond FERA’s independent contractor rationale. The only other requirement for this protection is that the conduct of the associated others must be “lawful.”

In any event, the new relationships and requirements in FERA and the latest amendments are subject to conflicting interpretations. Defining protected conduct of an “employee,” “contractor,” “agent,” and “associated others,” as well as determining what qualifies as discrimination “in the terms and conditions of employment” by non-employers, will surely be subject to debate and litigation. Because these amendments are substantive—they seemingly would enlarge liability and remove defenses—any dispute over which version of Section 3730(h) applies should be resolved under the principles that govern retroactive application of amendments to conduct occurring before their enactment, rather than by simply applying the newest version of the law. See *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1400 n.1 (2010); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 948 (1997).

Statute of Limitations Amendment

For the first time, the Committee has added a statute of limitations for retaliation in Section 3730(h), which requires these claims to be brought no more than three years from the date when the retaliation occurred. The lack of any statute of limitations for retaliation had prompted the Supreme Court to determine what limitation should be applied in *Graham County I*. The relator and the United States took the position in *Graham County I* that applying the FCA’s six-year limitation on *qui tam* actions would serve the purposes of uniformity and certainty, but the Court rejected their interpretation as unsupported by the statute itself and because it would lead to absurd results. Indeed, the Court found that substantive FCA violations and retaliation were separate causes of action, that a substantive violation of the FCA was not required for a violation of Section 3730(h), and that the limit for retaliation should begin to run when the cause of action for that violation accrued rather than when a substantive FCA violation occurred. The Court established a default rule under which state statutes of limitations for analogous state causes of action are applied to FCA retaliation actions.

The Committee’s three-year statute of limitations amendment finally fills the void that the Supreme Court’s default rule addressed in *Graham County I*. While a three-year limitation is longer than many analogous state statutes of limitations, uniformity will eventually be achieved when this amendment takes effect.

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