WRITTEN STATEMENT OF THE CHAMBER OF COMMERCE AND THE
U.S. CHAMBER INSTITUTE FOR LEGAL REFORM
IN OPPOSITION TO
S. 2041
THE FALSE CLAIMS ACT CORRECTIONS ACT OF 2007

BY

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WASHINGTON, DC

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I appreciate the opportunity to submit my views on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform in opposition to S. 2041. For the last 25 years, I have had the privilege of representing a wide variety of defendants in False Claims Act cases. My clients have included large and small companies in healthcare, oil and gas, technology and defense, as well as colleges and universities, municipal airports, churches, individuals, and local government agencies — precisely the diverse group that this proposed legislation threatens to affect most dramatically. In addition to my practice, I have also taught and studied the False Claims Act for many years. My two-volume treatise, *Civil False Claims and Qui Tam Actions*, was originally published in 1993 and is now in its Third Edition. It was the first treatise on the False Claims Act and *qui tam* enforcement and remains the leading authority cited by academics and practitioners as well as by Federal district and appellate courts on this topic.

The Chamber fully supports the Department of Justice's efforts to remedy fraud on the Government and does not countenance or support those who defraud the Federal Treasury. The Chamber recognizes the importance of an appropriate use of the False Claims Act in those efforts. The Chamber opposes S. 2041, however, because it will not assist the DOJ in its fraud-fighting efforts, it will not increase the monies returned to the Treasury, and it will not encourage more whistleblowers to bring new allegations of real fraud to the attention of the Government.

We oppose this bill because it would:

- greatly expand the scope of the Act to private contract disputes which do not affect the Treasury;
- cost the Treasury far more than it might gain by rewarding those who bring no new allegations of fraud to the attention of the Government;
- allow Government employees to abuse Government information for personal profit;
- create an administrative nightmare for any person, company, or institution that pays or receives Federal money;

- disassociate the whistleblower protection provisions of the Act from any activities regarding *qui tam* enforcement; and
- encourage private counsel access to information obtained under a Civil Investigative Demand to supplement *qui tam* complaints that do not state a claim under the Act.

In short, the amendments in S. 2041 would increase the possibility that False Claims Act enforcement will be abused by *qui tam* relators' counsel, particularly in the 80% of *qui tam* cases in which the DOJ declines to intervene because the cases are meritless.

The concerns being expressed by the Chamber on behalf of the business community are supported by more distant experience with *qui tam* enforcement. In fact, another country's experience with a very broad *qui tam* enforcement system provides an excellent preview of things to come if the proposed amendments are enacted. That history is described in a scholarly study published in 2000 by Professor Randy Beck, who traced the decline and ultimate repeal, in 1951, of England's *qui tam* laws. *See* J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. Rev. 539 (2000). Professor Beck describes a country plagued by malicious and harassing *qui tam* prosecution and reports that public sentiment turned against *qui tam* enforcement in England because of "the obnoxious practices of common informers," who were widely perceived to be practicing a "form of legalized blackmail." *Id*. at 603-04. As Professor Beck notes:

> A further defect in the system of *qui tam* enforcement related to selection of targets for prosecution. Ideally, a public prosecutor exercises discretion in choosing prosecution targets in order to avoid applying a statute in ways that undermine the public interest. A *qui tam* statute eliminates any incentive for a benevolent exercise of prosecutorial discretion. The common informer has little reason to consider broader issues of public policy raised by a particular prosecution, and in fact has a strong financial incentive not to take such considerations into account. The result is that informers pursue litigation that disinterested prosecutors would consider contrary to the public good.

Id. at 583 (internal citations omitted). Adoption of the amendments in S. 2041 will likewise undermine public support for the goals of the False Claims Act in this country.

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I. THE AMENDMENTS WILL EXPAND *QUI TAM* ENFORCEMENT, WHICH HAS BEEN ABUSED BY THE PLAINTIFFS' BAR

Before I address the amendments themselves, I believe it is important to address five (5) common misconceptions about the False Claims Act ("FCA" or "the Act"), and particularly *qui tam* enforcement in FCA cases declined by the DOJ.[1] This, after all, is the focus of the vast majority of these amendments, and this discussion should inform the Committee's view of the amendments that benefit those *qui tam* relators and their lawyers.

Some background information on FCA litigation will also help the Committee better understand why the proposed legislation poses a grave threat to the economic viability of many businesses, non-profit groups, and local governmental entities. It is against this background that the Committee should exercise great caution before expanding a statute that threatens such severe consequences for so many.

A. *Qui Tam* Enforcement Does Not Result in Large Recoveries

There is a common misconception, perpetuated by the plaintiffs' bar, that these particular amendments are necessary for private attorneys to combat major fraud by the big corporate interests who outgun DOJ attorneys. The opposite is true: Of the $20 billion recovered under the False Claims Act since the 1986 Amendments, only 1.4% was recovered in *qui tam* cases in which the DOJ did not intervene.[2] These amendments, designed only to expand this type of litigation with such a low track record for success, benefit only *qui tam* relators and their attorneys, not the U.S. taxpayer.

The fact is, the FCA works best when the Government investigates, intervenes, and determines whether or not a case has merit and, if so, prosecutes the case. These declined cases[3] are, by and large, meritless, and are focused on questionable cases or small businesses and institutions which can ill afford to defend themselves. They involve violations of regulations without loss to the Treasury and are contrary to public policy and common sense.

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1 Under the Act, a *qui tam* case must be filed under seal to give the Government the opportunity to investigate the allegations. After that investigation, DOJ can either intervene, in which case it has primary responsibility for the litigation, or decline to intervene, in which case the *qui tam* relator can proceed alone. 31 U.S.C. §§ 3730(b)(4) & (c). Historically, the DOJ intervenes in approximately 20% of *qui tam* cases. Department of Justice, Fraud Statistics for 2007-Overview (2007) (hereinafter "DOJ Statistics"), *available at* http://www.ffhsj.com/practice_groups/qui_tam/overview_2007.pdf. A copy of the DOJ Statistics is appended hereto as Attachment B.

2 DOJ Statistics at pp. 2 & 6.

3 When the Justice Department chooses not to exercise its statutory right to intervene in and take over *qui tam* FCA cases, such cases are commonly referred to as "declined" cases.

B. *Qui Tam* Enforcement Does Not Target Only Large American Businesses

A second common misconception, perpetrated by the plaintiffs' bar that profits from these cases, is that whistleblowers need the amendments so they can pursue big corporate frauds. While some *qui tam* cases are filed against large companies, the majority of defendants in *qui tam* cases are small businesses, local governments, and non-profit institutions. A sample from just the last few years includes:

Arkansas
Game and Fish Commission

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

Georgia
Augusta-Richmond County
Providence Missionary Baptist Church of Atlanta

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

Michigan
Oakland Livingston Legal Aid

Missouri
City of St. Louis

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

North Carolina
Easter Seals UPC

Ohio
Cuyahoga Falls General Hospital

Pennsylvania
Mercy Hospital of Pittsburgh
Tyrone Hospital
Lavender Hill Herb Farm

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

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

Vermont
City of South Burlington

Virginia
George Mason University

Washington
Housing Authority of Seattle

These non-profit institutions and public entities cannot, in many cases, afford to defend themselves against the treble damages and oppressive penalties assessed under the FCA, but they must divert valuable resources to do so because failing to do so would expose them to the very real risk of bankruptcy.

C. Innocent Companies and Institutions Are Adversely Affected by *Qui Tam* Enforcement of the FCA

A third common misconception is that *qui tam* enforcement only targets those who clearly defraud the Government. In fact, the opposite is true, and these meritless cases cost the American public dearly. As shown above, *qui tam* cases are filed every day against almost every type of institution in America. In 80% of those cases, the Government investigates and then declines to intervene, yet the *qui tam* relator and lawyer proceed with hopes of a big payoff. Those declined cases bring in only 1.4% of all FCA recoveries, yet they must be vigorously defended because the onerous treble damages and penalties will bankrupt most institutions. And they cost a fortune to defend.

I have two examples for the Committee from my own experience:

Example 1: A municipal airport was sued by a former environmental compliance officer under the FCA for applying for FAA grants and allegedly falsely certifying compliance with environmental regulations. The DOJ did not intervene. The court denied most pretrial motions, and the case went to trial. The jury entered a verdict against the *qui tam* relator and in favor of the airport, and the Fifth Circuit recently affirmed.

Cost of that trial and appeal to the airport: approximately $5 million.

Example 2: A non-profit hospital was sued by its former head nurse alleging violations of Medicare regulations. The DOJ did not intervene. Preliminary motions were denied, and the case went to full discovery. A month before trial, the court ruled in favor of the hospital on a summary judgment motion. No appeal was taken.

Cost to defend the hospital without a trial or appeal: approximately $1.7 million.

While some large defense contractors can try to pass on a portion of these defense costs to the Government, most small businesses and grantees have no ability to do so. They must simply absorb those costs as a "cost of doing business" with the U.S. Government. For many businesses, *qui tam* enforcement makes that cost too high.

D. Many *Qui Tam* Cases Are Inconsistent with Government Policy and the Public Interest

Most FCA cases brought by *qui tam* relators without DOJ intervention do not involve claims for services that were never rendered or products that were defective or never delivered. Instead, they more commonly involve allegations that, in the course of manufacturing a product or providing a service, a defendant falsely represented, or certified, that it was complying with various laws, regulations, and contract terms. *Qui tam* relators allege that such certifications are a basis for liability even if the Government is accurately billed for the correct amount.

The increasing tendency of *qui tam* relators to bootstrap regulatory violations onto the FCA is cause for great concern to the business community because most operate in highly regulated environments. Most of those laws and regulations — though perhaps important — have little or no direct bearing on the project or service being funded or the Government's purposes for

funding that project. In a typical contract or grant, for example, the recipient must certify that it is and will remain in compliance with more than 50 specified laws, regulations, executive orders, and other Federal requirements.

But imagine the daunting task of conducting business in an environment where such certifications become whistleblower-driven compliance traps, which can cost hundreds of millions of dollars and have the very real capacity to cripple organizations that are often among the most important employers in a community.

Medicare cost report certifications are good examples: the preparer must certify that he or she is "familiar with the laws and regulations regarding the provision of health care services and that the services identified in [the] cost report were provided in compliance with such laws and regulations." *United States ex rel. Thompson v. Columbia/HCA*, 20 F. Supp. 2d 1017, 1041 (S.D. Tex. 1998). The Federal "laws and regulations regarding the provision of health care services" occupy, according to one reliable estimate, "more than 130,000 pages of rules and regulations for all Government healthcare programs, over 100,000 of which are related to Medicare." *Rx for the Health Care System*, WALL ST. J. at A18 (Oct. 8, 1998) (quoting Robert R. Waller, M.D., president and CEO of the Mayo Foundation). This staggeringly broad certification has been the basis for dozens of *qui tam* suits.

Congress has wisely refrained from creating a private enforcement mechanism for most of these laws and regulations, but the FCA is already widely used by private plaintiffs to litigate alleged regulatory and statutory violations indirectly. When such cases involve little or no economic harm to the Federal Treasury (where, for example, an otherwise perfectly fine product was delivered and a well-performed service was actually rendered), the high per-claim penalties available under the FCA mean that penalties can quickly accrue to the point where they far exceed any actual out-of-pocket loss experienced by the Government.[4] It is safe to say that most legislators and regulators would not and did not impose such draconian sanctions for the underlying regulatory or statutory violations: The public outcry over such a regime would be deafening. Yet, the Act allows *qui tam* relators, for their own profit, to sue for just such extraordinary sanctions.

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[4] This draconian and excessive penalty is compounded dramatically when plaintiffs argue that all claims made during the period of alleged non-compliance were "false" and that the measure of damages is not the Government's economic loss (which is often zero), but rather three times the total amount received from the Government during that period. *See, e.g., United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908 (4th Cir. 2003); *Ab-Tech Constr., Inc. v. United States*, 31 Fed. Cl. 429, 430-33 (Fed. Cir. 1994). Although both of these courts rejected this approach to calculating damages, many of the FCA settlements involving the pharmaceutical industry involved drugs that were actually prescribed and provided, but the Government and relators asserted that the corresponding payment claims were "tainted" by kickbacks. Plaintiffs typically argue that the damages in "tainted" claims cases are measured by the total sum paid by the Government for a claim it allegedly would have refused to pay, if it had known of the alleged legal violation.

E. Extravagantly Excessive Bounties Encourage Frivolous *Qui Tam* Litigation

Under existing law, *qui tam* relators can receive up to 30% of an FCA settlement or judgment. Large settlements paid in recent years have produced extravagantly large relator share payments. Two relators received a $95 million payment in connection with a settlement paid by TAP Pharmaceuticals in 2001.[5] Another relator recently received a $62 million bounty in connection with a settlement paid by Merck.[6] But if the relators would, as is likely, have been very satisfied with $20 million each, then the Government overpaid the two TAP relators by a total of $55 million and the Merck relator received $42 million more than necessary, resulting in an economically inefficient misallocation of $97 million that should have been paid to the U.S. Treasury.

This analysis is relevant to the Senate's consideration of the proposed amendments because it reveals how the lottery-like aspect of the existing system encourages frivolous litigation that comes at significant direct and indirect cost to consumers, businesses and taxpayers. Although most relators get much less than the amounts listed above, the hope of a Lotto payoff encourages individuals to take a chance on a *qui tam* suit. If nothing else, claiming whistleblower status often allows problematic employees to extract some sort of payment from their former employers. The proposed amendments would increase the economic inefficiencies and abuses in the existing system and could have particularly catastrophic effects on American businesses in the current difficult economic environment.

II. THE COMMITTEE SHOULD REJECT THE NEW DEFINITION OF "GOVERNMENT MONEY OR PROPERTY" TO COVER PRIVATE CONTRACT AND TORT DISPUTES WITH NO LOSS TO THE FEDERAL TREASURY

A. Summary

Section 2 of S. 2041 would define "Government money or property" to include any money the Government possesses, handles, or processes in any way, regardless of whether the Government has a property interest in those funds as a matter of law. It would dramatically re-define historical concepts of property and would allow the FCA to be used in disputes over money or property held by a bankruptcy trustee or Federal employee donations made to private

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5 *See* "TAP Pharmaceuticals and Others Charged With Health Care Crimes: Company Agrees to Pay $875 Million to Settle Charges," DOJ Press Release # 513 (Oct. 31, 2001), *available at* http://www.usdoj.gov/opa/pr/2001/October/513civ.htm. What is extremely telling about subsequent developments in this case is that the 11 individual defendants indicted by the Justice Department who fought these charges at trial were *acquitted* by a jury of all of the charges against them. Because of the overwhelming failure of proof in this case (the defendants did not put on a defense because the case in chief was so inadequate), the court set aside the guilty plea that had been entered by one defendant before the case went to trial.

6 *See* "Merck to Pay More Than $650 Million to Resolve Claims of Fraudulent Price Reporting and Kickbacks," DOJ Press Release # 08-094 (Feb. 7, 2008), *available at* http://www.usdoj.gov/opa/pr/2008/February/08_civ_094.html.

charities participating in the Combined Federal Campaign. It constitutes a gross overreaction to issues raised in a very small number of cases that are better addressed through already existing remedies. The proposed amendment would divorce the FCA from the protection of the Federal Treasury and would "federalize" routine private contract disputes between private parties simply because one of the parties receives some Federal funds. In many ways, this effort to dramatically re-characterize "Government money or property" would trivialize the Act and subject the statute to public ridicule and to constitutional challenges that have a high probability of success.

B. Current Law

1. The FCA currently requires a call upon the public fisc

Under current law, the False Claims Act reaches any "claim," which includes "any request or demand which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(c).

For FCA liability to arise under current law, there must be an actual call upon the public fisc. *See, e.g., Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999). The First Circuit held, in *United States v. Rivera*, 55 F.3d 703, 710 (1st Cir. 1995), that the FCA attaches liability not to the underlying fraudulent activity or to the Government's wrongful payment, but to the "claim for payment." Courts must examine whether a false claim or statement actually has "the practical purpose and effect" of causing the Government to pay when it otherwise would not have done so. *Id.* at 710. Similarly, in *United States ex rel. Hutchins v. Wilentz, Goldman and Spitzer*, 253 F.3d 176, 183-84 (3d Cir. 2001), the Third Circuit emphasized that the ultimate payer or reimburser of the claim must be the United States Government.

2. Courts have properly concluded that wages paid to Federal employees are not Federal funds once they vest in the employee, even if the Federal Government processes those funds

Under current law, alleged schemes targeting funds that belong to Federal employees are not actionable under the FCA. The proposed amendments, however, would change that, despite the lack of any justifiable Federal interest in such cases.

One relator already tried to pursue a *qui tam* case under this theory, suing the United Way for allegedly misrepresenting its eligibility to participate in the Combined Federal Campaign ("CFC"). The relator claimed that because Federal employees are paid from the U.S. Treasury, "[t]his is a fraud perpetrated on recipients of federal funds to gain access to a portion of those funds." *United States ex rel. Bustamante v. United Way/Crusade of Mercy, Inc.*, No. 98C5551, 2000 WL 690250, at *4 (N.D. Ill. May 25, 2000). Under current law, the court easily rejected this expansive theory of liability, holding that

> although the federal government, as the employer, is responsible for deducting the designated contribution from an employee's paycheck, this does not convert the

> employee's personally paid charitable contribution into federal money. . . . [I]t would indeed be an illogical result if any time a federal employee spent her federal wages, she was considered to be expending federal funds and therefore protected from fraud by the FCA.

Id. at *5. *See also Sakote v. District of Columbia*, 56 Fed. Appx. 519 (D.C. Cir. 2003). However, as is explained below, this "illogical result" is exactly what S. 2041 would produce.

C. Analysis of the Proposed Amendment

S. 2041 proposes to define "Government money or property" as "money or property belonging to the United States Government; money or property the United States Government provides, has provided or will reimburse to a contractor, grantee, agent or other recipient to be spent or used on the Government's behalf or to advance Government programs; or money or property belonging to any 'administrative beneficiary.'" S. 2041, § 2(1)(b)(2).

An "administrative beneficiary" is further defined in a proposed new definition as any "natural person or entity, including any governmental or quasi-governmental entity, on whose behalf the United States Government, alone or with others, collects, possesses, transmits, administers, manages, or acts as custodian of money or property." *Id.* § (2)(1)(b)(4).

1. The proposed legislation would disassociate FCA liability from the act of submitting claims to the Federal Government

By changing the definition of Government funds, the amendment alters the definition of "claim" — removing from the liability assessment the critical element of Government approval or denial of payment — and thus eliminates that which is the "*sine qua non* of liability under the FCA: the submission of the false claim to the Government." *See, e.g., United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 225 (1st Cir. 2004); *United States ex rel. Clausen v. Lab. Corp. of Am., Inc*., 290 F.3d 1301, 1311 (11th Cir. 2002). By allowing FCA liability to extend to transactions between individuals based on some loose "association" with the Government rather than on the relatively well-defined act involved in an affirmative decision — *by the Government* — to pay or not to pay claims, the bill would change the statute's fundamental concern from preventing fraud against the Government to something completely different. It would apply the Act's lower intent threshold, punitive damages, and mandatory penalties to non-governmental transactions that are now covered by the higher intent standards that states require for proving common law fraud. Changing the law so drastically represents a fundamental policy change that should not occur because of a poorly conceived or unintended response to a few cases that resulted in rulings adverse to *qui tam* relators. They are not "corrections" to the law, but rather drastic changes to both common law and the FCA.

2. The proposed amendments would federalize disputes between private parties

The primary flaw in the proposed language re-defining "Government money or property" is the breadth of subsections (b) and (c). Viewed literally and broadly, a disputed claim to a Federal employee or retiree or Social Security beneficiary — who is arguably paid with Federal

funds "to advance Government programs" — would be swept under the False Claims Act. This would include claims by roofers, contractors, or landscapers who work at the private homes of Government employees, grantors, or contractors. Although the drafters clearly tried to avoid a broad result by inserting language purportedly limiting the application of the FCA to "money to be spent or used on Government programs," that effort is undone by the language that follows — a virtually limitless category of sums spent "to advance Government programs." Clearly, wages paid to Federal employees and benefits paid to Social Security beneficiaries advance Government interests and would thus lead to the absurd scenarios described above.

Relators will also inevitably assert that the allegations easily rejected in *Bustamante* are a valid basis for liability under this theory. In the unlikely event that they fail under the legislation's new definition of what qualifies as Government money or property, S. 2041 provides a generous second chance: FCA plaintiffs would also argue that the Federal Government transmits and administers money on behalf of Federal employees and CFC charities as "administrative beneficiaries." The 2007 list of CFC charities contains the names of 2,053 organizations, including the Tibet Fund, the Desmund Tutu Peace Foundation, and Bikes Not Bombs, Inc. Even if one assumes that an outright fraud has been committed against one of these organizations, it is difficult to understand how relatively small donations made with the personal funds of Federal employees justify the application of the civil FCA in such circumstances, particularly when the costs of such litigation described above are considered.

3. The proposed legislation intrudes on rights traditionally reserved to the states

Section 2 of S. 2041 would transform disputes traditionally addressed through state tort, contract, or fraud law into — literally — a Federal case. This raises significant federalism concerns because it shifts functions traditionally reserved to the states to individual whistleblowers and DOJ. S. 2041 creates a Federal fraud statute for private frauds, which is both unprecedented and, we hope, unintended.

This would have a particularly adverse effect on the cost of commercial products. Under this amendment, an allegedly defective product would, if purchased by a Federal employee (or Social Security recipient or any person or entity receiving Federal funds), be subject to the treble damages and penalty provisions of the Act. The cost of such litigation would cause the price for those products to skyrocket, even though such disputes have traditionally been resolved under state tort law.

4. The proposed legislation is a gross overreaction to a small number of cases involving unusual facts

The sponsors of this amendment explained that it is intended to overrule *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617 (E.D. Va. 2005), which is now on appeal to the U.S. Court of Appeals for the Fourth Circuit. That decision, which is still on appeal, concerned allegedly false claims to the Coalition Provisional Authority ("CPA") in Iraq,

an international entity that ceased to exist in 2004.[7] This is one case out of thousands brought under the FCA since 1986. Even if published reports of other sealed cases involving allegedly false claims to the CPA are true, amending the False Claims Act so drastically to allow it to apply to a small category of cases that are so unique — and incapable of repetition — is simply unnecessary and threatens the viability of American businesses.

5. The proposed legislation would be vulnerable to constitutional challenges that are very likely to be successful

This provision, if enacted, will face vigorous constitutional challenge. The Supreme Court has held in a series of decisions that FCA damages and penalties that exceed a reasonable multiple of the actual loss to the Government are unconstitutional under both the Due Process and Excessive Fines Clauses. *United States v. Halper*, 490 U.S. 435 (1989); *Hudson v. United States*, 522 U.S. 93 (1997) (stating that "[t]he Due Process and Equal Protection Clauses already protect individuals from sanctions which are downright irrational [and] [t]he Eighth Amendment protects against excessive civil fines"); *see also United States v. Mackby*, 261 F.3d 821, 831 (9th Cir. 2001) (ruling that because FCA damages and penalties have a punitive purpose, they both must be analyzed under the Eighth Amendment to determine whether they are unconstitutionally excessive). By definition, the Government suffers no economic loss when non-Government funds are at stake. There is, therefore, serious question as to whether such a provision, if passed, would survive a constitutional challenge.

*   *   *

Even more fundamentally, the question for the Senate is whether it wishes to impose on an even broader sector of the American economy the type of litigation described in the Introduction — where the False Claims Act is wielded as a sledgehammer in litigations involving an almost endless universe of organizations, entities, and beneficiaries whose transactions would potentially fall within the reach of the FCA under the sweeping definitions found in Section 2 of this proposed legislation.

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[7] That case held that two categories of funds at issue were Government funds within the meaning of the FCA: deposits in U.S. banks that once belonged to the Government of Iraq, but were seized by the United States during the first Gulf War, and funds and moveable property seized by Coalition forces on the ground in Iraq. *Custer Battles*, 376 F. Supp. 2d at 626, 645-46. Claims for one category of funds, however, were not "claims" within the meaning of the FCA because they had always been Iraqi funds: money from the Development Fund for Iraq, which originated primarily from sales of Iraqi oil under the United Nations Oil for Food program. *Id.* at *87.

III. THE COMMITTEE SHOULD REJECT THE AMENDMENT ALLOWING NON-WHISTLEBLOWERS TO BRING *QUI TAM* CASES BY ELIMINATING THE "PUBLIC DISCLOSURE/ORIGINAL SOURCE" DEFENSE

A. Summary

Section 4 of S. 2041 effectively eliminates a core tenet of *qui tam* enforcement — encouraging whistleblowers to come forward with new allegations of fraud against the Government. The Government pays up to 30% of all recoveries to a *qui tam* plaintiff because that person is a true whistleblower who exposes a fraud that has escaped the attention of the Federal Government. Section 4 of S. 2041 abandons that sensible approach and instead allows relators to turn public information into a winning lottery ticket for no other reason than the relators were the first to file a *qui tam* case and thus entitled to their share of the Government's recovery, even though they brought no new fraud allegations to the attention of the Government.

One of the most effective bars to meritless and parasitic lawsuits under the False Claims Act has been and continues to be the "public disclosure" bar that Congress included as part of the 1986 Amendments. The public disclosure bar allows defendants to seek dismissal if the relator's case is based on publicly disclosed information and the *qui tam* relator is not an "original source" to the Government.[8] This jurisdictional defense was the result of Congress' legitimate efforts in 1986 to strike a balance between the twin goals of preventing such "parasitic exploitation" of public information while still encouraging legitimate "whistleblowers" to give the Government important substantive information about fraud. The provisions of S. 2041 turn that delicate balance on its head, creating ample prospects for opportunistic relators to recycle stale information as they file parasitic suits that do little to enhance the Government's fraud investigation. Indeed, the bill would allow recovery in so-called "whistleblower" cases by those who are not whistleblowers at all.

In the end, the proposed elimination of the public disclosure/original source defense in *qui tam* cases will not increase the recovery of money lost to the U.S. Treasury from fraud. Instead, this provision will simply enrich the plaintiffs' bar and increase the costs of *qui tam* litigation to innocent American companies and institutions. By effectively eliminating the "public disclosure/original source" defense, these amendments will force American businesses and institutions to defend themselves against *qui tam* relators who do not bring any new fraud allegations to the attention of the Government.

B. Current Law

The purpose, of course, of the *qui tam* provisions of the False Claims Act is to "enhance the Government's ability to recover losses sustained as a result of fraud against the Government." S. Rep. No. 99-345, at 1 (1986), *reprinted in* 1986 U.S.C.A.A.N. 5266, 5266.

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[8] Importantly, this "public disclosure/original source" bar does not apply to the Government, only to *qui tam* relators, and is normally relevant only in *qui tam* cases in which the DOJ investigates and declines to prosecute. Unless the relator claims enormous attorneys' fees, the issue rarely arises in cases in which the DOJ intervenes because the case proceeds regardless of the status of the relator.

Qui tam enforcement accomplishes this goal by encouraging "private individuals who are aware of fraud being perpetrated against the Government to bring such information forward" in exchange for a percentage of the Government's ultimate recovery. H.R. Rep. No. 99-660, at 22 (1986). In other words, the *qui tam* enforcement mechanism essentially allows the Government to "purchase" from private citizens the information they may have about fraud on the U.S. Treasury. *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 309 (5th Cir. 1999).

The effectiveness of *qui tam* enforcement, however, also makes it susceptible to abuse by opportunistic bounty hunters masquerading as whistleblowers. Creating a statutory scheme that weeds out the former and encourages the latter has proved to be a tricky task. Thus, there should be no surprise that "[t]he history of the FCA *qui tam* provisions demonstrates repeated congressional efforts to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior." *United States ex rel. Springfield Terminal Railway Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994).

In 1986, after over 100 years of living with two different extremes — one that allowed parasitic *qui tam* relators to cut and paste allegations from the Government's own pleadings and another that disallowed *qui tam* suits where the Government had knowledge of the information even if the relator was the Government's source[9] — Congress forged a more balanced approach to screening for proper *qui tam* relators when it enacted the "public disclosure/original source" provision codified in 31 U.S.C. § 3730(e)(4). This provision states in full:

> (4) (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

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[9] The first example is the infamous case of *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), in which an enterprising *qui tam* relator made a direct copy of a criminal indictment, incorporated those allegations in a civil action under the False Claims Act and requested half of any subsequent civil judgment. *Id.* at 545. He ultimately prevailed, and, in response, Congress quickly amended the False Claims Act in 1943 to bar *qui tam* actions "based on evidence or information the Government had when the action was brought." Act of Dec. 23, 1943, Pub. L. No. 78-213, ch. 377, 57 Stat. 608.

The second example is from the equally infamous *United States ex rel. State of Wisconsin v. Dean,* 729 F.2d 1100 (7th Cir. 1984), in which the court refused to allow Wisconsin to act as a *qui tam* relator in a Medicaid fraud action (even though the investigation had been conducted solely by the State of Wisconsin and the Federal Government learned of the fraud only because Wisconsin had reported it) because, the court held, the FCA barred *qui tam* actions "whenever the government has knowledge of the 'essential information upon which the suit is predicated' before the suit is filed, even when the plaintiff is the source of that knowledge." *Id.* at 1103.

The *Marcus* case was largely responsible for the 1943 Amendments to the FCA; the *Dean* case was a key motivator for the 1986 Amendments. For a complete discussion of the history and policy behind the 1943 and 1986 Amendments, *see* John T. Boese, *Civil False Claims and Qui Tam Actions*, 3d ed. ch. 4.02.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4). Although not without its own ambiguities and interpretive challenges, Section 3730(e)(4) deprives courts of jurisdiction over claims that are based upon publicly disclosed allegations and transactions unless the relator is an "original source."

Lower courts have long understood Section 3730(e)(4)'s public disclosure provision to be a "quick trigger" test that, if necessary, will lead to the more nuanced original source analysis to determine whether the particular *qui tam* relator in a given case is a true whistleblower. *See United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1545 (10th Cir. 1996); *United States ex rel. Hagood v. Sonoma Co. Water Agency*, 81 F.3d 1465, 1476 n.18 (9th Cir. 1996); *Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 568 n.10 (11th Cir. 1994) (per curiam). The "original source" analysis is designed "to bar parasitic suits through which a plaintiff seeks a reward even though he has contributed nothing significant to the exposure of fraud," *United States ex rel. Devlin v. State of California*, 84 F.3d 358, 362 (9th Cir. 1996), and the original source provisions are structured "to encourage individuals who are either close observers or involved in the fraudulent activity to come forward" and to avoid "windfalls for people with secondhand knowledge," *United States ex rel. Kinney v. Stoltz*, 327 F.3d 671, 674 (8th Cir. 2003). Taken together, this scheme is designed to obtain "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 571 (10th Cir. 1995) (internal quotation marks and citation omitted).

C. Analysis of the Proposed Amendment

S. 2041 entirely dismantles the balance to *qui tam* enforcement that Congress achieved with the 1986 Amendments — amendments that allowed true whistleblowers to proceed with their actions while at the same time allowing defendants the opportunity, early in the litigation, to fend off truly parasitic *qui tam* suits. This bill abandons that sensible approach and, instead, effectively returns the FCA to the infamous pre-1943 days of "parasitic exploitation of the public coffers," where copying information from the Government's own criminal indictment could serve as a basis for a successful *qui tam* suit. *Springfield Terminal Railway*, 14 F.3d at 649 (citing *Marcus v. Hess*, 317 U.S. 537 (1943)). This bill also discards over 20 years of developed case law, culminating in the Supreme Court's recent decision in *Rockwell International Corp. v. United States*, 127 S. Ct. 1397 (U.S. 2007), that has brought the current public disclosure/original source provisions into sharper focus.

The proposed bill hits American companies and institutions with a triple whammy: (1) it neutralizes the meaning of "public disclosure," (2) it strips defendants of their standing to challenge relators who fail to meet the jurisdictional bar, and (3) it eliminates the requirement that the relator be an original source and instead substitutes a new threshold (whether the relator provides any "essential element of liability") that is so low almost any competent attorney could

draft a complaint to satisfy it. This wholesale abandonment of the public disclosure/original source provisions of the current FCA is unwarranted and will revolutionize *qui tam* enforcement, but not in a good way.

1. The definition of "public disclosure" is far too narrow

S. 2041 redefines the term "public disclosure" to mean "the public disclosure of allegations or transactions in a Federal criminal, civil, or administrative hearing, in a congressional, Federal administrative, or Government Accountability Office report, hearing, audit or investigation, or from the news media." S. 2041, § 4(b). It goes further, though, to narrow the definition even more by limiting public disclosures to include "only disclosures made on the public record or that have otherwise been disseminated broadly to the general public." *Id.*

Thus, under the proposed bill, public information does *not* include information from state and local proceedings, hearings, administrative reports, audits, or investigations, regardless of whether the Federal Government already has that information or has access to it. Moreover, by redefining "public disclosure" to mean only those disclosures made on the public record or disseminated broadly to the general public, opportunistic relators will be permitted to scavenge suits from otherwise public information that does not meet this new "public record" or "disseminated broadly to the general public" standard. Indeed, the very term "disseminated broadly to the general public" defies clear definition — does that mean it has to be in the *New York Times*, or will the Scranton *Times-Tribune* suffice?

The bottom line effect of this amendment will be to encourage more *qui tam* cases based on public information by relators who add nothing to the Government's knowledge or fraud fighting efforts. This means that anyone in Juneau, Alaska, with Internet access, a PACER account, and enough patience to monitor pleadings filed in the U.S. District Court for the Southern District of Florida could cobble together a *qui tam* complaint from criminal indictments filed against any federal contractor in Miami, never mind whether the purported whistleblower has ever *witnessed* any fraudulent activity by the defendants, ever *met* the alleged perpetrators, or even *visited* Miami.

2. The elimination of the defendant's ability to dismiss parasitic cases is unwarranted

S. 2041 also strips a defendant of its standing to challenge the jurisdiction of a *qui tam* relator who brings a case based on publicly available information. A defendant's ability to make this kind of challenge, however, has been a mainstay of the False Claims Act since 1943. This jurisdictional defense has allowed defendants to bring to an early end those parasitic cases that should never have been brought in the first place. This bill, instead, provides that only the United States may challenge the status of a *qui tam* relator, thus providing defendants no defense or remedy whatsoever when they face *qui tam* suits based on public information where the Government has declined to intervene in the case. *See* S. 2041, § 4.

Under the proposed bill, a defendant would have no standing at all to challenge the jurisdiction of a *qui tam* relator who derived every aspect of every element of every claim against it from publicly available, broadly disseminated information found in the news media and openly

discussed in Federal hearings. Even the Government would lack the power to challenge a relator who had gathered his key information about the fraud from public sources rather than from his own substantive knowledge and who has built a case on information the Government already has.

Putting aside these more fundamental flaws in the bill, there still is no reason to deprive defendants of the ability to seek dismissal of parasitic *qui tam* suits. Stripping defendants of their standing to challenge the jurisdiction of relators who have filed frivolous claims effectively eliminates the jurisdictional bar altogether. The Government has consistently demonstrated that it lacks the resources and the willingness to challenge a relator's satisfaction of the jurisdictional bar and usually does so only on those few occasions when a dispute occurs concerning a relator's claim to a settlement. The Government, instead, has relied on the resources of defendants to challenge parasitic lawsuits.

By placing the burden solely on the DOJ, S. 2041 places yet another burden on the limited resources of the DOJ. The Government already must investigate every *qui tam* lawsuit to determine whether to intervene in the case (*see* 31 U.S.C. § 3730(b)). With this bill all but eliminating the requirement that *qui tam* relators be true whistleblowers, a dramatic proliferation in the filing of *qui tam* suits is sure to follow, and the DOJ will have to investigate each and every one of these suits. The DOJ does not have the resources, and likely will not have the inclination, to seek dismissal of even those cases that qualify for dismissal under the otherwise stringent public disclosure provisions of S. 2041.

3. The grounds for dismissal are too narrow

Moreover, even in the rare circumstance where the Government might seek dismissal of a parasitic *qui tam* action, S. 2041 erects such a high threshold for obtaining such a dismissal that there would be very few motions, if any, that could succeed. The bill allows dismissal of only those cases where "the allegations relating to *all essential* elements of liability" are based "*exclusively* on the public disclosure." S. 2041, § 4 (emphasis added). Meeting *that* burden will be, quite literally, impossible, especially at an early stage of the litigation. This hurdle, such as it is, could be overcome by a relator basing just part of any one of the allegations that comprise the elements of a False Claims Act violation — *including* a general allegation that the defendant acted with the requisite "knowledge" (either actual knowledge, deliberate ignorance, or reckless disregard), *see* 31 U.S.C. § 3729(b) — on anything other than the public disclosure. Rather than shifting the law to give relators the benefit of this low threshold, the focus should remain, as the law does now, on examining the relator's knowledge of the substance of the alleged fraud.

This "all essential elements" test is also misguided. More importantly, it is difficult to understand why a *qui tam* lawsuit should go forward simply because at least some of the relator's allegations were derived from one source that, for one reason or another, does not qualify as a "public disclosure," when those same allegations and transactions were described in detail in a GAO report (for example) published the year before. There is little reason for the Government to pay a bounty to a relator who was savvy enough not to base his entire *qui tam* complaint on the contents of the GAO report (either out of ignorance of the report or by design) when the purpose of paying that bounty in the first place is to encourage whistleblowers to inform the Government of fraud.

4. The "source" of the public information should be irrelevant

Finally, although Section 4 of S. 2041 appears to include a provision meant to be an analog to the current "original source" requirement, this provision only allows a court to *reduce* a *qui tam* relator's bounty at the end of a case. Specifically, this provision allows a court to reduce the share of the proceeds for *qui tam* relators who derive their knowledge "primarily from specific information relating to the allegations or transactions" that the Government publicly disclosed or privately disclosed to the relators "in the course of its investigation." S. 2041, § 4.

Two features of this provision render it almost a nullity. First, a court must find that the relator not only derived some of his knowledge from a public disclosure — the court must find that the relator derived his knowledge "*primarily* from *specific* information relating to the allegations or transactions" in the public disclosure. (Emphasis added.) These limitations all but ensure that the only relators who will get caught by this provision are those who literally cut and paste their complaints from public disclosures obtained from the Government. Second, for the very few relators who may qualify for a reduction under this new provision, the reality is that even 5% or 10% of a multi-million dollar judgment is better than nothing. The low risk that a court, at the end of the case, *might* reduce a parasitic *qui tam* relator's share is simply too remote and, in any event, too insignificant to discourage such relators. And, perhaps more importantly, this provision would do absolutely nothing to discourage the attorneys of parasitic *qui tam* relators — S. 2041 does nothing to change the current provision in 31 U.S.C. § 3730(d)(4) that awards attorneys' fees and costs to successful *qui tam* relators.

5. The Amendment further erodes the constitutionality of *qui tam* enforcement

The Chamber has taken the consistent position that *qui tam* enforcement of the False Claims Act is unconstitutional under Article II of the U.S. Constitution, as it violates the Separation of Powers doctrine. *See Morrison v. Olson*, 487 U.S. 654 (1988) (the "degree of control exercised by the executive branch over a suit on behalf of the United States is determinative of the separation of powers issue"). We submit that, through the *qui tam* enforcement provisions, Congress has improperly delegated prosecutorial functions to private persons, whereas the Constitution vests the power to execute the laws exclusively in the executive branch. U.S. Const. art. II, § 3. *Qui tam* enforcement also violates the Due Process Clause because the provisions authorize representation of the United States by parties whose financial interests in the cases they prosecute unavoidably conflict with the duty of a government representative to seek a just and fair result. *Cf. Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 811-13 (1987) (holding that counsel for a party that is the beneficiary of a court order may not be appointed as a prosecutor in a contempt action alleging a violation of that order). The provisions of S. 2041 that eliminate the original source/public disclosure requirements only heighten the constitutional concerns that courts will consider in the future.

* * *

The False Claims Act has had a jurisdictional public disclosure bar since 1943. By redefining what constitutes a "public disclosure" and by eliminating altogether the "original source" provisions of the current law, S. 2041 renders this jurisdictional bar a dead letter. Rather

than rewarding *qui tam* relators who come forward with knowledge about fraud on the Federal Treasury, S. 2041 opens the door to a wave of parasitic lawsuits by the relators' bar while at the same time slamming shut the one procedure by which such suits can be exposed. Section 4 of S. 2041 should not be adopted.

IV. THE COMMITTEE SHOULD REJECT THE AMENDMENT ENCOURAGING FEDERAL EMPLOYEES TO ABUSE THEIR GOVERNMENT POSITIONS BY FILING *QUI TAM* SUITS

A. Summary

The Senate should not, under any circumstances, pass Section 3 of S. 2041, which allows former and current Government employees to enrich themselves by filing *qui tam* cases based on information gained as Government employees. This is bad public policy. Such suits destroy any respect and deference given to Government employees who interact with the American public and who demand and receive the most confidential and sensitive information on individual citizens, companies, and institutions. Allowing Government employees to misappropriate that information to enrich themselves is the best way to degrade and undermine Government functions.

Courts have long recognized, and the DOJ consistently agrees, that this is bad public policy. The proposal to "clarify" existing law by explicitly allowing Government employees to act as relators is an open invitation to suits by Government accountants, auditors, investigators, attorneys, and technical staff, creating clear conflicts of interest, perpetuating perverse incentives, undermining the credibility of Federal employees, and advancing the personal financial interest of Government employees and their lawyers — all at the public's expense. The proposed "safeguards" set forth is S. 2014 to avoid abuse are unworkable and restrictive, to the point that any protections they offer are illusory. The American public will understand only one thing: They are being sued by a Government employee using Government information for personal gain. That is toxic.

Instead of barring *qui tam* suits by Government employees, this bill for the first time explicitly allows such suits. The proposed legislation strips defendants of their standing to challenge suits by Government employee relators, instead granting this right only to the Government and then making it practically impossible for the Government to prevail on such a motion.

Under this flawed scheme, the Government would only have 60 days to move to dismiss a Government employee relator, even where the relator's action is derived from an "open and active fraud investigation by the Government" and then only if "*all* the necessary and material allegations" were derived from that investigation. S. 2041, § 3 (emphasis added). The other ground for the DOJ to seek dismissal is if the relator failed to first notify his agency's Inspector General, the Attorney General, and his supervisor before filing. Based on these requirements, only the most egregious cases of interference with a Government investigation — where the *qui tam* allegations were derived directly from an active Government investigation that had elicited a high degree of specific information — would subject a *qui tam* suit to dismissal. Under the great number of other circumstances, the Government lacks the ability to challenge a

Government employee's attempt to use Government information gained on the job to enrich herself and destroy the Government's relationship with the American people.

The "protections" in the proposed amendment are woefully inadequate to avoid the harm that will come by allowing Government employees to use Government information to enrich themselves. Instead of protecting those who are regulated by the Government and expect Government employees to act in good faith, the amendment practically encourages auditors, investigators, and regulators to file such suits.

B. Current Law

1. Pre-1986 law

Prior to the 1986 Amendments, Government employees could not file *qui tam* suits because of a jurisdictional prohibition in the law. In 1943, in response to the filing of parasitic *qui tam* actions based upon publicly disclosed indictments and hearings, Congress amended the False Claims Act to prohibit suits based upon information already possessed by the Government. *See, e.g., Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668, 671 (9th Cir. 1978). This 1943 amendment effectively barred Government employees from filing *qui tam* actions by prohibiting actions "based upon evidence or information in the possession of the United States, or any agency, officer, or employee thereof, at the time such suit was brought." 31 U.S.C. § 232(C) (1976).

Recognizing that this provision unduly restricted *qui tam* enforcement by true whistleblowers, Congress eliminated this provision in 1986 and replaced it with the "public disclosure/original source" limitation found in the current law, 31 U.S.C. § 3730(e)(4). The legislative history to the 1986 Amendments contains no indication that Congress intended — for the first time — to allow Government employees to bring *qui tam* cases, for their own financial benefit, based on information learned on the job. In fact Congress never intended to allow Government employees to bring *qui tam* actions by abusing their positions.

2. The law after the 1986 Amendments

While there was no indication in 1986 that Congress intended to change prior law with regard to *qui tam* suits by Government employees, the result of the change in statutory language had an unintended result. Despite vigorous and consistent opposition by the Government since 1986, most courts have reluctantly allowed *qui tam* suits by Government employees to proceed. Although many judges have severely criticized this result (see below), most courts have held that the current language of Section 3730(e)(4) left them no choice. For this reason, challenges to Government *qui tam* relators then shifted to other defenses. Importantly, current law gives both defendants and the Government latitude to challenge the right of Government employees to bring *qui tam* cases.

Where a *qui tam* action is based upon publicly disclosed allegations, the relator must be an "original source" of that information. 31 U.S.C. § 3730(e)(4); *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740, 741 (9th Cir. 1995). To qualify as an "original source," the relator must *voluntarily* provide the information forming the basis of the claim to the Government prior to filing the suit. *Chevron*, 72 F.3d at741. Where a Government employee

provides the information underlying his claims as part of his job responsibilities, courts have held that such a disclosure is not made "voluntarily" within the meaning of the False Claims Act and the relator therefore is not an original source. *Id.*

The Ninth Circuit in *Chevron* premised its decision on this logic. There, the putative relator was an auditor within the Office of Inspector General of the Department of Energy. *Id.* His job required him to supervise audits that other employees had conducted and to edit audit reports that others had written; as many as 97% of the audit reports from the Western Region Audit Office came from employees under his supervision. *Id.* As the court wrote, "he was a salaried Government employee, compelled to disclose fraud by the very terms of his employment. He no more voluntarily provided information to the Government than we, as Federal judges, voluntary hear arguments and draft dispositions." *Id.* at 743-44.

In finding that a Government employee was ineligible to act as a relator, the First Circuit, in *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17 (1st Cir. 1990), based its decision on different reasoning, but reached the same result. There, the court said that the Government employee's knowledge could not qualify as "independent" since his employment was conditioned on the duty to uncover fraud, rendering the "fruits of his effort" the property of his employer.

Existing law, however, by no means provides an absolute jurisdictional bar to Government employees acting as relators under many circumstances. The rationale for the dismissal of the Government employee relators in the cases referenced above only occurred because the allegations had been "publicly disclosed." Without such disclosure, the case proceeds. In *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1991), for example, an Air Force attorney discovered suspected bid rigging on Federal contracts in Japan. He reported the allegations to his superiors and then filed a *qui tam* suit. Because the allegations had not been made public and the Air Force attorney/relator complied with the procedural requirements of the FCA, the Eleventh Circuit ruled that he was a proper *qui tam* plaintiff. Mr. Williams therefore became eligible for as much as $30 million, or 30% of the settlement.

As the *Williams* case demonstrates, courts have reluctantly allowed some Government employees to bring *qui tam* cases under very limited circumstances despite DOJ's efforts. Even these limited circumstances, however, have been criticized by judges and commentators as improper.

C. Analysis of the Proposed Amendment

1. Sound public policy requires rejection of this Amendment

No matter how they arrive at their conclusion, courts generally tend toward the same result: Government employees should not be permitted to receive a financial windfall for merely doing their jobs. *See United States ex rel. Biddle v. Board of Trustees of Leland Stanford, Jr. Univ.*, 147 F.3d 821, 829 (9th Cir. 1998). According to one editorial discussion of certain Government employee suits, "the conflict of interest here is as clear as it would be if judges were empowered to set fines and keep a percentage of everything they collect." *Qui Tam Scam*, WASH. POST, Dec. 26, 1991, at A22.

Citing a brief by the Government, the *Chevron* court offered a persuasive and comprehensive statement on the relator status of Government employees, and the perverse incentives that unfettered relator status creates:

> To spend work time looking for personally remunerative cases . . . rather than doing their assigned work; to conceal information about fraud from superiors and government prosecutors so that they can capitalize on it for personal gain; to race the government to the courthouse to file ongoing audit and investigatory matters as *qui tam* actions before those cases have been sufficiently developed by the government to justify a lawsuit, this prematurely tipping off the target, undermining the likely effectiveness of the case, and diverting unnecessarily up to 30% of the government's recovery to the government employee; and to use the substantial powers of the federal government conferred upon public investigators . . . to advance their personal financial interests . . . . Public confidence in the integrity and impartiality of Government audits and investigations will necessarily decrease.

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

The concurring opinion of Judge Trott in the *Chevron* case acknowledged this policy consideration and argued that Government employees should therefore be prohibited from bringing a *qui tam* suit. The judge's examples are devastating:

> Permitting auditors to sue literally would destroy the government's anti-fraud and anti-waste programs. The "perverse incentives" outlined by the government and adopted by the majority exceed worrisome. Imagine, for example, an employee of the IRS bringing a *qui tam* lawsuit against a company that the employee had just audited on behalf of the government. Shades of the days leading up to the French Revolution of 1789 when taxes were collected by a private concern called the "Ferme Generale," or "Tax Farm." The first to be guillotined in the Place de la Revolution during the incarnadine Reign of Terror were the hated private tax collectors who made a profit by collecting more from the public than the amount needed by the government. One day, *Inspector* Fine uses the awesome power of the federal government to investigate you; the next, *Mr.* Fine uses the information he pries loose from you with that power to augment his bank account. Can anyone say when Inspector Fine wields the coercive tools of the government that he is also not working for himself? Dr. Jekyll one day, Mr. Hyde the next. Such an abuse could only cause the public to distrust government officials even more than the public already does.

Chevron, 72 F.3d at 747-48.

Other Federal law prohibits parties from making, and certain Government employees from receiving, payments that compensate those employees for their Government service. 18

U.S.C. § 209(a). Another provision prescribes criminal and civil penalties for violation of that provision. 18 U.S.C. § 216.

2. The POGO case

A recently-tried case demonstrates the evils of allowing Government employees to profit from *qui tam* cases. That case, *United States v. Project on Government Oversight*, underscores the potential for abuse when they do so. In that case, a senior economist with the Department of the Interior, Robert Berman, was given a $383,600 "public service award" from the Project on Government Oversight ("POGO") after POGO was one of several *qui tam* plaintiffs to secure a *qui tam* settlement stemming from the oil industry's alleged underpayment of royalties to the Government. In fact, that "award" was really a payment to Mr. Berman pursuant to an agreement with POGO to pay him 10% of whatever POGO recovered in its *qui tam* suits. In pursuit of its case, POGO published four investigative reports that contained citations to memoranda written by Mr. Berman. Moreover, around the time that POGO was making its efforts to initiate an action against the oil companies in question, Mr. Berman was himself allegedly participating in proposed rulemaking governing valuation for oil royalties. The United States maintained that, while he was employed at the Department of the Interior, Mr. Berman drafted a memorandum to the director of the agency responsible for managing oil royalties that contained suggestions intended to "ensure that the pending *qui tam* litigation would not be jeopardized."

After the scheme became public, the Government filed suit against both POGO and Mr. Berman, claiming the "public service award" violated 18 U.S.C. § 209(a). On February 11, 2008, the jury found both Mr. Berman and POGO guilty of violating that law. *See generally United States v. Project on Government Oversight,* Civil Action No. 03-0096 (JDB), Memorandum Opinion 12/3/07 and Verdict Form 2/1/08.

Cases like *Project on Government Oversight* make clear the potential for self-enrichment that the provisions of S. 2041 offer to Government employees. Government employees are in the unique position of interpreting the very rules and regulations that are the basis for allegations that companies violate the False Claims Act. Their interpretation must be above reproach and unaffected by personal conflicts. If Congress is to amend the rules on Government employee relators in any way, it should amend existing law to ensure that Government employees are not presented with conflicts of interest which threaten not only their own integrity but also the integrity of the programs, investigations, and audits with which the public has entrusted them. As currently written, S. 2041 would strip defendants of their standing to challenge relators' jurisdiction to file suit and leave the Government virtually powerless to dismiss many suits by Government employee relators. Such an amendment stands to undermine the very policies that form the foundation of the False Claims Act.

3. The "exceptions" in S. 2014 would allow more Government employees to file *qui tam* cases

Under S. 2041, the DOJ can dismiss a Government employee's *qui tam* case if it is based on an "open and active fraud investigation," but only under the following conditions: (1) the DOJ motion must be filed no more than 60 days after the relator files the case under seal and

serves the Government and (2) all necessary and specific material allegations must derive from that open and active investigation. There is no rational basis for these restrictions.

If there is an existing "open and active fraud investigation," why should the Government reward any *qui tam* relator for filing such a suit, much less one who learned of the allegations as a Government employee? Why is DOJ only given 60 days to move to have the relator dismissed? The DOJ may not even be aware of a grand jury or Inspector General investigation within that time period. Why must "all necessary and specific material allegations" derive from that investigation? These restrictions encourage Government auditors and investigators to misappropriate information they receive on the job and file *qui tam* cases to enrich themselves.

S. 2041 also allows a Government employee to bring a *qui tam* case if he or she notifies his or her agency's Inspector General (or the Attorney General) and if, after 12 months, the DOJ has not filed an FCA suit. This allows a Government auditor, investigator, or regulator to bring a *qui tam* action even if the agency and DOJ determine there was no fraud.

One cannot imagine a more outrageous situation: The Federal regulatory agency and the chief enforcement agency conclude that no fraud exists, yet a Government employee, using Government information, can sue a regulated entity and attempt to force a settlement to enrich himself.

* * *

Allowing *qui tam* suits by Government employees will destroy whatever trust and confidence exists between the American people and the Government employees who regulate them. If Congress is to amend the False Claims Act, it should amend it to prohibit — without exception — all *qui tam* suits by Government employees based on information gained as a Government employee.

V. THE COMMITTEE SHOULD REJECT THE AMENDMENT CREATING AN ADMINISTRATIVE NIGHTMARE FOR AMERICAN BUSINESSES AND FEDERAL GRANTEES BY EXTENDING THE STATUTE OF LIMITATIONS AND THE TOLLING PROVISIONS

A. Summary

Two provisions of Section 6 of S. 2041 dramatically lengthen the time period for filing *qui tam* cases. By extending the statute of limitations to 10 years in all cases, regardless of actual Government knowledge of the alleged fraud, S. 2041 allows the Government or a *qui tam* relator to bring a lawsuit long after the documents and witnesses essential to the case have disappeared.

This same proposed amendment also provides that this lengthy limitations period does not even begin to run in a *qui tam* case until that case is unsealed. Today, cases often are not unsealed for at least 2 years after filing, and many are not unsealed for over 5 years, since there are no legal limits on how long a *qui tam* case can remain under seal. Nor is there any requirement in existing law that the Government give notice to a defendant of the pendency of a sealed *qui tam* case.

If amended as proposed, the False Claims Act will have one of the longest statutes of limitations in all Federal law. It will require any individuals, institutions, or companies that receive money from, or pay money to, the Federal Government to retain records and files almost forever. Witnesses who can explain the circumstances of a business relationship, contract term, or claim process will inevitably retire, disappear, or die in the decade or more that transpires between the relevant events and the subsequent litigation. Even when witnesses remain available, memories — especially regarding the kinds of details that can make or break an FCA case — grow increasingly unreliable with each passing year. Access to critical documents in the files of third parties or Government agencies will be unavailable. This will create an administrative nightmare for anyone dealing with the Government and make it extraordinarily difficult to mount a defense to such stale claims.

B. Current Law

The False Claims Act currently requires that that the Government bring an action within 6 years of submission of the alleged false claim, or within three years of the date that the Government learns, or should have learned, that a fraud has been, or might have been, committed. There is also a 10-year cutoff date for all actions, s*ee* 31 U.S.C. § 3731(b), but this 10-year period applies only when the Government is not aware of the alleged fraud. Where the Government *is* aware of the fraud, however, the limitations period is 6 years. The 10-year repose provision was meant as an ultimate cutoff date to protect defendants from precisely the scenario threatened today — litigation of stale issues from the distant past. The limitations period prescribed under current law forces the Government to act expeditiously when it learns of an alleged fraud so that defendants are aware of the allegations and can retain records, witnesses, and other sources of evidence relevant to the fraud. The proposed legislation turns this system on its head.

Outside the context of False Claims Act cases, civil complaints are not filed under seal and must be served within 120 days of filing, giving a defendant almost immediate notice of the allegations. Fed. R. Civ. P. 4. This is significant because Federal Rule of Civil Procedure 15(c)(2) normally allows an amendment to a pleading to relate back to the date of the original pleading when the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading. Recent appellate decisions have generally held that the statute of limitations will run despite the fact that a case is under seal; the fact that a case is under seal will not toll the running of the statute.

For example, the Second Circuit recently held that the secrecy of the allegations in *qui tam* complaints filed under seal conflicts with principles of fundamental fairness and common sense. *United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263 (2d Cir. 2006). Rule 15(c) assumes that a defendant has notice of the allegations once a case has been filed. The *Baylor* court held that a rule that would allow additional allegations to relate back to the date of a *sealed* complaint lacks the necessary notice to defendants of the claims filed against them on the date that the original pleading was filed. The *Baylor* decision rested on the principle of fundamental fairness — that a defendant should not have to defend allegations over 10 years old unless the defendant had been formally notified of those allegations.

The proposed legislation threatens to unravel the balance achieved by the current system, which values notice to defendants and litigation of claims before evidence disappears.

C. Analysis of the Proposed Amendment

The proposed 10-year limitations period is unfair, unworkable, and unprecedented. The proposed amendments in S. 2041 extend the statute of limitations to 10 years in all cases, regardless of Government knowledge of alleged fraud, and overrule the *Baylor* decision by allowing the period a *qui tam* case is under seal to stop the running of the limitations period. *See* S. 2041, § 6.

1. The limitations period unfairly burdens defendants

The 10-year statute of limitations period, coupled with the provision that the statute of limitations is tolled while the case is under seal, would require all organizations that receive money from, or pay money to, the Federal Government — no matter how small, no matter how unsophisticated — to defend themselves for actions that occurred 12, 15 or even 20 years ago, depending on how long a *qui tam* case remains under seal. The amendments would require small businesses, churches, and other similar organizations to keep records for staggering lengths of time. More importantly, witnesses critical to both the interpretation of contracts and regulations, as well as to demonstrating good faith, could be deceased or otherwise unavailable.

The proposed limitations period also poses the risk of subjecting defendants to unfair, seemingly unending delay on the part of the Government. *United States ex rel. Health Outcomes Techs. v. Hallmark Health Sys., Inc.*, 409 F. Supp. 2d 43 (D. Mass. 2006), illustrates the problem. There, the court applied Federal Rule of Civil Procedure 15(c)(2) to new allegations that the Government attempted to add as amendments to the original complaint. The court found that the Government's long delay conflicted with the spirit of the False Claims Act. The court wrote, "[a]fter Health Outcomes brought its complaint in 1996, the Government strategically chose not to intervene in the action but rather to stand to one side and pick off defendants *seriatim.* The Government's investigation dragged on incessantly, and with respect to these particular hospital-defendants seven years, until it chose officially to intervene." *Id.* at 50.

In addition to the threat of Government delay, the legislation will provide relators with an opportunity to further delay *qui tam* suits to increase recoveries and force ever higher settlements. Instead of encouraging the Government and *qui tam* relators to bring their cases as quickly as possible, these amendments will encourage more delay because every day brings higher damages and more penalties.

The proposed legislation will subvert existing law on tolling, which is designed to ensure that defendants have notice of the claims against them and can retain documents and other evidence to prepare for litigation.

2. The limitations period is unworkable for the Government

In FCA cases, Government documents, as well as the documents of third parties, are almost always critical. Agency documents are particularly critical, since the agency's interpretation of a regulation or contract or grant term is essential to determining whether a

particular claim or statement is "false" and to calculating the amount of damages suffered by the Government. By extending the time limitations period to 10, 12 or 15 years, those documents will inevitably become unavailable or irretrievable.

Issues of stale proof will inevitably arise beyond just the context of document retention. The Government and defendants alike will be faced with the unworkable prospect of finding witnesses who are knowledgeable about events that took place years — potentially decades — in the past. Witnesses forget. Witnesses move. Witnesses change their names. Witnesses die. The Government cannot build a case, and parties cannot defend themselves, where witnesses are expected to provide information from the distant past.

3. The limitations period is unprecedented

The proposed limitations period is a complete aberration. A look to other Federal laws with significant damages and civil enforcement mechanisms like those of the False Claims Act is illustrative. Both the Racketeer Influenced and Corrupt Organizations ("RICO") statute, 18 U.S.C. § 1961, and the Clayton Antitrust Act, 15 U.S.C. § 15, like the False Claims Act, contain a private right of action and provide for the recovery of treble damages, costs, and attorneys' fees.

All civil claims under RICO are subject to a 4-year statute of limitations. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc*., 483 U.S. 143 (1987). The Supreme Court based its decision in *Agency Holding Corp.* on the statute of limitations period found in the civil enforcement provision of the Clayton Antitrust Act, which is also 4 years. *Id*. at 150-56.

* * *

The limitations provisions of S. 2041 are drastically out of line with analogous law and are so unreasonably long that they offer few of the protections normally inherent in a statute of limitations.

VI. EXPANSION OF THE WHISTLEBLOWER RETALIATION DEFINITION PROVISION IS UNNECESSARY

A. Summary

Currently, Section 3730(h) of the FCA provides relief from retaliation by employers against employees who take lawful steps in furtherance of a *qui tam* suit. Section 3730(h) protects employees who have engaged in such protected conduct, but it also protects employers from unfounded claims of retaliation that are not based on protected conduct. S. 2041 invites unfounded claims, however, by eliminating the test for retaliation that requires the employee to take steps in furtherance of FCA allegations that notify the employer about the allegations. S. 2041 substitutes another test that is poorly drafted and ambiguous, under which no clear steps toward initiating FCA claims are apparently required. It also enlarges the pool of individuals who will bring these suits to include those that are not employees and includes protection for undefined actions that are unrelated to FCA claims.

The new standards in the bill are poorly drafted, ambiguous, and overbroad. They remove necessary protections provided under the current law and will open the door to suits that are based on conduct that is unrelated to FCA actions without helping true whistleblowers or the Government.

B. Current Law

Under Section 3730(h), an employee is protected from an employer's retaliation for protected conduct that is defined as:

> lawful acts . . . 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 . . . .

In order to recover under Section 3730(h), employees must show that the following elements are met:

1. that the employee engaged in conduct protected under the statute,
2. that the employer was aware of the protected conduct, and
3. that the employer discriminated against the employee because of her protected conduct.

In applying the FCA's whistleblower protection, courts have looked to the common law and similar statutes for definitions of employer-employee relationships to define the parameters of the protection, but they differ on the correct test that triggers its application. *See, e.g., Neal v. Honeywell*, 33 F.3d 860, 865 (7th Cir. 1994) (whether litigation is a distinct possibility); *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514 (10th Cir. 1996) (if employee's job is to report wrongdoing to supervisors, such reports, without more, would not necessarily meet "in furtherance" test); *Wilkins v. St. Louis Housing Auth.*, 314 F.3d 927, 933 (8th Cir. 2002) (whether reasonable employee would have believed that employer was committing fraud against the Government). No bright line test, such as a requirement that a *qui tam* complaint was filed or that the Government was alerted to the fraud, has developed. Instead, the caselaw in this area establishes the following basic parameters: Where serious allegations of fraud are made by an employee whose job responsibility does not involve investigating fraud in the company, courts are likely to find protected activity, but where the employee's complaints are such that it is the employee's job to disclose such fraud, courts are less likely to find simple complaints protected activity without a distinct possibility of a *qui tam* suit.

C. Analysis of the Proposed Amendment

Section 5 of S. 2041 enlarges the pool of individuals entitled to relief from "any employee" to "any employee, Government contractor, or agent" and removes from the definition of retaliatory acts the requirement that limits them to acts "by . . . [the] employer." It also defines protected acts as those taken in furtherance of "other efforts to stop 1 or more violations of this subchapter" and includes within protected acts those that are taken by a protected individual on behalf of "associated others."

Most employment-related discrimination occurs within the relationship of an employment contract and thus is covered by the current law. Protected conduct that occurs outside of the employment relationship should, if it is important enough to protect, at least be clearly defined. S. 2041 enlarges the members of the protected group to include contractors and agents without carefully defining the group receiving protection or the protected acts, and it removes the requirement that limits retaliatory acts to those taken by employers. The bill's removal of the phrase "by his or her employer" that limits liability to employers is a deceptively simple change and masks the exponential expansion of liability it would allow, including any and all persons that interact with the plaintiff in the workplace, whether in their individual capacities or in their capacities as employers. Without that limit, extending liability to anyone in any of these contexts yields absurd results and claims that have no place in a whistleblower protection statute.

In addition, protecting acts on behalf of "associated others" is entirely open-ended and so vague that it could include acts on behalf of a business acquaintance or a neighbor or acts undertaken at the direction of a *qui tam* attorney. Such conduct does not properly fall within the purposes of a retaliation provision and the False Claims Act and should not be a basis for recoveries under it.

Under the current law, courts generally limit relief under Section 3730(h) to employees who have engaged in conduct that sends a clear signal of serious allegations about fraud against the Government to their employers so that the employer understands that the employee's actions are in furtherance of a whistleblower claim. If the employee's job responsibilities include alerting the employer to fraud within the company, the employee usually must do more than point out the fraud to the employer to produce this understanding. Mere "saber-rattling" is unprotected because it does not provide this notice to th*e employer*. *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 193 (3d Cir. 2001); *Yesudian v. Howard Univ.*, 153 F.3d 731, 740 (D.C. Cir. 1998); *Zahodnick v. Int'l Bus. Machs. Corp.*, 135 F.3d 911 (4th Cir. 1997). The importance of establishing a clear standard that incorporates notice to employers was enunciated in *United States ex rel. Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730 (7th Cir. 1999). The court in *Luckey* affirmed the lower court's grant of summary judgment on behalf of defendant, holding that defendant's decision to terminate the relator's employment was permissible because the relator's actions could not be understood as acts in furtherance of a whistleblower claim. The court explained that:

> [i]ntra-corporate debates about optimal testing protocols cannot be equated to knowledge of litigation . . . . An employer is entitled to treat a suggestion for improvement as what it purports to be rather than as a precursor to litigation . . . . [E]mployees who use reports of fraud to better their own position, or who behave like Chicken Little, impose costs on employers without advancing any of the goals of the False Claims Act. Saber-rattling is not protected conduct. Only investigation, testimony, and litigation are protected.

Id. at 733 (quotations and citations omitted).

The bill's ambiguous reference to "other efforts" to stop violations puts the basis for retaliation claims on unsteady ground. It removes the guidance provided under the long history

of the current law and opens this provision to use in disputes without requiring a clear relationship to FCA allegations. Specifically, the bill's substitution of acts "in furtherance of other efforts to stop" a violation for the current requirement of acts that are "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" removes the key language in Section 3730(h) that ties the protected acts to FCA claims.

At bottom, the ambiguities in this new provision and the potential overbreadth associated with it would allow extension of whistleblower protections to cases where no false claims allegations are involved and where no retaliation by an employer is required. The provision would extend the benefits intended for whistleblowers to others who do not act on the Government's behalf and would subject non-employers to liability for normal interactions in the workplace. The current retaliation provision should remain limited to protect those who truly engage in acts in furtherance of false claims allegations, rather than make other complaints, and the protections for employers and other individuals from unfounded retaliation suits should remain.

VII. THE CHANGES TO THE CIVIL INVESTIGATIVE DEMAND PROCESS ARE UNNECESSARY AND WOULD ENCOURAGE ABUSE BY RELATORS

A. Summary

The Civil Investigative Demand ("CID") is a tool which authorizes the Attorney General to request information (by way of documents, sworn depositions, interrogatories, and other forms of discovery) as part of the Government's investigation of false claims. The bill would permit the Government to share the information obtained through a CID with any *qui tam* relator if, in the Attorney General's judgment or that of a designee, it is "necessary as part of any false claims act investigation." *See* S. 2041, § 7. It would also allow the Attorney General to share the authority to issue CIDs with a "designee," without defining who that person or persons would be.

Government investigators already have adequate tools to obtain documents under the subpoena power of the Inspectors General and can allow a relator, or any other witness, to review those documents as part of the investigation. The only purpose for this amendment must be to allow non-documentary evidence — particularly depositions — taken under a CID to be shown to a relator's counsel. Its effect, however, is to allow relators expansive discovery prior to unsealing, without regard to the merits of their allegations, whether or not they would meet the stringent pleading requirements of Rule 9(b) without such discovery, even when the Government ultimately decides not to bring the case. These changes give private parties sensitive information on an *ex parte* basis without helping the Government or true whistleblowers.

B. Current Law

Under 31 U.S.C. § 3733(a)(1), the Attorney General may issue a CID when he or she 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. Before the commencement of an FCA proceeding, the Attorney General may require the person to produce documentary evidence, answer interrogatories, give oral testimony, or furnish a combination of such evidence.

The Attorney General may not delegate the authority to issue a CID to anyone else, and the information received in response to the CID is allowed to be disclosed to no one other than Government agencies or Congress.

C. Analysis of the Proposed Amendment

Section 7 of S. 2041 allows "the Attorney General, or a designee (for purposes of this section)" to issue a CID, authorizing him or her to share the authority to issue CIDs without defining who the designee would be. In addition, the bill provides that:

> [a]ny 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.

Thus, the bill allows the information received in response to a CID to be shared with "any *qui tam* relator" if the Attorney General or designee believes it is "necessary for any false claims act investigation."

The bill represents a complete about-face from existing law, and it threatens to expand abusive *qui tam* suits by allowing relators who are not true whistleblowers. The purpose of CID authority is to allow the Government to get the information it needs in order to determine whether there is sufficient evidence to file an FCA suit. That is the reason that the exercise of this authority is limited to the period prior to the commencement of an FCA proceeding under Section 3730. *See* H.R. Rep. No. 99-660, at. 26 (1986) (citing to similar CID provisions in Hart-Scott-Rodino Anti-Trust Improvements Act of 1976, 15 U.S.C. §§ 1311-1314). In fact, courts have noted that "using the CIDs for a purpose other than to determine if there is sufficient evidence to file" a suit would be improper. *United States v. Witmer,* 835 F. Supp. 208, 219 (M.D. Pa. 1993). *See also United States v. Seitz,* No. MS2-93-063, 1993 WL 501817 (S.D. Ohio Aug. 26, 1993). The purposes of relators are not so limited, however, because they are potential litigants in FCA actions, whether the Government decides to proceed with the suit or not. That difference is a major reason why information gathered by the Government on an *ex parte* basis through CIDs in advance of intervention should not be shared with them and why, instead, relators should gather their information according to the discovery provisions of the Federal Rules.

Despite the critical difference between the Government's purpose and the purposes of relators and their counsel in accessing CID information, the bill makes the information easily accessible to relators when a "designee" determines that it is necessary as part of any FCA investigation. It gives relators expanded access to information that they should already have, since true whistleblowers should have enough information to make *qui tam* allegations without the help of discovery or publicly disclosed information. *See, e.g., United States ex rel. Karvelas v. Melrose-Wakefield Hosp.,* 360 F.3d 220, 231 (1st Cir. 2004); *Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 566 (6th Cir. 2003); *United States ex rel. Clausen v. Lab Corp. of Am., Inc.*, 290 F.3d 1301, 1313 n.24 (11th Cir. 2002).

Moreover, easy access to the information submitted to the Government by CID recipients can be abused by relators who are also business competitors, disgruntled employees, or others for purposes other than helping to uncover fraud against the Government. *See, e.g., United States ex rel. Taylor v. Gabelli,* Civ. No. 03 8762(PAC), 2005 WL 2978921 (S.D.N.Y. Nov. 4, 2005) (*qui tam* suit by competitor relator); *Clausen*, 290 F.3d 1301 (*qui tam* suit by competitor relator). Providing this information to these relators prior to unsealing assists them in cases that the Government declines. These changes are unwarranted, and do not help, true whistleblowers.

This provision is entirely unnecessary. Under current law, the Government is fully empowered to issue a CID in order to gain information that will be useful in its fraud investigations. A *qui tam* relator, on the other hand, is supposed to be a whistleblower who brings new information and new allegations of fraud to the Government and is richly rewarded for that information. Existing law already provides that documents obtained in compliance with an Inspector General subpoena can be shared with relators if it is part of the investigation. *See* Inspector General Act of 1978, 5 U.S.C. app. 3 § 6(a)(4) (2000) (authorizing Inspectors General to serve subpoenas for documentary evidence). Whatever the propriety of that sharing, no court has prohibited it. The only information not obtainable through an IG subpoena that can be obtained through a CID is oral testimony. The bill would allow relators' attorneys to gain access to this information when true whistleblowers do not need it. This does not advance the goal of ferreting out fraud perpetrated against the Treasury. Allowing the Government to share the information gleaned from depositions stands only to strengthen the hand of those who bring cases that the Government declines.

CONCLUSION

I want to urge the Committee to recognize the potential abuse that these amendments will impose not only on large and small American businesses but also on all other institutions that receive Federal funds — the churches, local Government entities, schools and colleges, and other contractors and grantees. When these companies and institutions deal with the Government, they are properly expected to do so honestly and forthrightly. But the Government also promises that it will deal with them fairly. These amendments, if passed, would break that promise.

ATTACHMENT A

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John T. Boese is a partner in the Washington, D.C. office of Fried, Frank, Harris, Shriver & Jacobson LLP. Mr. Boese is a nationally-recognized expert on the civil False Claims Act. For over 25 years, he has represented defendants in numerous fraud investigations and False Claims Act cases brought by *qui tam* relators or by the Department of Justice. His clients include corporations and institutions in a broad variety of industries. He has represented defense contractors, hospitals, churches, construction companies, insurance companies, pharmaceutical companies, oil & gas companies, major retailers, import/export firms, computer manufacturers, software and computer service providers, universities and airports in False Claims Act litigation.

He is the author of the book, *Civil False Claims and Qui Tam Actions* (Aspen Publishers 3d ed.), a comprehensive, two-volume treatise on the civil False Claims Act and *qui tam* enforcement at both the Federal and state levels. This book, updated biannually, was published originally in 1993, and is now in its Third Edition. The book is commonly cited as authority on this subject by courts at all levels, as well as by practitioners and academics. His other journal publications include: "Why Thompson Is Wrong: Misuse of the False Claims Act to Enforce the Anti-Kickback Act," *Alabama Law Review,* Vol. 51, No. 1, Fall 1999 (John T. Boese, Beth C. McClain); "When Angry Patients Become Angry Prosecutors: Medical Necessity Determinations, Quality of Care and the *Qui Tam* Law," *Saint Louis University Law Journal,* Vol. 43, No. 1, Spring 1999 (John T. Boese); and "Private Enforcement of State Fraud Laws: A Comparative Analysis of State *Qui Tam* Provisions," *Journal of Health and Hospital Law,* Vol. 31, No. 1, Winter 1998 (John T. Boese, Shannon L. Haralson).

Mr. Boese lectures frequently to private and public groups on civil fraud issues. He is the co-chair of the biennial ABA National Institute on the Civil False Claims Act & *Qui Tam* Enforcement, and he moderates the "*Qui Tam* Lawsuits" session at the annual ABA National Institute on Health Care Fraud and Abuse. He was co-chair of the *Qui Tam* Subcommittee of the American Bar Association Section of Criminal Justice from 1998 to 2006, and he is a Vice-Chair of the Debarment and Suspension Committee of the Section on Public Contract Law.

Prior to joining Fried Frank in 1977, Mr. Boese was a trial attorney with the Civil Division of the U.S. Department of Justice, where he was awarded a Special Commendation for Outstanding Service in 1976. He received a Bachelor of Science degree from Washington University in 1969 and graduated, *magna cum laude*, with a Juris Doctor degree from St. Louis University Law School in 1972, where he served as an associate editor of the *St. Louis University Law Journal*. He is admitted to practice before the United States Supreme Court; the United States Courts of Appeals for the Second, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits; the United States Court of Appeals for the District of Columbia Circuit; the District of Columbia Court of Appeals; and the United States Court of Appeals for the Federal Circuit. He has appeared in more than 50 different Federal district and appellate courts.

He is a member of the American Law Institute.

ATTACHMENT B

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

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

FRAUD STATISTICS - OVERVIEW

October 1, 1986 - September 30, 2007

Civil Division, U.S. Department of Justice

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

NOTES:

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

FRAUD STATISTICS - HEALTH & HUMAN SERVICES[1]

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

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

NOTES:

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

FRAUD STATISTICS - DEPARTMENT OF DEFENSE[1]

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

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

NOTES:

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

FRAUD STATISTICS - OTHER (NON-HHS, NON-DOD)[1]

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

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

NOTES:

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

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

Civil Division, U.S. Department of Justice

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